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Statement of Ross Eisenbrey

Reforming the H-2B Non-immigrant Visa Program

House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Wednesday, April 16, 2008

Madame Chairman, I am Ross Eisenbrey, Vice President of the Economic Policy Institute, a non-partisan research institute and think tank dedicated to advancing policies to ensure broadly shared prosperity. Thank you for inviting me to testify today.

The H-2B non-agricultural guest worker program has been the fastest growing and most problematic immigration program in our recent history. In FY 1993, fewer than 10,000 H-2B visas were issued; nearly 130,000 were issued in FY2007. This expansion is alarming because the H-2B program undermines the wages and working conditions of U.S. workers; creates dependencies among businesses for docile foreign workers with no voice, no bargaining power and few rights; and allows abuses that most Americans would denounce if they were aware of them.

If our nation is to have a guest worker program for unskilled occupations – and it is far from clear that such a program is necessary or desirable – it must be reformed in significant ways, including at least the following reforms:

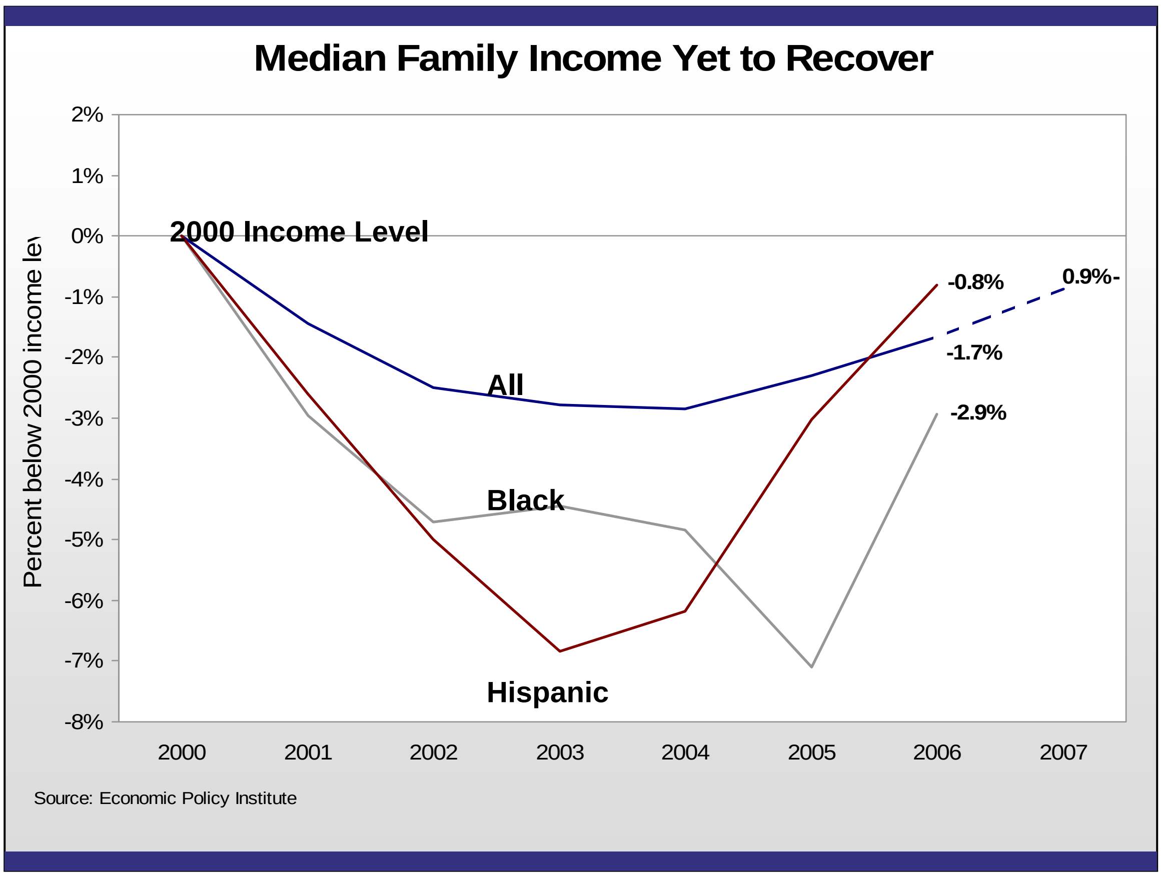
1. The right of U.S. workers to learn about, apply for, and take jobs offered to H-2B workers must be strengthened and enforced.
2. The wages and benefits offered or paid to U.S. workers by employers petitioning for H-2B workers, or the wages and benefits paid to H-2B workers themselves, must never be less than the prevailing wages and benefits, and never less than 150% of the federal minimum wage, even if it would not apply to U.S. workers.
3. H-2B workers must be allowed to organize unions and bargain collectively.
4. H-2B workers must have enforceable contract rights, access to legal representation, access to an effective administrative complaint process or to the federal courts, and protection against retaliation.

