

Protecting Worker Rights In the Context of Immigration Reform

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Overview of the Impact of Changes in Immigration Law on Worker Rights

Immigration “reform” has become one of the hottest topics on the national political scene over the past several years. Unprecedented community mobilization of immigrant rights advocates in the Spring of 2006 has created a political climate in which there is a strong momentum for legalization of undocumented immigrants in the United States. Nonetheless, Congressional debate in the 109th Congress appears likely to fail to achieve positive comprehensive immigration reform. The demands of those who advocate immigration restriction, particularly in the House of Representatives, and the asserted needs of business interests appear likely to have serious adverse consequences on the wages and working conditions of workers if legislation is adopted in this Congressional session.

The failure to address the presence of more than ten million foreign born undocumented immigrants and migrants and the insistence on draconian enforcement procedures are likely to increase the degree to which unauthorized foreign-born workers will be victimized by unscrupulous employers. In addition, there is likely to be a continued expansion of “temporary” guest worker programs without adequate attention to mechanisms to protect against adverse impact on the wages and working conditions of all workers.

This article seeks to focus advocates for immigrant and workers rights formulating a progressive alternative to current immigration law on the need to recognize and confront the economic incentives for employers of new immigrants, migrants and “temporary” workers to

¹ The author has been General Counsel of Friends of Farmworkers, Inc. in Pennsylvania since 1982. He has a J.D. from New York University School of Law in 1976.

undercut worker rights. The adverse impact on the employment rights of workers from immigrant and minority communities is particularly intense.² While seeking humane immigration laws, immigrant and minority communities need to work together to win changes in employment laws that will protect the workplace rights of all workers and overcome the tendency to utilize such new workers to undercut worker rights. The failure to fully articulate a pro-immigrant and pro-worker political agenda has created opportunities for anti-immigrant forces to seek to mobilize African American communities in opposition to rights for immigrant workers.

When the rights of undocumented and migrant³ workers are not protected, the rights of all workers are diminished. Unscrupulous employers seek out undocumented immigrants or temporary workers because they believe that there are no consequences for violating their

² See NAT'L RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 223 (James P. Smith & Barry Edmonston eds., 1997) ("The one group that appears to suffer significant negative effects from new immigrants are earlier waves of immigrants, according to many studies."); RUSSELL SAGE FOUND., *IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY AND EMPLOYMENT IN THE UNITED STATES* 15 (Frank D. Bean & Stephanie Bell-Rose eds., 1999) ("[S]ocioeconomic status seems to operate to condition the implications of immigration. Immigration may have worsened the economic situations of those in the population with lower socioeconomic status, including many African Americans."); see also George J. Borjas, *The Economic Benefits from Immigration*, J. ECON. PERSP. Spring 1995, at 3, 10-11, available at http://ksghome.harvard.edu/~GBorjas/Papers/Economic_Benefits.pdf ("Ironically, even though the debate over immigration policy views the possibility that immigrants lower the wage of native workers as a harmful consequence of immigration, the economic benefits from immigration arise only when immigrants *do* lower the wage of native workers.").

³ In this context the author is utilizing "migrant worker" in the comprehensive terms of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides that "[t]he term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G. A. Res. 45/158, U.N. Doc. A/RES/47/1 (Dec. 18, 1990), Art. 2(1), available at http://www.unhchr.ch/html/menu3/b/m_mwc_p1.htm.

rights. These employers gain a competitive advantage over employers who abide by the law. This creates a perverse incentive for employers to hire undocumented workers over citizens or authorized workers. The position of citizen and authorized workers is weakened when they confront abuse or discrimination because their undocumented coworkers have fewer legal avenues for redress of labor violations, including unlawful retaliation, and therefore they have far less incentive to participate in efforts to improve conditions.

My views on this issue are guided by historical, economic, and sociological reading on the impact of new immigrant, migrant, and other foreign-born workers on the terms and conditions of employment for more established immigrant communities. However, most importantly, my perspective is shaped by the practical experience of over 30 years of legal advocacy for worker rights and, in particular, for immigrant worker rights.⁴ This experience

⁴ While a law student at New York University from 1973-1976 and as an attorney through the spring of 1979, I worked through the Labor Committee of the New York City Chapter of the National Lawyers Guild in projects that attempted to provide assistance and representation to workers with employment related problems while concomitantly employed at a small labor and civil rights law firm that combined the representation of progressive unions committed to organization of unorganized workers with assistance to rank and file caucuses and workers in workplaces without unions or with unions that failed to adequately represent workers in their bargaining units.

Since May 1979, I have specialized primarily in the representation of migrant farmworkers first in New Jersey and since 1982 in Pennsylvania. Since October 1982, my work has primarily been as General Counsel of Friends of Farmworkers, Inc. *See* Friends of Farmworkers, Inc., <http://www.friendsfw.org>. That legal representation has predominately been of Latino migrant workers, including Puerto Rican, Mexican-American, Mexican, Dominican, Cuban, Guatemalan, and El Salvadorian workers. It has also included assistance and representation to African-American, Haitian, Jamaican, and Asian workers. In recent years, this work has gradually broadened to include larger number of workers in industries outside of primary agriculture such as food processing and landscaping.

My legal work has included the representation of low-wage worker membership associations and organizations that have developed strong positions on immigrant and worker rights issues. This work has included the representation since its founding in 1979 of CATA (El Comité de Apoyo a Los Trabajadores Agrícolas or the Farmworker Support Committee). *See* CATA, <http://www.cata-farmworkers.org>.

includes legal work relating to two principal temporary worker programs: the H-2A program for temporary agricultural workers⁵ and the H-2B program for temporary non-agricultural workers.⁶

Policy Recommendations

Key policy recommendations of this article for immigrant worker activists are consistent with those that immigrant worker rights advocates persuaded the national AFL-CIO to adopt as statements of official policy of the then-unified organized labor movement in February 2000.⁷

From its founding during a strike in April 1993 until April 2005, I represented the only union of workers in the mushroom industry in Pennsylvania. The Kaolin Workers Union's membership and leadership are Mexican workers in the largest agricultural industry in Pennsylvania. That Union has successfully organized a workforce of predominately documented Mexican immigrants and migrants in an industry that is overwhelmingly dominated by employers who predominately employ undocumented Mexican workers. *See* Kaolin Workers Union, http://friendsfw.org/Links/Kaolin_Workers.htm.

