

**Testimony of Mary Bauer**  
**Southern Poverty Law Center**  
**before the Subcommittee on Workforce Protections of the**  
**Education and the Workforce Committee**  
**U.S. House of Representatives**  
**March 14, 2013**

*"Examining the Role of Lower-Skilled  
Guest Worker Programs in Today's Economy"*

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

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

During my legal career, I have represented and spoken with literally thousands of H-2A and H-2B workers in many states. The SPLC has represented tens of thousands of H-2A and H-2B guestworkers in class action lawsuits. We also published a report in 2013 about guestworker programs in the United States entitled "*Close to Slavery*," which I have attached to these comments as Exhibit I to my written testimony.<sup>1</sup>

The report discusses in further detail the abuses suffered by H-2 guestworkers. It is based upon thousands of interviews with workers as well as the research related to guestworkers and the experiences of legal experts from around the country. As the report reflects, guestworkers are systematically exploited because the very structure of the program places them at the mercy of a single employer for both their job and continued presence in the United States. It permits workers to enter the United States, encumbered with overwhelming debt—debt that they paid to get short-term, low paid work. It provides no realistic means for workers to exercise the few rights they have.

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

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<sup>1</sup> *Close to Slavery* was originally released in 2007, but was updated and re-released in 2013.

introduced into the labor market are vulnerable guestworkers who lack the basic labor protections available to U.S. workers.

The government's H-2B program undercuts employers' incentive to hire U.S. workers or make jobs more appealing to domestic workers by improving wages and working conditions. Not surprisingly, many H-2 employers discriminate against U.S. workers, preferring to hire guestworkers, even though they are required to certify that no domestic workers are available to fill their jobs. It is well-documented that wages for U.S. workers are depressed in industries that rely heavily on guestworkers. Astonishingly, the H-2B program does not prohibit the importation of guestworkers during periods of high unemployment. Indeed, the unemployment rate in a locality or an industry is not a consideration for DOL in determining whether to certify an H-2B application. The H-2B program allowed for the importation of 50,009 workers in 2012.<sup>2</sup> In December 2012, there were 12.2 million Americans looking for work.<sup>3</sup>

The H-2B (non-agricultural) guestworker program permits U.S. employers to import human beings on a temporary basis from other nations to perform work only when the employer certifies that qualified persons in the United States are not available and the terms of employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.<sup>4</sup>

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

In practice, the program is rife with abuses. The abuses typically start long before the worker has arrived in the United States and continue through and even after his or her employment here. A guestworker's visa is good only so long as he works for the employer who sponsored him. Unlike U.S. citizens, guestworkers do not enjoy the most fundamental protection of a competitive labor market — the ability to change jobs if they are mistreated.

If guestworkers complain about abuses, they face deportation, blacklisting or other retaliation. Because H-2B guestworkers are tied to a single employer and have little or no ability to enforce their rights, they are routinely exploited. If this program is

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

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

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

permitted to continue at all, it should be substantially reformed to address the vast disparity in power between guestworkers and their employers.

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

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

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

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

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

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

Under the law, H-2B workers are entitled only to the “prevailing wage” for their work; there is no adverse effect wage rate for those workers, as there is with H-2A

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<sup>5</sup> See *Close to Slavery*, Chapter 5.

workers. Of course, even though H-2B workers are entitled to payment of prevailing wages and to employment in conformity with required minimum terms and conditions as provided for in the employer's labor certifications, federal law provides no real remedy when these rights have been violated due to anemic staffing at federal workplace enforcement agencies. For example, 1,100 DOL investigators have the Sisyphean task of protecting a workforce of 135 million.<sup>6</sup>

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

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

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

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

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

<sup>7</sup> Denise Velez, "Wages for H-2B Workers Set Lower than the Prevailing Wage", available at [http://www.epi.org/publication/webfeatures\\_snapshots\\_20080813/](http://www.epi.org/publication/webfeatures_snapshots_20080813/) (last visited Aug. 13, 2008).

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

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

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

The legal requirements for recruiting U.S. workers are few. Employers are required to publish advertisements for two days in a newspaper. They must also contact the local union as a recruitment source if the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application. Employers must not reject U.S. applicants for the job opportunity for which the labor certification is sought for reasons other than ones that are lawful and job-related.

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

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

The Palm Beach Post conducted an investigation into claims by Florida employers that they had been unable to find U.S. workers to take hospitality jobs even in localities where the unemployment rate was well over 10% and higher still for unskilled labor.<sup>12</sup> In the Palm Beach Post investigations, an employer claimed to have worked with the local government agency that helps Floridians file jobs, but that agency denied any knowledge of the employer. That employer, Workaway Staffing, was approved to bring in 810 H-2B employees. Its president, William Mayville said H-2B workers were

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

<sup>11</sup> *Supra* n.10, at 11.

