

Statement Before
The House Education and the Workforce Committee
Subcommittee on Workforce Protections

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Compliance Group
and on behalf of the
Essential Worker Immigration Coalition

March 14, 2013

Introduction

Chairman Walberg, Ranking Member Courtney, and distinguished members of the Committee, good morning, and thank you for the opportunity to testify today before the Committee. I am Laura Reiff, the Co-Managing Shareholder of Greenberg Traurig, LLP's ("GT") Tysons Corner Office and Co-Chair of GT's Business Immigration and Compliance Group. I focus my practice on business immigration laws and regulations affecting U.S. and foreign companies, as well as related employment compliance and legislative issues.

I am also one of the founders and a member of the leadership team of the Essential Worker Immigration Coalition. The Essential Worker Immigration Coalition (EWIC) is a coalition of businesses, trade associations, and other organizations from across the industry spectrum that support reform of U.S. immigration policy to facilitate a sustainable workforce for the American economy while ensuring our national security and prosperity.

Overview

It is a privilege for me to be here today discussing the role of lower-skilled guest worker programs as Congress wrestles with comprehensive immigration reform issues. It is very important to note that an overhaul of our immigration policy to meet our national security and economic needs is long overdue – it has been more than twenty-six years since the last reform – it is time for good public policy to take center stage.

The Immigration Reform and Control Act of 1986 was designed to be a solution to a broken immigration system of the day. The law included a new legal immigration program that brought more than 3 million people out of the shadows and granted them lawful status. There was also a plan to hold employers accountable for hiring workers by asking them to check the identity and work authorization of new hires. As a counter balance to employer verification, there were antidiscrimination requirements passed to ensure that employers didn't discriminate in hiring based upon citizenship and national origin.

This was to be the solution. The idea was good, but many things went dreadfully wrong over the past two plus decades. The programs didn't work the way they were envisioned. Millions of foreign workers entered the U.S. in questionable status and took jobs with U.S. employers. Most employers did go through an employment verification process, but the new workers had documents to satisfy the requirements. Why didn't these foreign workers enter the U.S. legally or overstay their status and take jobs without authorization? The answer is simple – there was no immigration program available to foreign workers who wanted to enter the U.S. lawfully. What is needed to correct this broken employment based immigration system is (1) a workable employment eligibility verification program; (2) a functional temporary worker program that allows employers to hire foreign workers when U.S. workers are not available and (3) some sort of stabilization of the existing foreign workforce that is embedded in the U.S. economy.

Current Visa Programs for Lesser Skilled Workers

Most foreign workers entering the U.S. to work enter under one of the following categories: professionals, and executives or managers; agricultural workers or seasonal non-agricultural

workers. Traditionally, the visa status used for technical professionals is the H-1B. Canadian and Mexican professionals are eligible for expedited visa and admission procedures pursuant to the North American Free Trade Agreement (NAFTA) under a TN visa. An employer may sponsor an unskilled worker for permanent residence, or greencard status, but this category is restricted to 10,000 visa numbers per year. Due to backlogs in this category, it can take 10 – 15 years to actually enter the U.S. in this category and for most employers that is not a realistic or timely method to bring in workers.

The commonly used temporary worker programs in existence today are the H-1B, the H-2B, TN and the H-2A programs. The H-2A agricultural visa program has proven to be difficult to use and not responsive to the realities of the agricultural workplace.

H-1B Visa – Temporary Specialty Worker Visa

The H-1B visa is available to nonimmigrants who are temporarily employed in professional positions that qualify as "specialty occupations." A "specialty occupation" requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree – or its foreign equivalent – or higher in a specific specialty as a minimum for entry into the occupation in the United States.

The position to which the individual is transferred must be professional. Professional positions include positions such as engineer, computer systems analyst, financial analyst, attorney, accountant, and many others; these are considered occupations for which a bachelor's degree is the minimum requirement for entry. If the employee has the equivalent of a U.S. bachelor's degree and an employer requires his/her services in a professional position, the employee should qualify for an H-1B temporary worker visa. H-1Bs visas are employer and location-specific. The initial period of stay granted to H-1B beneficiaries is three (3) years, with the option to extend their status in three (3) year increments. At the end of the six (6) year term, beneficiaries must spend one (1) full year outside the United States before being permitted to re-enter in H-1B status.

All H-1B petitions must be filed by the employer. Prior to filing an H-1B petition with the USCIS, the employer must first attest to the Department of Labor that the alien will receive a salary commensurate with the prevailing wage for U.S. workers in the same job category. The employer must also make certain attestations to show that U.S. workers are in no way disadvantaged by the hiring of the foreign national. The employer must also attest that it offers its U.S. and H-1B workers the same benefits. A notice of the filing and the attestations must be posted internally along with the offered salary and the prevailing wage for ten (10) consecutive days in two (2) conspicuous locations. The employer is also required to obtain and maintain documentation to support each of the Labor Condition Statements made on the Labor Condition Application ("LCA").