In May 2003 at the National Low-Income Immigrant Rights Conference co-sponsored by a broad spectrum of organizations, I organized and moderated the panel discussion on "Guestworker Programs: Designing a Viable Alternative That Does Not Lead to Worker Exploitation." *See* Nat'l Immigr. Law Ctr., Workshop Details: 4th National Low-income Immigrant Rights Conference, http://www.nilc.org/DC_Conf/dc-conf2003/wkshp_details.htm.

⁵ *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000) (defining temporary agricultural worker as "an alien . . . coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature."); 20 C.F.R. § 655.90 (2005) *et seq.* (implementing the H-2A program); *see also* U.S. Dep't of Labor, Employment & Training Admin., H-2A Certification, <http://workforcesecurity.doleta.gov/foreign/h-2a.asp> (discussing the H-2A program).

⁶ *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2000) (defining 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."); *see also* 20 C.F.R. § 655.1(2005) *et seq.* (implementing the H-2B program); U.S. Dep't of Labor, Employment & Training Admin., H-2B Certification for Temporary Nonagricultural Work, <http://workforcesecurity.doleta.gov/foreign/h-2b.asp> (discussing the H-2B program).

⁷ *See* AFL-CIO Principles On Immigration: Ensuring Worker Rights And A Better Life For All Working Families,

The AFL-CIO Principles on Immigration include four key principles:

Principle 1 – Legalization

Legalization means 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. . . .

Principle 2 – Repeal and Replacement of Employer Sanctions and the I-9 System

The current system of I-9 enforcement and employer sanctions should be repealed and replaced with a new law creating penalties for employers who seek to violate labor laws based on a worker's immigration status, and providing stiff penalties for smuggling, document fraud and for those employers who break labor laws as a matter of business practice

Employer sanctions must be replaced with a new system targeting employers who try to use a worker's immigration status to intimidate those seeking to organize or otherwise exercise labor and employment rights.

The new system should have enhanced penalties for those employers who knowingly recruit undocumented workers, and for those employers involved in document fraud for commercial gain.

Workers who file charges alleging labor violations, such as unfair labor practices and wage and hour complaints, should be protected from deportation. . . .

Principle 3 – Reform, Not Expansion, of Guestworker Programs

A new large-scale guestworker program should not be the focal point of legalization efforts.

<http://www.aflcio.org/issues/civilrights/immigration/upload/immigrationpolicy.pdf>, [hereinafter AFL-CIO Principles].

In 1999, delegates to the 23rd AFL-CIO Biennial Convention formed a Special Committee on Immigration, chaired by HERE President John Wilhelm 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 AMERICA@WORK* (AFL-CIO, Washington, D.C.), May 2000, available at <http://www.aflcio.org/aboutus/thisistheafcio/publications/magazine/commonbonds.cfm>; 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 Conditions (Feb. 16, 2000), at <http://www.aflcio.org/mediacenter/prsptm/pr02162000d.cfm>.

Guestworker programs have a long, sad history resulting in oppressive working conditions, wages at less than the going rate, and denial of opportunities to U.S. and long-term immigrant workers.

Although employers typically claim that ‘market forces’ should determine wages and benefits, they are unwilling to let ‘market forces’ work when it comes to guestworkers. A large guestworker program that ties workers to an employer or an industry will serve only to thwart market forces that would lead to increased pay and benefits for all workers.

The guestworker program cannot become a modern day bracero program that ties foreign workers to bad jobs for long periods of time with the hope of a provisional or permanent resident status at the end.

All labor rights, including the right to join a union, must extend to guestworkers.

Principle 4 – Family Reunification

Any proposal must address the backlog of people waiting to legally join their close relatives.⁸

This article focuses on issues raised by above AFL-CIO Principle 2 (repeal of “employer sanctions”) and Principle 3 (preventing the expansion of guestworker programs).

Employer Sanctions

Widespread acceptance that the Immigration Reform and Control Act of 1986 adoption of “employer sanctions”⁹ has failed to curtail undocumented immigration and,

⁸ AFL-CIO Principles, *supra* note 7, at 2; see also Arthur N. Read, Let the Flowers Bloom and Protect the Workers Too: A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers, 6 U. PA. J. LAB. & EMP. L. 525 (2004) (discussing approaches to resolve gaps in current labor law which deny agricultural workers and many temporary workers employed through labor contractors the right to organize).

⁹ See Immigration and Control Act of 1986, 8 U.S.C. §1324a(a)(1)(A) (2000) (providing that it is unlawful for a person to “to hire, or to recruit or refer for a fee, for employment in the United States an alien *knowing* the alien is an unauthorized alien . . . with respect to such employment.”) (emphasis added); see also 8 U.S.C. §1324a(a)(1)(B) (2000) (rendering it illegal for employers to fail to verify the legal status of all new employees by checking documents prescribed by the Attorney General and by recording the information on the designated form); 8 U.S.C. §1324a(a)(2) (2000) (criminalizing continued employment of an alien knowing that the alien has become or is unauthorized);.

indeed, increased exploitation of undocumented workers¹⁰ has not resulted in any serious political effort to remove “employer sanctions” from current immigration law. Despite the AFL-CIO’s public embrace of the above principles, the post-9/11 political environment has discouraged legislators from even proposing legislation for the repeal of employer sanctions; efforts to develop new approaches toward immigration law and to develop policies that might legalize the undocumented immigrant communities have faced a resurgence of anti-immigrant sentiment and fear.

Meanwhile, the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*¹¹ to elevate immigration law “employer sanctions” applied as undocumented worker

¹⁰ Prior to the enactment of the employer sanctions provisions in the Immigration Reform and Control Act of 1986, commentators predicted that it would be a failure. *See, e.g.,* John E. Huerta, *Immigration Policy and Employer Sanctions*, 44 U. PITT. L. REV. 507, 508 (1983) (“[E]mployer sanctions will not work to reduce significantly the flow of undocumented aliens into this country. Although employer sanctions will not accomplish their stated goal, they will have negative effects on our economy and society.”); R. Paul Faxon, Comment, *Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT’L L. & BUS. 203, 205 (1984) (“[T]he current employer sanction proposals seem to offer limited hope for accomplishing their purpose and, if successful, might result in consequences which outweigh any benefits.”).