<sup>12</sup> John Lantigua, "Use of Guest Workers in Palm Beach County Draws Fire" Palm Beach Post, July 11, 2011.

necessary because “you don’t see Americans wanting to get into the hospitality industry.”<sup>13</sup>

## ***II. Guestworker Programs Are Inherently Abusive***

When recruited to work in their home countries, workers are often forced to pay enormous sums of money to obtain the right to be employed at the low-wage jobs they seek in the United States. It is not unusual, for example, for a Guatemalan worker to pay more than \$5,000 in fees to obtain a job that may, even over time, pay less than that sum. Workers from other countries may be required to pay substantially more than that. Asian workers have been known to pay as much as \$20,000 for a short-term job under the program. Unregulated foreign labor recruiters in home countries make false promises to workers about the H-2B jobs and visas. Only after the workers have paid high recruiting fees and arrive in the United States do they learn the less rosy truth.

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

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

Guestworkers routinely receive less pay than the law requires. In some industries that rely upon guestworkers for the bulk of their workforce — seafood processing and forestry, for example — wage-and-hour violations are the norm, rather than the exception. These are not subtle violations of the law but the wholesale cheating of workers. We have seen crews paid as little as \$2 per hour, each worker cheated out of hundreds of dollars per week. Because of their vulnerability, guestworkers are unlikely to complain about these violations. Public wage and hour enforcement has minimal practical impact because overstretched labor standards enforcement agencies can follow up on only a small fraction of violations.

Even when workers earn the minimum wage and overtime, they are often subject to contractual violations that leave them in an equally bad situation. Workers report again and again that they are simply lied to when they are recruited in their home

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<sup>13</sup> Id.

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.<sup>14</sup> Thus, according to that court, employers may evade the clear intent of Congress that they not discriminate in hiring by simply shipping their hiring operations outside the United States — even though all of the work will be performed in the United States.

Many foreign recruiters have very clear rules based on age and gender for workers they will hire. One major Mexican recruiter openly declares that he will not hire anyone over the age of 40. Many other recruiters refuse to hire women for field work. Employers can shop for specific types of guestworkers over the Internet at websites such as [www.labormex.com](http://www.labormex.com), [www.maslabor.com](http://www.maslabor.com), [www.mexicanworkers.biz](http://www.mexicanworkers.biz), or [www.mexican-workers.com](http://www.mexican-workers.com). One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as people with “a good old fashioned work ethic” who are “very friendly and easy to work with.”<sup>15</sup>

We have received repeated complaints of sexual harassment by women guestworkers. Again, because workers are dependent upon their employer to remain in,

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<sup>14</sup> *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).

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

and return to, the United States, they are extremely reluctant to complain even when confronted with serious abuse.

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

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

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

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

### ***III. Virtually No Legal Protections Exist for H-2B Workers***

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

#### *The H-2A Program*

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

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

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

H-2A workers also are legally entitled to:

- Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised (the "three-quarters guarantee");
- Receive free housing in good condition and meals or access to a cooking facility for the period of the contract;
- Receive workers' compensation benefits for medical costs and payment for lost time from work and for any permanent injury;
- Be reimbursed for the cost of travel from the worker's home to the job as soon as the worker finishes 50% of the contract period. The expenses include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract or is terminated without cause, the employer must pay transportation and subsistence costs for returning home; and
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.

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

### *The H-2B Program*

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

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, prior to 2008, DOL had not promulgated substantive labor regulations for the H-2B program.<sup>16</sup> As discussed in Section IV below, DOL promulgated new regulations in 2011 and 2012 that better protect workers, but

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<sup>16</sup> See *Martinez v. Reich*, 934 F. Supp. 232 (D. Tex. 1996)

those regulations have been enjoined by the courts and subject to Congressional action prohibiting their enforcement.

While the employer is obligated to offer full-time employment (currently defined as only 30 hours per week) that pays at least the prevailing wage rate, none of the other substantive regulatory protections of the H-2A program apply to H-2B workers. There is no free housing. There is no access to legal services. There is no “three-quarters guarantee.” And the H-2B regulations do not require an employer to pay the workers’ transportation to the United States.

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

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

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

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

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

##### ***A. The 2008 H-2B Regulations***

Prior to 2008, DOL had not promulgated regulations that provided substantive labor protections for H-2B workers and their U.S. worker counterparts.<sup>17</sup> In December 2008, President Bush’s Department of Labor published “midnight” regulations for the H-

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

2B program.<sup>18</sup> These regulations provided only minimal protections for H-2B workers and lacked many of the fundamental legal protections afforded to H-2A workers, such as reimbursement of the H-2B workers' transportation costs to the United States and the "three-quarters guarantee." The 2008 regulations also established a methodology for calculating the wage that employers must pay to their H-2B workers (the prevailing wage) that causes the very depressive effect on U.S. worker wages Congress intended to avoid in requiring the H-2B prevailing wage.

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

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

### *B. The 2011 H-2B Wage Rule*

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

Shortly before the wage rule was set to go into effect in September 2011, H-2B employers and trade associations representing H-2B employers filed lawsuits in federal courts in Florida and Louisiana (later transferred to Pennsylvania) challenging the rule. The lawsuits both allege that DOL issued the rule in violation of the APA and the

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<sup>18</sup> 77 Fed. Reg. 78,020-01 (Dec. 19, 2008).

