

**Testimony of Mary Bauer
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before the
Committee on Education and Labor
U.S. House of Representatives
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***“Protecting U.S. and Guest Workers:
the Recruitment and Employment of Temporary Foreign Labor”***

Thank you for the opportunity to speak about the abuse of guestworkers who come to the United States as part of the H-2 program administered by the U.S. Department of Labor (“DOL”).

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

During my legal career, I have represented and spoken with literally thousands of H-2A and H-2B workers in many states. Currently, the Southern Poverty Law Center is representing workers in seven class action lawsuits on behalf of H-2A and H-2B guestworkers. We have also recently published a report about guestworker programs in the United States entitled “Close to Slavery,” which I have attached to these comments as part of my written testimony.

The report discusses in much further detail the abuses suffered by guestworkers and is based upon thousands of interviews with workers as well as review of the research related to guestworkers and the experiences of legal experts from around the country. As the report reflects, guestworkers are systematically exploited because the very structure of the program places them at the mercy of a single employer and provides no realistic means for workers to exercise the few rights they have.

The H-2A (agriculture) and H-2B (non-agriculture) guestworker programs permit U.S. employers to import human beings on a temporary basis from other nations to perform work when the employer certifies that “qualified persons in the United States are not available and . . . the terms of employment will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.”¹ Those workers

¹ U.S.C. §1188(a)(1); 1101(a)(15)(H)(ii); 20 CFR Part 655

generally cannot bring with them their immediate family members, and their status provides them no route to permanent residency in the U.S.

Both the H-2A and H-2B programs are rife with abuses. The abuses typically start long before the worker has arrived in the United States and continue through and even after his or her employment here. Unlike U.S. citizens, guestworkers do not enjoy the most fundamental protection of a competitive labor market — the ability to change jobs if they are mistreated. If guestworkers complain about abuses, they face deportation, blacklisting or other retaliation.

Passage of Chairman Miller’s bill, the Indentured Servitude Abolition Act of 2007 (HR 1763), would be an important first step toward reforming the guestworker program by addressing many of the serious abuses that routinely occur in the recruitment and hiring of guestworkers.

Guestworker Programs Are Inherently Abusive

When recruited to work in their home countries, workers are often forced to pay enormous sums of money to obtain the right to be employed at the low-wage jobs they seek in the U.S. It is not unusual, for example, for a Guatemalan worker to pay more than \$2,500 in fees to obtain a job that will, even over time, pay less than that sum. Workers from other countries may be required to pay substantially more than that. Asian workers have been known to pay as much as \$20,000 for an H-2A job. Because, generally, only indigent workers are willing to go to such extreme lengths to obtain these jobs, workers typically have to borrow the money at high interest rates. Guatemalan workers routinely tell us that they have had to pay approximately 20% interest *per month* in order to raise the needed sums. In addition, many workers have reported that they have been required to leave collateral—often the deed to a vehicle or a home—in exchange for the opportunity to obtain an H-2 visa. These requirements leave workers incredibly vulnerable once they arrive in the U.S.

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

Guestworkers routinely receive less pay than the law requires. In some industries that rely upon guestworkers for the bulk of their workforce—seafood processing and forestry, for example—wage-and-hour violations are the norm, rather than the exception. These are not subtle violations of the law but the wholesale cheating of workers. We have seen crews paid as little as \$2 per hour, each worker cheated out of hundreds of dollars

per week. Because of their vulnerability, guestworkers are unlikely to complain about these violations, and public wage-and-hour enforcement has minimal practical impact.

Even when workers earn the minimum wage and overtime, they are often subject to contractual violations that leave them in an equally bad situation. Workers report again and again that they are simply lied to at the time they are recruited in their home countries. Another common problem workers face is that they are brought into the U.S. too early, when little work is available. Similarly, employers often bring in far too many workers, gambling that they may have more work to offer than they actually do. Because the employers are not generally paying the costs of recruitment, visas, and travel, they have little incentive not to overstate their labor needs. Thus, in many circumstances, workers can wait weeks or even months before they are offered the full-time work they were promised. Given that workers bring a heavy load of debt, that many must pay for their housing, and that they cannot lawfully seek work elsewhere to supplement their pay, they are often left in a desperate situation.