Analysis since the enactment of the law has confirmed those predictions. *See, e.g.,* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 356 (2001) (“[I]t is widely acknowledged that the law has been ineffective in curbing illegal immigration into the United States.”); Maria Isabel Medina, *The Criminalization Of Immigration Law: Employer Sanctions And Marriage Fraud*, 5 GEO. MASON L. REV. 669, 690 (1997) (“There is evidence that sanctions generally have been ineffective in substantially reducing the employment of undocumented workers.”); Elizabeth M. Dunne, Comment, *The Embarrassing Secret Of Immigration Policy: Understanding Why Congress Should Enact An Enforcement Statute For Undocumented Workers*, 49 EMORY L.J. 623, 643 & n.123 (2000) (“Employer sanctions have been largely unsuccessful in eradicating the incentive for illegal immigration.”).

¹¹ *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker fired for union-organizing activities, where the employer was unaware of worker’s illegal immigration status at the time of discharge, is ineligible for a backpay award under the National Labor Relations Act).

employment sanctions¹² above employment law protections for workers seriously set back many years of consistent advocacy by immigrant worker employment advocates.¹³ There appears to be no prospect for a prompt legislative reversal of the *Hoffman Plastics* decision.¹⁴

The decision has inspired a flood of law review commentaries on the inappropriateness of the decision. See, e.g., Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 104 (2003) (“[T]he opinion could have a significant and broad ripple effect.”); Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. J. 313, 339 (“[T]he Supreme Court has dealt a blow to workers, both legal and illegal in the United States.”) (2003); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 507 (2004) (“The Court’s decision in Hoffman Plastic deserves criticism on many grounds.”); see also Rebecca Smith et al., National Employment Law Project, *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB* 1 (Apr. 3, 2003), available at <http://www.nelp.org/document.cfm?documentID=305> (“The U.S. Supreme Court’s recent decision in Hoffman Plastic Compounds v. NLRB . . . has had a devastating effect in immigrant communities nationwide.”)

¹² See *supra* note 100. There is a lack of enforcement of “employer sanctions” against employers. In the last ten years immigration law enforcement has instead targeted undocumented workers for sanctions.

The author represented workers in a meat processing plant following a 1994 immigration raid where approximately 90% of the work force was undocumented and where the employer had promised workers that it would help them get immigration papers if they crossed union picket lines during a strike. Immigration agents initially threatened workers who did not agree to immediate voluntary departure with criminal prosecution.

The Immigration and Nationality Act was amended in 1990, 1991, 1994, and 1996 to create “Penalties for document fraud.” See 8 U.S.C. §1324c. The increased focus on criminalization of civil immigration violations by undocumented workers was a particularly strong element of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. See Pub. L. No. 104-208, 110 Stat. 3009; Medina, *supra* note 10, at 676 (“Nowhere is the trend towards the use of criminal sanctions in the immigration context more evident than in the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996.”). See also M. Isabel Medina, *Employer Sanctions in the United States, Canada And Mexico: Exploring the Criminalization of Immigration Law*, 3 SW. J. OF L. & TRADE AM. 333 (1996) (“Increasingly, legislative policy has looked to the criminal law to address the problem of undocumented immigration.”).

¹³ The author participated in efforts with other advocates for worker rights beginning in 1995 to persuade officials in federal agencies including the Immigration and Naturalization Service, the U.S. Department of Labor, and National Labor Relations Board (NLRB) to adopt internal guidelines which recognized the importance of enforcing labor rights for

undocumented workers in order to minimize employer incentives for the utilization of such workers precisely because of their lack of labor protections

This advocacy had led to the adoption by the late 1990's of formal policies by the federal agencies which were intended to protect the employment rights of immigrant workers. *See, e.g.,* NLRB Memorandum GC 98-15, Reinstatement and Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent (1998), *available at* http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc98-15.asp; EEOC, Notice No. 915.002, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (1999), *available at* <http://www.eeoc.gov/policy/docs/undoc.html>; Memorandum Of Understanding Between the INS, Dep't of Justice and the Employment Standards Admin., Dep't of Labor (1998), *available at* <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm>; INS, Operating Instruction 287.3a, Questioning Persons During Labor Disputes (1996) (redesignated as Special Agents Field Manual § 33.14(h)).

¹⁴ The *Hoffman* decision has not resulted in the passage of legislation which would overcome its effects, despite the introduction of bills containing the following provision:

Section 274A(h) of the Immigration and Nationality Act (8 U.S.C. 1324a(h) (2000)) is amended by adding at the end the following:

(4) BACKPAY REMEDIES.--Backpay or other monetary relief for unlawful employment practices shall not be denied to a present or former employee as a result of the employer's or the employee's--

(A) failure to comply with the requirements of this section; or

(B) violation of a provision of Federal law related to the employment verification system described in subsection (b) in establishing or maintaining the employment relationship.

Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, H.R. 3809, 108th Cong. § 702(a) (2004); Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act, S. 2381, H.R. 4262, 108th Cong. § 321 (2004). Both of these bills were defeated in committee in both houses of Congress.

See also id. at § 322:

(B) PROHIBITION ON THREATS OF REMOVAL- It is an unfair immigration-related employment practice for any employer, directly or indirectly, to threaten any individual with removal or any other adverse consequence or legal process pertaining to the immigration status or benefits of that individual for the purpose of--

(i) intimidating, pressuring, or coercing any such individual not to exercise any right protected by Federal or State labor or employment law, including section 7 of the National Labor Relations Act (29 U.S.C. 157); or

(ii) retaliating against any such individual for having exercised, or having stated an intention to exercise, any such right.

The 109th Congress has seen increased efforts by immigration restrictionists to tighten pre-employment verification systems and to increase the severity of employer sanctions while further criminalizing unauthorized foreign born workers.¹⁵ These proposals offer no effective mechanism for the millions of unauthorized workers presently in the U.S. to obtain documented status, thus virtually guaranteeing that undocumented workers will be driven underground and made more vulnerable to employer exploitation. The probable result of such legislation is that undocumented immigrants and migrants would be forced to accept employment from unscrupulous employers willing to risk sanctions in return for an exploitable workforce.

