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**LEARNING FROM THE PAST: DESIGNING EFFECTIVE WORKER
PROTECTIONS FOR COMPREHENSIVE IMMIGRATION REFORM**

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LEARNING FROM THE PAST: DESIGNING EFFECTIVE WORKER PROTECTIONS FOR COMPREHENSIVE IMMIGRATION REFORM

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INTRODUCTION

On the eve of the opening of the 110th Congress,¹ the prospects for comprehensive immigration reform, which includes protections for workers' rights, appeared far brighter than they did at any time during the previous two Congressional sessions. Unfortunately, by late April 2007, those prospects appear far dimmer.

Including labor protections in comprehensive immigration reform legislation requires progressive Congressional leadership to channel strident anti-immigrant rhetoric from the right into crafting legislation that will: (1) address the impact of the status of the millions of undocumented² workers currently in the United States and (2) protect workers against the potentially negative economic impact for low-wage workers arising from employer exploitation of continuing cross-border migration of workers.³

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1. The 110th United States Congress was sworn in on January 4, 2007. U.S. House of Representatives, House Schedule, http://www.house.gov/house/House_Calendar.shtml (last visited June 26, 2007).

2. "Undocumented," as used in this article, refers to a person who is present in the United States but who is not a U.S. citizen, has not been admitted for permanent residence, and is not in a set of specific, authorized, temporary statuses permitting longer-term residence and work.

3. See Arthur N. Read, *Protecting Worker Rights in the Context of Immigration Reform*, 9 J.L. & SOC. CHANGE 65, 65-66 (2006) (addressing "the need to recognize and confront the economic incentives for employers of new immigrants, migrants and 'temporary' workers to undercut worker rights"); DORIS MEISSNER ET AL., *MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER* 10 (2006) (stating:

Before creating new categories of employment-based immigration, it is critical to understand the deficiencies of the existing temporary worker programs and ensure that they are addressed as part of reform legislation. It is also critical that the deficiencies of existing programs are not carried over into new employment-based immigration programs.

This article reviews the current temporary worker programs and, in particular, the H-2B⁴ non-agricultural temporary worker program. A starting point for legislative discussion of comprehensive immigration reform in the 110th Congress continues to be the “Comprehensive Immigration Reform Act of 2006,”⁵ (CIRA) a bill adopted May 25, 2006, by the Senate of the 109th Congress.⁶ This article analyzes how worker protection issues were addressed in CIRA. Finally, this article suggests lessons from past legislative and administrative efforts to protect worker rights, which could be the basis for effective worker protections as part of comprehensive immigration reform. In particular, this article emphasizes the importance of learning from experience with existing H-2A⁷ and H-2B⁸ temporary worker programs and the history of the Migrant and Seasonal Agricultural Worker Protection Act of 1983,⁹ which offer important lessons for crafting effective worker protections.

I. LEGALIZATION OF UNDOCUMENTED WORKERS

Estimates of the size of the undocumented foreign-born population vary, but the respected Pew Hispanic Center estimated that population as of March 2006 to be 11.5 million to twelve million persons.¹⁰ Based upon its analysis of the March

The belief that immigrants take jobs from American workers and depress their wages is one of the most widely felt fears about immigration, according to opinion surveys. Whether at the top or the bottom of the job ladder, unchecked or illegal immigration can drive down wages and undermine working conditions. The best available evidence remains inconclusive regarding immigration’s effects on the work opportunities of native-born Americans, including the less skilled and minorities. There is, however, evidence that in some sectors of the economy and parts of the country, immigrants may adversely affect the job opportunities and wage scales of native workers (citations omitted).

4. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000) (defining the temporary non-agricultural worker as “an alien . . . who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country”).

5. S. 2611, 109th Cong. (2006).

6. 152 CONG. REC. S5190 (daily ed. May 25, 2006). Note that the bill was not adopted by the 109th House of Representatives.

7. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000) (defining the temporary agricultural worker as “an alien . . . coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature”).

8. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000).

9. 29 U.S.C. §§ 1801-72 (2000).

10. JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 2 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>. That March 2006 report further stated:

Analysis of the March 2005 CPS [Current Population Survey] shows that there were 11.1 million unauthorized [migrants] in the United States a year ago. Based on the monthly Current Population Surveys conducted since then and other data sources that offer

2005 Current Population Survey, the Pew Hispanic Center estimated that about 7.2 million unauthorized migrants¹¹ were employed in March 2005, accounting for about 4.9% of the civilian labor force.¹² They made up a large share of all workers in a few more detailed occupational categories, including twenty-four percent of all workers employed in farming occupations, seventeen percent in cleaning, fourteen percent in construction, and twelve percent in food preparation.¹³

It is central to any effective comprehensive immigration reform that it includes provisions for legalization of the existing undocumented foreign-born population.¹⁴ CIRA contained provisions attempting to address this issue.¹⁵ Although the terms of this Senate bill generated considerable political heat from anti-immigrant restrictionists, it is central to the protection of workers' rights that persons now employed in the United States have full workplace rights and protections equivalent to other workers.¹⁶ Attempts from anti-immigrant restrictionists to give such

indications of the pace of growth in the foreign-born population, the Center developed an estimate of 11.5 to 12 million for the unauthorized population as of March 2006.

....

In the March 2005 estimate two-thirds (66%) of the unauthorized population had been in the country for ten years or less, and the largest share, 40% of the total or 4.4 million people had been in the country five years or less.

....

There were 5.4 million adult males in the unauthorized population in 2005, accounting for 49% of the total. There were 3.9 million adult females accounting for 35% of the population. There were 1.8 million children who were unauthorized, 16% of the total.

....

Nearly two-thirds (64%) of the children living in unauthorized families are U.S. citizens by birth, an estimated 3.1 million children in 2005.

Id. at i-ii.

11. The Pew Hispanic Center defines the term "unauthorized migrant" as follows: "This report uses the term 'unauthorized migrant' to mean a person who *resides* in the United States, but who is *not* a U.S. citizen, has *not* been admitted for permanent residence, and is *not* in a set of specific authorized temporary statuses permitting longer-term residence and work." *Id.* at i. This article uses the phrase "undocumented" to refer to persons meeting that description. *See supra* note 2.

12. PASSEL, *supra* note 10, at ii.

13. *Id.* at ii.

14. *See Read, supra* note 3, at 66-67 (stating that employers take advantage of undocumented status to exploit the immigrant population).

15. CIRA would have left millions of undocumented foreign-born persons ineligible for legalized status by only providing for adjustment of status and legalization of workers who had entered the United States before April 5, 2001. Under CIRA, undocumented foreign-born persons who entered after April 5, 2001, and before January 7, 2004, would be eligible to apply for lawful re-entry after departure from the United States. Persons who entered after January 7, 2004, would have no path to legal status under CIRA. The continued presence of millions of undocumented foreign-born persons in the workforce would perpetuate a sub-class of persons subject to serious employer exploitation. The AFL-CIO supported an amendment for an "orange card," Senate Amendment 4087, to CIRA, proposed by Senator Dianne Feinstein, which would have eliminated three-tier classification of undocumented persons eligible for legalization. The amendment was defeated in the Senate. *See Letter from AFL-CIO to Senators, (May 23, 2006), available at http://www.aflcio.org/issues/legislative/alert/alerts/upload/s2611_immigration.pdf.*

16. The Supreme Court held, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002), that an undocumented worker, fired for union-organizing activities, where the employer was unaware of the worker's illegal immigration status at the time of discharge, was ineligible for a back-pay award under the National Labor Relations Act. This decision, as well as subsequent decisions extending

workers only temporary guest worker status, with the expectation that they will leave the country after a set period (such as three to six years), are doomed to failure from a practical perspective¹⁷ and would only leave such workers in an economically exploitable status.

The AFL-CIO Executive Council issued a statement on immigration reform on March 1, 2006, which noted:

At the same time that global forces are pushing workers to our borders, judicial and public policies toward immigrants have created new so-called pull factors for migration into the United States, namely, an incentive for employers to recruit undocumented immigrants for economic exploitation. Too many employers seek to avoid, evade, and ultimately negate U.S. labor and employment laws through the recruitment and importation of undocumented workers. The U.S. Supreme Court created a powerful new incentive for such exploitation by its decision in *Hoffman Plastic Compounds v. National Labor Relations Board*. In that case, the Court determined that an undocumented worker is not entitled to back pay — the only monetary remedy available to workers under the National Labor Relations Act — when he or she is fired illegally for trying to organize a union. This has

its scope to other laws, has significantly increased the degree to which undocumented workers are subject to exploitation by employers with impunity. New Jersey and California courts have concluded that victims of discrimination who are undocumented have no right to certain forms of compensation. *See* *Morejon v. Terry Hinge & Hardware*, No. B162878, 2003 WL 22482036 (Cal. Ct. App. Nov. 4, 2003) (holding that an undocumented worker could not collect for wrongful termination); *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004) (denying an undocumented worker the right to recover any damages for wrongful termination when employer would not allow worker to return after maternity leave). Since *Hoffman*, at least three state courts have limited undocumented workers' access to workers' compensation in certain circumstances. *See* *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Mich. Ct. App. 2003); *Wudson Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005); *Reinforced Earth Co. v. Workers' Comp. App. Bd.*, 810 A.2d 99 (Pa. 2002).

The Inter-American Court of Human Rights issued an advisory opinion (*Opinión Consultiva 18*) on the treatment of unauthorized migrant workers and their labor rights in the countries that make up the Organization of American States. OC-18 provides that, as a matter of compliance with the anti-discrimination provisions of various Inter-American human rights treaties, countries must protect the rights of all migrant workers. *Judicial Condition and Rights of the Undocumented Migrants*, 18 Op. Inter-Am. Ct. of Human Rights 113-14 (2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf; Read, *supra* note 3, at 71-73.

On November 1, 2006, a Petition Alleging Violations of the Rights of Undocumented Workers was filed by the Inter-American Commission on Human Rights seeking to follow up on that advisory opinion. ACLU, *Undocumented Workers Bring Plea for Non-Discrimination to Human Rights Body* (Nov. 12, 2006), <http://www.aclu.org/immigrants/discrim/27235prs20061101.html>.

17. Temporary guest-worker programs fail in the fundamental premise of forcing guest workers to leave the country. *See* Nicole Jacoby, Note, *America's De Facto Guest Workers: Lessons from Germany's Gastarbeiter for U.S. Immigration Reform*, 27 *FORDHAM INT'L L.J.* 1569, 1652 (2004) ("The de facto guest worker policies instituted in the United States over the past two decades . . . have merely resulted in the long-term settlement and marginalization of undocumented workers."). *See also* VERNON M. BRIGGS, JR., *IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE* 121-27 (Johns Hopkins Univ. Press 1984) (discussing the European experience and how policy on temporary workers is not necessarily determined by economic considerations).

made the cost of exploiting immigrants insignificant to unscrupulous employers. The end result is that industries that cannot export jobs — such as those in construction — are attempting to use flawed immigration policies to import the labor standards of developing nations into the United States.

The broken immigration system has allowed employers to create an underclass of workers, which has effectively reduced working standards for all workers. Immigrant workers are over-represented in the highest risk, lowest paid jobs, but the exploited immigrants do not work in isolation. U.S.-born workers who work side by side with immigrants suffer the same exploitation. The U.S. Department of Labor, for example, determined the poultry industry — which is nearly half African American and half immigrant — was 100 percent out of compliance with federal wage and hour laws. The Department of Labor also estimated more than half of the country's garment factories violate wage and hour laws, and more than 75 percent violate health and safety laws. Of course, workplaces that are dangerous for immigrant workers are equally dangerous for their U.S.-born counterparts and co-workers.

. . . .

