PRIORITY WORKER PROTECTION PROVISIONS IN IMMIGRATION REFORM LEGISLATION

As the issue of immigration reform percolates in the House, there are many aspects in which the Senate-passed bill is inadequate, and the House piece meal proposals are, for the most part, far worse. It is likely that S 744, and its House counterpart, House Bill 15, represent, in most respects, the high water mark for progressive reform. S. 744, 113th Cong. (as passed by the Senate, June 27, 2013); H.R. 15 (introduced October 2, 2013).[1] In the effort to pass some form of relief for the millions of undocumented in the country, no doubt many further compromises will be demanded. While progressives generally agree that worker rights should be protected in immigration reform, it may be less clearly understood which protections matter and should be defended most vigorously. The purpose of this memorandum is to attempt to identify the most important workers' rights issues that may be in play. There are a range of other important issues that merit support, but the focus here is on immigration reform viewed from the perspective of the rights of all workers—citizens, documented and undocumented residents of the United States and workers who may be brought into the United States under one of the temporary immigrant worker programs.

The following are central and most worth fighting for:

I. Adequate means to allow U.S. and foreign workers to enforce their labor rights

Whatever rights may be provided in theory, if workers cannot enforce those rights effectively, history shows that labor protections will mainly be honored in the breach. Key provisions that would enhance enforceability are:

a. The right to sue foreign labor contractors and those U.S. employers who use unlicensed labor recruiters or who ignore violations by their recruiters in federal court for recruitment abuses

The Senate bill provides that workers who are injured by actions of foreign labor recruiters can sue those recruiters in U.S. courts for damages, and that employers, themselves, are subject to legal action if they use unlicensed recruiters. S. 744 § 3610(f)(1), p.743; § 3610(g), p.747. Since administrative enforcement of labor protections has always been weak, these are very important provisions, allowing workers to take direct action to protect themselves. We call on the House to expand these protections to allow for actions against employers who turn a blind eye to obvious violations by their recruiters.

[1] All specific references to Senate Bill 744 include the page number of the Government Printing Office's printing of this version of the Bill.

 This analysis was produced by a working group of the Low Wage Workers Legal Network composed of staff from the Northwest Workers' Justice Project, the Southern Poverty Law Center and the Texas Equal Justice Center. The Low Wage Workers Legal Network consists of 277 legal advocates in 119 programs and 23 law firms in 34 states, D.C. and Mexico City, representing marginalized workers in the new economy.

a. Assurance that foreign workers have access to U.S. courts through expanded U visa protections and by making them eligible for legal services funded by the Legal Services Corporation

In order to pursue legitimate claims of abuse, foreign workers will need to be able to stay in the United States long enough to complete legal processes. They will also need to obtain counsel in most cases. The Senate bill enhances the U-visa program better to accommodate the need to stay in the country. *Id.* § 3201 (amending 8 U.S.C. 1101(a)(15)(U)), p.652.

Under current law, only a few categories of aliens, such as permanent residents, H-2A workers and H-2B forestry workers can be represented by federally-funded legal assistance programs; most other aliens are ineligible. The Senate bill provides LSC eligibility for some workers, but not for other classifications, e.g., those on a path to citizenship (RPIs), the new W-1 and W-2 visa workers, and H-2B workers (except for forestry workers) are not eligible for federally funded services in most instances. While not a complete fix for this gap, provisions in the Senate bill allowing all workers who have whistle-blower claims to be represented by legal services are important and must be retained.

b. Clarity that promises made by employers in applying for foreign workers are enforceable by the workers affected

Employers must make certain promises to the federal government about how they will treat U.S. and foreign workers in order to obtain workers from outside of the country. Recent case law has cast doubt about whether those promises can be enforced by the workers themselves. *See e.g., Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 716-17 (E.D.N.C. 2009). The best solution would be to recognize a cause of action permitting workers to sue to enforce the assurances the employer has made. We call upon the House to make this improvement.

c. Equality of remedies for all workers for workplace violations regardless of immigration status (*Hoffman Plastics* fix)

The Supreme Court held in the *Hoffman Plastics* case that the National Labor Relations Board (NLRB) could not award back pay to a worker who was illegally retaliated against for engaging in protected collective activity but who did not have work authorization. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 146 (2002). While the breadth of this holding is not fully clear, employers argue that this doctrine applies to back wages claimed under other discrimination and anti-retaliation statutes, as well as to claims before the NLRB. This creates a significant deterrent to asserting workplace rights, since no effective remedy may be available to an undocumented worker who is harmed by illegal discrimination or retaliation, thus creating a perverse incentive for employers to hire and exploit undocumented workers who have fewer remedies to protect their rights. Defending the provision in the Senate bill that reverses the *Hoffman Plastics* holding is a priority. *Id.* § 3101(a) (amending 8 U.S.C. 1324a(a)(8)), p.519.

d. Effective anti-retaliation provisions (POWER Act)

Ultimately, enforcement of labor standards in temporary foreign worker programs will depend almost entirely upon the willingness of the workers, themselves, to come forward and provide information about what is happening to them. However, fear of retaliation and blacklisting for future work in the United States is both universal and justified. If workers can't be protected from these adverse effects, program standards will only be honored in the breach. The whistle blower protections of S 744 are vital. *See e.g.*, *id*. § 3610(h), p.748.