Guestworker Programs

Business interests have focused their legislative advocacy on arguing for massive “temporary” guestworker programs. Business interests have sought to incorporate such guestworker proposals into proposals for earned adjustment of legal status for currently undocumented workers in order to build on immigrant community activists’ support for some form of legalization for undocumented workers in the country.¹⁶

(C) PROHIBITION ON UNLAWFUL DISCRIMINATION- It is an unfair immigration-related employment practice for any employer, except to the extent specifically authorized or required by law, to discriminate in any term or condition of employment against any individual employed by such employer on the basis of the immigration status of such individual.

See also Anita Sinha, Nat’l Immigr. Law Center, *Democrats Introduce Comprehensive Immigration Reform Proposal: Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act* (2004), available at http://www.nilc.org/immlawpolicy/cdev/SOLVE_summary_052504.pdf.

¹⁵ *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, 109th Cong., Tit. VII.

¹⁶ The Essential Worker Immigration Coalition is one of the groups which has emerged to advocate employer interests in immigration “reform.” *See* <http://www.ewic.org>.

In January 2004, President George W. Bush embraced business demands for an expanded temporary worker program as part of his political program for immigration “reform.”¹⁷ As will be discussed further below, such expanded temporary worker programs, in the format in which they are likely to be established, are both unworkable and highly undesirable from the perspective of both the temporary immigrants themselves and other workers.

If we accept the principle that employer sanctions are useless to discourage employers from preferring to utilize vulnerable and exploitable undocumented workers,¹⁸ it makes sense instead to structure minimum employment terms and conditions of work at levels high

¹⁷ See President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004), *reprinted in* Press Release, Office of the White House Press Sec’y, President Bush Proposes New Temporary Worker Program, <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>; Press Release, Office of the White House Press Sec’y, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>.

¹⁸ [T]he problem of illegal immigration...can only be understood in the context of the supply-and-demand principle enshrined in traditional U.S. economics. . . . [T]he illegal immigration problem is no different from our national drug problem, where all the traffic interdiction and supply eradication efforts . . . have had little impact on U.S. sales and consumption. . . . [H]arsh immigration laws will only make illegal aliens more vulnerable to smugglers and employers, raise the costs of smuggling even higher, and force the smuggling syndicates to grow even more brutal and immune to government powers.

PETER KWONG, FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR 7 (1997)

As long as employer sanctions are in effect, new federal laws against illegal immigration . . . will not be effective because they only drive the illegals further underground, making detection more difficult, while enhancing the employer’s control over them. Employer sanctions are actually useless and counterproductive, they only function as a “symbolic law,” a pretense of state action to check illegal immigration with which to placate the American public.

Id. at 185.

enough to minimize the adverse impact on wages and general working conditions of workers in industries which employ significant percentages of non-citizens.¹⁹

Such adverse effect minimum wage rates²⁰ could be based upon existing strengthening concepts for adverse effect wage rates²¹ and prevailing wages²² for employers

¹⁹ The procedure for establishing such a triggering threshold must avoid encouraging discrimination on the basis of citizenship status or national origin at any specific workplace.

The concept for triggering such enhanced minimum wage protection for jobs in industries which employ *significant* percentages of non-citizens rather than utilizing a workplace-specific standard is to avoid any employer argument that refusal to hire any specific job applicant was for a *bona fide* non-discriminatory economic reason.

²⁰ The concept could be applied on a flexible basis by specific geographic areas such as standard metropolitan statistical areas (MSAs). A similar MSA-specific basis for determining prevailing wages is utilized in the current permanent and temporary labor certification systems, including the H-2B system. See 20 C.F.R. § 656.40(b)(2) (2005) (“[T]he prevailing wage for labor certification purposes shall be the arithmetic mean . . . of the wages of workers similarly employed in the area of intended employment.”); U.S. Dep’t of Labor, Employment & Training Admin., Attachment to GAL No. 2-98, Prevailing Wage Policy for Nonagricultural Immigration Programs, Section II.C, http://workforcesecurity.doleta.gov/dmstree/gal/gal98/gal_0298a.pdf, at 3.

A principal defect of the existing H-2A (agricultural) and H-2B (non-agricultural) temporary worker systems is that minimum adverse effect wage rates frequently act instead as maximum wage rates since workers seeking to work at rates higher than the established minimum adverse effect wage rate can be refused employment and are not considered “available” workers.

An H-2 worker may be brought into the country “if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. §1101(a)(15)(H)(ii)(b) (2000). Workers who seek terms *better* than the established prevailing or adverse effect wage rate are considered unavailable for this purpose. See *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977), *cert. denied*, 436 U.S. 945 (1978) (holding that Puerto Rican workers were unavailable for work in New York because the Commonwealth of Puerto Rico set minimum terms for their hiring beyond those required under the U.S. Department of Labor’s prevailing and adverse wage rate determinations for workers in New York).

²¹ For agricultural H-2A workers adverse effect wage rates are set in accordance with procedures at 20 C.F.R. §§655.107 and 655.207 (2005). See U.S. Dep’t of Labor, Employment & Training Admin., Adverse Effect Wage Rates -Year 2006, <http://workforcesecurity.doleta.gov/foreign/adverse.asp>. U.S. DEP’T OF LABOR, EMPLOYMENT TRAINING ADMIN., ETA HANDBOOK 398, H-2A PROGRAM HANDBOOK (1988) sets forth various methodologies in Chapter 2 for determining prevailing wages and

seeking to utilize either agricultural or non-agricultural temporary workers. Such *minimum* wage rates would apply to all workers (whether supplied through subcontractors, temporary employment agencies or otherwise) employed in such jobs. Equally importantly, concepts of joint employment must be expanded to bar the owners of places of employment from hiding behind subcontractors and temporary employment agencies in evading minimum terms and conditions of employment. It is also critical that any adverse effect wage rate be directly enforceable by actions for damages by any workers employed at workplaces employing such workers.²³ Simultaneously, strong whistleblower protections must be enacted in order to protect all workers with complaints about violations of minimum employment standards.

Political Background

Effective immigration legislative political advocacy has long involved otherwise peculiar political alliances. Much of the general political dialogue about the potential negative economic impact of new immigrant and migrant workers on other workers has been

prevailing practices. There are significant practical deficiencies to these methodologies. However, if such wage rates truly act as minimum rather than maximum wage rates, the deficiencies of such methodologies are less serious.