Legalization is an important worker protection. History shows that legalizing this population benefits all workers: Wages and working standards of undocumented workers increased significantly after the legalization program of the 1986 Immigration Reform and Control Act, thereby raising the floor for all workers. Without a legalization program, the economic incentive to hire and exploit the undocumented will remain, to the detriment of U.S. workers who labor in the same industries as the undocumented, because all workers will see their working conditions plummet.¹⁸

18. AFL-CIO Executive Council, *Responsible Reform of Immigration Laws Must Protect Working Conditions for all Workers in the U.S.*, Mar. 1, 2006, <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec02272006e.cfm>. See also AFL-CIO, *AFL-CIO Principles on Immigration: Ensuring Worker Rights and a Better Life for All Working Families*, <http://www.aflcio.org/issues/civilrights/immigration/upload/immigrationpolicy.pdf> [hereinafter AFL-CIO Principles] (listing various ways to help ensure safe and economically sound employment for immigrant workers). The AFL-CIO defines legalization as “a broad program allowing workers from around the world who have contributed to their workplace and community here in the U.S. to adjust their status to permanent resident alien.” *Id.*

In 1999, delegates to the 23rd AFL-CIO Biennial Convention formed a Special Committee on Immigration, chaired by John Wilhelm, then President of HERE Local 17, a union of hotel employees and restaurant employees, and made up of union leaders from every sector, to study and recommend changes to the AFL-CIO's immigration policy. The changes in AFL-CIO policy, which had, since 1985, supported employer sanctions for hiring undocumented immigrants, were adopted at the February 2000 meeting of the AFL-CIO Executive Council. See James B. Parks, *Recognizing Our Common Bonds*, <http://www.aflcio.org/aboutus/thisistheafclcio/publications/magazine/commonbonds.cfm> (last visited June 26, 2007) (describing the need for employer sanctions and the hardships imposed on employees without them); see also Press Release, AFL-CIO, *AFL-CIO Calls for New Direction in U.S. Immigration Policy to Protect Workers, Hold Employers Accountable for Exploitative Working*

Since the current undocumented foreign-born population is generally already in the workforce, the principal thrust of workers' rights advocacy as to such workers should be to ensure that they have full and enforceable workplace rights¹⁹ and to ensure that such workers are not afraid to exercise their rights because of their need to remain employed in order to retain their continued lawful status.

II. IMPACT OF EMPLOYER SANCTIONS ON EFFECTIVE WORKPLACE PROTECTIONS

Proposals for immigration reform in the 109th Congress uniformly included provisions for strengthened "employer sanctions" for hiring unauthorized foreign-born workers. The intent of such restrictions is to lessen the "pull" factor of available employment opportunities as an incentive for unauthorized migrants to risk enhanced border enforcement in order to obtain employment.²⁰

It is critical to realize that undocumented workers will continue to be employed in some workplaces and to understand that denying those workers rights to enforce federal protective statutes violated by their employers will only increase the incentive for exploitative employers to utilize such workers.²¹

One proposal, which has not been explored in the immigration debate, would be to make any employer who "intentionally"²² utilized undocumented workers subject to the prevailing wage and benefit requirements that would apply to an

Conditions (Feb. 16, 2000), available at <http://www.aflcio.org/mediacenter/prsptm/pr02162000d.cfm> (stating that employers must be stopped from retaliating against employees who join unions by firing or intimidating the undocumented workers).

19. This should include the right of access to legal services funded by the federal Legal Services Corporation. Employers have sought to restrict the rights of many foreign-born workers (including workers lawfully present in the United States) to such services. See discussion *infra* Part III.

20. On the contrary, "employer sanctions" in practice mean "worker sanctions" and are more likely in practice to encourage increased exploitation of undocumented workers in workplaces where such workers are hired by unscrupulous employers. See Read, *supra* note 3, at 70-71.

21. Even if employer sanctions are adopted, unauthorized undocumented workers employed at such workplaces *must* have the same basic employment rights as other workers, if employers are to be denied an economic incentive to hire such workers. See Judicial Condition and Rights of the Undocumented Migrants, 18 Op. Inter-Am. Ct. of Human Rights 113-14 (2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

22. This is a standard lower than "knowingly," since an employer can intend the natural consequences of their acts. For example, under the Agricultural Workers Protection Act (AWPA), relief is only available if the violation was "intentional." 29 U.S.C. § 1854(c)(1) (2000). AWPA adopts the common civil standard of "intent," holding a defendant liable for the natural and foreseeable consequences of his acts. "Intentional" means merely that the defendant consciously committed the act which violated the AWPA (i.e., that the act was not accidental or involuntary). See *Cochran v. Vann*, No. 91-3121, 1992 WL 103977 (11th Cir. May 12, 1992); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269 (M.D. Fla. 1999); *Rodriguez v. Carlson*, 943 F. Supp. 1263 (E.D. Wash. 1996); *Avila v. A. Sam & Sons*, 856 F. Supp. 763 (W.D.N.Y. 1994), *aff'd sub nom. Holland v. A. Sam & Sons Produce Co., Inc.*, 60 F.3d 812 (2d Cir. 1995); *Campbell v. Miller*, 836 F. Supp. 827 (M.D. Fla. 1993); *Smith v. Bonds*, No. 91-818-CIV-5-D, 1993 WL 556781 (E.D.N.C. Sept. 28, 1993); *Saintida v. Tyre*, 783 F. Supp. 1368 (S.D. Fla. 1992); *Howard v. Malcolm*, 658 F. Supp. 423 (E.D.N.C. 1987); *Bernett v. Hepburn Orchards, Inc.*, No. JH-84-991, 1987 WL 16939 (D. Md. Apr. 14, 1987); *Bueno v. Mattner*, 633 F. Supp. 1446 (W.D. Mich. 1986), *aff'd* 829 F.2d 1380 (6th Cir. 1987).

employer seeking to utilize “guest workers” under the provisions of CIRA.²³ All workers at such a workplace would have the right to sue for damages for unpaid wages due if such an employer offered terms and conditions lower than those of prevailing wages and practices required for an H-2C employer. Under this scenario, employers would lose some of their economic incentive to employ undocumented workers.

III. CURRENT TEMPORARY WORKER PROGRAMS

The structure and scope of existing “temporary” worker programs is complex and not widely understood. The two principal temporary labor programs currently in operation are the H-2A agricultural temporary labor program and the H-2B non-agricultural temporary labor program. Ironically, as will be discussed more below, the documented history of exploitation of agricultural workers and prior advocacy for such workers has given H-2A agricultural workers theoretical protections and remedies the non-agricultural H-2B workers lack.²⁴ Although neither of these programs is currently of the size or scope of the discredited “Bracero” program,²⁵ which was in existence from 1942 until its abolition in 1964, both fail to adequately protect the rights of “temporary” H-2 workers or of other workers in industries that use them.

The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952.²⁶ Prior to the Immigration Reform and Control

23. See discussion *infra* Part V.E (describing the prevailing wage requirements for “H-2C workers” proposed in CIRA).

24. The U.S. Department of Labor, Wage and Hour Division has promulgated regulations for the enforcement of contracts for H-2A agricultural workers. 29 C.F.R. § 501 (2000). Actual enforcement of such provisions is seriously deficient. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 598-99 (2001) (describing the contract enforcement provisions as being loose and lacking). However, no equivalent regulations for federal government enforcement of contracts for H-2B non-agricultural workers have even been promulgated.

25. Various sources provide a capsule history of the Bracero program. See Holley, *supra* note 24, at 583-85 (describing the purpose of the program as an attempt to replace domestic workers at war during WWII); Michael J. Mayerle, Comment, *Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, If Not Impossible, Question*, 6 J. SMALL & EMERGING BUS. L. 559, 564-66 (2002) (describing how the Bracero program did not achieve its goal of creating more documented Mexican workers than undocumented). See also KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (Routledge 1992); ERNESTO GALARZA, *FARM WORKERS AND AGRIBUSINESS IN CALIFORNIA, 1947-1960* 203-76 (Univ. of Notre Dame Press 1977); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (McNally & Loftin 1964); LINDA C. MAJKA & THEO J. MAJKA, *FARM WORKERS, AGRIBUSINESS, AND THE STATE* 136-66 (Temple Univ. Press 1982). Recently, material related to the Bracero era has been made available on the Internet. See Carlos Marentes, *Bracero Project*, <http://www.farmworkers.org/benglish.html> (last visited Feb. 25, 2007). Among the documents made available, there is a version of the Bracero contract of August 1942, which was modified and released on April 26, 1943. *The Official Bracero Agreement*, Apr. 26, 1943, available at <http://www.farmworkers.org/bpaccord.html>. Perhaps what is most striking about that contract is the extent of its nominal protections for workers brought in as Braceros. *Id.*

26. 8 U.S.C. § 1101(a)(15)(H)(ii)(A) (2000). See Joyce Vialet, *Immigration: The “H-2A” Temporary Agricultural Worker Program*, CRS Report for Congress, Apr. 9, 1998, <http://countingcalifornia.cdlib.org/crs/pdf/97-714.pdf>.

Act of 1986²⁷ (IRCA), there was no separate H-2B program.²⁸ There had been considerable advocacy to protect rights of temporary agricultural workers, and in 1986, Congress created the H-2A program for such workers and a separate H-2B program for non-agricultural workers.

North Carolina farm-worker attorney Mary Lee Hall, in discussing the existing H-2A agricultural worker program, correctly asserted that:

For a democratic society, the fundamental problem with a guest worker program is that guest workers are not free and have no rights of membership in society. . . .

. . . .

When I say that H-2A workers are not free, the lack of freedom has several different aspects:

- They cannot change employers.
- They cannot bargain over their terms and conditions of employment.
- Their remedies are limited and less than those afforded other workers.
- They are subject to deportation and banishment from the program if they complain or are even suspected of complaining.²⁹

The central flaw, from a worker-rights point of view, of all existing “temporary” worker programs is both that employers (or employer associations) control the right of such temporary workers to lawfully enter the country and that any such H-2 worker who wishes to continue legal employment may only do so through the employer who sponsored his or her entry into the country.³⁰ To succeed in reversing the incentives of employers to exploit such workers, any

27. The Immigration Reform and Control Act of 1986 amended the Immigration and Nationality Act, 8 U.S.C. § 1101-1537 (2007).

28. See ANDORRA BRUNO, DOMESTIC SOC. POL’Y DIV., CONG. RESEARCH SERV., LIBRARY OF CONG., IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 2 (2006), available at <http://fpc.state.gov/documents/organization/62664.pdf> (explaining how IRCA “amended the INA to subdivide the H-2 program into the current H2-A and H2-B programs”).

29. Mary Lee Hall, Essay, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. INT’L L. & COM. REG. 521, 527-29 (2002). See also Holley, *supra* note 24, at 594-616 (offering substantial criticism of the H2-A system from an experienced farmworker advocate); See Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Legal Egalitarianism*, 52 DEPAUL L. REV. 759, 768 n.51 (2003). The communitarian Michael Walzer adopts a similar position. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 56-61 (1983) (arguing that guest-worker programs are inconsistent with political justice in a democratic state). See also James Woodward, *Commentary: Liberalism and Migration*, in FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY at 59, 82 (Brian Barry & Robert E. Goodin eds.) (1992) (“The creation of a class of permanent residents who are restricted from becoming citizens (if they should wish to do so) or any similar system of differential status among a state’s permanent inhabitants is fundamentally incompatible with liberal egalitarian ideals.”).

30. Binding the temporary worker to a particular employer was also a characteristic of the Bracero program.

temporary worker program *must* change those terms.³¹ The ability of employers to blacklist workers who make complaints, and to deny re-entry with temporary worker visas, is a critical flaw of the H-2 program because it vests employers with an overwhelming ability to control workforces subject to recruitment.³² Thus, permitting a worker to retain her legally-authorized status, only so long as she remains employed by a particular employer, is inherently a form of compulsory servitude that should be unacceptable in this society.³³

As National Employment Law Project attorney Rebecca Smith noted in her July 19, 2006, testimony before the Committee on Education and the Workforce of the House of Representatives:

One of the primary problems with guestworker systems is that a guestworker's job AND his or her ability to remain in the country depend on remaining in the good graces of the employer. This is a situation made for employers who would take advantage of workers. Along with beefed up enforcement of wage and hour laws, workers must have the ability to change jobs in order to equalize bargaining power.³⁴

This problem remains fundamental to both the H-2A and H-2B programs and can only be addressed by Congressional action.³⁵

This article does not discuss in detail proposed legislative changes to the H-2A program, in particular the Agricultural Job Opportunity, Benefits, and Security (AgJOBS) Act,³⁶ which was the result of careful compromises between agricultural employers and farm-worker advocates, including the United Farm Workers, and

31. See COORDINATING COMM. ON IMMIGRATION LAW, ABA, REPORT TO THE HOUSE OF DELEGATES 1 (2002), available at <http://www.abanet.org/leadership/recommendations02/115a.pdf> (recommending that "any temporary worker or legalization program guarantee[] basic labor rights with the ability to change employers").