Without these reforms, the H-2B program should be capped far below its current level of 66,000 visas a year, or eliminated. Such reforms or elimination are particularly germane as the current downturn takes hold in the job market. Employment is down 230,000 so far this year, unemployment is rising, and most workers wages are consistently falling behind inflation. In other words, as is common in recession-like conditions, labor supply is surpassing labor demand. The idea of further increasing labor supply through fiat is clearly a policy mistake in this context. To the contrary, as the economy falters, U.S. workers need help from Congress in protecting or improving their wages; without reform, an expansion of the H-2B program would further damage their prospects.

The Economic Context for Consideration of H-2B Reform

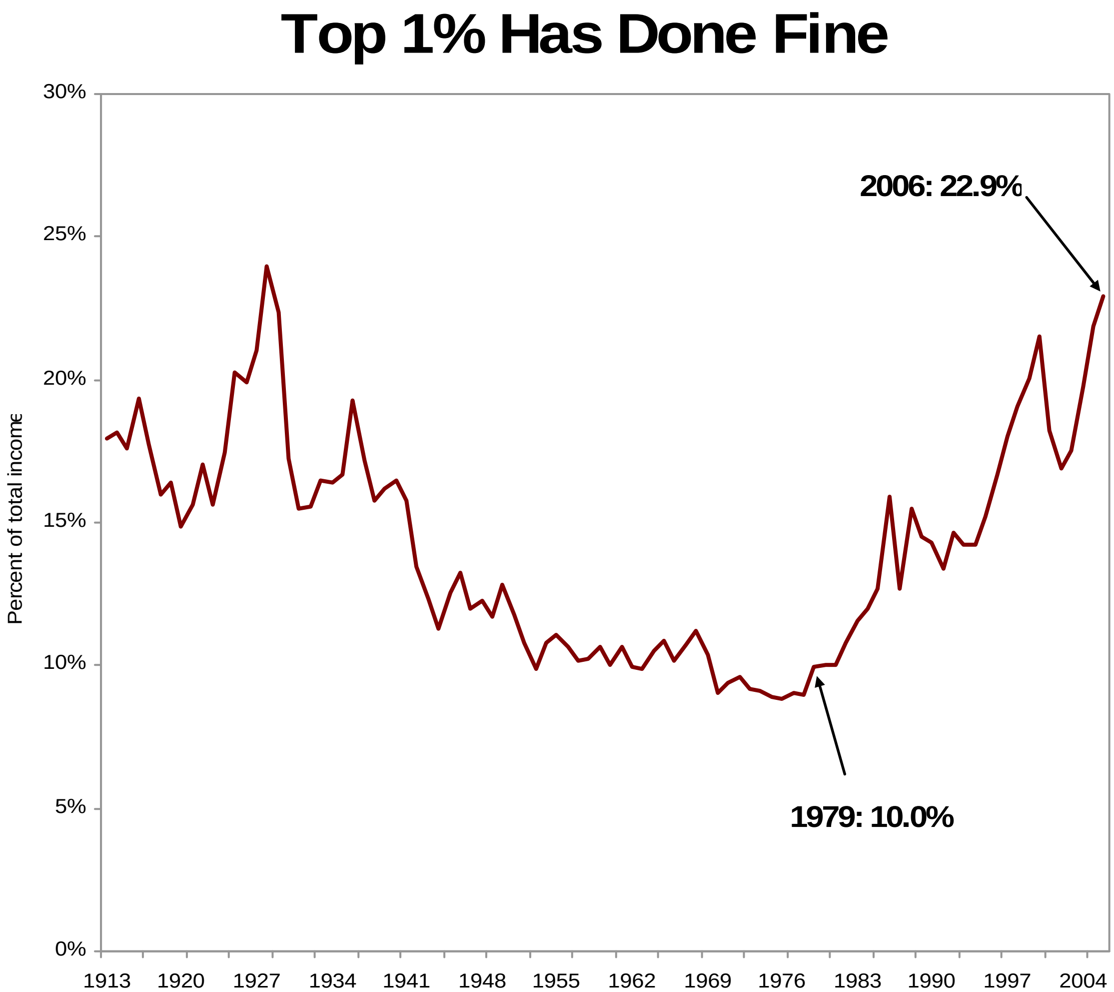
As you consider reform of the H-2B program, the economy is sliding into a recession that will have terrible consequences for millions of American families. Unemployment is rising fast as employers stop hiring and reduce payrolls. The unemployment rate is likely to reach 6% by the end of the year, even taking into account the effect of the stimulus package Congress enacted and the Federal Reserve's rate-cutting efforts. More than 9 million Americans will be jobless but still seeking work, and millions more are already underemployed – wanting full-time work but forced to work part-time. EPI's Jared Bernstein and Lawrence Mishel estimate that the weakening labor market will depress wages and shorten work hours enough to cost the average family $750-$1000 in lower earnings this year.[1]