²² For non-agricultural H-2B workers, prevailing wage rates are set in accordance with procedures at 20 CFR § 656.40 (2005) for permanent labor certifications. *See also supra* note 20 (discussing this procedure for setting prevailing wage rates).

²³ *See* Mary Bauer et al., *An Analysis of the Labor Provisions of McCain/Kennedy* (2005), available at http://friendsfw.org/Advocates/immig/Analysis_Labor_Provisions_McCain-Kennedy.pdf.

That article discusses at length provision of the proposed Secure America and Orderly Immigration Act, S.1033, 109th Cong. (2005) which fail to adequately protect worker rights. The article urges that an adverse effect prevailing wage rate standard should be set applicable to all workplaces with any unauthorized / undocumented workers and any new guestworkers recruited by the employer or its agents or in their first job in the U.S. Bauer, *supra* at 5. The article further discusses the importance of creation of a private right of action to enforce any guaranteed wage rate. *Id.* at 10.

from an anti-immigrant political perspective that has sought to severely restrict immigration into the country.

In response, immigrant advocates have sought to stress the many positive macroeconomic benefits that result from continued immigration. Many of the studies of the economic effects of immigration have concluded that there are minimal negative impacts on “domestic” workers, while concluding that the economy overall has benefited from the ability of employers to pay lower wages to recently-immigrated workers. In order to be successful, advocates for expanded immigration have had to join forces with employer lobbyists who have sought changes in immigration law designed to benefit the interests of employers.²⁴

²⁴ This article does not discuss in detail the Agricultural Job Opportunity, Benefits, and Security (AgJOBS) Act, S. 359, H.R. 884, 109th Cong. (2005) which are the result of careful compromises between agricultural employers and farmworker advocates including the United Farm Workers.

Agricultural worker advocates, including the author, and farmworker organizations have endorsed this proposed legislation as the best compromise available to agricultural workers. See Farmworker Justice Fund, Farmworker Immigration Legislation: Update on AgJOBS, <http://www.fwjjustice.org/LEGISLAT.HTM>. See also California Rural Legal Assistance Foundation, Nat’l Clearinghouse on Agricultural Guest Worker Issues, Legislative Update, <http://www.crlaf.org/gworkers.htm>; Press Release, United Farm Workers of America, UFW urges action on AgJobs: 'The need is great', available at <http://www.ufw.org/legislation/agjobs/21005asr.htm>

The proposal provides strong protections for currently workers undocumented workers who qualify for earned adjustment of status under the proposed legislation.

The proposal does not include changes to the H-2A program which would be consistent with the recommendations of this article. The distinction is particularly important in considering whether the AgJobs proposal should be extended to encompass other low wage non-agricultural workers as some members of the employer EWIC coalition would advocate. See *supra* note 16 (discussing EWIC).

The legitimate need of unions to protect workplace rights historically has placed them at political odds with advocates of expanded immigration.²⁵ As organized labor has increasingly recognized the political imperative to reach out to low-wage immigrant workers, advocates for immigrant worker rights have struggled with how to balance a pro-immigrant position with the difficulties of protecting terms and conditions of employment for workers.

At the same time the focus of the immigrant advocate community on winning some form of legalization or earned adjustment of status for undocumented immigrants has taken priority over challenges to the inherent failure of temporary worker “guestworker” programs in meeting needs of low wage workers. This article seeks to stress the need for continued emphasis on those problems in reaching legislative compromises.

The Big Lie – Unavailability of Workers

The “big lie” inherent in employer demands for liberalized temporary worker programs is that there are not currently workers available to fill jobs has not been adequately challenged. That lie was central to the January 7, 2004 public declaration of President George W. Bush stating his support for a new “temporary worker program.” The President’s statement said:

I propose a new temporary worker program that will match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs. This program will offer legal status, as temporary workers, to the millions of undocumented men and women now employed in the United States, and to those in foreign countries who seek to participate in the program

²⁵ It was the organized labor movement that fought in 1985 for inclusion of employer sanctions in the 1986 IRCA immigration amendments, *supra* note 7.

and have been offered employment here. This new system should be clear and efficient, so employers are able to find workers quickly and simply.²⁶

The background fact sheet released to support President George W. Bush's statement spelled out the "big lie" more specifically:

Current immigration law can ...hinder companies from finding willing workers. The visas now available do not allow employers to fill jobs in many key sectors of our economy.²⁷

Richard M. Estrada, Commissioner U.S. Commission on Immigration Reform, testified in relationship to agricultural employers December 7, 1995 before the U.S. House Judiciary Subcommittee on Immigration and Claims that:

[O]ne often gets the feeling that when growers say they can't find workers, they fail to complete the sentence. What they really mean is that they can't find workers at the extremely low wages and working conditions they offer. . . .

Moreover, labor economists point out that California agribusiness in particular does not want so much a stable supply of labor, but rather a dependable system of constantly disposable and replenishable labor. Foreign labor is best for their needs precisely because it represents a never-ending pool and because the constant replacement of such labor ensures that the entire workforce will, in the classic phraseology of those who are familiar with the bottom line of illegal or legally admitted but not totally free labor, "work hard and scared."²⁸

Immigration advocates can certainly agree with the need to permit the millions of undocumented workers currently working in the country to do so legally, but the notion that

²⁶ President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004), *reprinted in* Press Release, Office of the White House Press Sec'y, President Bush Proposes New Temporary Worker Program, <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

²⁷ Press Release, Office of the White House Press Sec'y, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>.

²⁸ *Guest Worker Programs: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Richard M. Estrada, Commissioner, U.S. Commission on Immigration Reform), *available at* <http://www.utexas.edu/lbj/uscir/120795.html>. See also Kwong, *supra* note 18, at 208 n. 3-4

such workers should be periodically recycled out of the country and replaced by new workers employed as temporary workers should be vigorously resisted by all immigrant advocates.²⁹

Understanding Guest Worker Temporary Labor Programs

Immigrant rights advocates are able to arouse some sympathy by accusing advocates of expanded “temporary” labor programs of recreating the failures and abuses of workers by the discredited “Bracero” program, which was in existence from 1942 until its abolition in 1964. However, very few immigrant rights advocates have a very clear understanding of exactly why the “Bracero” program resulted in abuses of worker rights.³⁰

²⁹ As discussed below, temporary worker programs are clearly not in the interest of worker rights advocates or immigrant communities themselves.