An employer must maintain a Public Access File (PAF) that is accessible to interested and aggrieved parties, and kept separate from personnel records. The PAF must be available at either the employer's principal place of business or at the worksite within one (1) day after the LCA is filed with supporting documentation

There is currently 65,000 H-1B visas allocated every fiscal year. The cap has been reached well before the end of the fiscal year for the past several years, meaning that new H-1B petitions are not

available until the next federal fiscal year (starting October 1). There are also 20,000 available visas per year for nonimmigrants who have earned a Master's degree or higher from a U.S. institution.

Trade NAFTA "TN" Status

NAFTA has special provisions for Canadian and Mexican citizen professionals who are offered a position in the U.S. The professional visa status under NAFTA is called Trade NAFTA status or TN status. The person must be coming to work in an occupation on the NAFTA list. A Canadian citizen who fits within one of the TN occupational categories may present documentation at the border in order to obtain a TN. If a Canadian national does not fit within one of the given professions identified in the NAFTA, he/she still may qualify for the standard H-1B category for specialty occupations. Mexican nationals may qualify for TN status. However, there is a limit of 5,500 Mexican TN visas per year. In addition, Mexican nationals must first obtain a labor condition attestation from the Department of Labor and be pre-approved by the USCIS within the U.S. The process is similar to the process for H-1B status.

H-2B – Seasonal Non-Agricultural Temporary Worker

The other major temporary worker program is the H-2B program. This program is designed specifically to allow foreign nationals to work for a sponsoring employer in a job that is only temporary in nature; for example, to fill a seasonal job (but not in agriculture), to meet a one-time project or need, to add additional staff during a time of exceptionally high peak load, or to fill a position that is intermittently used in the business. H-2B visas are used in industries such as landscaping, seasonal hospitality (such as resort hotels, restaurants and attractions), and seasonal construction, as well as to meet specific needs in manufacturing, retail and other industries. The cap on H-2B visas is 66,000 annually. The H-2B program helps supplement the native-born workforce, but it cannot be used to fill all types of jobs because of the seasonal nature of the visa. A company has to first recruit and advertise for the opening in the U.S. The employer must then obtain a temporary labor certification from the Department of Labor, receive approval from the Department of Homeland Security, and then request that the visa be issued through consular process of the Department of State.

The existing types of temporary worker programs do not begin to meet all of the complex needs of the U.S. economy. In sum, the H-1B program is focused on higher-skilled immigrant workers, while the H-2B program is limited to short-term, seasonal types of work, although it allows for recruitment of lower-skilled workers. Furthermore, particularly when viewed against a domestic economy of over 154 million workers, the caps are simply unrealistic. There is no temporary worker program that addresses the huge gulf between these programs and the complexities of the many different kinds of jobs and skill levels. Employers need a way to recruit foreign workers when they cannot find a U.S. worker, and currently there are few realistic mechanisms to accomplish that.

What are the Needs of our Economy and Business

The population of the U.S. as a whole will increase over the next several decades. However, this population is aging, more educated and participating at lower rates in the workforce. The

demographic changes caused by our aging workforce and the lower participation of the baby boomers will have long lasting effects on our labor market.¹ The Bureau of Labor Statistics also has projected job growth, both in low-skilled and high-skilled occupations. The BLS expects that between 2010 and 2020 the number of U.S. jobs will increase by 20 million.²

Employers are experiencing persistent and recurring job openings. Many positions remain unfilled despite extensive efforts to recruit and retain U.S. workers. Some of the industries that have expressed concern include: Meat Processing, Specialty Construction Employers; Manufacturing; Restaurants and Food Service; Hospitals; and as you have heard here today, Hotels and Resorts and Senior Care Medical Facilities. Here is a short list of some of the positions that I am aware of that are in need of workers.

Industry/Positions with Identified Needs:

Landscaping Industry

- Landscape Laborer
- Irrigation Technician
- Crew Leader
- Tree Surgeon Assistant

Manufacturing

- Welders
- Electricians

Health Care

- Nurses
- Certified Nursing Assistants
- Licensed Practical Nurses

Construction Industry

- First Line Supervisor/ Managers of Construction
- Steel Workers and Structural Iron Workers
- Brick mason and Block masons
- Cement Mason and Concrete Finishers
- Roofers

Hotel Industry

- Baggage Porters and Bellhops
- Hotel, Motel, and Resort Desk Clerks
- Maids and Housekeeping Cleaners

Restaurant Industry

- Food Service Manger
- Chefs and Head Cooks
- First-line Supervisors/ Managers of Food Prep & Servers
- Cooks/Restaurants
- Dishwasher

¹ Bureau of Labor Statistics, Projection of the Labor Force to 2050. *Monthly Labor Review*, October 2012.

² Bureau of Labor Statistics, Labor Force Projections to 2020. January 2012.

