

An Analysis of the Labor Provisions of McCain/Kennedy

September 2005

The undersigned authors of this analysis bring the unique prospective of a collective 136 years of legal experience representing immigrant workers, mostly in migrant legal services projects. A significant aspect of this work has involved litigation and advocacy with respect to the H-2A and H-2B temporary worker programs. Experience with these programs, and with the implementation of the Immigration Reform and Control Act of 1984, offers significant insight into how the H-5A and H-5B programs proposed in the McCain/ Kennedy bill might actually work in the real world. This analysis of the labor provisions of that bill was prepared to share those perspectives with labor, immigrant advocacy organizations and other allies in the comprehensive immigration reform movement.

1. An analytical framework

The McCain/Kennedy bill probably represents the best opportunity in many years, and perhaps for many years to come, for a broad, comprehensive and generous reform of the broken immigration laws that are causing so much pain and hardship in immigrant families and communities across the country. It contains two very significant labor law reforms that we must take quite seriously.

The first, of course, is the general legalization of most of the immigrants who are now working and living in the United States, coupled with the operating principle that future immigrants will be afforded a reasonable avenue to obtain legal status to work. Just being in legal status will, all other things being equal, no doubt boost the ability of such workers to defend themselves and to improve their wages and working conditions. When coupled with provisions for family unification and a path to citizenship, these provisions offer the prospect of a time in the not-too-distant future when immigrant communities will have a voice in the affairs of this country commensurate with their numbers and the contributions they make to our society.

The second important reform is the principle that worker visas will be portable, belonging to the worker, not her employer. The significance of this difference from other models of temporary worker programs for non-professional workers cannot be gainsaid. It offers the worker options. He can organize, complain or just vote with his feet, when conditions with an employer are substandard. This is a very significant reform.

Because of these factors, and because the bill would alleviate suffering of workers in the United States who are now undocumented, we want to like this bill. However, many who have worked for years with temporary worker programs are left with a queasy feeling that, for all of its strengths and benefits, this act falls short of its goal of improving the lot of immigrant and other workers in this country. Because the bill is so attractive, it seems important to analyze carefully and to state clearly the shortcomings of this legislation so that it can be improved, if possible, and if compromise is necessary and desirable, the trade-offs are clearly understood by policy-makers, and, above all, by ourselves.

It is in this spirit that we undertake the task of clarifying the aspects of McCain/Kennedy that are troubling to some seasoned immigrant worker advocates. We acknowledge from the outset the important contribution the negotiators of this compromise have made.

Traditionally, temporary worker programs have sought to protect wages and working conditions in the United States by restricting the number of new entrants into the labor market to certain jobs for which there were not sufficient available workers, and by regulating the wages and conditions offered by employers of workers admitted from other countries to prevent undermining the prevailing conditions. The fundamental theory underlying McCain/Kennedy's new approach to labor exchange appears to stem from the conclusion that it is either impossible or undesirable, or both, to restrict unlawful entry into the United States' labor market, or to protect prevailing U.S. wages and working conditions through regulation of employers of non-native workers. Instead, by giving new workers the same choices as to how and for whom they work, it is hoped that they will be able to prosper in the free market. This notion is appealing when one looks back at the utter failure of border control measures or the regulatory schemes in programs like H-2A and H-2B or the *Bracero* program.

However, three fundamental aspects of the bill are of serious concern.

1. No one prospers in a free market that is so flooded with low cost competition for the goods or services they offer that prices plummet to the level of the lowest cost competitor in the world. The bill seems to be based upon the idea of legalizing the immigrant workers now in the economy, and accepting that the current level of about 400,000 workers a year will enter in the future either legally or illegally, and so provides visas to permit legal entry of this level of future flow workers. However, rather than merely accommodating the current state of affairs, the bill actually contains incentives for employers to churn their labor forces in ways that will likely stimulate far wider immigration, both legal and illegal. This flood of new workers is likely to swamp the free-market advantages workers gain through legalization and portability.
2. While the ideal is for new workers to have the freedom to make choices about their work, this freedom is illusory. The structure of the future flow immigration program under McCain/Kennedy ends up, in some ways, with the worst of both worlds. Because of what they must do to become and remain legally authorized, workers will find themselves without the practical ability to exercise choices in the free market, but also without the protections of more traditional temporary worker programs.
3. Finally, the labor protections that are included in the bill cannot actually be enforced under proposed mechanisms.

The remainder of this paper will look in greater detail at each of these issues and, where possible, address alternatives.

2. Inducements to churning and labor oversupply. \$5.15 for all non-professional work?

It is estimated that about 400,000 workers come to the United States each year to work without authorization. Hence, McCain/Kennedy includes this number of visas for H-5A workers each year. The bill's triggers for higher visa numbers, depending on demand, can quickly escalate the number of new workers (we are talking here about those who are not now working in the United States, who would be eligible for H-5B visas). Within a few years, it is possible that this provision could admit some 4,000,000 new workers beyond the work force that is currently in the country, since each visa is good for three years, with a renewal for another three year term.

