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Administration's new immigrant guestworker proposal: immigrant labor issues.

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Within days of its unveiling, the Bush Administration's temporary worker proposal was labeled an "amnesty," (1) the "Wal-Mart bracero" (2) program, a "new era of indentured servants," (3) an "election-year ploy," (4) a "huge step backward," (5) a "reward" to "illegal aliens" (6) and "a classic guest worker program on the European model." (7) It was even deemed "dead on arrival." (8)

This heated rhetoric and the political polarization it reflects should not detract from the very real concerns that the plan could harm both the U.S. labor force and the temporary workers themselves. Meanwhile, there exists a threshold question of how serious the proposal is in the first place.

These comments examine the current status of the Bush temporary worker proposal, and compare it with the current H-2A and H-2B programs in place in the United States as well as the former bracero program of 1942 to 1964. In addition, from a worker perspective, these comments point out other concerns about the proposal.

A. A SERIOUS PROPOSAL?

The Bush Administration temporary worker program, "Fair and Secure Immigration Reform," was announced Jan. 7, 2004. (9) It essentially outlined broad principles, such as protecting the "homeland," serving the nation's economy by matching a willing worker with a willing employer, and providing "incentives" for the worker's return to his or her home country. (10) Little detail was provided about implementation of these principles and other program requirements. For example, under the plan, employers would have to make "every reasonable effort" to find an American to fill a job before extending job offers to foreign workers. (11) But the proposal does not specify how exactly an employer would demonstrate that effort. Other considerations seemed to be omitted altogether. For example, the government fact sheet mentioned wages only once, with a reference to "fair wages," (12) without specifying any sort of scheme to avoid undercutting the current labor market.

When the Administration provided further details about the plan, it was not through proposed legislation, but in the form of testimony by Department of Homeland Security (DHS) officials before the Senate Judiciary Committee on February 12.³ That testimony still yielded few specifics. For example, Steven J. Law, Deputy Secretary of the U.S. Department of Labor (DOL) testified that the program would "put American workers first" and that the DOL "would protect the rights of workers regardless of citizenship." (14) There appeared to be no testimony about such key issues as how to prevent a downward spiral of wages and what sort of "incentives" would be implemented to encourage the workers to return to their country. (15) The Administration has made occasional references to "a fair and meaningful citizenship process" (16) and applying for permanent residence within the United States. (17) At the same time, it is clear the Administration intends for these workers to remain non-immigrants (i.e., maintain visitor status) and not obtain residency directly through the temporary worker program. (18) Specifically, it would require "the return of temporary workers to their home country [sic] after their period of work has concluded." (19) Thus, it seems references to citizenship and lawful permanent residence are misleading.

Finally, as of March 23, the Administration still had not proposed any specific legislation. (20) At least six senators, three Republicans and three Democrats, reportedly expressed frustration at the lack of progress in advancing immigration reform. (21) According to Eduardo Aguirre, director of DHS's Bureau of Citizenship and Immigration Services, despite the lack of progress in proposing its own specific legislation, the White House was not ready to back any existing immigration bills pending before congress either. (22) Two pending immigration bills that have widespread support from congress and the public, but not from the Administration, are the DREAM Act 23 and the AgJOBS Act. (24) The DREAM Act would eventually grant residence to certain young people who have been long-term residents of the United States, who graduate from high school, who can demonstrate good moral character, and who complete certain specified future schooling or military service. (25) AgJOBS in part would provide for eventual lawful permanent residency, known as "earned adjustment," for workers who can show a certain amount of past employment and who later complete additional time in agriculture. (26) The bill has bipartisan support, including 54 sponsors in the Senate, 94 cosponsors in the House, (27) and hundreds of organizations.

The vagueness of the Bush Administration proposal to date, combined with the delay in proposing specific legislation and the Administration's unwillingness to support any pending immigration bills, raises doubts that the President is serious about immigration reform.