This is on top of the fact that the most recent economic expansion has been the weakest since World War II, with median household incomes never even recovering their 2001 peak. It is no wonder that, as the Pew Foundation reports, most Americans feel they are either just hanging on or are falling behind economically. They are right.



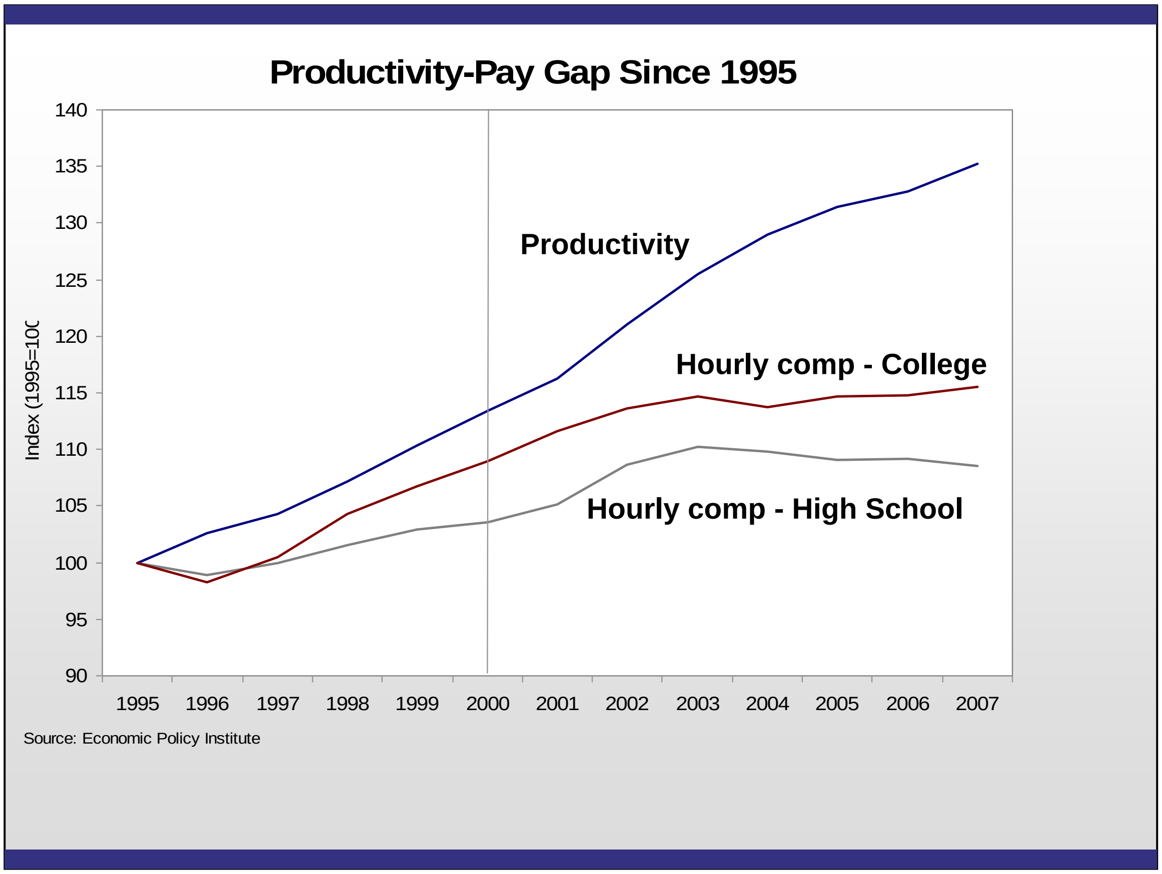
[1] Lawrence Mishel, Jared Bernstein and Heidi Shierholz, *State of Working America 2008/2009*, forthcoming.(Economic Policy Institute).

That most families are so squeezed and have gained so little is not new. For almost 30 years, the inflation-adjusted wages of the typical American male have stagnated -- even as productivity has soared and as average wages have risen, driven by gains at the top. The fruits of this productivity growth have instead gone to corporate profits and higher earnings for those in the top 20% of the income distribution, especially those at the very top. As a result, income inequality has returned to levels unseen since just before the Great Depression, with the share of national income going to the top 1% of Americans more than doubling since 1979.



Source: Piketty and Saez (2006)

During the last five or six years in particular, most Americans have worked hard and been productive, but they haven't shared in our rising national prosperity. This is clear in the following chart, which shows that regardless of educational level, the hourly compensation of U.S. workers has stagnated since 2002, while productivity has continued to rise at a strong pace:



The goal of Congress and this subcommittee should be raising wages and incomes of working families, reducing income inequality, and strengthening the institutions that protect and improve labor standards and working conditions. Expanding the H-2B program or weakening its worker protections would undermine these goals, especially as we enter into a recession.

Labor Shortages

It is a fundamental principle that U.S. citizens and legal residents should be preferred over foreign workers for jobs in the United States, and that the use of guest workers should be a last resort. Our national economic policy is not that employers should be able to hire workers at whatever wage they choose to offer, even if that means recruiting from abroad. If there is no shortage of U.S. workers, there should be no guest workers.

Establishing the existence of a shortage is therefore of fundamental importance. True shortages are rare and should be temporary because markets are self-correcting. If not impeded, the market will provide a willing worker once the price (the wage) is high enough. The so-called ‘shortages’ that have justified increasing numbers of H-2B workers, on the other hand, persist for years and years and the market never self-corrects.

A basic principle of economics is that in market economies, shortages signal adjustments that need to take place to move the economy from one equilibrium to another. Thus, if workers in a particular region or occupation are in short supply, compensation will rise as employers need to attract workers. This will entice new workers to move to that region or enter that occupation, and encourage existing workers to transfer from sectors that are stagnant or contracting.

To jam market signals by resorting to a visa program for special types of workers has the potential to prevent the optimal allocation of labor, leading to market distortions. One such distortion is the dampening of wage gains that should accompany a growing economy.