Guestworkers who are injured on the job face significant obstacles in accessing the benefits to which they are entitled. First, employers routinely discourage workers from filing workers' compensation claims. Because those employers control whether the workers can remain in or return to the U.S., workers feel enormous pressure not to file such claims. Second, workers' compensation is an *ad hoc*, state-by-state system that is typically ill-prepared to deal with transnational workers who are required to return to their home countries at the conclusion of their visa period. As a practical matter, then, many guestworkers suffer serious injuries without any effective recourse.

The guestworker program appears to permit the systematic discrimination of workers based on age, gender and national origin. At least one court has found that age discrimination that takes place during the selection of workers outside the country is not actionable under U.S. laws.² Thus, according to that court, employers may evade the clear intent of Congress that they not discriminate in hiring by simply shipping their hiring operations outside the U.S.—even though all of the work will be performed in the U.S. Many foreign recruiters have very clear rules based on age and gender for workers they will hire. One major Mexican recruiter openly declares that they will not hire anyone over the age of 40. Many other recruiters refuse to hire women for field work. Employers can shop for specific types of guestworkers over the Internet at websites such as www.get-a-worker.com, www.labormex.com, www.landscapeworker.com or www.mexican-workers.com. One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as “happy, agreeable people who we like a lot.”

² *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001). For a discussion of this case, see Ruhe C. Wadud, *Note: Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C.J. Int'l Law & Com. Reg. 335 (2001)

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

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

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

Few Legal Protections Exist for Guestworkers

The H-2A Program

The H-2A program provides some legal protections for foreign farmworkers. Unfortunately, far too many of the protections exist only on paper.

H-2A workers must be paid wages that are the highest of: (a) the local labor market’s “prevailing wage” for a particular crop, as determined by the DOL and state agencies; (b) the state or federal minimum wage; or (c) the “adverse effect wage rate.”³

H-2A workers also are legally entitled to:

- Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised. (This is called the “three-quarters guarantee.”)
- Receive free housing in good condition for the period of the contract.
- Receive workers’ compensation benefits for medical costs and payment for lost time from work and for any permanent injury.
- Be reimbursed for the cost of travel from the worker’s home to the job as soon as the worker finishes 50 percent of the contract period. The expenses

³ 20 C.F.R. § 655.102(b)(9)

include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract the employer must pay transportation home.

- Be protected by the same health and safety regulations as other workers.
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.⁴

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

The H-2B Program

The basic legal protections afforded to H-2A workers do not apply to guestworkers under the H-2B program.

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers.⁵

Unlike the H-2A program, the procedures governing certification for an H-2B visa were established by internal DOL memoranda (General Administrative Letter 1-95), rather than regulation. An employer need only state the nature, wage and working conditions of the job and assure the DOL that the wage and other terms meet prevailing conditions in the industry.⁶ Because the H-2B wage requirement is set forth by administrative directive and not by regulation, the DOL takes the position that it lacks legal authority to enforce the H-2B prevailing wage.

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

Guestworkers Cannot Enforce the Few Rights They Do Have

The legal rights of guestworkers can be enforced in two ways: through actions taken by government agencies, mainly the DOL, or through litigation. Neither method has proven effective at protecting workers from ongoing abuse.

⁴ 45 C.F.R. § 1626.11

⁵ See *Martinez v. Reich*, 934 F. Supp. 232 (D. Tex. 1996)

⁶ GAL No. 1-95 (IV)(D) (H-2B); See DOL ETA Form 750

Although abuses of guestworkers are routine, the government has not committed substantial resources to addressing these abuses. In general, Wage and Hour enforcement by the Department of Labor has decreased relative to the number of workers in the job market. The major agencies that might protect these vulnerable workers—the Department of Labor, the Occupational Safety and Health Administration, and state workers' compensation divisions—simply do not have sufficient resources or political will to do the job.