32. The threat to blacklist an H-2 employee goes beyond the individual worker to potentially encompass communities in which aggrieved workers live. Many workers who have been fired are discouraged from making complaints by family members and friends from the same community for fear that they will be blacklisted as a result of these complaints.

33. Cf. Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 470-71 (2002) ("Freedom to leave an employer and to take employment elsewhere would give workers greater power to assert their rights against employers and thus prevent abuses. . .").

34. See *Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy: Hearing Before H. Comm. on Educ. and the Workforce*, 109th Cong. 38 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28808.pdf (statement of Rebecca Smith, National Employment Law Project).

35. In practice, an H-2B worker who enters the United States on a valid H-2B visa must apparently leave the country to apply for an H-2B visa in order to work with a different employer. This practice is particularly problematic for workers who are hired for very short-term H-2B jobs and for those whose employment ends sooner than the period for which they were recruited. Friends of Farmworkers, Inc., has had experience with H-2B employers who were so undercapitalized that they ceased business operations shortly after H-2B workers arrived for employment, thereby leaving workers with significant debts they incurred to obtain the employment.

36. AgJOBS Act of 2005, S. 359, 109th Cong. (2005); AgJOBS Act of 2005, H.R. 884, 109th Cong. (2005).

was incorporated with some amendments into CIRA.³⁷ Instead, this article will focus on the existing non-agricultural worker H-2B program and the need for legislative and regulatory changes in that program.

IV. THE H-2B TEMPORARY NON-AGRICULTURAL WORKER PROGRAM

A. *Overview of the H-2B Temporary Non-Agricultural Worker Program*

IRCA created the H-2B visa program at the same time the agricultural H-2A program was crafted from the former H-2 program.³⁸ While considerable legislative attention in the Senate in the 109th Congress went into the scope and terms of the proposed new temporary guest worker programs, the existing H-2B non-agricultural temporary worker program was virtually ignored in the legislative debate.³⁹

The United States Citizenship and Immigration Services describes the H-2B visa program as follows:

The H-2B visa category allows U.S. employers in industries with peak load, seasonal or intermittent needs to augment their existing labor force with temporary workers. The H-2B visa category also allows U.S. employers to augment their existing labor force when necessary due to a one-time occurrence which necessitates a temporary increase in workers. Typically, H-2B workers fill labor needs in occupational areas such as construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.⁴⁰

As will be discussed in detail below, the U.S. Department of Labor (DOL) Employment and Training Administration (ETA), which is responsible for labor certification decisions under the H-2A and H-2B programs, has completely failed to develop substantive regulations for the administration of the H-2B program. The program was not used extensively in the first ten years after passage of the IRCA, but that has changed in the last several years.

37. S. 2611, 109th Cong. §§ 611-19 (2006).

38. See BRUNO, *supra* note 28, at 1-2 (tracing the historical development of U.S. temporary foreign worker programs); see also Daniel E. Lungren, *The Immigration Reform and Control Act of 1986*, 24 SAN DIEGO L. REV. 277, 295-97 (1987) (“The legislation [IRCA] passed by Congress codifies modifications intended to streamline the H-2 program and make it more attractive to the agricultural community.”).

39. See generally MARY BAUER ET AL., AN ANALYSIS OF THE LABOR PROVISIONS OF MCCAIN/KENNEDY 4 (2005), available at http://friendsfw.org/Advocates/immig/Analysis_Labor_Provisions_McCain-Kennedy.pdf (examining legislation proposing to create a new guest worker visa category instead of confronting endemic problems experienced under current H2-A and H2-B systems). The author of this article was one of the co-authors of that analysis.

40. U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., Current Cap Count for Non-Immigrant Worker Visas for Fiscal Year 2007, <http://www.uscis.gov/portal/site/uscis> (follow “Services & Benefits” hyperlink, then follow “Employer Information” hyperlink) (last visited Feb. 22, 2007).

B. History of Regulation of the H-2B Program

Comparison of the regulations for H-2B workers outside of logging and non-H-2A agricultural employment with the regulatory structure for H-2A agricultural workers readily demonstrates the degree to which the H-2B program lacks fundamental legal protections that are at least theoretically available to H-2A workers.⁴¹ Moreover, an examination of the history of DOL regulation under the H-2 program reveals that this has been the case throughout the program's existence.

Prior to changes in the methodology for determination of prevailing wage rates under the H-2B system, employers seeking certification of their need for H-2B workers were generally required to offer higher wage rates to such workers than to H-2A workers.⁴² Although H-2A workers were required to be provided with housing at no cost by their employers, H-2B workers frequently incur significant housing costs.⁴³ Over the past several years, the required prevailing wage rate has changed significantly for workers in the landscaping industry in Pennsylvania, and at this point, wage rates offered to H-2B workers may be lower than the adverse-effect wage rates for H-2A workers in the area.⁴⁴ Moreover, despite requirements

41. Compare Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States, 20 C.F.R. §§ 655.1-.3 (2006) (addressing only the application and determination process of H-2B visas), with Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment, 20 C.F.R. §§ 655.200-.212) (including such protections as employer assurances, rules governing recruitment, and penalties for non-compliance).

42. H-2B visa recipients must be paid wages which comport with the "prevailing wage rate." See 20 C.F.R. § 656, subpt. D (explaining the determination of prevailing wage); EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION PREVAILING WAGES (2005), available at <http://www.foreignlaborcert.doleta.gov/wages.cfm> ("The prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment."). Wages for H-2A agricultural workers, however, are analyzed with adverse-effect wage rates (AEWR). See 20 C.F.R. § 655.107 (requiring that the highest available wage must be paid to H-2A workers, whether computed using AEWR rates or prevailing wage rates). Current AEWR rates are available at: <http://www.foreignlaborcert.doleta.gov/adverse.cfm> (last visited Feb. 22, 2007).

43. Although in reality many H-2B employers or their agents are involved in arranging housing for H-2B workers (or, in some cases, directly house such workers), there is no effective regulation of such arrangements or of the costs imposed for such housing.

44. In 2000, well before the change in the procedures for determination of prevailing wage rates for H-2B workers, the landscaping industry won a series of DOL ETA Employment Service Program Letters which essentially directed prevailing wage rates to ignore wage rate requirements set by the Service Contract Act for landscaping workers who could be classified as "Laborer, Landscape - DOT Code 408.687-014." See Employment Service Program Letter 01-01, Change 2, Employment and Training Admin., U.S. Dep't of Labor, Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2000-2001 (Sept. 30, 2002), available at http://www.ows.doleta.gov/dmstree/espl/es2k1/espl_01-01c2.htm (altering previous directives on temporary landscaping H-2B applications); Employment Service Program Letter 01-01, Change 1, Employment and Training Admin., U.S. Dep't of Labor, Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2000-2001 (Aug. 31, 2002), available at http://www.ows.doleta.gov/dmstree/espl/es2k1/espl_01-01c1.htm (updating policy regarding temporary H-2B applications for the landscaping industry); Employment Service Program Letter 01-01, Employment and Training Admin., U.S. Dep't of Labor, Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2000-2001 (Dec. 22, 2000), available at http://www.ows.doleta.gov/dmstree/espl/es2k1/espl_01-01.htm (resolving systemic inconsistencies in H-2B applications for landscaping employment). These DOL interpretive

under the Fair Labor Standards Act (FLSA) and overseas laws governing recruitment of temporary workers in Mexico and Guatemala, most H-2B employers fail to reimburse their workers for costs incurred by temporary workers “for the benefit or convenience of the employer” prior to their first week of employment.⁴⁵

C. Congress Needs to Require DOL to Adopt Regulations to Enforce the H-2B Program

The most fundamental problem for H-2B workers, and other laborers in the workplace, is that the DOL has no mechanism for investigating and responding to employer violations of the rights of such workers. Although H-2B workers are entitled to payment of prevailing wages and employment in conformity with required minimum terms and conditions of employment, as provided for in the employer’s labor certifications, DOL regulations and federal law provide no remedy when these rights have been violated.⁴⁶

policies resulted in significantly lower prevailing wage rate determinations than would have been the case under Service Contract Act rate requirements.

Because H-2B workers should generally not be classified as agricultural workers under the Fair Labor Standards Act (FLSA), they should theoretically be entitled to earn overtime pay at time-and-a-half. In practice, a significant number of employers of H-2B workers do not pay overtime wages. Friends of Farmworkers, Inc., has frequently encountered practices of employers paying straight-time, cash wages for hours worked over 40 hours in a week. For instance, some H-2B employers even claim exemption from FLSA overtime requirements under the Motor Carrier Act. DOL methodology for determination of prevailing wage rates permits wage rates below minimum wage to be paid.

Employers of traveling carnivals employing H-2B workers assert exemption from even minimum wages; the prevailing wage rates approved by the DOL ETA are below minimum wage for such workers. *See* Fair Labor Standards Act, 29 U.S.C. § 213(a)(3) (2004) (providing an exemption from the minimum wage and overtime provisions of the FLSA for “any employee employed by an establishment which is an amusement or recreational establishment . . . if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year”); WAGE AND HOUR DIV., EMPLOYMENT STANDARDS ADMIN., U.S. DEP’T OF LABOR FACT SHEET #18: EXEMPTION FOR SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS UNDER THE FAIR LABOR STANDARDS ACT, <http://www.dol.gov/esa/regs/compliance/whd/whdfs18.htm> (last visited Feb. 22, 2007) (detailing changes made by the H1-B Visa Reform Act).

Fiscal year 2005 DOL ETA data indicates that H-2B applications were filed by employers under DOT occupational code 969.687-010 “circus laborers” for 1530 H-2B workers. Prevailing wage rates for these workers were set on a weekly, rather than hourly, basis at rates as low as \$250 per week, even though some of these workers might work as many as 90 hours in a week. *See* U.S. Department of Labor, Employment & Training Administration, H-2B Disclosure Data, 2005, http://www.flcdatacenter.com/download/H-2B_FY2005.zip.

45. *See* *Arriaga v. Florida Pac. Farms*, 305 F.3d 1228, 1236 (11th Cir. 2002) (citing 29 C.F.R. § 531.32(c)) (holding that employers are obligated to reimburse employees for their transportation, visa, and immigration expenses).

46. As long ago as January 2000, Friends of Farmworkers, Inc., met with representatives of the Employment and Training Administration and the Employment Standards Administration of the DOL to discuss procedures for violations of the terms of labor certification for H-2B employers. In the end, they were informed that the only circumstances under which the DOL could respond to such violations were if there were independent violations of the FLSA that could be addressed by the Wage and Hour Division. The ETA Regional Administrator had no procedure for investigating alleged violations.

After enactment of IRCA in 1986, DOL ETA promulgated regulations for the enforcement of contractual rights of H-2A workers by the Wage and Hour Division, Employment Standards Administration of DOL.⁴⁷ These regulations can and should be applied verbatim to H-2B workers, and the Wage and Hour Division of the Employment Standards Administration should be given the responsibility and resources to enforce these requirements.⁴⁸ A particularly important element of those protections is a federal regulation barring discrimination or retaliation against workers making complaints or exercising rights under those protections.⁴⁹

D. DOL Needs to Be Required to Establish Better Procedures for Recruitment of U.S. Workers

Another fundamental defect of the H-2B system is the virtual absence of any genuine requirement for recruitment of U.S. workers.⁵⁰ Not only are H-2B job orders entered into the Employment Service System months before the employment period would begin, but such job orders remain in the system for only ten days.⁵¹ Those job orders are never put into interstate circulation to recruit workers within the United States who would travel for employment. Employers seeking to utilize H-2B workers place a single ad in a local newspaper of general circulation months before the employment period and have no obligation to employ U.S. workers who apply for employment after that initial recruitment period.⁵²

47. See 29 C.F.R. § 501 (setting forth regulations governing enforcement of contractual obligations for H-2A workers, as amended by IRCA).