EPI researchers Jin Dai and Jared Bernstein examined key labor market indicators for seven jobs that constitute more than 60% of H-2B employment.[2] The data show no evidence of a labor shortage: unemployment for these occupational groups is actually higher than average *and rising*, and real wages have been flat. Economic theory is quite clear on this point: if labor supply were truly scarce for these jobs, unemployment would be lower than average and falling, and real wage rates would be rising.

Using data from the nationally representative Current Population Survey, we compared these indicators for the relevant occupations for 2000/01 and 2006/07 (we combine two years of data to get adequate sample sizes). Unemployment in these occupations was 6.9% in 2000/01 and 7.4% in 2006/07, compared to the national rates of 4.4% and 4.6% over those years. Average real wages in these occupations increased only slightly over these years, by six-tenths of one percent , compared to the economy-wide real average wage increase of 4%. This finding belies any claim that labor demand is outpacing labor supply in these occupations.

In short, national data provide no support for expanding the number of H-2B visas.

[2] Food prep related services; lodging related services; construction; motor freight; packing and material handling; extraction occupations; and grounds maintenance workers.

Recruitment as a test of labor shortage

Isn't it possible, however, that even though there is a pool of unemployed or underemployed workers across the nation, available, for example, to do housekeeping work at resorts and hotels, there are shortages in particular areas, such as Northern Michigan and Stowe, Vermont? It is certainly possible that given the seasonal nature of the work, the schedules demanded by the employers, and the low pay offered, that few local residents can be found to fill those jobs.

Would-be H-2B employers are supposed to demonstrate that they have not been able to recruit local workers for these jobs, but why should recruitment be limited to a local area if employers are willing to seek workers as far away as Asia, South America and Europe, and to pay their transportation costs? Before hiring foreign workers, why shouldn't employers be required to recruit more broadly within the United States? Shouldn't American citizens in Detroit and Syracuse have a chance to learn about and apply for such jobs before they are given to workers a continent away? Shouldn't they be offered the same transportation and housing arrangements as foreign workers?

It is instructive how employers in areas like Cape Cod with longstanding labor "shortages" are beginning to deal with the loss of their expected H-2B workforce because the 66,000-visa cap has been reinstituted. Some are raising wages, some are holding job fairs and inviting applicants from neighboring towns and cities, and some have turned to their state governments for help in recruiting more broadly. Providing transportation to low-wage workers seems to be an essential element of the solution. The net result is that U.S. workers are now being recruited and hired who, if not for the visa cap, would never have had a chance at these jobs.

Recommendation: *Before H-2B workers are recruited from outside the country, every State Workforce Agency – not just the agency in the state where the work will be performed -- should get 30 days notice of the job vacancy and terms and conditions of employment, transportation, and housing, in order to offer the position to unemployed U.S. workers.*

In addition, it is usually the case under the H-2B program that employers advertise four or five months before the jobs become available. This virtually guarantees that no U.S. workers will be hired, because U.S. workers seeking employment in low-wage jobs normally need a job right away. So if, for example, a ski resort advertises for tow rope operators in June or July and fails to receive any applicants, it is no test of the availability of U.S. workers in December, when the work will be performed.

The H-2A program—for farm workers—deals with this problem by giving U.S. workers the right to have a job with an H-2A employer until the contract period is 50% completed. Similar protections should be extended to U.S. workers in the H-2B program.

Recommendation: *U.S. workers should have a right to take any job offered to an H-2B worker until such time as the H-2B has an enforceable, written contract with the employer and has left his country of origin for the U.S.*

Moreover, it is not enough that U.S. workers be offered the job at wages the employer and its peers deem adequate. If, for example, most hotels in Southern Vermont pay housekeepers $8 an hour but insufficient local workers can be found to fill the jobs, the market solution is to raise wages to attract workers from other areas or sectors, not to look for workers abroad. By allowing employers to pay foreign workers only the prevailing $8 wage, the H-2B program prevents the labor market from self-correcting, putting a thumb on the scale to tip the balance in favor of employers and their desire to keep wages low at the expense of U.S. workers.