It is equally apparent, however, that guest worker programs fail in the fundamental premise of forcing 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 (1984) (discussing the European experience).

³⁰ Various sources provide a capsule history of the Bracero program. See Michael Holley, *Disadvantaged By Design: How The Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 *HOFSTRA LAB. & EMP. L.J.* 575, 583-585 (2001); 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, 564-466 (2002). See also KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992); ERNESTO GALARZA, *FARM WORKERS AND AGRI-BUSINESS IN CALIFORNIA, 1947-1960* (1977), at 203-276; ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); LINDA C. MAJKA & THEO J. MAJKA, *FARM WORKERS, AGRIBUSINESS, AND THE STATE* 136-166 (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>. Amongst the documents made available there is a version of the Bracero contract of August 1942. See <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.

The structural inability of the Mexican government on to adequately protect the rights of its citizens working as agricultural workers in the United States not only parallels the experience of workers from Caribbean nations under the H-2 agricultural worker system³¹ but also is similar to the experience for U.S. citizen Puerto Rican migrant workers recruited under the Puerto Rican contract system.³²

³¹ Cindy Hahamovitch provides a historical study of the early usage of temporary foreign workers in East Coast agriculture. *See* CINDY HAHAMOVITCH, *THE FRUITS OF THEIR LABOR : ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870-1945*, at 166-181 (1997).

During World War II in April 1943 shortly after the establishment of the Bracero program with Mexico, the British West Indies (BWI) temporary foreign labor program was established through agreements with governments of the United States and the British West Indies (Jamaica, the Bahamas, St. Lucia, St. Vincent, Dominica, and Barbados). *See* BRIGGS, *supra* note 29, at 102-03.

The BWI program became the H-2 program as part of the Immigration and Nationality Act (McCarran-Walter Act), Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (1952). During the existence of the Bracero program, Mexican workers were not eligible for the H-2 temporary worker program. *See* CALAVITA, *supra* note 30, at 134. Until recent years the program primarily admitted temporary agricultural workers from the British West Indies. *See* BRIGGS, *supra* note 29, at 107 (writing in 1984 that “about 90 percent of the number [of agricultural H-2 workers] admittedly annually are from the British West Indies (predominately from Jamaica).”).

³² Beginning during World War II in 1944 agricultural workers were recruited through the Commonwealth of Puerto Rico to meet labor shortages. *See* HAHAMOVITCH, *supra* note 31, at 174.

Surprisingly little has been published about workers’ experience with the Puerto Rican contract labor system, which provided thousands of workers each year from the mid-1940’s to the late 1980’s to East Coast agriculture, especially New Jersey. The Puerto Rico contract system was regulated by P.R. LAWS ANN. tit. 3, § 319 (2004). Predecessor statutes have regulated the recruitment of those workers as well. *See* 1943 P.R. LAWS 445; 1947 P.R. LAWS 387, art. 1.

That law attempts to protect Puerto Rican migrant workers by establishing minimum terms and conditions of employment before such workers could be recruited for employment in the mainland. Because those legal protections went beyond the bare minimum required for H-2 temporary workers, the Commonwealth of Puerto Rico was forced to amend Public Law 87 to permit the Puerto Rico Department of Labor to waive its terms when Puerto Rican workers would otherwise be unavailable for H-2 jobs. *See* *Orchard Mgmt. Co. v. Fernando Varges Soto*, 463 S.E.2d 839, 842 (Va. 1995); *see also* *Flecha v. Quiros*, 567 F.2d at 1156.

Few immigrant rights advocates have a clear understanding of the legal structure and scope of existing “temporary” worker programs. This failing is particularly serious because employer advocates of “reforming” existing “temporary” worker programs seek to eliminate even the nominal protections inherent in such existing programs while exponentially increasing their size and scope.

The two principal temporary labor programs currently in operation are the H-2A³³ agricultural temporary labor program and the H-2B³⁴ non-agricultural temporary labor program. Ironically, the documented history of exploitation of agricultural workers and some prior advocacy for such workers has given H-2A agricultural workers theoretical protections and remedies the non-agricultural H-2B workers lack.³⁵ Although neither of these programs is currently of the size or scope that the “Bracero” program was at its peak, both fail to adequately protect the rights of such workers or of other “domestic” workers in industries that utilize such “temporary” H-2 workers.

North Carolina farmworker attorney Mary Lee Hall correctly asserts that:

As a former attorney with the Farmworker Division of Camden Regional Legal Services in New Jersey during the period 1979-1982, I am familiar with representation by Camden Regional Legal Services, Puerto Rico Legal Services, and the ACLU Farmworkers Rights Project of New Jersey of numerous Puerto Rican farm workers under the Puerto Rican contract system. Despite its nominal protections, the Puerto Rican contract was a wholly ineffective means for protecting the rights of workers, since the continuation of the contractual arrangements between the Commonwealth of Puerto Rico and the grower associations were dependent upon keeping agricultural employers happy.

³³ *See supra* note 5.

³⁴ *See supra* note 6.

³⁵ The U.S. Department of Labor, Wage and Hour Division, has promulgated regulations at 29 C.F.R. Part 501 for the enforcement of contracts for H-2A agricultural workers. Actual enforcement of such provisions is seriously deficient. *See Holley, supra* note 30 at 598-599. However, no equivalent regulations for federal government enforcement of contracts for H-2B non-agricultural workers have even been promulgated.

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.³⁶

The central flaw from a worker rights point of view of all existing “temporary” worker programs is that employers (or employer associations) control the right of such temporary workers to lawfully enter the country and any such worker is bound to continue legal employment only through the employer who sponsored their entry into the country as an H-2 worker.³⁷ Any temporary worker program that will succeed in reversing the incentives of employers to exploit such workers must change those terms.³⁸ The ability of

³⁶ Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. INT'L L. & COM. REG. 521, 527-529 (2002). See also Holley, *supra* note 30, at 594-616 (containing another excellent discussion from an experienced farmworker advocate of the H-2A system). Michael Walzer, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 56-61 (1983) (arguing that the inability of guest workers to obtain permanent residency is 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 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.”)

³⁷ The binding of the temporary worker to a particular employer was also a characteristic of the Bracero program.

