TESTIMONY SUBMITTED

BY

JAVIER RIOJAS

TO

U.S. HOUSE COMMITTEE ON EDUCATION AND LABOR

AT

HEARING:

"Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?"

HELD ON

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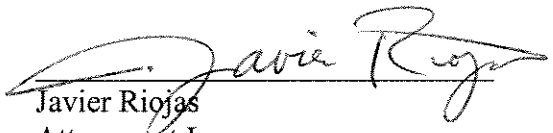
Respectfully submitted by:



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Before the
Committee on Education and Labor
U.S. House of Representatives
May 6, 2008

"Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?"

Thank you for inviting me to discuss our lawsuit, *Riojas, et al. v. Chao*, et al.,[1] involving the U.S. Department of Labor's ("DOL") unlawful administration of the H-2A and H-2B guestworker programs. In the case, we represent 22 of the hundreds of U.S. workers who were rejected on H-2 job orders from 2001 to 2007. Unfortunately, our clients could not testify in person because of work conflicts.

My name is Javier Riojas. I am a 1981 graduate of Brown University and a 1983 graduate of the University of Texas School of Law in Austin. I am an attorney and branch manager for Texas RioGrande Legal Aid, Inc. (TRLA) in Eagle Pass, Texas, a small town on the border with Mexico. I have worked for TRLA since 1984 and have represented thousands of U.S. farmworkers, H-2A agricultural guestworkers and other low-income Texans. I grew up as a migrant worker and traveled north every year with my family from our home in Eagle Pass.

I. Summary of Riojas, et al. v. Chao, et al.

We represent 22 U.S. citizens and legal permanent residents, who are migrant and seasonal farmworkers that tried to obtain and hold H-2 jobs. We sued three south Texas agricultural employers—a watermelon grower, two farm labor contractors, their shared immigration attorney and DOL. We alleged that the employers falsely misclassified their jobs as nonagricultural in order to qualify for H-2B workers and avoid the H-2A program's relatively more stringent recruitment requirements for U.S. workers, free housing and transportation, Adverse Effect Wage Rate, fifty percent rule, three-fourths guarantee, and other benefits.[2] The employers acquired over 400 Mexican H-2B workers from 2001 to 2007 to work mainly harvesting watermelons and onions in their fields in Edinburg, Quemado, and other areas in Texas. The Texas and Arkansas workforce agencies referred about 720 U.S. workers for the H-2 jobs. *See* Exhibit 3 for a partial list of Texas referrals. Almost all of them were rejected outright or received the "run-around." Exhibits 1, 5 and 6. The few U.S. workers who were hired suffered abusive treatment and received lower pay and fewer benefits than the H-2 workers. Year after year, DOL continued to approve the employers' fraudulent applications despite mounting evidence of visa fraud and U.S. worker discrimination.

[1] *Riojas, et al. v. Chao, et al.*, No. DR-07-CV-058 (W.D.Tex. filed Oct. 9, 2007).
[2] *See infra* VIII.

II. H-2 Programs' Adverse Effects on Our Clients: U.S. Workers

Maria R. and her daughter Romelia R. are legal permanent residents. They worked for the companies for several years until their employers began to use H-2B workers. In 2005, Maria R. and Romelia R. contacted the companies several times and went to the packing shed for a job as they had each year for several years. They were told to wait and there might be work later. They waited all day. When Maria R. picked up a broom and began to sweep, the supervisor shouted at her to leave because all the jobs were filled.

Bladimir G. is a U.S. citizen. He is one of four adult children in a family of migrant farmworkers. They travel and work together. His family applied at TWC for several of the H-2 jobs for the 2005 and 2007 seasons. They never got the jobs. Instead, they got the H-2 "run-around." The 2005 job advertisement attracted the family because of a wage of $8.75 per hour, full-time local work indoors in a packing shed in nearby Edinburg, Texas for eleven months. The ad stated no minimum requirements and sixty positions available. The family called the company five times in the two months leading up to the job's starting date. The company always told them to await a return call. When the family called, the company gave them different information than that stated in the job ad. The company said the work was outdoors, in the fields cutting onions and watermelons. The work would start in Edinburg and then move to west Texas, where the family would need to find its own housing. Although disappointed by the changed job terms, the family was still willing to accept the job. The family called two days before the job was supposed to begin in January 2005 and was told that the work would start in March, and to wait for a call then. Bladimir G.'s father called the company in February and the company told him for the first time that they were not going to hire the family.