48. Congress can and should direct the DOL to develop such regulations for enforcement of rights of both H-2B and U.S. workers presently employed or seeking employment with employers utilizing H-2B workers. In the interim, Congress should direct the DOL to apply the existing regulations at 29 C.F.R. § 501 to H-2B workers.

The provision of resources to the DOL ESA Wage and Hour Division for enforcement of any labor protection standards in temporary worker programs is critical to the operation of such programs. A complaint under the FLSA on behalf of a carnival worker was submitted in October 2005, but the Wage and Hour Division has not yet completed an investigation of the complaint.

49. 29 C.F.R. § 501.3 (prohibiting employer discrimination or retaliation against any person who has filed a complaint, instituted a proceeding, testified, exercised rights, or sought legal assistance in relation to section 216 of the INA).

50. In this context, a "U.S." or "domestic" worker refers to those who are authorized to work in the United States, including foreign nationals with employment authorization. It does not include undocumented workers without work authorization. CIRA refers to these workers as "United States workers." Department of Labor regulations under the H-2A and H-2B programs refer to these workers as "domestic workers."

51. Telephone interview with John Stoltz, Pennsylvania Department of Labor and Industry official (Aug. 3, 2003). Stoltz is responsible for prevailing wage determinations of H-2B applications in Pennsylvania.

52. Under the H-2A system, employers are supposed to engage in positive recruitment efforts for employment of domestic workers, and job orders are supposed to be circulated as interstate clearance orders. Most importantly, under the "fifty-percent rule," domestic workers are entitled to employment at any time up to fifty percent of the employment period. See EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, H2-A CERTIFICATION (2005), available at <http://www.foreignlaborcert.doleta.gov/h-2a.cfm> (explaining the fifty percent rule as a requirement that "[t]he employer must hire any qualified and eligible U.S. worker who applies for a job until fifty percent (50%) of the period of the work contract has elapsed.").

E. Abuses by Employer Agents Need to Be Remedied

The H-2B and H-2A programs have created intricate layers of domestic and overseas agents for employers of temporary workers. Many of these agents actively recruit employers to enter into the H-2 systems and some promise employers that they will be able to force their employees to repay all of the fees for their services.⁵³

Some employers and their agents actively misrepresent the employment being offered to employees in order to avoid requirements to pay higher prevailing wage rates commensurate with the actual job duties.⁵⁴ Some H-2B employers have discovered that they can re-sell their workers by becoming temporary employment agencies supplying H-2B workers theoretically employed for their own business operations to other businesses at rates considerably above those paid to the workers.⁵⁵

F. The H-2B Program Has Grown in Size with No Oversight

The H-2B program has quietly expanded to a major degree with virtually no attention to the operation of the program. In fact, the 109th Congress twice quietly passed legislation which greatly expanded the size of the existing H-2B program without addressing serious continued deficiencies in the H-2B program.⁵⁶

A recent report by the Congressional Research Service⁵⁷ analyzed the quantitative and qualitative growth in both the H-2A and H-2B temporary worker programs. The report indicated that, “[a]ccording to preliminary data, 87,492 H-2B visas were issued in [fiscal year] 2005” whereas, in fiscal year 1993, only 9691 H-2B visas were issued.⁵⁸ That was a growth of more than 800%.

In May 2005, Congress enacted the Save Our Small and Seasonal Businesses Act of 2005 (SOS Act).⁵⁹ That legislation, which expired on October 1, 2006, exempted returning H-2B workers from the cap on the number of visas for such

53. Some agents for employers proudly advertise this on their websites. No mechanism exists within the Department of Labor, Department of Homeland Security, the U.S. Citizenship and Immigration Service, or the Department of State for addressing such issues.

54. Cf. BAUER ET AL., *supra* note 39, at 4 (pegging the development of a “quasi-criminal army of recruiters,” who have developed nefarious tactics to take advantage of desperate workers, to the H-2A and H-2B visa programs).

55. *Id.*

56. See John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109th Cong. § 1074 (2006) (amending the INA to permit more returning H-2B visas workers than under the previous statutory cap); Save Our Small and Seasonal Business Act of 2005, S. 352, 109th Cong. (2005) (expanding the numerical limitations on H-2B workers).

57. BRUNO, *supra* note 28, at 1-6 (explaining the development and present status of the H-2A and H-2B guest worker programs).

58. *Id.* at 5-6. The Immigrant Visa Control and Reporting Division, Visa Office, Bureau of Consular Affairs, U.S. Department of State, Report of the Visa Office 2005, reported an additional 1643 “H-2R” visas (for returning H-2B workers issued after May 2005) for a total of 89,135 H-2B and H-2R visas. View published annual reports at http://travel.state.gov/visa/about/report/report_1476.html.

59. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, div. B., at tit. IV, 119 Stat. 231, 318 (2005) (incorporating the SOS Act within the REAL ID Act of 2005 at Title IV of Section B). President Bush signed the entire Appropriations Act into law on May 11, 2005.

workers if they had worked in any of the previous three fiscal years.⁶⁰ The program continued to grow significantly during fiscal year 2006 because it was the first full fiscal year in which H-2B workers from 2003, 2004, and 2005 were eligible to return without regard to the previous statutory cap of 66,000 workers. Despite the cap of 66,000 new H-2B visas, the Department of State reports that it issued 71,687 H-2B visas and 50,854 H-2R visas for returning H-2B workers employed during the previous three years. This resulted in a record total of 122,541 H-2B and H-2R workers.⁶¹

60. See Immigration and Nationality Act, 8 U.S.C. §1184(g) (2005) (creating the cap on temporary workers and trainees).

61. See IMMIGRANT VISA CONTROL & REPORTING DIV., VISA OFFICE, BUREAU OF CONSULAR AFFAIRS, U.S. DEPARTMENT OF STATE, REPORT OF THE VISA OFFICE (2006), Table XVI(B), available at http://travel.state.gov/visa/frvi/statistics/statistics_3163.html.

The U.S. Department of Labor (DOL) Employment Training Administration (ETA) Office of Foreign Labor Certification has compiled summary information about applications to the U.S. Department of Labor for H-2B workers. Data since fiscal year 2000 is now available in computer-readable format on the DOL website at <http://www.flcdatabase.com/CaseH2B.aspx>. Similar summary data is available from the Department of Labor beginning with fiscal year 1997.

Employers seek labor certifications from the Department of Labor for many more workers than the number of visas issued. Some large employer agents apparently routinely request authorization for over 50% more workers than they actually have visas issued for. The DOL data reflects requests for labor certification for 203,450 persons during fiscal year 2004. Because the Department of Labor refused to accept requests for labor certification during the first five-and-one-half months of calendar year 2005, the 203,450 figure more accurately reflects the demand for H-2B workers. The DOL data is the only available source of information for the different occupational categories for which H-2B workers are requested. The Congressional Research Service study of guest worker programs states that:

According to DOL data on H-2B labor certifications, the top five H-2B occupations in FY2004, in terms of the number of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) construction worker, and (5) stable attendant.

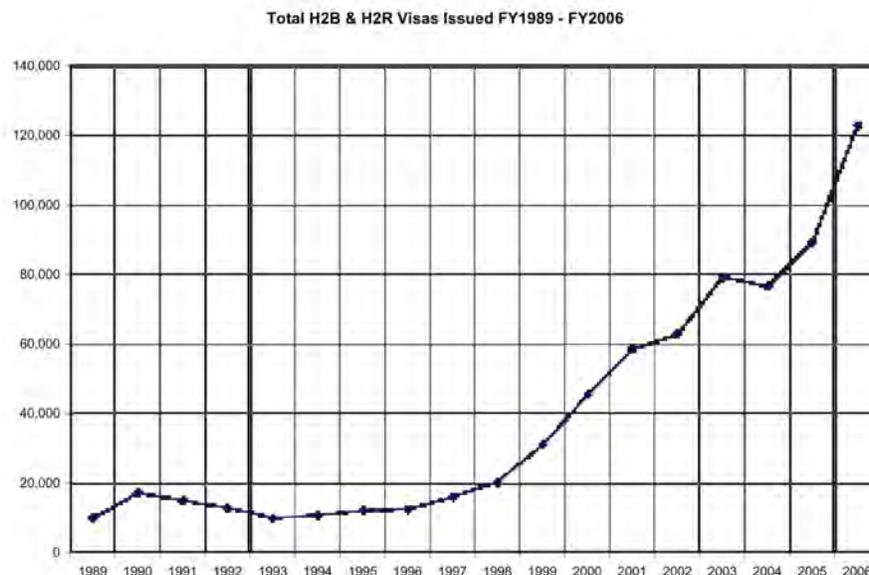
BRUNO, *supra* note 28, at 5. Friends of Farmworkers, Inc., has extensively analyzed the DOL ETA data on labor certification applications for H-2B workers.

DOL ETA data utilizes the Dictionary of Occupational Titles (DOT) classification to indicate the jobs for which H-2B workers were sought by employers. See OFFICE OF ADMIN. LAW JUDGES, DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES – OCCUPATIONAL CATEGORIES, DIVISIONS, AND GROUPS (1991), available at <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTCATE.HTM> (explaining the number system for those jobs). Distribution data for the states of applications for H-2B workers by Major Occupational Categories demonstrates the following distribution of applications for H-2B workers during fiscal year 2005:

Occ. Group	Industry Major Group: Dictionary of Occupational Titles	Group %	Num. of Aliens
4	Agricultural, Fishery, Forestry, and Related Occupations	47.57	71,911
3	Service Occupations	17.64	26,676
8	Structural Work Occupations	12.43	18,795
9	Miscellaneous Occupations	15.29	23,115
5	Processing Occupations	3.07	4641
1	Professional, Technical, and Managerial Occupations	1.37	2073
2	Clerical and Sales Occupations	1.09	1646
7	Benchwork Occupations	0.74	1112
6	Machine Trades Occupations	0.65	979

See READ, *supra* note 3.

The Department of State, Annual Visa Reports reflect the following numbers for the growth of the H-2B (and H-2R) program since 1989:



Source: Immigrant Visa Control and Reporting Division, Visa Office, Bureau of Consular Affairs, U.S. Department of State.⁶²

Equally importantly, the H-2B program has increasingly been utilized by employers and their agents in an ever increasing number of occupations. Although the logging industry is the *only* industry for which the Department of Labor ever developed specific regulatory procedures for the H-2B program,⁶³ those operations utilize a relatively small percentage of the total number of H-2B workers.

In recent years, the H-2B program has become a principal economic determinant of wage rates and terms and conditions of employment in the landscaping industry, especially in certain regions of the country.⁶⁴ In recent years,

62. Annual Visa Reports, Table XVI(B). Immigrant Visa Control and Reporting Division, Visa Office, Bureau of Consular Affairs, U.S. Department of State. See http://travel.state.gov/visa/about/report/report_1476.html. For FY2006, see http://travel.state.gov/visa/frvi/statistics/statistics_3163.html. Published data for Fiscal Years 1989-1995 is not available over the internet. Data for those years was confirmed on April 30, 2006 by telephone with Charles Oppenheim, Control and Reports Division, Office of Field Support Liaison, Department of State.

63. See Labor Certification Process for Logging Employment and Non-H-2A Agricultural Employment, 20 C.F.R. pt. 655, subpt. C (governing labor certification, job offer content, employer assurances, and recruitment practices of H2-B workers for the logging industry).

