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

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

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

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

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

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

The H-2A agriculture and H-2B non-agriculture programs have been plagued for years by overly bureaucratic processes, inefficiencies, and delays. Even those employers who manage to navigate the bureaucratic maze are often unable to hire workers on time. And in the case of agriculture, those timing problems can have a devastating effect on the ability to harvest crops. Several significant reforms to improve these programs can be

made through the regulatory process and do not require statutory changes. The Department has published proposed rules for the H-2A program and will do the same for the H-2B program in the coming months.

On February 13, 2008, the Department published a Notice of Proposed Rulemaking to reform the H-2A agricultural worker program. The H-2A Program has not been updated through substantial rulemaking in more than 20 years. In that time, our economy, the workforce, and the needs of our Nation's farmers have changed considerably. U.S. farms must be able to hire sufficient numbers of workers in a timely manner in order to continue to provide our Nation with a safe and secure domestic food supply. Farmers who are unable to obtain the U.S. workers they need are increasingly being placed at risk of losing their crops and their livelihood, and furthering our Nation's dependence upon agricultural products produced in foreign countries.

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

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

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

THE DEPARTMENT OF LABOR'S ROLE IN THE H-2A AND H-2B PROGRAMS

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

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

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

H-2A

In the H-2A program, the statute sets out specific time requirements that the employer, the Department of Labor, and SWAs must meet in the processing of employer

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

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

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

To allow the employer to begin the mandatory "positive recruitment" of domestic workers and provide an opportunity to amend the application to address any deficiencies, the Department is statutorily required to accept or reject the application within 7 days of receipt. If the application is rejected, the employer must submit amendments within 5 days. During this timeframe, the SWA may not place the job order into the interstate clearance system until the Department has officially accepted the application – and

confirming the order has no restrictive job requirements or other problems that could unfairly exclude U.S. workers. Once the application is accepted, the SWA places a job order initiating local recruitment in its state job clearance system.

The Department issues a formal letter to the employer and SWA authorizing conditional entry of the job order into the interstate clearance system, outlining the specific steps the employer must take to actively recruit domestic workers (i.e., positive recruitment), and specifying the time requirements for the employer to submit any other documentation, such as a housing certification and proof of workers' compensation insurance, before the certification may be issued.

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

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

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

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

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

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

Once H-2A workers are in the country, the Wage and Hour Division of the Employment Standards Administration within the Department of Labor enforces the terms and

conditions of the H-2A job order pursuant to statutory authority in the Immigration and Nationality Act (INA).

H-2B

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

To obtain a temporary labor certification for the H-2B program, the employer must demonstrate that its need for the temporary services or labor meets one of the regulatory standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. As with the H-2A program, the H-2B program sets filing and processing deadlines requiring that the employer cannot submit its application more than 120 days in advance and fewer than 60 days prior to the date of need. This has traditionally allowed the Department and the applicable SWA 60 days to review the application, ensure that adequate recruitment of U.S. workers is undertaken, and adjudicate the application.

The H-2B non-agricultural program presents a slightly different processing model for employers. H-2B applications that are received by the Department are processed first through the SWA having jurisdiction over the area of intended employment. To allow sufficient time for the recruitment of U.S. workers and sufficient time for processing by

the states and NPCs, the SWAs advise employers to file requests for temporary labor certification at least 60, but no more than 120 days, before the worker(s) is needed.

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

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

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

There have been considerable workload increases for both the Department and the SWAs in recent years. For example, in Fiscal Year (FY) 2007, there was an approximate 30

percent increase in H-2B applications received by the Department as compared to FY 2006.

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

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

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

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