Benigna and Eustaquio L. have been married for 26 years. They are legal permanent residents. They have performed farm work together for eleven years. They too got the H-2 "run-around." Benigna L. tells her story in an affidavit, attached as Exhibit 1. The couple called the company several times over two months and was told to expect return calls. The couple quit calling about the job when they learned from a TWC official that the company had mockingly told another U.S. applicant to quit trying. The company never overtly refused to hire the pair, and like many workers they just quit trying.

III. Current Status of the Case

We settled our case with the employers, who acknowledged the work was agricultural and agreed to hire U.S. workers first, and if they cannot find enough, then they will apply for H-2A workers. Our suit against DOL is ongoing. DOL filed a motion to dismiss for failure to state a claim. We responded and reasserted our allegations that DOL specifically violated the law several times in our case, and that the agency's general administration of the H-2 programs violates the Administrative Procedures Act (APA).

IV. DOL Knowingly Approved Employers' Fraudulent H-2B Applications

In our case, DOL knowingly approved the employers' fraudulent H-2B applications. In 2005, DOL's Wage and Hour Division conducted a field inspection of one of the employers and

reported H-2B workers in the field. Exhibit 4. DOL continued to certify the employer for H-2B workers for two more years.

In 2002, one of the farm labor contractors applied for H-2B workers to pack sweet corn in Newport, Arkansas starting in February 2003, and then other work in the Rio Grande Valley and west Texas the rest of the year. Because of the H-2B program's fewer U.S. worker recruitment requirements, the employer only needed to recruit U.S. workers for ten days in Newport in the fall, and avoided recruiting farmworkers in Texas in the spring and summer. Still, at least twelve U.S. workers applied and the farm labor contractor hired zero because they lacked "experience." DOL certified the application even though sweet corn is not ready to harvest or pack in Arkansas in February.

Each year from 2005 to 2007, the Texas Workforce Commission sent numerous warnings to DOL that the employers were discriminating against U.S. referrals. Exhibit 5. Finally in 2007, DOL required one of the three employers to submit an H-2A application, which the agency approved despite multiple unlawful rejections of U.S. workers. Exhibit 6.

V. DOL's Administration of the H-2 Programs Is Unlawful

DOL unlawfully administers the H-2 programs. DOL has never promulgated substantive rules for the H-2B program. Its operative H-2B rule states that the H-2A policies should be followed in certifying H-2B applications.[3] Instead, DOL has issued a series of substantive memos[4] that were never subjected to notice and comment rulemaking as required by the APA.[5] These guidance letters prescribe the procedures, benefits and protections of the H-2B program, which are far fewer than its H-2A counterpart. As a result, many U.S. workers are harmed, violating the two-part statutory mandate that U.S. must be recruited first, and their wages and working conditions must not be adversely affected by the employment of foreign guestworkers.[6]

VI. DOL Argues that Congressional Silence Allows it Broad Discretion over the H-2B Program

DOL's main argument in its motion to dismiss is that Congress was silent about the H-2B program when it passed the Immigration Reform and Control Act (IRCA) of 1986. IRCA bifurcated the H-2 visa category into the H-2A agricultural and H-2B nonagricultural programs. In contrast, Congress codified the then existing regulations for H-2 agricultural workers, which were fairly detailed, into the H-2A provisions now in the statute.[7] Therefore, argues the agency, because Congress did not issue any similar H-2B provisions, Congress intended fewer benefits and protections for American and foreign workers in the H-2B program, or at least allowed DOL to prescribe fewer. In 1996, a federal court agreed with DOL on this interpretation.[8] Ironically,

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[3] 20 C.F.R. § 655.3(b).
[4] General Administration Letter (GAL) No. 10-84, 49 Fed. Reg. 25,837 (June 25, 1984); General Administration Letter No. 1-95, 60 Fed. Reg. 7216 (Feb. 7, 1995); Training and Employment Guidance Letter No. 21-06, Change 1, 72 Fed. Reg. 38621 (July 13, 2007).
[5] 5 U.S.C. §§ 553 et seq.
[6] 8 U.S.C. § 1188(a); 20 C.F.R. § 655.0(a)(1).
[7] 8 U.S.C. § 1188.
[8] *Martinez v. Reich*, 934 F.Supp. 232, 237-38 (S.D.Tex. 1996).