64. Landscaping industry-related jobs constituted approximately 37% of the H-2B labor certification applications to the U.S. Department of Labor during FY05. See ARTHUR N. READ, FRIENDS OF FARMWORKERS, INC., FY05 H-2B PRINCIPAL OCCUPATIONS add. 6 (2006), in Supplemental Testimony by Arthur N. Read to the H. Comm. On Educ. and the Workforce (Aug. 9, 2006), available at http://www.friendsfw.org/H-2B/Testimony_H2-B_Cmt_Ed_Wrk.pdf (proffered supplement to the testimony of Rebecca Smith, National Employment Law Project, by Arthur N. Read,

application of DOL methodology for the determination of required prevailing wages under the H-2B program has resulted in lower required prevailing wage rates than under previous methodology.⁶⁵

The 66,000-person cap on H-2B visas arguably caused serious hardship to many *truly* seasonal industries during 2004 and especially early 2005; there is a strong and valid argument for avoiding the disruptions to both employer and worker expectations by forgoing the cap.⁶⁶ Giving priority in employment to

Friends of Farmworkers, Inc. for *Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy: Hearing Before H. Comm. On Educ. and the Workforce*, 109th Cong. (2006)).

65. EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION PREVAILING WAGES (2005), available at <http://www.foreignlaborcert.doleta.gov/wages.cfm>; EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE: NONAGRICULTURAL IMMIGRATION PROGRAMS (2005), available at http://www.workforcesecurity.doleta.gov/foreign/pdf/Policy_Nonag_Progs.pdf (discussing the methodology utilized since May 2005 for determining prevailing wage rates for the H-2B program). Most significantly, that guidance clarifies that the Labor Certification for the Permanent Employment of Aliens in the United States (PERM) regulation, 20 C.F.R. pts. 655 - 56 (2005), published on December 27, 2004, and effective on March 28, 2005, modified the prevailing wage determination process in a number of significant ways.

First, "[t]he use of Davis-Bacon or the McNamara-O'Hara Service Contract Act is no longer controlling for prevailing wage determinations" See Implementation of New System, 69 Fed. Reg. 77,326 (Dec. 27, 2004) (to be codified at 20 C.F.R. pts. 655-56) (setting forth PERM regulations), available at http://workforcesecurity.doleta.gov/foreign/pdf/PERM_Final_Rule_12-27-04_FR.pdf. In many areas, the Service Contract Act or the Davis-Bacon Act had required significantly higher wages for H-2B workers. For procedures prior to these changes, see http://friendsfw.org/H-2B/H-2b_Wage_Links.htm (last visited Feb. 22, 2007).

A second aspect of the change in regulatory procedure is also particularly significant for determining the prevailing wage rate for low skill jobs. The May 9, 2005, Nonagricultural Wage Determination Policy Guidance states:

Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing governmental survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE: NONAGRICULTURAL IMMIGRATION PROGRAMS, *supra* note 65.

The U.S. Department of Labor Employment and Training Administration (ETA) attributes this change to the H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, §§ 421-30 (passed under the Consolidated Appropriations Act of 2005). Prior to this change, the prevailing wage process had utilized two tiers of wages. See WAGE AND HOUR DIV., U.S. DEP'T OF LABOR FACT SHEET #59: CHANGES MADE BY THE H1-B VISA REFORM ACT OF 2004, <http://www.dol.gov/esa/regs/compliance/whd/whdfs59.htm> (last visited Feb. 22, 2007) (detailing changes made by the H1-B Visa Reform Act).

The functional effect of these changes in methodology has been to lower the required prevailing wage rate for many H-2B jobs. The ETA and Congress should revisit the process for determining prevailing wages for H-2B workers and should develop procedures to ensure that wage rates do not adversely affect the wages of U.S. workers. See 20 C.F.R. § 655.0 (setting forth requirements).

66. See Press Release, Sen. Barbara A. Mikulski, Mikulski Introduces Legislation To Provide Solution To H2B Visa Shortage (Feb. 10, 2005), available at <http://mikulski.senate.gov/record.cfm?id=232118> (highlighting the detrimental effect of the 66,000-person cap on businesses dependent upon seasonal labor); see also Save Our Small and Seasonal Business Act of 2005, S. 352, 109th Cong. (2005) (exempting seasonal workers from the cap).

returning workers (by exempting them from the cap) is also reasonable. However, the H-2B program needs major regulatory oversight by the DOL, which is *totally* absent in practice. In addition, there is no valid reason for the exclusion of H-2B workers from representation by federally funded Legal Services Corporation programs as if they were unauthorized undocumented workers.⁶⁷

Rather than dealing with any of these issues in September 2006 as part of the Department of Defense Appropriations Act for Fiscal Year 2007,⁶⁸ Congress attached a further provision as section 1074 of the National Defense Authorization Act for Fiscal Year 2007, which continued the exemption of returning H-2B workers who had worked in any of the previous three fiscal years.⁶⁹

Based on the number of H-2B and H-2R workers employed in FY2004, 2005, and 2007, the author estimates that up to 160,000 workers are eligible to be H-2R workers in the current fiscal year and that with the additional 66,000 H-2B new workers the total of H-2B and H-2R workers in the current fiscal year could be as high as 226,000 persons.⁷⁰

V. PROPOSED GUEST WORKER PROGRAMS

A. *Addressing Future Employer Demand for Immigrant and Migrant Labor Through Guest Worker Programs*

It has been the intent of many proponents of comprehensive immigration reform to include sufficient provisions for future lawful immigration to meet needs of employers for additional workers in the future and to avoid further unauthorized

67. See 45 C.F.R. pt. 1626.5 (enumerating a list of aliens entitled to representation); see also Petition on Labor Law Matters Arising in the U.S., available at <http://www.dol.gov/ILAB/media/reports/nao/submissions/2005-01petition.htm> (Apr. 13, 2005) (submitted to the National Administrative Office of Mexico) (outlining the "extreme difficulty obtaining legal representation" endured by H2-B visa-holding temporary workers); Press Release, Nw. Workers' Justice Project, U.S. Violates International Law by Denying Latin American Temporary Workers Access to Labor Rights Lawyers (Apr. 13, 2005), <http://www.nwjp.org/docs/NAALC-press-release.pdf> (decrying the inability of H2-B employees "to vindicate their rights under the auspices of the nation's Legal Services Corporation"); Press Release, Nw. Workers' Justice Project, Fact Sheet: Complaint to Mexican Government Regarding Access to Labor Rights Lawyers for Temporary Workers in the U.S. (Apr. 13, 2005), <http://www.nwjp.org/docs/Fact-Sheet.pdf> (explaining H2-B workers' lack of legal redress for labor violations). See generally Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003) (arguing that denial of state-funded legal services to certain categories of documented aliens is bad policy, violates the Privileges and Immunities Clause, and violates Equal Protection).

68. See Department of Defense Appropriations Act of 2007, Pub. L. No. 109-289, 120 Stat. 1257 (2006) (passing both the House and Senate as H.R. 5631).

69. See John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. 1022, 109th Cong. § 1074 (2006) (extending the returning worker exemption to the H2-B numerical limitation).

70. All of the 122,541 H-2B and H-2R workers employed in FY2006 are eligible to return as H-2R. In addition, 38,281 FY2005 H-2B workers who did not return in FY2006 remain eligible in FY2007 for visas as H-2R workers together with any additional FY2004 H-2B workers who did not return as H-2R workers in FY2006.

migration of foreign-born persons into the United States.⁷¹ Beginning with a press conference on January 7, 2004, President George W. Bush has promoted a new “temporary worker program” as a critical element of comprehensive immigration reform.⁷²

On May 12, 2005, Senators John McCain and Edward Kennedy, sponsors of the Secure America and Orderly Immigration Act⁷³ (McCain/Kennedy), introduced comprehensive immigration reform legislation as a bipartisan compromise. That proposed legislation included a new expanded “temporary essential worker program.”⁷⁴ CIRA, as introduced in April 2006 and adopted by the Senate in May 2006, included a new “guest worker” program as part of the effort to meet future needs for workers.⁷⁵

B. Labor Opposition to Expanded Guest Worker Programs

The AFL-CIO has consistently opposed the inclusion of new expanded guest worker programs into comprehensive immigration reform legislation.⁷⁶ This position was reaffirmed on March 1, 2006, by the AFL-CIO national Executive Council, which stated:

71. See, e.g., Press Release, Office of the Press Sec’y, The White House, Fact Sheet: Operation Jump Start: Acting Now to Secure the Border (Aug. 3, 2006), available at <http://www.whitehouse.gov/news/releases/2006/08/20060803-7.html> (stating that comprehensive immigration reform must create a temporary worker program that would establish a legal channel for foreign workers to enter our country in an orderly way, for a limited period of time. Further, “By creating a lawful channel for those who want to work in our country, a temporary worker program would reduce the number of people trying to sneak across the border, freeing agents to focus on apprehending criminals and terrorists who pose a threat to our security.”).

72. See George W. Bush, President of the U.S., Remarks by the President on Immigration Policy (Jan. 7, 2004), in Press Release, Office of the Press Sec’y, The White House, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html> (proposing a new temporary worker program).

73. S. 1033, 109th Cong. (2005). For an analysis of critical weaknesses of the proposed H-5A program, see generally BAUER ET AL., *supra* note 39.

74. S. 1033 tit. III (including provisions for temporary H-5A “essential” workers).

75. See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. tit. IV (2006), (creating admission protocols and obligations for future workers).

76. See Letter from AFL-CIO to Senators (May 24, 2006), available at http://www.aflcio.org/issues/legislativealert/alerts/upload/final_immigration.pdf (asking for action on post-cloture amendments to CIRA); Letter from AFL-CIO to Senators (May 23, 2006), available at http://www.aflcio.org/issues/legislativealert/alerts/upload/s2611_immigration.pdf (urging support for amendments to CIRA); Letter from AFL-CIO to Senators (May 16, 2006), available at http://www.aflcio.org/issues/legislativealert/alerts/upload/Immigration_DorganBingamanLetter.pdf (rejecting guest worker programs as a viable solution and castigating the three-tiered Hagel-Martinez guest worker compromise as “undemocratic, unjust, and unworkable”); Letter from AFL-CIO to Senators (Apr. 5, 2006), available at http://www.aflcio.org/issues/legislativealert/alerts/upload/ImmigrationBill_SenateFloorDebate.pdf (commending a compromise immigration reform bill produced by the Senate Judiciary Committee and cautioning against amendments to weaken guest-worker protections); Letter from Linda Chavez-Thompson, Executive Vice President, AFL-CIO, to Sen. Arlen Specter, Chair, Senate Judiciary Committee (Jan. 11, 2006), available at http://www.aflcio.org/issues/legislativealert/alerts/upload/specter_immigration.pdf (opposing H.R. 4437, the Border and Immigration Enforcement Act of 2005).

We must reverse the trend of allowing employers to turn permanent, full-time year-round jobs into temporary jobs through attempts to broaden the size and scope of guestworker programs.

Longstanding U.S. guestworker policy requires that temporary workers can be used only to satisfy short-term or seasonal labor needs. The agricultural guestworker program, for example, the best known of these programs, is designed to satisfy the seasonal needs of employers who need to temporarily hire large numbers of workers during the growing season, which may be as short as six 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.

Guestworker programs are bad public policy and operate to the detriment of workers, in the both the public and private sector, and of working families in the U.S. The abuses suffered by workers in the first such program, the post World-War II Bracero program, are well documented. The negative effects of the modern versions of the “guestworker” construct — such as the H1-B and H2-B programs — are all too evident today. Workers around the country are witnessing the transformation of formerly well-paying, permanent jobs into temporary jobs with little or no benefits, which employers are staffing with vulnerable foreign workers who have no real enforceable rights through the guestworker programs. These modern programs have had a major and substantial detrimental effect on important sectors of our economy.

The massive expansion of guestworker programs contemplated by current legislation before the Senate — which would more than quadruple the number of foreign workers admitted annually⁷⁷ and would allow employers to import workers into the public and private sector — will not only harm U.S. workers, but also represents a radical and dark departure from our long-held vision of a democratic U.S. 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, in the future of our children, and in our democracy. It defies everything that our nation stands for to legitimize a system that forces our communities to simply be “hosts” for “guests” who are only here to lend their labor, and who have no reason to become invested in that community, and who will never have a voice in their future within

77. At the time of this statement, CIRA had not yet been introduced. The reference was likely to the Secure America and Orderly Immigration Act, as introduced in May 2005. As discussed more fully below, CIRA provisions as to the numbers of guest workers authorized were modified significantly as a result of floor amendments during the May 2006 Senate debate. In particular, an amendment adopted May 16, 2006, reduced the number of guest workers under the new H-2C program to a maximum of 200,000 individuals per year. See 152 CONG. REC. S4562 (daily ed. May 15, 2006) (statement of Sen. Bingaman on Senate Amendment 3981).

that community. We are not a nation of guests; we are a nation of citizens.