If Congress wants to combat falling wages and incomes, it should not provide employers a convenient way to escape pressure to raise wages and benefits (or provide housing and transportation) in order to attract U.S. workers. Ideally, Congress should require that the wage offered by H-2B employers be *greater* than the prevailing wage. The U.S. Department of Labor has moved in the opposite direction, removing long-standing requirements that H-2B employers pay not just the prevailing wage, but the higher of the prevailing wage or the applicable Davis-Bacon Act or Service Contract Act wage. According to recent analyses by Gerald Mayer of the Congressional Research Service, the result has been a general lowering of the wage that must be offered to U.S. workers and paid to H-2B workers.

Recommendation: *The labor market test should include:*
1) a requirement that before resorting to foreign H-2B workers, employers offer the prevailing wage to U.S. workers, as determined by the Davis-Bacon Act, the Service Contract Act, or the 67th percentile wage for the occupation under the most recent BLS Occupational Employment Statistics Survey, whichever is highest;
2) a requirement that the minimum pay offered to U.S. workers be at least 150% of the U.S. minimum wage, regardless of the prevailing wage.[3]

H-2B and Other Guest Worker Programs Undermine U.S. Workers

As former Secretary of Labor Ray Marshall has written, "Experience in the United States and Europe shows that the short-run economic benefits of guest worker programs are more than offset by long-run social, political and economic problems. It is not good policy for a democracy to admit large numbers of workers with limited civil and

[3] It is surprising that H-2B workers may, under current law, legally work in the United States for less than the federal minimum wage. In 2005, for example, the Department of Labor certified an H-2B application for more than 1000 "circus laborers" at $250 per week, effectively less than $3.00 per hour for a 90-hour work week, at a time when the minimum wage was $5.15 per hour. See, "Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform" 16 Temp. Pol. & Civ. Rts. L. Rev. 423 (Spring 2007). Available at: **http://friendsfw.org/Advocates/Immig/Learn_Past.pdf**

employment rights."[4] The presence of workers with second-class status reduces the ability of other workers to improve their own compensation and working conditions and can actually worsen them.

The second class employment status of H-2B and other guest workers is undeniable: they cannot change employers – a fundamental right; they cannot bargain over the terms and conditions of their employment; they do not have enforceable remedies for contract violations and other abuses; and they are subject to deportation and banishment from the program if they complain.

When one group of employers employs captive H-2B guest workers who have no ability to raise their wages, it makes it difficult for workers at competing employers to improve their own wages and working conditions, since to do so might give the H-2B employer a cost advantage. If Hotel X can pay its foreign housekeepers $8 an hour with no fear of agitation or organizing, Hotel Y will have more reason to resist its U.S. employees' demands for a raise.

What happens when guest worker visas aren't available? The bargaining power of U.S. workers increases immediately. The landscape and gardening business has become a major employer of H-2B workers in recent years, and it is no surprise that in inflation-adjusted terms, the pay of landscape laborers is lower today than it was in 2000. Now, however, the unexpected loss of the additional H-2B workforce is eliciting howls of protest as employers find themselves having to offer a better deal to U.S. workers. *Lawn and Landscape* magazine reports that Ohio landscape business owner Steve Pattie had expected 30 H-2Bs: "If I lose 30 workers, somehow I'm going to try to get a workforce," he says. "I'll raise my wages and try to get workers from other companies. It's going to affect everyone."[5]

That kind of wage competition is precisely what U.S. workers need.

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[4] Marshall, Ray, "Getting Immigration Right," Economic Policy Institute, March 13, 2007, p.7; available at: http://www.sharedprosperity.org/bp186.html.
[5] Heather Wood,,*Land and Landscape*, "H-2B Special Report: Effects Will Be Felt Outside Green Industry," Nov.8, 2007.