B. COMPARISON WITH CURRENT GUEST WORKER PROGRAMS

Assuming the Administration's proposal is genuine, it appears to provide fewer protections for workers than the current guest worker programs, which themselves are seriously flawed. Most relevant are the H-2A (28) and H-2B (29) programs, which are temporary worker programs for agricultural workers and other laborers.

First, the H-2A program allows the "import" of foreign workers to provide agricultural labor or services of a temporary or seasonal nature. (30) Requirements for H-2A petitions include: a certification that there are not sufficient able and available U.S. workers; and a certification that the employment of the temporary worker will not adversely affect the wages and working conditions of workers in the United States. (31) Thus, the statute itself requires that wages remain high enough that they do not undercut the wages of U.S. workers. To date, it appears no such provision has been mentioned for the Bush temporary worker program. The Bush program mentions only a vague "fair wage" (32) and protecting the rights of workers. (33) Unless some reasonable base wage is established, this temporary worker proposal could result in a downward spiral ending at the federally mandated minimum wage of \$5.15 per hour, (34) or at the state minimum wage, in states that have one. If employers find temporary workers who are willing to accept wages of \$5.15 an hour, there may well develop a new underclass of undocumented workers willing to work for even less. (35)

The H-2A program has additional requirements that apparently would be eliminated under the Bush proposal. These include a requirement that employers furnish housing (36) and that the employer guarantee employment for at least three-fourths of the work days in the contract period. (37)

Because of these requirements, the H-2A program has been criticized by employers, who call it expensive, because of the wage rates, and cumbersome, due to the certification process. (38) News reports have claimed that farmers are "dropping out" of the H-2A program and employing undocumented workers because it is too difficult to have to work with two government agencies and too costly to pay the required wage rate. (39) By promising "user-friendly, streamlined mechanisms for employers to locate willing and available workers," (40) the Administration apparently is attempting to appease these employers.

Second, the H-2B visa allows workers to come temporarily to the United States to perform temporary nonagricultural labor if such workers cannot be found in the United States. (41) The program does not afford as many protections as the H-2A visa, and has fewer requirements, which include: the job and the employer's need must be one time, seasonal, peak load or intermittent; the job must be for less than one year; and there must be no qualified and willing U.S. workers available for the job. (42) There is a 66,000-per-year limit on the number of foreign workers who may receive H-2B status each fiscal year. (43) The H-2B visa does not require that employers provide housing. While employers must pay the prevailing wage, they do not need to pay the "adverse effective wage rate" required for H-2A workers, which is typically higher. It also requires less paper work. (44) Thus, generally it has not received as much attention from disgruntled employers as the H-2A program.

Meanwhile, workers and worker advocates have longstanding concerns about both the H-2A and H-2B temporary worker programs. Worker advocates consider the H-2A and H-2B programs to be detrimental to workers in many respects, even though the H-2A program provides some protections. For example, because they are nonimmigrant visa categories, H-2A and H-2B visas do not lead to permanent residence or citizenship. (45) Under both the H-2A and H-2B programs, employees are only allowed to work with the employer they have contracted with and will lose status if they leave their jobs. (46) They fear being blacklisted—refused employment in future years—or otherwise intimidated if they attempt to assert their rights. (47) Thus, they are less likely to complain about illegal employment conditions and may become virtually a captive work force. The Bush proposal could lead to many of these same problems. The level of intimidation would still exist, but could be reduced somewhat, if under the Bush proposal employees were able to change employers without risking their status, detention, and ultimately, deportation.

Based on the information currently available, the "Fair and Secure Immigration Reforms" appears to eliminate many of the protections available under current guest worker proposals, especially the H-2A program's wage, housing, and work guarantees. In addition, it would not be limited to agricultural workers and would apply to year-round, not just seasonal work. Consequently, a larger range of workers would be harmed. Finally, it continues the guest worker principle of denying residency to long-term laborers, undermining their futures and creating a class of expendable, lower-skilled workers.