In our 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 "guestworker" status, would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.⁷⁸

C. *Portability of Visas Under New Guest Worker Programs*

Significantly, the temporary worker program initially proposed by McCain/Kennedy in May 2005 included the right for temporary workers to change employers without penalty.⁷⁹ This provision for "portability" of visas would have avoided one of the most severe problems of the existing H-2A and H-2B programs, which limits the lawful status of temporary workers to employment with the specific employer who initially petitioned for their entry.⁸⁰ This critical provision for portability of worker visas remained in the new H-2C temporary guest worker program in the final Senate version of CIRA.⁸¹ An additional significant protection against worker abuse included in both McCain/Kennedy and CIRA is a prohibition on treating the temporary guest workers as independent contractors.⁸²

D. *Regulation of Labor Recruiters and "Whistleblower" Protections*

McCain/Kennedy included provisions that remained in CIRA as adopted by the Senate in May 2006, attempting to regulate foreign labor contractors engaged in recruitment⁸³ of temporary workers from other countries, as well as

78. Executive Council Statement, AFL-CIO, Responsible Reform of Immigration Laws Must Protect Working Conditions for All Workers in the U.S., (Mar. 1, 2006), <http://www.aflcio.org/aboutus/thisistheaficio/ecouncil/ec02272006e.cfm> (last visited Feb. 22, 2007) (condemning the lack of employer accountability and poor working conditions resulting from previous guest worker programs).

79. See S. 1033 tit. III, § 302 (adding a provision, § 218A(e), for "portability" of visas to the Immigration and Nationality Act tit. II, ch. 2 (presently codified at 8 U.S.C. § 1188)).

80. See Read, *supra* note 3, at 85 (explaining that without "portability of visas, employees cannot organize for improved terms and conditions of employment").

81. See S. 2611 tit. IV, § 403(a) (containing § 218A(j), which incorporates a provision for "portability" of H-2C visas into Immigration and Nationality Act tit. II, ch. 2 (currently codified at 8 U.S.C. § 1188 (2005))).

82. See S. 2611 tit. IV, § 404(a) Employer Obligations (forbidding treatment of H2-C nonimmigrants as independent contractors via § 218B(f)(1), an amendment to the Immigration and Nationality Act tit. II, ch. 2 (presently codified at 8 U.S.C. § 1188 (2005))).

83. A number of lawsuits have alleged that recruiters require that employees pay large recruitment fees and/or pledge collateral with the employer's representatives in order to be hired under the H-2B programs. See, e.g., *De Leon-Granados v. Eller and Sons Trees, Inc.*, No. 1:05 CV 1473 CC, 2006 WL 736527 (N.D. Ga. Jan. 31, 2006) (amended class action complaint) (asserting unlawful recruitment practices); *Recinos-Recinos v. Express Forestry*, No. 05-1355, 2006 WL 197030, at *2, (E.D. La. Jan. 24, 2006) (memorandum opinion and protective order) (setting forth plaintiff allegations that they were not reimbursed for expenses); *Martinez-Vera v. Grano-Reforestation*, No. 03-06002-JLH, (W.D. Ark.

“whistleblower” protections for workers facing retaliation or discrimination.⁸⁴ These provisions appear to be modeled to a significant degree on protections for migrant agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act of 1983.⁸⁵ Unfortunately, critical legislative lessons learned under the predecessor Farm Labor Contractor Registration Act of 1963⁸⁶ (FLCRA) as to the need for effective private causes of action to enforce rights under that act were completely ignored in the drafting of CIRA.⁸⁷

Similarly, CIRA and McCain/Kennedy have generally failed to address the need to allow workers access to legal representation to enforce their rights. In 1974, the U.S. Congress passed the Legal Services Corporation Act,⁸⁸ which was designed to provide equal access to the civil justice system for people who cannot afford lawyers. Legal Services Corporation programs are prohibited from providing legal assistance “for or on behalf of” most immigrant workers who are not lawful permanent residents.⁸⁹ As a practical matter, without legal representation, workers’ rights cannot be adequately enforced.

March 15, 2004) (stipulated judgment); *Perez-Perez v. Progressive Forestry Services, Inc.*, No 98-1474-KI, 2000 WL 40927, at *2-3 (D. Or. Jan. 19, 2000) (motion for class certification) (parsing plaintiff allegations of unlawful recruiting practices). A recent compilation of the stories of individual guest workers chronicles unredressed workplace complaints, unaddressed workplace injuries, and retaliation in the forestry industry. IMMIGRANT JUSTICE PROJECT, S. POVERTY L. CTR., *BENEATH THE PINES: STORIES OF MIGRANT TREE PLANTERS*, available at http://www.splcenter.org/images/dynamic/main/ijp_beneaththepines_web.pdf.

84. S. 2611 tit. IV, § 404(a) (incorporating whistleblower protection in section 218B(g), which would amend the Immigration and Nationality Act tit. II, ch. 2 (current version at 8 U.S.C. § 1188 (2005))).

85. 29 U.S.C. § 1831 (2006).

86. 7 U.S.C. §§ 2041-2055 (2005), *repealed by* Pub. L. 97-470, tit. V, § 523, 96 Stat. 2600 (1983).

87. *See* 29 U.S.C. §§ 1854, 1855 (providing a private right of action for violation of the Agricultural Worker Protection Act); H.R. REP. NO. 97-885 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 4547, 4548 (reporting that 1974 amendments to the FLCRA were intended to strengthen enforcement through the provision of civil remedy for violations of the Act). Congress specifically identified the lack of a private right to sue as a primary reason for failure of FLCRA as originally enacted in 1964. S. REP. NO. 93-1206, at 3 (1974); H.R. REP. NO. 93-1493, at 1 (1974). Accordingly, one of the “major purpose[s]” of the 1974 Amendments was to “creat[e] a civil remedy for persons aggrieved by violations of the act.” H.R. REP. NO. 93-1493, at 1. Congress deemed “an unfettered federal civil remedy” to be “crucial to the effective enforcement of existing law.” *Id.* at 7. *See* BAUER ET AL., *supra* note 39, at 10-13 (arguing that an express private cause of action is necessary for an effective enforcement of labor standards).

88. 42 U.S.C. § 2996 (2006) (amended 1977).

89. Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626.3 (2006). This provision is currently being challenged as a violation of the NAFTA Labor Side Agreement. *See* Petition on Labor Law Matters Arising in the U.S. (Apr. 13, 2005), available at <http://www.dol.gov/ILAB/media/reports/nao/submissions/2005-01petition.htm> (submitted to the National Administrative Office of Mexico) (“Regarding the Failure of the United States to Effectively Enforce Laws Protecting the Rights of Immigrant Workers”); Memorandum in Support of Petition on Labor Law Matters Arising in the U.S., available at <http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01memo.htm>; *see also* BAUER ET AL., *supra* note 39, at 11 (asserting that meaningful access to legal representation is critical to enforcement of labor standards); *Guest Worker Programs: Impact on the American Workforce and U.S. Immigration Policy: Hearing Before H. Comm. on Educ. and the Workforce*, 109th Cong. § 37 (2006) (statement of Rebecca Smith, National Employment Law Project), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28808.pdf (testifying that “all workers, without discrimination, should have access to representation by federally-funded legal services programs.”).

E. Minimum Prevailing Wage Protections in New Temporary Worker Programs

CIRA significantly modified the temporary guest worker provisions as to minimum required wages from the provisions of McCain/Kennedy.⁹⁰ The initially proposed McCain/Kennedy May 2005 temporary worker program abandoned any pretense at establishing minimum labor standards for temporary workers despite the fact that existing H-2A and H-2B temporary worker programs are theoretically intended to include protections to prevent adverse effects on the wages and working conditions of United States workers. Commentators have noted:

Traditionally, temporary worker programs have sought to protect wages and working conditions in the United States by restricting the number of new entrants into the labor market to certain jobs for which there were not sufficient available workers, and by regulating the wages and conditions offered by employers of workers admitted from other countries to prevent undermining the prevailing conditions. The fundamental theory underlying McCain/Kennedy's new approach to labor exchange appeared to stem from the conclusion that it is either impossible or undesirable, or both, to restrict unlawful entry into the United States' labor market, or to protect prevailing U.S. wages and working conditions through regulation of employers of non-native workers. Instead, by giving new workers the same choices as to how and for whom they work, it was hoped that they will be able to prosper in the free market.⁹¹

On September 6, 2005, following the Gulf Coast hurricane disasters, the Department of Homeland Security publicly announced a forty-five day suspension of pre-employment I-9 employment authorization documentation for hiring hurricane victims.⁹² On September 8, 2005, in response to the Hurricane Katrina disaster, President George W. Bush suspended provisions of the Davis-Bacon

90. See S. 1033 tit. III (including provisions for temporary H-5A "essential" workers). For an analysis of critical weaknesses of the proposed H-5A program, see generally BAUER ET AL., *supra* note 39.

91. BAUER ET AL., *supra* note 39, at 2.

92. Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims, Department of Homeland Security (Sept. 6, 2005), available at https://www.dhs.gov/xnews/releases/press_release_0735.shtm. The announcement stated:

[T]he Department of Homeland Security will refrain from initiating employer sanction enforcement actions for the next 45 days for civil violations, under Section 274A of the Immigration and Nationality Act, with regard to individuals who are currently unable to provide identity and eligibility documents as a result of the hurricane. Employers will still need to complete the Employment Eligibility Verification (I-9) Form as much as possible but should note at this time that the documentation normally required is not available due to the events involving Hurricane Katrina. At the end of 45 days, the Department of Homeland Security will review this policy and make further recommendations.

Id. See also CONG. RESEARCH SERV., HURRICANE KATRINA-RELATED IMMIGRATION ISSUES AND LEGISLATION, CRS REP. NO. RL33091 (Sept. 19, 2005), available at <http://fpc.state.gov/documents/organization/53687.pdf>.

Act,⁹³ which required the payment of prevailing wages on federal government funded construction contracts in specified counties in Alabama, Florida, Louisiana, and Mississippi.⁹⁴ During a period in which thousands of displaced residents of the Gulf Coast states were without employment, migrant workers, including persons who were not U.S. citizens, were recruited for reconstruction work, in many cases at substandard wages.⁹⁵ The resulting substandard wages and working conditions endured by these workers, and the continued unemployment endured by displaced workers, crystallized for many the serious deficiencies of the McCain/Kennedy proposal for a massive new temporary worker program with no minimum labor standards provisions to protect against the exploitation of immigrant labor.⁹⁶

93. 42 U.S.C. § 3142 (2005).

94. The Davis-Bacon Act provides that:

[E]very contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia that are located in a State or the District of Columbia and which requires or involves the employment of mechanics or laborers shall contain a provision stating the minimum wages to be paid various classes or laborers and mechanics.

40 U.S.C. § 3142(a) (2005). Another section of the Act provides that:

[M]inimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed

40 U.S.C. § 3142(b) (2005). The DOL regulations governing wage determinations may be found at 29 C.F.R. pt. 1 (1983) and 29 C.F.R. pt. 4 (1983). *See also* Proclamation by the President: To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina, 70 Fed. Reg. 54,227 (Sept. 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html> (stating that it was necessary to suspend wage requirements under § 3142(a) and (b) because increased federal funding was going to be necessary to rebuild certain areas); Dep't of Labor Memorandum No. 199 (Sept. 22, 2005), available at <http://www.wdol.gov/aam/AAM199.pdf> (explaining the details of the suspension of the Davis-Bacon Act to all contracting agencies of the federal government).