II. Regulation of the foreign labor recruitment system so that it is less abusive

A main cause for the vulnerability to exploitation of foreign workers (which undermines the labor standards of U.S. workers) is that temporary foreign workers so often arrive in the United States subject to oppressive debt imposed by labor recruiters in the home country in order to secure a work visa. These recruiters commonly charge illegal fees for recruitment or for costs to get to the job site. Since most workers can't pay these fees in advance, they are often forced to borrow from loan sharks, frequently at exorbitant interest, or to pledge family property as security. No matter how bad conditions at work in the United States turn out to be, foreign workers often feel compelled to stay on the job until these debts can be paid. Since, under current law, the worker may only be employed at the job for which he was recruited, this debt creates a *de facto* form of indenture. However, for the most part, foreign recruiters function beyond the reach of current U.S. law. The following provisions would address the problems presented by the foreign recruiting system:

a. Licensing and bonding of foreign labor recruiters.

S 744 requires that recruiters of workers abroad to come to work in the United States be licensed to carry out that function. *Id.* § 3605(a), p.730. A part of the licensing process would be to agree to be subject to the jurisdiction of U.S. courts and to post a bond to secure lawful operations. *Id.* § 3605(c)(7), p.733; *Id.* § 3606(a), p.736. These provisions would go far in affording some ability for injured workers to be compensated by U.S. courts. For this system to work, however, U.S. employers must only use licensed and bonded recruiters. The incentive to do so is provided by making the employer, itself, liable for recruitment abuses if the employer uses an unlicensed recruiter, as is adopted in S 744. . *Id.* § 3610(b), p.740; § 3610(c), p. 742; § 3610(g)(2), p.747. Moreover, the employer who ignores obvious violations of its recruiter should also be subject to liability in federal court.

b. Outlawing recruitment fees for people seeking to work in the United States.

Although charging workers for fees in the H-2B visa program is barred by DOL regulations, the implementation of these regulations has been held up by litigation over the authority of the Secretary of Labor to promulgate rules concerning the H-2B program. Provisions in the Senate bill to outlaw such fees should be protected to avoid subjecting foreign workers to debt-related coercion. *Id.* § 3604, p.729-730.

c. Clarity that U.S. employment discrimination laws apply to the recruitment of foreign workers to work in the United States.

Foreign labor recruiters should not be able to discriminate against women, ethnic minorities, people older than 40, or other protected groups, in hiring for U.S. jobs. Case law in the Fourth Circuit suggests that anti-discrimination laws like Title VII do not apply in the recruitment of foreign workers abroad to enter the United States to work. *Reyes-Gaona v. N. Carolina Growers Ass'n*, 250 F.3d 861, 863 (4th Cir. 2001). This not only is unfair to certain affected foreign workers, but undermines the protection of U.S. workers under laws prohibiting discrimination. U.S. discrimination laws should not have a loophole opened simply by moving hiring decisions onto foreign soil. The provision of S 744 overturning that decision should be defended strongly. *Id*. § 3603, p.728.

d. Portability of foreign workers' visas so they can leave a bad job.

Generally, under foreign worker programs, the alien worker can only be employed by the employer who sponsored the visa. If employment conditions are bad, this forces workers into a very difficult decision. If the worker leaves the job, he cannot legally remain or work in the United States. This lack of job mobility is an additional source of recruitment abuse, since it allows recruiters to deliver a captive work force that cannot leave to seek more suitable work. S 744 contains limited provisions to make some of the new temporary worker visas "portable," *i.e.* the worker can leave work and obtain other employment. *Id*. § 4404(a) (amending 8 U.S.C. 1184(n)), p.987. This limited opportunity to seek adequate employment should be defended, and broadened, if possible.