DOL uses its discretion to prescribe fewer procedures for the H-2B program while claiming that it lacks authority to enforce the H-2B contracts.

VII. Our Response to DOL Lists Nine Ways the Agency Should Comply with its Statutory Mandate to Protect U.S. Workers

In our response to DOL's motion to dismiss, we stated nine ways DOL should comply with the statute so that U.S. workers are hired first, and their wages and working conditions are not adversely affected by foreign guestworkers.[9] First, the agency should incorporate the H-2A program's benefits and protections into the H-2B program according to 20 C.F.R. § 655.3(b). Second, DOL should cease its practice of "one-to-one" labor certifications which allows employers to over-apply for H-2 workers and then unlawfully reject any U.S. workers that apply.[10] For example, in our case, an employer applied for 40 H-2A workers. The employer unlawfully rejected 37 U.S. applicants. DOL sent a letter that denied certification for 37 openings and approved three. DOL's letter even detailed the unlawful rejections of the U.S. workers. Exhibit 6. Third DOL should use its expertise and data to set an objective threshold like 8 percent local unemployment, above which H-2 workers will only be certified during an extraordinary, bona fide labor shortage. In our case, the agency approved hundreds of H-2 workers in areas of south and west Texas with double-digit unemployment rates. Fourth, DOL should enforce H-2B rules. Fifth, the agency should use a standard like "reasonable suspicion" to bar, suspend, reject, revoke noncompliant employer applications and job orders before harm occurs to U.S. workers. DOL currently requires the results of a completed investigation before ceasing service to an employer, and will often force state workforce agencies like the Texas Workforce Commission to circulate job orders that state officials suspect to be fraudulent. Many Texas farmworkers and SWA officials no longer trust job orders with H-2A job terms after years of rejection and the H-2 "run-around" when they try to contact the employer. Sixth, DOL should reinstate the coordinated enforcement activities at 29 C.F.R. Part 42, which the agency has suspended.

Finally, we stated three ways that DOL should comply with the law in the context of large grower operations with packing sheds and food processing areas, like our in our case. Packing sheds are a gray area in between the H-2A and H-2B programs. Sometimes the work is agricultural, and sometimes it is nonagricultural depending on various factors like the source of the produce. Thus, many employers have learned to manipulate the job description to qualify for H-2B workers, or they are confused. DOL should classify all packing shed work as agricultural, and thus make it subject to the H-2A program. Alternatively, the agency should prescribe special H-2B procedures for packing sheds similar to the H-2B special procedures for tree planters and entertainers.[11] Third, DOL should require special assurances from registered farm labor contractors who seek H-2B nonagricultural workers.

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[9] 8 U.S.C. § 1188(a); 20 C.F.R. § 655.0(a)(1).

[10] DOL actually articulated this practice of "one-to-one" partial certification in the H-2B program with TEGL 21-06, Change 1 (V)(E): "If one or more U.S. workers . . . were unlawfully rejected by the employer . . . the NPC Certifying Officer has the authority to issue a partial certification for only those job opportunities that remain unfilled by qualified U.S. workers . . . ."

[11] *See* Training and Employment Guidance Letters No. 27-07 (June 12, 2007) *and* No. 31-05 (May 31, 2006).

VIII. Employers Fraudulently Apply for Misclassified H-2B Workers to Avoid the Benefits, Protections and Costs of the H-2A Program

Because of the disparities between the benefits and protections in the H-2A and H-2B programs, employers like the defendants, prefer H-2B workers because there are much fewer requirements for recruiting U.S. workers and because it is cheaper to employ them. Therefore, the differences between the H-2A and H-2B programs provide an incentive for unscrupulous employers to abuse the guestworker programs and commit visa fraud.

One historical limitation on employers' preference for H-2B workers was the statutory cap of 66,000 annual visas.[12] The Save Our Seasonal Businesses Act of 2005[13] increased the cap for three years and led to a huge expansion of the H-2B program. The cap increase expired in fall of 2007 and Congress is currently debating whether to extend it.

The H-2A program better tests the availability of American workers. H-2A employers must actively recruit U.S. workers for 45 days in comparison to the ten day recruitment period for the H-2B program.[14] In addition, whereas the 45-day H-2A recruitment period directly precedes the start of the work, the 10-day H-2B recruitment period occurs several months before the start of the work thereby discouraging U.S. applicants who need immediate employment.[15] An H-2A employer must hire U.S. applicants for the job until 50 percent of the visa period has elapsed, even if the employer must displace H-2A workers.[16] The H-2B program has no such requirement as currently administered.