After considerable political uproar over the suspension of the Davis-Bacon Act provisions by the President, the DOL announced on October 26, 2005, that "the Administration will reinstate Davis-Bacon Act provisions effective November 8." Elaine L. Chao, U.S. Labor Secretary, Lifting of the Davis-Bacon Act Suspension U.S. Dep't of Labor (Oct. 26, 2005), available at <http://www.dol.gov/opa/media/press/opa/OPA20052088.htm>. *See also* CONG. RESEARCH SERV., PREVAILING WAGE REQUIREMENTS AND THE EMERGENCY SUSPENSION OF THE DAVIS-BACON ACT, CRS REP. NO. RS22265 (Sept. 16, 2005), available at http://openocrs.cdt.org/rpts/RS22265_20050916.pdf (providing an overview of Davis-Bacon and the consequences of its suspension); THE DAVIS-BACON ACT: SUSPENSION, CRS REP. NO. RL33100 (Sept. 26, 2005), available at http://openocrs.cdt.org/rpts/RL33100_20050926.pdf (describing positive and negative views on President Bush's suspension of the Act); DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH, CRS REP. NO. RS22288 (Oct. 3, 2005), available at http://openocrs.cdt.org/rpts/RS22288_20051003.pdf (describing various proposed legislative actions following the suspension of Davis-Bacon and negative reactions to the suspension, deeming it a time for Republicans to take action against the Act they otherwise could not have taken).

95. *See* JUDITH BROWNE-DIANIS ET AL., ADVANCEMENT PROJECT, THE NEW ORLEANS WORKER JUSTICE COALITION, AND THE NATIONAL IMMIGRATION LAW CENTER, AND INJUSTICE FOR ALL: WORKERS' LIVES IN THE RECONSTRUCTION OF NEW ORLEANS 29 (July 2006), available at <http://www.advancementproject.org/reports/workersreport.pdf> (describing the experience of workers in New Orleans as including substandard housing, low wages, wage theft, and discrimination).

96. An analysis of the improper usage by employers and labor contractors of legally authorized temporary H-2A and H-2B workers in the Gulf Coast states following Hurricane Katrina is beyond the

CIRA, as proposed in April 2006, and as adopted by the Senate in May 2006, included critical provisions apparently modeled on the H-2B temporary labor program and programs for permanent labor certification requiring employers of H-2C workers to guarantee to offer wages not less than “prevailing wages.”⁹⁷ The requirements for determining prevailing wages under CIRA included the requirement to utilize Service Contract Act⁹⁸ and Davis-Bacon Act⁹⁹ wage rates where there are such rates in the area of employment for the work to be

scope of this article. However, the work of the New Orleans Worker Justice Coalition and its partners suggests that the region experienced many of the changes that an improperly regulated temporary worker program can cause in a much more rapid period of time than would otherwise be the case. *Id.*

97. CIRA provides:

(2) WAGES-

(A) IN GENERAL- The H-2C nonimmigrant will be paid not less than the greater of-

(i) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or

(ii) the prevailing wage level for the occupational classification in the area of employment, taking into account experience and skill levels of employees.

(B) CALCULATION- The wage levels under subparagraph (A) shall be calculated based on the best information available at the time of the filing of the application.

(C) PREVAILING WAGE LEVEL- For purposes of subparagraph (A)(ii), the prevailing wage level shall be determined in accordance as follows:

(i) If the job opportunity is covered by a collective bargaining agreement between a union and the employer, the prevailing wage shall be the wage rate set forth in the collective bargaining agreement.

(ii) If the job opportunity is not covered by such an agreement and it is in an occupation that is covered by a wage determination under a provision of subchapter IV of chapter 31 of title 40, United States Code [Davis-Bacon], or the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), the prevailing wage level shall be the appropriate statutory wage.

(iii)(I) If the job opportunity is not covered by such an agreement and it is in an occupation that is not covered by a wage determination under a provision of subchapter IV of chapter 31 of title 40, United States Code, or the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), the prevailing wage level shall be based on published wage data for the occupation from the Bureau of Labor Statistics, including the Occupational Employment Statistics survey, Current Employment Statistics data, National Compensation Survey, and Occupational Employment Projections program. If the Bureau of Labor Statistics does not have wage data applicable to such occupation, the employer may base the prevailing wage level on another wage survey approved by the Secretary of Labor.

(iii)(II) The Secretary shall promulgate regulations applicable to approval of such other wage surveys that require, among other things, that the Bureau of Labor Statistics determine such surveys are statistically viable.

(3) WORKING CONDITIONS- All workers in the occupation at the place of employment at which the H-2C nonimmigrant will be employed will be provided the working conditions and benefits that are normal to workers similarly employed in the area of intended employment.

S. 2611., 109th Cong. § 404 (2006).

98. 41 U.S.C. §§ 351-58 (2005).

99. 42 U.S.C. § 3142 (2005).

performed.¹⁰⁰ This inclusion is particularly significant because changes, effective March 2005, made by the Department of Labor methodology for determining prevailing wage rates have eliminated the requirement for employers to pay those wages that are frequently significantly higher than wage rates that would otherwise have been required.¹⁰¹

Unfortunately, the “prevailing wage” provisions of CIRA, while a vast improvement over the initial McCain/Kennedy, would likely be inadequate to protect the wages and working conditions of U.S. workers.¹⁰² This is particularly true if Congress establishes new minimum wage rates but does not require a commensurate increase in otherwise established low prevailing wage rates for low wage jobs.¹⁰³ The cumulative effect of large numbers of undocumented workers in many low-wage jobs and the existing H-2B “temporary” worker program is that many job classifications for which new guest workers might be sought by employers have prevailing wage rates which are already too low to offer any employment opportunities for U.S. workers.

One approach to this dilemma would be to set a statewide minimum adverse effect wage rate for each state, to be offered where the prevailing wage rate was

100. See 40 U.S.C. § 3142(a)-(b) (2005) (describing the wages under Davis-Bacon for laborers as being equal with laborers performing the same class of work within the state).

101. See EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, PREVAILING WAGE DETERMINATION POLICY GUIDANCE: NONAGRICULTURAL IMMIGRATION PROGRAMS, *supra* note 65 (discussing the methodology utilized since May 2005 for determining prevailing wage rates for the H-2B program).

102. See *id.* (discussing the mathematical impact of the change from two wage rate levels to four wage rate levels). The functional effect of this change in methodology has been to lower the required prevailing wage rate for most low skill jobs for which guest workers will be recruited.

103. A review of the wage rates required by the DOL methodology for many of the job classifications for which thousands of H-2B workers are currently used indicates that the “prevailing wage” rate in many geographic areas is below the minimum wage rate that will likely be established by the 110th Congress.

The Fair Minimum Wage Act of 2007 (House) was introduced by Rep. George Miller with 214 initial co-sponsors on January 5, 2007. H.R. 2, 110th Cong. (as proposed, Jan. 5, 2007). It provides for the minimum wage to become: “(A) \$5.85 an hour, beginning on the 60th day after enactment . . . ; (B) \$6.55 an hour, beginning 12 months after that 60th day; and (C) \$7.25 an hour, beginning 24 months after that 60th day.” See also Fair Minimum Wage Act of 2007 (Senate), S. 2, 110th Cong. (as introduced by Sen. Henry Reid with 29 initial co-sponsors on Jan. 4, 2007).

The DOL website contains downloadable data files with established prevailing wage rates for job classifications for all geographic areas in the country. For many of the jobs for which employer applications for H-2B workers are currently approved, pay rates would only be slightly above likely new minimum wage rates. U.S. Department of Labor, Employment, and Training Administration, FLC Data Center — Downloadable Files, <http://www.flcdatacenter.com/Download.aspx> (last visited Feb. 22, 2007).

Even more shocking, in fiscal year 2005, DOL approved H-2B applications for 1530 “Circus Laborers,” 915 of whom were employed not on a minimum hourly wage rate, but on a weekly wage rate as low as \$250, despite the fact that many of those workers may work as many as 80 to 90 hours in a week. The federal minimum wage rate of \$5.15 per hour plus overtime for hours worked over 40 hours should have guaranteed a minimum wage rate of \$515.20 for 80 hours of work per week or \$592.50 for 90 hours of work per week. Many such workers are exempt under an FLSA exemption for employees of seasonal carnivals. 29 U.S.C. § 213(a)(3) (2004). The willingness to approve petitions for temporary guest workers where prevailing wages are even below minimum wage, if an employer is otherwise exempt from minimum wage requirements, is inexcusable.

less than that adverse effect wage rate. This is the procedure utilized under the H-2A program.¹⁰⁴ Effective March 2006, the 2006 AEWR rates for each state and their relationship to the then-federal minimum wage of \$5.15 per hour are described in the table below:¹⁰⁵

STATE	2006 AEWR	% Min. Wage	STATE	2006 AEWR	% Min. Wage
Alabama	\$8.37	163	Nebraska	\$9.23	179
Arizona	\$8.00	155	Nevada	\$8.37	163
Arkansas	\$7.58	147	New Hampshire	\$9.16	178
California	\$9.00	175	New Jersey	\$8.95	174
Colorado	\$8.37	163	New Mexico	\$8.00	155
Connecticut	\$9.16	178	New York	\$9.16	178
Delaware	\$8.95	174	North Carolina	\$8.51	165
Florida	\$8.56	166	North Dakota	\$9.23	179
Georgia	\$8.37	163	Ohio	\$9.21	179
Hawaii	\$9.99	194	Oklahoma	\$8.32	162
Idaho	\$8.47	164	Oregon	\$9.01	175
Illinois	\$9.21	179	Pennsylvania	\$8.95	174
Indiana	\$9.21	179	Rhode Island	\$9.16	178
Iowa	\$9.49	184	South Carolina	\$8.37	163
Kansas	\$9.23	179	South Dakota	\$9.23	179
Kentucky	\$8.24	160	Tennessee	\$8.24	160
Louisiana	\$7.58	147	Texas	\$8.32	162
Maine	\$9.16	178	Utah	\$8.37	163
Maryland	\$8.95	174	Vermont	\$9.16	178
Massachusetts	\$9.16	178	Virginia	\$8.51	165
Michigan	\$9.43	183	Washington	\$9.01	175

104. The U.S. Citizenship and Immigration Services may not approve an employer's petition for admission of H-2A workers or H-2 logging workers in the United States unless the petitioner has received from DOL an H-2A or H-2 labor certification, as appropriate. 8 U.S.C. § 1184(c) (1993). Approved labor certifications attest: (1) there are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c), 1188 (1993).

DOL's regulations for the H-2A and H-2 program require covered employers to offer and pay their U.S., H-2A, and H-2 workers no less than the applicable hourly AEWR in effect at the time the work is performed. 20 CFR §§ 655.102(b)(9), 655.202(b)(9) (1998); *see also* 20 C.F.R. §§ 655.107, 655.207 (1998). Reference should be made to the preamble of the Final Rule, 54 Fed. Reg. 28037 (July 5, 1989), which explains in great depth the purpose and history of AEWRs. *See also* 20 C.F.R. § 655.107(a) (1998) (describing DOL's discretion in setting AEWRs, and the AEWR computation methodology); 52 Fed. Reg. 20496, 20502-05 (June 1, 1987).

In practice, the AEWR for H-2B logging workers has been set at the prevailing wage for such workers.

105. *See* 71 Fed. Reg. 13633-35 (Mar. 16, 2006), available at <http://www.foreignlaborcert.doleta.gov/adverse.cfm>. The rate should be revised for 2007.

STATE	2006 AEWR	% Min. Wage	STATE	2006 AEWR	% Min. Wage
Minnesota	\$9.43	183	West Virginia	\$8.24	160
Mississippi	\$7.58	147	Wisconsin	\$9.43	183
Missouri	\$9.49	184	Wyoming	\$8.47	164
Montana	\$8.47	164			

The 2006 AEWR ranged from a low in Mississippi, Louisiana, and Arkansas of \$7.58 per hour (147% of \$5.15 per hour) to highs of \$9.99 per hour (194% of \$5.15 per hour) in Hawaii and \$9.49 per hour (184% of \$5.15 per hour) in Iowa and Missouri.¹⁰⁶ The median rate was \$8.78 per hour (170% of \$5.15 per hour).¹⁰⁷ This approach would suggest that, nationally, an AEWR for all H-2B and H-2C workers should never be less than 150% of the federal minimum wage and that a state-by-state relationship to the federal minimum wage could determine the H-2B and H-2C AEWR for that state.