III. Protection of U.S. workers' jobs, wages and working conditions.

Much of this paper has focused upon protection of those coming to work in the U.S. temporarily. The exploitation of the most vulnerable inevitable also undermines the circumstances of all workers. Therefore, in a sense, all of the suggestions above relate to protection of U.S. workers. The following additional provisions are important specifically to preserve the jobs and working conditions of U.S. workers:

a. Requirement of rigorous recruitment of U.S. workers prior to importing workers from other countries

The basic assumption underlying all of the programs designed to allow U.S. employers to hire workers from abroad is that there are jobs in the U.S. economy for which there are not sufficient numbers of U.S. domestic workers available. Prior to gaining access to foreign workers, therefore, employers must be required to make reasonable efforts to advertise the jobs and to recruit U.S. workers. *Id.* § 4703(a) (specifically section 220(2)(B)(i) as added to 8 U.S.C. 1181 et seq.), p.1077. In practice, recruitment of domestic workers has been *pro forma*, with a clear preference for hiring compliant workers from outside of the United States. Effective recruitment is the lynch-pin of protection of U.S. workers.

b. Requiring employers who want to hire foreign workers to offer the jobs first to U.S. workers at a fair wage set high enough not to lower U.S. wages and working conditions ("prevailing wage")

Opportunity for transnational workers to be employed in the United States to fill jobs that are needed in the economy for which U.S. workers are not available is sound policy. However, use of foreign workers should not be allowed to replace willing U.S. workers or to depress U.S. wages and working conditions. Thus, the wage that must be paid for jobs subject to international recruitment is critical. The wage provisions of S 744 already represent very significant compromise, and should not be allowed to slip further. *Id.* § 4211(a)(2) (amending 8 U.S.C. 1182(p)(1), p.917 (in H-1B context); *id*. § 4211(a)(2) (amending 8 U.S.C. 1182(p)(4), p.919 (in H-2B context); *id.* § 4703(a) (specifically section 220(e)(1)(C) as added after 8 U.S.C. 1181), p.1073-74 (in W context).

c. Incorporation of safeguards in any electronic verification system so that workers who are mistakenly or unlawfully denied a job can correct the problem without losing the chance to be hired

The current error rates in the existing e-verify program, while statistically small, when multiplied by the huge ramp up in users when the program becomes mandatory, will mean that thousands of qualified workers will be denied work based upon erroneous e-verify reports that they are not work authorized. A clear, efficient means to challenge such a report that protects the right to work in the course of correction of errors should be a part of widening the requirement to use this system.

d. Review of foreign worker applications and enforcement of foreign worker visa program standards by the Department of Labor

The Department of Labor has decades of experience and significant expertise in testing the U.S. labor market for the need to import workers in order to avoid adverse effects on U.S. wages and working conditions. The Department of Homeland Security (DHS) has a very different mission, focus and history. Yet much of the task of implementing the future flow programs of S. 744 is delegated to DHS. *See e.g., id.* § 4703 (specifically sections 220(e)(2)(C) (regarding recruitment requirements), p.1078; 220(g)(2)(B) (regarding numerical limits), p.1085; and 220(n) (regarding handling complaints by workers), p.1101; as added to 8 U.S.C. 1181). The role of the Department of Labor should be preserved, and the Secretary of Labor should be provided with clear rule-making authority regarding the determinations of whether U.S. workers are available and what conditions are necessary to avoid depression of wages and conditions of U.S. workers.

e. Reasonable limits on the number of work visas to maintain a functional labor market

While a key aspect of immigration reform must be a means for those desiring to come to the United States in the future to work or live to be able to do so in an orderly and lawful way, unless reasonable limits are set, U.S. working conditions will inevitably deteriorate due to an oversupply of labor.

IV. Include foreign workers, including long term workers in the new temporary work programs, on the path to citizenship and make requirements for citizenship reasonable

The American dream has always encompassed the idea that if a person was willing to work hard, contribute to society and be a good neighbor, it was possible to earn a place in our country. S. 744 provides some opportunity to do so, but poses a very arduous and difficult path that simply will not be possible for many. The need to stay employed at all costs to avoid falling off the path to citizenship will create a new form of vulnerability to exploitation that is likely to force workers to accept illegal conditions rather than risk losing their jobs in retaliation for enforcing their rights.

a. Any work requirement should match the realities of work for low-wage workers: the continuous work requirement for the 11 million on the path to citizenship should be expanded to allow for gaps in employment of up to 180 days rather than the 60 days allowed in S. 744

S. 744 allows aspiring citizens to continue on the path to citizenship so long as they are not unemployed for longer than 60 days at any time. *Id*. § 2101(a) (specifically section 245B(c)(9)(B)(i)(I) as added to 8 U.S.C. 1255 et seq.), p.165. We commend Congress for acknowledging that unemployment too often is a fact of life for many people. However, 60 days is too short of an allowance for unemployment before a person is barred from continuing on the path to citizenship. In August 2013, the average unemployed adult could not find a job for 37 weeks -- 259 days – according to the Bureau of Labor Statistics. Even in the best of times in recent years, average weeks unemployed far outstrips the Senate bill's 60 day allowance. The shortest period of average unemployment during the last decade was in December 2006, when the average unemployed adult found a new job in 16.1 weeks, or 112 days.[2] Under the Senate bill's expansion of the temporary foreign worker programs – and even more so under the vastly expanded temporary worker programs in the House bills – these aspiring citizens will face greater competition for jobs from hundreds of thousands of temporary workers being imported by employers. We call on Congress to allow for the more realistic amount of 180 days' gap in employment before someone would be shunted off the path to citizenship. As it stands, many RPIs seeking to remain eligible for citizenship will stay in bad jobs for fear of not being able to find another job within the 60 day window.