³⁸ American Bar Association, Coordinating Committee on Immigration Law, Resolution Supporting Legislation to Legalize Noncitizens Residing in the United States who Demonstrate Significant Ties to the U. S. and Meet Certain Prerequisites 1 (2002), available at <http://www.abanet.org/leadership/recommendations02/115a.pdf> (Recommending that “any

employers to blacklist workers who make complaints and deny them re-entry of temporary worker visas is a critical flaw since it vests employers with an overwhelming ability to control workforces subject to such recruitment.³⁹ The requirement that a worker may retain her legally authorized status only so long as they remain employed by a particular employer is inherently a form of compulsory servitude that should be unacceptable in this society.⁴⁰

The existing temporary labor certification systems remove those jobs from the competitive labor marketplace altogether as a practical matter since H-2 employers can get workers who are guaranteed to be unable to enforce their legal rights. Once an industry begins to utilize H-2 workers as its primary labor source, the ability of other workers to bargain for improved terms and conditions of employment is seriously undercut. Existing guestworker programs quickly transform employers to a permanent dependency on the control over workers inherent in a program where the legal status of the worker is dependent on continued employment with the employer. Administrative mechanisms for determining if

temporary worker or legalization program guarantee[] basic labor rights with the ability to change employers.”)

³⁹ The threat to blacklist goes beyond the individual worker to potentially encompass communities in which aggrieved workers live. Thus, 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.

⁴⁰ 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.”).

there are available “domestic” workers⁴¹ for H-2A and H-2B jobs prior to labor certification by the Department of Labor for jobs are impractical and unworkable.⁴²

We represented a client membership organization which opposed the right of employers in the Pennsylvanian mushroom industry, which employs thousands of workers to produce nearly half of the mushrooms in the country, to qualify for temporary H-2A agricultural workers. Although the basis of our challenge was that the employment was not of a temporary or seasonal nature, the reason for that challenge was that the methodology for establishing the prevailing wage rate for piece rate work performed at most workplaces would have resulted rapidly in the lowering of wage rates throughout the industry.⁴³

⁴¹ “Domestic” workers in this context refers to any workers in the country who are authorized to work including foreign nationals with employment authorization. It does not include undocumented workers without work authorization.

⁴² This problem is even more severe for H-2B non-agricultural workers since there is no requirement to give a “domestic” worker a position filled by an H-2B worker once that H-2B worker has arrived at the job. In most agricultural jobs, a “domestic” worker is theoretically entitled to an employment position through 50% of the employment period. *See* 20 CFR §655.103(e) (stating the “fifty-percent rule”).

The largest numbers of H-2B workers in the mid-Atlantic region are currently employed in the landscaping industry, which, in turn, has in recent years been heavily dominated by employers participating in the H-2B system. The typical recruitment for an H-2B landscaping job will be limited to a single newspaper ad near Christmas for work to begin in the spring and continue through the fall. These advertisements seldom generate serious job applications and are not intended to.

⁴³ Under the H-2A system, the statewide adverse effect wage rate will control unless it is possible to establish that a particular prevailing piece-rate practice is utilized by more than 50% of employers. Although payment on a piece-rate incentive basis is the rule for harvesters in the mushroom industry, there is no single uniform system for computation of piece rates. Of even greater consequence, a high percentage of employers in the industry relied upon undocumented workforces who were paid at rates significantly lower than those paid to documented workers at companies that principally hired such documented workers. Unionizing workers at Kaolin Mushroom Farms, Inc. who were in the process of struggling for their first collective bargaining agreement at the time of the industry-wide H-2A application would have had their ability to fight for improved terms and conditions of employment severely jeopardized. That workforce was an entirely immigrant workforce,

In order to force all employers to compete for workers and to permit workers to organize for improved terms and conditions of employment, it is absolutely essential that no employer should be guaranteed workers at a particular wage rate by the government “Portability” of visas between employers was one area where the legislative proposals in the 109th Congress reflected positive legislative proposals. Several of the guestworker programs under consideration in the Senate as of early 2006 recognized the appropriateness of portability of visas between employers.⁴⁴

Effective Workplace Protections for Workers

Effective “whistleblower” protections for all workers exposing employment abuses by employers and other workplace protections are essential to any fair employment system.⁴⁵

Among substantive protections which members of the Low Wage Immigrant Workers Rights Coalition have urged be included in protections for workers are the following:⁴⁶

many of whom had been documented only over the past 20 years since the passage of the legalization provisions of the Immigration Reform and Control Act of 1986.

⁴⁴ See Secure America and Orderly Immigration Act, S. 1033 & H.R. 2330, 109th Cong. sec. 302(a), § 218A(e) (2005) (“Portability. A nonimmigrant alien described in this section, who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(v)(a), may accept new employment with a subsequent employer.”)

⁴⁵ Professor Howard F. Chang agrees: “We can also fortify the guest worker's incentives to complain about abuses with protections against employer retaliation for whistle-blowers or even bounties or other rewards for those who make meritorious claims that their employers are violating the rights of employees.” Chang, *supra* note 40, at 471.

⁴⁶ See Low Wage Immigrant Worker Rights Coalition, *Low Wage Worker Statement of Principles* (2005), available at http://www.nilc.org/DC_Conf/dc-conf2005/dcc05_wrkshp_materials/1-2_employment_sec_of_conf_binder.pdf, at 17-18. That document describes the Coalition as:

The Low-Wage Immigrant Worker (LWIW) Coalition is a collaborative of state and national advocates and organizers working to improve the conditions of immigrant laborers. The mission of the LWIW is to support this community of advocates by sharing information and strategies impacting immigrant workers at both the

- **All Workers Should Have a Safe Workplace.** Workers should not be forced to work in unsafe conditions.
- **All Workers Should Have Real Access to the Protections of Labor and Employment Laws.** Laws should protect all workers, regardless of race, gender, national origin, age, religion, or citizenship status.
- **Workers Should Have Access to Meaningful Remedies for Employer Misconduct.** All workers should have means available to correct unlawful conduct by employers. Perverse incentives are created for employers if some workers are excluded from meaningful remedies. Those remedies should be available to all workers, regardless of race, national origin, gender, religion, age, or citizenship.
- **All Workers Should be Compensated Fairly and Every Job Should Meet a Set of Minimum Standards.** Work should be fairly compensated in a nondiscriminatory manner. Minimum standards and nondiscrimination go hand in hand because standards are undermined unless all workers are treated equally. Anti-discrimination laws should be reviewed to ensure that all workers have a meaningful opportunity to obtain relief. Laws governing compensation and benefits should be fully enforceable by all workers.
- **Workplaces with Immigrants Should Have the Same Protections as Other Workplaces.** Employers should not be able to misuse immigration laws to circumvent their legal obligations in the workplace. The rights of low-wage workers

local/state and national level. The LWIW is co-convened by the AFL-CIO, NILC [National Immigration Law Center], and National Council of La Raza.

are undermined by the prospect of workplace immigration enforcement which makes some workers vulnerable to coercion and mistreatment. Some employers attempt to take advantage of that vulnerability. Their ability to intimidate one group of workers severely weakens the protections relied on by everyone else.