In addition to its other inadequacies, CIRA did not explicitly require employers to guarantee that all existing U.S. workers employed by an employer seeking the right to employ H-2C workers would be offered wages and working conditions no lower than those required to be offered to prospective H-2C guest workers.¹⁰⁸ It is critical to give both current U.S. workers in workplaces where employers seek government approval to utilize H-2C workers, as well as the H-2C guest workers themselves, the ability to sue to enforce for themselves required minimum prevailing wage rates (not merely the federal minimum wage) and working conditions in federal court.¹⁰⁹

F. *The Size of New Guest Worker Programs*

The potential numbers of future guest workers that “market based numerical limitations” would have permitted under the initial McCain/Kennedy are quite substantial.¹¹⁰ CIRA, as introduced, reduced the numbers of future guest workers

106. *Id.*

107. *Id.*

108. Employer Obligations, S. 2611, Title IV, § 404, contains in section 218B(c)(2)(A)(i) the requirement that “the H-2C non-immigrant will be paid not less than . . . the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.” CIRA, S. 2611, 109th Cong. § 404 (2006). Protections of U.S. workers at section 218B(c)(1) do not include a similar guarantee that they will be paid as much as the wage required to be offered to H-2C workers. *Id.* This is particularly significant since temporary guest workers are far less likely to be willing to challenge employer failure to pay promised wages than would U.S. workers.

109. Experience with low-wage workers in many industries establishes that one of the most common forms of employer abuse of worker rights is a failure to pay required overtime wages through the payment of straight-time cash payments for hours worked over 40 hours. If an employer is subject to the Fair Labor Standards Act, the failure to pay a required prevailing wage rate could be brought for the amount of unpaid overtime, but federal courts do not have federal jurisdiction over claims for a federally required minimum prevailing wage rate. *See* Fair Labor Standards Act, 29 U.S.C. § 207 (2004) (describing employer overtime compensation requirements).

110. Under McCain/Kennedy, in the first fiscal year of implementation, 400,000 new temporary visas would have been made available for use within that program. S. 1033, 109th Cong. (as proposed in the

slightly from McCain/Kennedy (starting with 325,000 visas instead of 400,000 visas), but would still have permitted the number of visas to grow annually based on market demand.¹¹¹ On May 16, 2006, Senator Arlen Specter explained on the

Senate, May 12, 2005). In subsequent fiscal years, the number would have adjusted according to market demand. *Id.* If the total number of visas allocated for that fiscal year were allotted within the first quarter of that fiscal year, then an additional 20% of the allocated number would have been made available immediately and the allocated amount for the following fiscal year would have increased by 20% of the original allocated amount in the prior fiscal year. *See* S. 1033 § 305 (as proposed in the Senate, May 12, 2005). Within a few years, it is possible that this provision could have admitted some four million new workers beyond the work force that is currently in the country, since each visa is good for three years, with a renewal for another three-year term. BAUER ET AL., *supra* note 39, at 3. Potential Size of the S. 1033 Temporary Guestworker Program with 20% annual increase:

Potential H-5A Visas in Current Use as of:						
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
New Yr 1 Visas	400,000	400,000	400,000	400,000	400,000	400,000
New Yr 2 Visas*		480,000	480,000	480,000	480,000	480,000
New Yr 3 Visas*			576,000	576,000	576,000	576,000
New Yr 4 Visas*				691,200	691,200	691,200
New Yr 5 Visas*					829,440	829,440
New Yr 6 Visas*						995,328
Cumulative Total Visas	400,000	880,000	1,456,000	2,147,200	2,976,640	3,971,968

Id. at 3.

111. S. 2611 § 408(g) (as introduced in Senate, Apr. 7, 2006). That section originally proposed:

(g) Numerical Limitations- Section 214(g)(1) (8 U.S.C. 1184(g)(1)) is amended-

(1) in subparagraph (B), by striking the period at the end and inserting ‘; and’; and

(2) by adding at the end the following:

‘(C) under section 101(a)(15)(H)(ii)(c) may not exceed--

‘(i) 325,000 for the first fiscal year in which the program is implemented;

‘(ii) in any subsequent fiscal year--

‘(I) if the total number of visas allocated for that fiscal year are allotted within the first quarter of that fiscal year, then an additional 20 percent of the allocated number shall be made available immediately and the allocated amount for the following fiscal year shall increase by 20 percent of the original allocated amount in the prior fiscal year;

‘(II) if the total number of visas allocated for that fiscal year are allotted within the second quarter of that fiscal year, then an additional 15 percent of the allocated number shall be made available immediately and the allocated amount for the following fiscal year shall increase by 15 percent of the original allocated amount in the prior fiscal year;

‘(III) if the total number of visas allocated for that fiscal year are allotted within the third quarter of that fiscal year, then an additional 10 percent of the allocated number shall be made available immediately and the allocated amount for the following fiscal year shall increase by 10

Senate floor the rationale behind the initially proposed version of CIRA, in opposition to an amendment that limited the maximum number of H-2C visas to 200,000 per year:¹¹²

[I]t is always difficult to make a determination as to what is the right figure. The committee came to the figure of 325,000, after a great deal of analysis and thought. It is the result of a compromise that was worked out, with some figures being substantially higher than that, some lower. But that is the figure the committee came to. The amendment offered by Senator Bingaman and Senator Feinstein would also eliminate the fluctuation which is to allow for a 20-percent increase if we hit the top. What we are trying to do in this legislation is to accommodate the market, if there is demand for these guest workers. So the fluctuating cap is perhaps even more important than the difference between 325,000 and 200,000.¹¹³

Despite Senator Specter's opposition to the amendment limiting the number of H-2C visas, this amendment was approved by the Senate.¹¹⁴

The apparent victory of those seeking to limit the size of guest worker programs during the debate on CIRA was, in reality, only illusory.¹¹⁵ As discussed above, the 109th Congress has permitted the H-2B program to expand excessively

percent of the original allocated amount in the prior fiscal year;
'(IV) if the total number of visas allocated for that fiscal year are allotted within the last quarter of that fiscal year, then the allocated amount for the following fiscal year shall increase by 10 percent of the original allocated amount in the prior fiscal year; and
'(V) with the exception of the first subsequent fiscal year to the fiscal year in which the program is implemented, if fewer visas were allotted the previous fiscal year than the number of visas allocated for that year and the reason was not due to processing delays or delays in promulgating regulations, then the allocated amount for the following fiscal year shall decrease by 10 percent of the allocated amount in the prior fiscal year.'

Id.

112. 152 CONG. REC. S4600-03 (May 16, 2006); *See also* 152 CONG. REC. S.4562 (May 15, 2006) (Sen. Bingaman proposed an amendment to the Numerical Limitations section of CIRA).

113. 152 CONG. REC. S4602 (May 16, 2006).

114. A motion to table Senate Amendment 3981 was rejected in the Senate by a Yea-Nay Vote of 18-79. 152 CONG. REC. S4603 (May 16, 2006). The amendment was then approved on a voice vote. *Id.*

115. The American Immigration Lawyers Association has expressed strong reservations about the impact on permanent labor certifications of a different amendment adopted during the Senate debate on CIRA in May 2006. *See* AILA InfoNet Doc. No. 06053065, <http://aila.org/content/default.aspx?docid=19533> (last visited Feb. 23, 2007). Amendment 4131 was introduced by Senator Jeff Bingaman on May 25, 2006, to limit the total number of aliens, including spouses and children, granted employment-based legal permanent resident status to 650,000 during any fiscal year. That amendment was adopted by the Senate 51-47. 152 CONG. REC. S5141-46; (May 25, 2006). To the extent that temporary H-2 immigration programs were permitted by CIRA to grow at the expense of permanent immigration, the effect of the amendment would appear to be counter-productive.

while debating new temporary worker programs that were touted as curing many of the evils of the current H-2B program.¹¹⁶

Significantly, although many anticipated that the new H-2C program would supersede the current H-2B program, CIRA, as approved by the Senate, included provisions allowing the H-2B program to grow instead.¹¹⁷ As discussed further below, there is no reason for a separate H-2B program. The appropriate size of any program should be discussed openly, without simply allowing the H-2B program to grow while restricting the proposed H-2C program.

VI. FURTHER RECOMMENDATIONS AS TO WORKER RIGHTS REQUIREMENTS FOR EFFECTIVE COMPREHENSIVE IMMIGRATION REFORM

It is essential that Congress look critically at the role that any temporary worker programs should play in comprehensive immigration reform. For example, CIRA contained critical legal protections that should be applied to existing “temporary” working programs including the H-2B program.¹¹⁸ Congress should critically examine why any “temporary” worker program is necessary and should permit eligible workers to qualify for permanent labor certification positions.¹¹⁹ In particular, the role of “temporary” employment positions in the economy generally is a trend that should be discouraged rather than encouraged.

Workers entering under any H-2 program should be entitled at least to protections proposed by CIRA for H-2C workers. Minimum fundamental protections available to workers should include:

- Portability of jobs.

116. See discussion *supra* at Part IV.F.

117. See S. 2611 § 753 (as passed by Senate, May 25, 2006). This “Extension of Returning Worker Exemption” provided: “Section 402(b)(1) of the Save Our Small and Seasonal Businesses Act of 2005 (title IV of division B of Public Law 109–13; 8 U.S.C. 1184 note) is amended by striking ‘2006’ and inserting ‘2009.’”

The result would have been to continue to allow the H-2B program to grow by as many as 66,000 additional workers *each* year. Ultimately, in September 2006, the 109th Congress continued this growth in the H-2B program through fiscal year 2007. See *supra* note 56 and accompanying text. The issue of the status of the program for fiscal year 2008 and beyond will undoubtedly be before the 110th Congress even if efforts at comprehensive immigration reform fail before September 30, 2007.

118. See S. 2611 § 403 (as passed by Senate, May 25, 2006) (stating temporary guest worker rights).

119. If the protections of the CIRA-proposed H-2C program were to be applied to workers employed in seasonal industries, it would be necessary to modify the restriction requiring H-2C workers to obtain new offers of employment if they were unemployed for more than 60 days. See *id.* Workers last employed in seasonal employment positions should be permitted to remain in the United States if the seasonal industry in which they were last employed would normally have positions available within 120 days after their last employment ended. Such workers would not be restricted to seasonal industries, but could also seek employment in other industries paying required prevailing wages and offering required minimum employment conditions.

A modified provision accommodating existing H-2B workers who chose to return to their overseas homes could provide that, if workers employed in seasonal industries were employed for at least six months after their last entry into the United States, and they left within 120 days after their last employment ended, then they could re-enter the United States without need for a specific employer job offer. The goal would be to permit such workers to obtain job offers without being tied to a specific employer.

- Rights to enforce required minimum terms and conditions of employment.
- Promulgation of an effective adverse effect wage rate for workers that will increase proportionately to increases in the federal minimum wage.
- Enforceability of contract terms disclosed at the time of recruitment for employment.
- Access to legal services to enforce rights in employment.
- Effective protections against retaliation and discrimination including private rights of action if their rights are violated.
- Federal court jurisdiction to enforce claims arising from violations of rights of such workers.

Workers lawfully authorized for employment in the United States, including U.S. citizens and permanent residents throughout the country, should be entitled to learn about employment opportunities offered to H-2 workers, including provisions for transportation advances by employers prepared to recruit employees outside of the local area of employment. United States workers at workplaces offering to employ H-2 workers should be entitled to employment on terms as favorable as those offered to H-2 workers. This should remain true even if such job opportunities are all filled by U.S. workers. All workers and their labor organizations should be entitled to enforce required minimum terms of employment at workplaces offering employment to H-2 workers.

A primary goal of comprehensive immigration reform should be to promote the workplace economic rights of all workers. Careful attention by the 110th Congress to that concern will make immigration reform a benefit to all workers.