C. COMPARISON TO BRACERO PROGRAM

The United States previously has experimented with this sort of expendable foreign worker. One notable example, the bracero program, began in 1942 through an agreement between the United States and Mexico. (48) U.S. growers were permitted to hire Mexican workers, provided that there was a shortage of U.S. workers. (49) Administration of the program evolved over the years; (50) ultimately, however, more than 4 million Mexican workers toiled in the United States under the program between 1942 and 1964: They became the "backbone" of U.S. agriculture during World War II and beyond, (52) and, typically, they ended up having to abandon their farms back in Mexico. (53) During the period of their contract, they could only return to Mexico in the event of an emergency. (54) Once the contract period ended, however, they were required to turn in their alien laborer permits and leave the United States, with no right to long-term or permanent residence. (55) The braceros experienced numerous abuses, including racial oppression, economic hardship, and mistreatment by employers. (56) In one notorious failure of the program, ten percent of the braceros' wages completely disappeared. (57) Under the terms of the program, this ten percent was withheld from their pay, to be deposited in Mexico for their future retirement. (58) However, they never received those funds, which some estimate could be worth \$150 million by now. (59) As a result of this monumental loss, those familiar with the bracero program are apprehensive when hearing the government speak of financial "incentives" that would encourage workers to return to their home countries. (60)

As vague as the details are, the Bush Administration proposal indeed bears some resemblance to the bracero program, even broadening it. Since the Bush proposal does not appear to limit the countries of origin, workers from all over the world could face the vulnerability of depending on their employer for temporary status, and of not wanting to jeopardize that status by asserting their rights. Furthermore, under the Bush program, the laborers would not only be working in the fields for part of the year. They might well be changing sheets in hotels, building homes, emptying bed pans in nursing homes, planting trees, cooking in restaurants, all for three years at a time. The program could expand into more skilled employment as well, since there appear to be no limitations on the types of positions that could be filled by temporary workers. The Administration's overview—again, notably vague—proposes the matching of temporary workers "with willing U.S. employers when no Americans can be found to fill the jobs." (61) The Administration fact sheet laments that "[t]he visas now available do not allow employers to fill jobs in many key sectors of our economy," (62) such as Wal-Mart, perhaps. (63)

D. CONCLUSION

The labels given to the Bush temporary worker scheme are perhaps more inventive than the proposal itself. If the government and the public fail to learn from past mistakes, a "Wal-Mart bracero" program indeed could result. Unless the planners develop numerous protections, many of which are not evident in the information provided thus far, this temporary worker program would lead to the worst worker exploitation since the original bracero program. Necessary protections include: wage rates based on the labor market rather than on the federal minimum wage, to avoid wage deflation; a genuine requirement that employers first search for U.S.-based workers; a clear path to residency and later citizenship for the workers themselves; the ability for the workers to change jobs without losing their status; and provisions that allow families to be together.

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(2.) Juan Gonzalez, Down This Dead-end Road Before, DAILY NEWS (N.Y.), Jan. 8, 2004, at 7.

(3.) Farmworker Justice Fund Inc., The President's Temporary Foreign Worker Proposal is Ill-Conceived, at http://www.fwjjustice.org/bash_policy.htm (last visited Mar. 29, 2004).

(4.) Huteheson and Montgomery, *supra* note 1.

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(6.) *Id.*

(7.) David Abraham, American Jobs but Not the American Dream, N.Y. TIMES, Jan. 9, 2004, at A19.

(8.) Patrisia Gonzales and Roberto Rodriguez, Try These Other Methods of Immigration Reform, CAPITAL TIMES (Madison, WI), Jan. 14, 2004, at 9A.

9. White House, Office of the Press Secretary, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html> (last visited Mar. 30, 2004).

(10.) *Id.*

(11.) *Id.*

(12.) *Id.*

(13.) Rachel L. Swams, Officials Discuss Details of Bush's Immigrant Worker Plan, N.Y. TIMES, Feb. 13, 2004, at A28. See also Senate Committee Evaluates Proposed Temporary Guest Worker Program, 81 INTERPRETER RELEASES 341 (Mar. 15, 2004).

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(17.) Swams, *supra* note 13.