[2] Survey of average, seasonably adjusted unemployment from 2003 to 2013 on Table A-12. Unemployed persons by duration of unemployment, United States Department of Labor, Bureau of Labor Statistics, *available at* http://www.bls.gov/webapps/legacy/cpsatab12.htm.

b. Exceptions for unemployment due to factors beyond the worker's control recognized in the Senate bill should be preserved

Under S. 744, Registered Provisional Immigrants on the path to citizenship must extend their status as RPIs at least once before they will become eligible to apply to adjust status to legal permanent resident. At that point, and after 10 years on the path to citizenship, when RPIs petition to become legal permanent residents, S. 744 recognizes limited exceptions for people who could not work because they were in the hospital, caring for a child, or otherwise prevented from working by forces outside their control. *Id*. § 2102 (a) (specifically section 245C (b)(3)(D)-(E) as added to 8 U.S.C.1255 et seq.), p.184-185. These limited and sensible exceptions to the continuous work requirement should be preserved.

c. Unemployment caused by retaliatory firing should not count against eligibility.

A key goal of comprehensive immigration reform is to place immigrant workers in the position of being able to insist on legal working conditions, both to protect immigrants from exploitation, and to maintain working conditions for all workers. Given the likely competition for jobs that will result from other provisions of S. 744, workers would have to think long and hard before jeopardizing their lawful status by complaining about unlawful conditions and losing their job as a result. If they cannot find other work within 60 days they would be left out of eventual legalization of their status.

d. Workers must be allowed to pay the fees, fines and back taxes over a reasonable period of time without losing eligibility

Most of the prospective RPIs are working in relatively low wage jobs. S. 744 requires a series of fines and fees and provides that all back taxes and penalties be paid in full in order to qualify for permanent legal status. The costs will be crushing for most, and an insurmountable barrier for many. At a minimum, RPIs should be allowed reasonable payment arrangements to satisfy these obligations.

e. Protecting a workable path to citizenship for foreign workers

The Senate bill creates a very limited path to citizenship for foreign workers who have W visas through a new "merit-based" visa system. *Id*. § 2301(a)(2) (specifically section 203(c)(5) as added to 8 U.S.C. 1153) p.354; § 4401(b), p. 979 (citing 8 U.S.C. 1184(h)). The merit-based visa, which grants LPR status and would be accessible in the fifth year after enactment of S. 744, awards points to applicants based on how well they match with certain factors deemed desirable. Those individuals with the most points earn the visas. The Secretary of Homeland Security would allocate between two tiers that consider somewhat differing factors. The first tier grants points based on education, employment experience, employment related education, entrepreneurship, working in a high demand occupation, civic involvement, English language proficiency, family relationships, age and country of origin. *Id.* § 2301(a)(2) (adding 8 U.S.C.

1153(c)(4)), p.351; § 2301(c)(4), p. 351 (citing § 201(e) of 8 U.S.C. 1151(e)); § 2301(c)(5), p. 354. The second tier grants points based on employment experience, special employment criteria, working as a caregiver, exceptional employment record, civic involvement, English language proficiency, family relationships, age and country of origin. *Id.* § 2301(a)(2) (specifically section 203(c)(5) as added to 8 U.S.C. 1153), p.354. 60,000 visas will be available annually in each tier as an initial matter, and the Secretary can expand the program based on demand and unemployment rates. *Id.* § 2301(a)(1) (amending 8 U.S.C. 1151(e)(1)(A)), p. 347; *id.* § 2301(a)(1) (amending 8 U.S.C. 1151(e)(3)), p.348; § 2301(e) (citing § 201(e) of 8 U.S.C. 1151(e)), p. 349.

This program takes an important step in giving temporary foreign workers the power to self-petition for a visa with a path to citizenship. Low wage workers currently are not eligible for any worker-initiated employment-based immigrant visas. S. 744's merit-based system begins to fill in this gap. This process is not perfect; the limited number of visas available through this merit-based system is a concern, and the use of employment criteria will keep some employees from complaining about low wages or dangerous work conditions in order to satisfy certain merit-based factors. However, this path to citizenship for foreign workers is worth fighting to keep.