The DOL also takes the position that it cannot enforce the contractual rights of H-2B workers, and it has declined to take action against employers who confiscate passports and visas.

Government enforcement has proven largely ineffective. The DOL actively investigates only H-2A workplaces. In 2004 the DOL conducted 89 investigations into H-2A employers.⁷ Today, there are about 6,700 businesses certified to employ H-2A workers.

There are currently about 8,900 employers certified to hire H-2B workers, but there do not appear to be any available data on how many investigations the DOL conducts of these employers. Our experience suggests it is far fewer than the number of H-2A employers investigated, something that is predictable, unfortunately, given the DOL's stance that it is not empowered to enforce the terms of an H-2B worker's contract.

Though violations of federal regulations or individual contracts are common, DOL rarely instigates enforcement actions. And when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers. Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against abusive employers is not a realistic option in most cases. Even if guestworkers know their rights — and most do not — and even if private attorneys would take their cases — and most will not — guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit the Southern Poverty Law Center filed, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.⁸

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

Typically, workers will make complaints only once their work is finished or if

⁷ Lornett Turnbull, "New State Import: Thai Farmworkers" *The Seattle Times*, February 20, 2005. See also Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)

⁸ *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (D.La. 2006)

they are so severely injured that they can no longer work. They quite rationally weigh the costs of reporting contract violations or dangerous working conditions against the potential benefits.

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

As a result of these enormous obstacles to enforcing workers' rights, far too many workers who are lured to the United States by false promises find that they have no recourse.

Substantial Changes Are Necessary to Reform These Programs

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

The passage of the Indentured Servitude Abolition Act of 2007 (HR 1763) or the inclusion of these protections in upcoming guestworker legislation would be an important first step toward reforming the guestworker program and leveling the playing field between guestworkers and their employers. It would make unlawful the recruitment charges that so oppress workers. It would require that workers be provided accurate information at the time of hire to permit them to make a reasoned choice about the job. It would make discrimination in the hiring of guestworkers for employment in the U.S. clearly unlawful in the same way that that discrimination would be unlawful if the hiring took place in the U.S. It would make employers jointly liable for violations committed by recruiters in their employ, and it would make possible the imposition of fines against recruiters and employers who violate their promises to workers. It is a good first step to strengthening workers' rights.

In addition, Congress must provide meaningful, substantive labor protections for H-2B workers. The Department of Labor has never promulgated substantive labor protections for these workers. Congress should demand that it do so promptly. Congress should also address the common problem of employers or persons who confiscate guestworker documents in order to hold guestworkers hostage.

Our government must take responsibility for stopping the abuses that routinely occur in the recruitment of guestworkers. While the abuses may begin in foreign countries, the abuses are directly related to the workers' employment in the U.S. and affect workers' ability to assert their rights to basic fair treatment in the U.S.

Congress must work to make the enforcement of workers' rights more possible in

the real world. For too long, guestworker rights have existed mostly on paper. Congress needs to both demand that federal agencies do a better job and provide workers a real mechanism to obtain an attorney to enforce their legal rights when necessary. To that end, all low-income guestworkers should be made eligible for federally funded legal services, and there must be additional money allocated for those services.

Lastly, Congress should provide strong oversight of these programs. Specifically, Congress should hold hearings specifically related to guestworker program administration. A review of available evidence would amply demonstrate that these programs have led to the shameful abuse of workers. Congress must not allow that abuse to continue.

Conclusion

Guestworker programs currently in existence in the U.S. lack worker protections and lack any real means to enforce the protections that exist. Vulnerable workers desperately need Congress to take the lead in demanding reform.

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