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(20.) Rachel L. Swains, White House Irks Senators by Inaction on Immigrants, N.Y. TIMES, Mar. 24, 2004 at A17.

(21.) *Id.*

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(24.) Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act, S. 1645, 108th Cong. (2003).

(25.) For a summary of the DREAM Act, see, National Immigration Law Center, Dream Act Reintroduced in Senate, Sept. 4, 2003, at <http://www.nilc.org/immlawpolley/DREAM/Dream001.htm> (last visited Mar. 30, 2004).

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(27.) Sergio Bustos, Bill to Legalize Migrant Farmworkers Gets Support, TUCSON CITIZEN,

Mar. 25, 2004, available at http://www.tucsoncitizen.com/index.php?page=local&story_id=032504a4immigration (last visited Mar. 30, 2004).

(28.) INA [section] 101(a)(15)(H)(ii)(a), 8 U.S.C. [section] 1101(a)(15)(H)(ii)(a).

(29.) INA [section] 101(a)(15)(H)(ii)(b), 8 U.S.C. [section] 1101(a)(15)(H)(ii)(b).

(30.) INA [section] 101(a)(15)(H)(ii)(a), 8 U.S.C. [section] 1101(a)(15)(H)(ii)(a).

(31.) INA [section] 218(a), 8 U.S.C. [section] 1188 (a).

(32.) The White House Fact Sheet, *supra* note 9.

(33.) 81 INTERPRETER RELEASES, *supra* note 13, at 343.

(34.) 29 U.S.C. [section] 206.

(35.) See, e.g., Ann Imse, Critics See Flaw in Bush Immigration Plan; Union Says it Will Create 'Permanent Underclass, ROCKY MOUNTAIN NEWS, Jan. 16, 2004, at 15B.

(36.) INA [section] 218(c)(4), 8 U.S.C. [section] 1188(c)(4).

(37.) 20 C.F.R. [section] 655.102(b)(6).

(38.) See, e.g., Stella M. Hopkins, Immigrant Reform: Hard Road Ahead, " Carolinas Offer Good Look at Obstacles Bush Proposal Faces, CHARLOTTE OBSERVER, Feb. 1, 2004, at 1E.

(39.) *Id.*

(40.) 81 INTERPRETER RELEASES, *supra* note 13, at 343.

(41.) INA [section] 101(a)(15)(H)(ii)(b), 8 U.S.C. [section] 1101(a)(15)(H)(ii)(b).

(42.) U.S. Department of Labor, Employment & Training Administration, H-2B Certification for Temporary Nonagricultural Work, available at <http://workforcesecurity.doleta.gov/foreign/h2b.asp#qc> (accessed Mar. 30, 2004).

(43.) *Id.*

(44.) *Id.*

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(54.) Id.

(55.) Id.

(56.) Id.

(57.) Maria Elena Salinas, *supra* note 51.

(58.) Id.

(59.) Id.

(60.) Id.

(61.) White House Fact Sheet, *supra* note 9.

(62.) Id.

(63.) The Wal-Mart department store chain, the world's largest retail chain, received national attention in October, 2003, after federal officials reportedly raided some 60 of its stores across the country and arrested more than 250 allegedly undocumented immigrants who worked as janitors for contractors used by the store. See, e.g., Steven Greenhouse, *Wal-Mart Raids By U.S. Aimed At Illegal Aliens*, NEW YORK TIMES, Oct. 24, 2003, at A1.

Patricia L. Medige, Esq. is Managing Attorney of the Migrant Farm Worker Division of Colorado Legal Services, as well as President of the Board of Directors for the Rocky Mountain Immigrant Advocacy Network (RMIAN) and a member of the Board of Directors, El Centro Humanitario Pars Los Trabajadores (Humanitarian Center for Workers). She has coordinated or presented at numerous national and statewide migrant and immigration law conferences. Recent publications include "Immigration Issues in a Security Minded America" which appeared in the March, 2004 Colorado Lawyer. She practices in federal, state and administrative courts.. Ms. Medige graduated from the University of Denver College of Law, where she served on the Denver Journal of International Law and Policy.

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