- Cooks/Fast Food/Crew Member (non-managerial)

Other Positions

- Carpenter
 - Helper-Carpenter
- Plumbers, Pipefitters and Steamfitters
 - Helper-Plumber
- Meat Processor
- Housekeeping Cleaner
- Truck Driver

EWIC Proposal for a Temporary Worker Program

We need to fill the program gap that was left in 1986 with a supplemental worker program that can be used when U.S. workers cannot be found. A visa program that allows employers from across the spectrum to obtain workers from abroad should be established so that all employers with worker needs that can't be filled by U.S. workers can bring workers to this country through legal channels. Since 1999, EWIC has supported new worker programs that meet business needs. EWIC has worked with businesses and other advocates to develop a program that fills this critical gap in our legal immigration system.

A critical element of a program is to supply the U.S. economy with the workers it needs to recover from the downturn and grow in years ahead. This visa program must give employers, not the government, the primary say in which workers they need to staff their businesses and give the labor market the primary say in how many workers enter the country annually in a legal program. The marketplace can best make these determinations. The most accurate way to measure whether immigrant workers are needed is for employers to try - and either succeed or fail - to hire U.S. workers. The enclosed Exhibit is the most recent proposal for a new worker program.

As described above, of the many inadequacies of the existing legal immigration system, few are as damaging – with worse consequences for immigrants or for the U.S. economy – than the lack of a visa program for less skilled immigrants seeking to enter the country legally and work in the United States. EWIC developed a proposal to fill this void: a provisional visa program designed to reflect market dynamics, expanding in good times when U.S. labor needs intensify and contracting in downturns when U.S. labor needs subside.

In contrast with other existing U.S. temporary worker programs, under this proposal, employers would not sponsor workers for visas, and workers would not be tied to specific jobs or specific employers, but rather would be free to change jobs at will, working for any employer who is registered to participate in the program. The following is a short synopsis of the key program points:

TWO APPLICATION TRACKS. One track is for employers who demonstrate they have tried and failed to find U.S. workers and are given permission to hire less-skilled foreign workers for specific, “registered jobs.” The other track is for foreign workers who are granted visas based on initial job offers, but then are free to change jobs in the U.S., accepting work from any employer who has demonstrated a labor need and been registered with the program.

COMPLETE PORTABILITY. The foreign worker is not tied to a specific job for a specific employer but rather is free to work for any employer who has tested the market and been registered with the program.

OCCUPATIONS COVERED. Any nonfarm, low-skilled job that does not require a college degree as standard preparation, including year-round employment.

DUAL INTENT. The initial visa is temporary: two years, renewable twice. But just as high-skilled H-1B temporary visa holders can eventually transition to permanent visas, so low-skilled workers in this program can eventually earn the right to get in line for a green card. Who can make the transition will be determined by an evaluation of the newcomer's rootedness, assimilation and personal success in the U.S.

LABOR MARKET TEST. Attestation-based with back-end audits. Before they can be registered, employers must test the labor market, making a good faith effort to recruit U.S. workers, and every two years, they must reapply, demonstrating their continued labor need and keeping their registration current.

NUMBER OF VISAS AVAILABLE. The number of visas issued each year will float up and down in response to U.S. labor needs – need demonstrated and quantified by the employer attestation process. Employers who have tried and failed to find U.S. workers will attest to their job openings and recruitment efforts. The government will approve a given number of registered job openings, and the annual visa quota will be adjusted to meet this demand using a mathematical formula.

WAGES. Participating foreign workers will receive the actual wage paid to similarly situated U.S. workers in the same location OR an agreed upon prevailing wage, whichever is greater. The prevailing wage will be determined by any relevant collective bargaining agreement, applicable Davis-Bacon and Services Contract Act requirements, the Bureau of Labor Statistics-determined wage for that occupational classification or a private wage survey that meets standards specified by the Secretary of Homeland Security.

E-VERIFY and an ELLIS MONITORING SYSTEM. Movement of workers from job to job will be tracked electronically by a government monitoring system and through E-Verify, and the two systems will be coordinated.

A new temporary worker program to meet the needs of an expanding economy will also enhance our national security and control over our borders. When available jobs are filled (after recruitment in the domestic labor pool) by legal foreign workers, there will no longer be jobs to be filled by those who may come here illegally and thus, the magnet that drives much illegal immigration will be eliminated. A successful temporary worker program should bring these economic migrants through lawful channels allowing the Border Patrol to focus on the real threats coming across our border.

Conclusion

What is needed, and the challenge you face as legislators, is an immigration system that reflects the needs of the economy. Picking an arbitrary number of immigrants to be allowed into the U. S. and only allowing some industries the workers needed at the expense of other industries is not in our national interest. If we want the economy to grow, we will need workers. When we can't find U.S. workers we need to be able to hire foreign workers.

Immigration is a complex, complicated problem. It deserves more than piecemeal solutions, more than a patchwork of regulation at various levels of government. It deserves a thoughtfully reasoned solution from the people who have true responsibility for immigration law: Congress and the President. Thank you.