Reject a Pure Free Trade in Labor Analysis

Academics supporting increased immigration have frequently trumpeted the success of employers in utilizing recent immigrants to reduce their costs of production and thereby producing goods more cheaply for consumers. One of the principal advocates of this approach is Professor Howard F. Chang of the University of Pennsylvania Law School, who has written a series of articles on this topic.⁴⁷ His initial statement of this approach sounds appealing to immigrant activists:⁴⁸

Free trade in all services, including labor services, would imply free movement of people across borders. To provide many services, workers must cross borders to where the work must be performed, either on a temporary basis or to accept permanent employment.⁴⁹

Id. at 17 n.*

⁴⁷ See Howard F. Chang, *Liberalized Immigration As Free Trade: Economic Welfare And The Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997) [hereinafter Chang I]; Howard F. Chang, *Migration As International Trade: The Economic Gains From The Liberalized Movement Of Labor*, 3 UCLA J. INT'L L. & FOR. AFF. 371 (1998-99) [hereinafter Chang II]. See also Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions As Employment Discrimination*, 78 CHI.-KENT. L. REV. 291 (2003); Chang, *supra* note 40.

⁴⁸ A different and insightful analysis of labor migration in a historical and international context supports the underlying impossibility of sustaining political borders as barriers to the movement of labor. See Nigel Harris, *THE NEW UNTOUCHABLES: IMMIGRATION AND THE NEW WORLD WORKER* (1995). See also Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 264 (2003) (“Experience demonstrates that, at least within modern sensibilities, border controls cannot be enforced.”).

⁴⁹ See Chang II, *supra* note 47, at 372.

However, further elaboration of this approach in its pure form makes clear that it implies accepting reduced wages for employment within this country:

Immigration barriers interfere with the free flow of labor internationally and thereby cause wage rates for the same class of labor to diverge widely among different countries. For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries. Economic efficiency in the global labor market would call for unrestricted migration, which would allow labor to move freely to the country where it earns the highest return. Market forces would thus direct labor to the market where its marginal product is highest. Given the large international differences in wages, it should be apparent that the potential gains from international trade in labor (and the costs we bear as a result of immigration barriers) are large.⁵⁰

Immigration restrictions impose costs by driving up the cost of labor, which in turn drives up the cost of goods and services to consumers. Native workers may gain from higher wages, but this gain comes only at the expense of employers in the host country and ultimately consumers. The increase in wages for domestic labor is a pure transfer from owners of other factors of production (for example, capital and land) in the host country and from consumers. Immigration restrictions not only redistribute wealth among natives but also destroy wealth by causing economic distortions.⁵¹

Professor Chang himself concedes that unrestrained free trade in labor may have adverse consequences for immigrant communities in this country:

Immigration not only expands wealth, but also can have important distributive effects. Those natives who must compete with immigrants in the labor market may find that immigration reduces their real income.

Empirical studies, however, consistently find that immigration has only a weak effect on native wages. This result may not be surprising, given that natives and immigrants tend to work in different occupations and therefore tend not to compete in the same labor markets. Thus, **immigration does have a more significant effect on the wages of earlier waves of immigrant workers, who are close substitutes for new immigrants.**⁵²

⁵⁰ See Chang II, *supra* note 47, at 373.

⁵¹ See Chang II, *supra* note 47 at 379.

⁵² See Chang II, *supra* note 47 at 408.

[Emphasis added].

Professor Chang’s proposals for “a ‘tariff,’ that is, a tax imposed on immigrants” to replace existing quotas⁵³ are unlikely to appeal to immigrant communities or low-wage activists, although forms of such “tariffs” exist in practice for most “temporary” and undocumented foreign born workers.⁵⁴ Restrictions that set minimum terms of employment and provide for worker rights may also be viewed as “tariffs” rather than as quotas, but such costs are appropriately born by employers who benefit from the labor of workers rather than by imposing them on low wage immigrant workers.

Conclusion

Immigrant rights advocates seeking immigration law reform should fight for employment law reforms that protect the rights of all workers in employment regardless of their immigration status and should resist any proposals for expansion of guest worker programs. It is appropriate for organized labor, immigrant activists, and low-wage worker rights advocates to insist that wage levels be set at levels sufficient for a living wage and to resist employers’ use of new immigrants, whether undocumented or “temporary,” in order to

⁵³ See *Chang I*, *supra* note 47 at 1155; *Chang II*, *supra* note 47 at 378.

⁵⁴ One of the particular problems with current H-2 temporary worker programs in the United States is the imposition of costs in the form of visa fees, immigration processing fees incurred by employer and charged to workers, recruitment fees, and travel costs which are either paid in advance by such workers or deducted from their pay. The 11th Circuit has ruled that such expenses and deductions must be repaid by employers at the beginning of employment to the extent that they reduce wages below the minimum wage. See *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1231 (11th Cir. 2002). Such fees often in practice continue to reduce workers wages to unacceptably low levels. This is particularly true where workers are employed for only very short periods of time. In practice Federal Insurance Contributions Act (FICA) and Medicare (collectively “Social Security”) deductions are taxes on undocumented (and H-2B) workers since such workers do not obtain benefits from such taxes.

exert downward pressure on wages and work conditions for all workers. Because of the inherent economic incentives for employers to use new immigrants, migrants and temporary workers to undercut the economic and workplace rights of other workers, it is important to consciously design minimum protections for workplaces that would otherwise have rights for workers reduced. These are issues of particular importance to immigrant and minority communities and should not be ignored.