The H-2A program requires employers to submit a work itinerary that lists the location and dates of all job sites.[17] The H-2A employer must cooperate with the State Workforce Agency (SWA) to locally recruit U.S. workers at each location on the itinerary.[18] An H-2B employer, however, is not required to recruit U.S. workers locally for each job site on the itinerary.[19] Also, the H-2B employer need only pay the prevailing wage from the first job site at subsequent job sites.[20]

The H-2A program provides more benefits and protections for U.S. and foreign workers than does the H-2B program as administered by DOL. For example, an H-2A employer must pay the "Adverse Effect Wage Rate," and provide free housing and transportation, meals or a kitchen facility, tools, workers compensation insurance and a three-fourths work guarantee during the visa period.[21] H-2B workers receive a lower "prevailing wage," or the minimum

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[12] 8 U.S.C. § 1184(g)(1)(b).
[13] Save Our Small and Seasonal Business Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in 8 U.S.C. § 1184(g)(9)).
[14] *Compare* DOL H-2A Handbook I-50, 20 C.F.R. §§ 655.100(b), 655.101(c), 655.103(d) and 655.105 *with* TEGL 21-06, Change 1 (IV)(C).
[15] TEGL 21-06, Change 1 (III)(E) and (F).
[16] 20 C.F.R. § 655.103(e).
[17] ETA H-2A Handbook No. 398 (I)(A)(2)(C).
[18] *Id.*
[19] TEGL 21-06, Change 1 (IV)(C) and (D).
[20] TEGL 21-06, Change 1 (IV)(A).
[21] *See e.g.* 20 C.F.R. §§ 655.90(a)(2), 655.100(b), 655.102(b)(1), 655.102(b)(5)(i), (ii) and (iii), and 655.102(b)(6).

wage, and none of the foregoing benefits.[22] In our case in 2007, the H-2B prevailing wage for packers was $6.53 per hour whereas the H-2A Adverse Effect Wage Rate was $8.66. The company was offering the U.S. workers $5.59. Exhibit 5.

IX. Because of Legal Services Corporation Restrictions, TRLA could not Represent 400 Ineligible H-2B Workers who should have been Eligible H-2A Agricultural Workers

One unfortunate irony about our case is that TRLA could not offer representation to the 400 H-2B guestworkers because of Legal Services Corporation restrictions imposed by Congress.[23] We are authorized, however, to represent H-2A workers with matters related to their H-2A contract.[24] Here, because the employers misclassified the workers as H-2B workers, we could not offer them representation even though they were employed in agricultural and should have received H-2A visas.

During outreach in 2005, we located twenty of the H-2B workers in a run-down apartment building in Eagle Pass. Twelve workers shared a vacant unit with air mattresses on the floor. Only one H-2B worker, Isidro A., had the guts to speak up. Exhibit 2. We were lucky to get him a local private attorney, with knowledge of immigration law, who was generous enough to co-counsel on the case for the prospect of "peanuts" in compensation. Isidro A. patiently waited in his small village in central Mexico for three years as the private attorney investigated, filed and then settled his case, in conjunction with workers represented by TRLA.

The farm labor contractor always recruited crews of young men from Isidro A.'s village. When the employer learned about the lawsuit, he intimidated Isidro A.'s sister in Texas to get Isidro A. to drop the suit. The employer also blamed Isidro A. for not getting any more H-2B visas for the villagers. As a result, Isidro A. has been ostracized locally in Mexico for exercising his rights in the United States. If TRLA had been able to offer representation to the twenty H-2B workers that night in 2005, maybe Isidro A.'s coworkers would have joined the suit and Isidro would not have been isolated and ostracized.

X. Conclusion

Thank you for inviting me to testify about our case. I welcome your questions.

EXHIBITS:

1. Affidavit of U.S. Worker, 2008
2. Affidavit of H-2B Worker, 2008
3. TWC print-outs of U.S. job referrals, 2006-2007
4. DOL Wage & Hour Division Field Inspection Report, 2005
5. TWC Emails to DOL, 2007
6. DOL H-2A Certification Letter, 2007

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[22] TEGL 21-06, Change 1 (IV)(A).
[23] 45 C.F.R. § 1626.5 implementing Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53 to -56, and subsequent appropriation bills.
[24] 45 C.F.R. § 1625.11.