<sup>19</sup> See *CATA*, 2010 WL 3431761 at \*2, *supra* n. 8.

<sup>20</sup> 76 Fed. Reg. 3452 (Jan. 19, 2011).

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

<sup>22</sup> *Id.*; see also 75 Fed. Reg. 61,578, 61,580-81 (Oct. 5, 2010) ("2010 NPRM").

<sup>23</sup> 76 Fed. Reg. at 3463.

Regulatory Flexibility Act (RFA) and DOL lacks authority from Congress to issue any legislative rules for the H-2B program.<sup>24</sup> H-2B employers also galvanized a group of vocal Senators and Representatives from states with industries that rely heavily on H-2B workers to ensure the new wage rule would not be implemented. This effort led to Congress passing a series of appropriations bans and continuing resolutions that effectively blocked the 2011 wage rule by prohibiting DOL from using funds towards its implementation.<sup>25</sup>

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

### C. *The 2012 Comprehensive H-2B Rule*

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

In April 2012, just days before the new regulations were scheduled to go into effect, business interest groups, including the Chamber of Commerce, and a few H-2B employers sought and won a nationwide injunction in federal court in Florida that blocked DOL from implementing the 2012 Final Rule.<sup>27</sup> Similar to the employers' challenges to the 2011 wage rule, this lawsuit alleges that DOL did not comply with the APA and RFA when issuing the 2012 Final Rule and that DOL does not have authority to issue any rules for the H-2B program. DOL appealed the injunction to the Eleventh

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

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

<sup>26</sup> See *Louisiana Forestry Ass'n, Inc., et al. v. Solis*, No. 11-7687, 2012 WL 3562451 (Aug. 20, 2012).

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

Circuit Court of Appeals, and several *amici* submitted briefs in support of DOL's rulemaking authority and the new rules, including Representative Peter DeFazio and Senator Jeffrey A. Merkley, and labor unions UNITE HERE and PCUN. The Eleventh Circuit's decision is pending. In the meantime, as a result of the district court's injunction, the critical worker protections provided by the 2012 Final Rule did not go into effect as planned and may never go into effect.

While the employer-driven attacks on DOL's new H-2B regulations have completely derailed the implementation of long overdue protections for U.S. and H-2B workers, the real implication of this litigation is more concerning. The gravamen of the employers' claims in all three lawsuits is that DOL lacks authority to issue any regulations for the H-2B program. Given that DOL has been regulating the H-2 guestworker programs for over forty years, the employers' sudden challenge to DOL's authority is particularly transparent. Indeed, not until DOL proposed a wage rule that will lead to fair wages that better approximate the market wage for U.S. and H-2B workers across the country did DOL's rulemaking authority become an issue for the employers. Clearly, the H-2B employers do not just want less onerous regulation – they want no regulation or regulations – like the 2008 Bush-era rules – that overwhelmingly favor employers, even if those regulations do not adequately effectuate the protections for U.S. workers that Congress intended when creating the H-2B program.

#### ***V. Substantial Changes Are Necessary to Reform These Programs***

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

The SPLC recommends that Congress take the following actions:

- Congress must finally allow the protective regulations promulgated by DOL in 2011 and 2012 to go into effect. In doing so, it should also make clear that DOL does have rulemaking authority under the H-2B program.
- Congress should enact protections to regulate the recruitment of workers. Congress should make clear that the systematic discrimination entrenched in this program is unlawful. Congress should regulate recruitment costs and should make employers responsible for the actions of recruiters in their employ. Any such regulation must make the employer who selects a recruiter responsible for the actions of that recruiter. Doing so is the only effective means of avoiding the severe abuses that routinely occur in recruitment. Holding employers responsible for their agents' actions is not unfair: if those hires were made in the U.S., there is no doubt that the employers would be lawfully responsible for their recruiters'

promises and actions. Making the rules the same for those who recruit in other countries is fair, and it is the only way to prevent systematic abuse.

- Congress should also make H-2B workers eligible for federally funded legal services. There is simply no reason that these workers – who have come to the U.S. under the auspices of this government sponsored plan – should be excluded from eligibility.
- Congress should make the H-2B visa fully portable to other employers, at least under some circumstances. For example, at a minimum, Congress should create a means by which workers may obtain visas when they need to remain in or return to the United States to enforce their rights. Employers currently control workers' right to be here. That means when workers bring suit, or file a workers compensation claim, the employers have extraordinary control over that process.
- Congress should provide a pathway to permanent residency for guestworkers who would choose to become full members of our community.
- Enforcement should include a private federal right of action to enforce workers' rights under the H-2B contract.
- Lastly, Congress should provide strong oversight of the H-2B program. Congress should hold additional hearings on this issue related to the administration of the guestworker programs.

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

### ***Conclusion***

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

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