Potential Size of the H-5A Temporary Guestworker Program
With 20% annual increase

	Potential H-5A Visas in Current Use as of:					
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
New Yr 1 Visas	400,000	400,000	400,000	400,000	400,000	400,000
New Yr 2 Visas*		480,000	480,000	480,000	480,000	480,000
New Yr 3 Visas*			576,000	576,000	576,000	576,000
New Yr 4 Visas*				691,200	691,200	691,200
New Yr 5 Visas*					829,440	829,440
New Yr 6 Visas*						995,328
Cumulative Total Visas	400,000	880,000	1,456,000	2,147,200	2,976,640	3,971,968

* Assumes a 20% increase in the number of H-5A visas issued each year. (For the first fiscal year of implementation, 400,000 H-5A visas will be made available for use within this program. In subsequent fiscal years, the number will adjust according to market demand. If the total number of visas allocated for that fiscal year are allotted within the first quarter of that fiscal year, then an additional 20 percent of the allocated number shall be made available immediately and the allocated amount for the following fiscal year shall increase by 20 percent of the original allocated amount in the prior fiscal year.)

This is bound to have a large impact on availability of work for all workers who do not have advanced education.

One could plausibly argue that this would occur anyway due to illegal migration. But current new migration of unauthorized workers comes overwhelmingly from Mexico, and to a certain extent, elsewhere

in Central America. However, the proposed H-5A visas are not particularly tied to any country of origin. Therefore if the “free market” reforms produce the desired effect of permitting newly admitted workers and those newly in lawful status as H-5B workers to become more assertive as to conditions of work, employers could avoid their demands by seeking even more desperate workers from ever poorer parts of the globe, who could be offered the incentive of work in the U.S. and eventually, the chance to immigrate. These advantages may well make the costly trip to the U.S worthwhile.

To the extent that world economic competition causes some of the annual supply of 400,000 visas to be used in new sending countries, those visas would not be available to absorb the Mexicans and Central Americans who could be expected to come to the United States on their own under current law. Will the bill’s changes in enforcement, and the opportunity to stand in line for a visa, be sufficient to deter those workers from nearby countries who are excluded by the cap from coming anyway on their own without papers? We can’t really know, but the history of efforts to stop illegal migration across a three thousand mile border does not bode well.

Further, the H-2A and H-2B programs have produced a quasi-criminal army of recruiters in Mexico, Guatemala, and other countries who profit from selling the right to work in the United States, on an annual basis, to desperate workers. It is predictable that this system will swing into gear to recruit new H-5A workers, especially since the new system would leave recruitment of participants in the hands of employers. Since the opportunity to profit would inure only in the first year (since workers can return on their own thereafter) this system will be biased in favor of introducing new workers each year. Numerous examples of abuses exist under the current H-2A and H-2B programs;¹ these abuses will only increase with a program the size and nature of the H-5A program.

These factors are likely to conspire to cause churning of workers in non-professional occupations, with very little job security and too many workers chasing too few jobs.

Traditionally, temporary labor programs have attempted to protect the wages and working conditions in the U.S. economy not only by limiting the numbers of new workers, but by mandating minimum conditions of employment that meet or exceed those conditions prevailing in the industry and area of employment. This program does not have an adverse effect wage rate, as in H-2A, or even much of a prevailing wage rate requirement. (The adverse effect wage rate is the average hourly rate that all field and livestock workers made the prior year in the region of employment, the prevailing wage rate is the most

¹ For example, a number of lawsuits have alleged that recruiters require that employees pay large recruitment fees and/or pledge collateral with the employer’s representatives in order to be hired under the H-2B programs. *Perez-Perez, et al. v. Progressive Forestry Services, Inc., et al.*, U.S. District Court for the District of Oregon, Civ. No 98-1474-KI (D. Or.) (1998); *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas; Case No. 03-6002 (2003); *Escolastico De Leon Granados, et al. v. Eller and Sons Trees Inc., et al.*, Northern District of Georgia, Case No. 1:05-CV-1473 (2005); *Hugo Martin Recinos-Recinos, et al. v. Express Forestry, et al.* U.S. District Court for the Eastern District of Louisiana, Case No. 05-1355 (2005).

common rate paid in the particular job in the industry and area. Both serve to help protect the wages of all workers from being adversely affected by use of temporary workers from other countries.) There is only the requirement that the H-5A worker be paid the same as others similarly situated. There is nothing, aside from the economic counter pressure of workers' demands, to keep wages from drifting steadily downward to the minimum wage.

The lack of a prevailing wage standard will encourage recruitment of new workers at the lowest level and will drive down wages. Protections against wage discrimination between workers will only encourage employers to discharge or fail to rehire current staff in order to reduce wages for everyone. Further, the virtually limitless availability of cheap workers will promote transfer of work from direct hire to labor contractors, who then can hire their new crews at the lower rate at which foreign workers are hired.

These factors could be mitigated.

The law could require that any employer who employs or knowingly uses either (1) H-5A workers who were recruited into the country by it or its agents, (2) H-5A workers who are in their first U.S. job or (3) an unauthorized worker be required to pay all workers in the employ of the enterprise in that work classification an AEW or prevailing wage rate for the work in question. The rate could be calculated as an average using the OES data set and be published by the Department of Labor. To be at all real, this rate must be enforceable by the workers through a direct cause of action, with a significant penalty, payable to the workers, for noncompliance. This would reduce incentives for an employer deliberately to churn his work force to reduce wage rates

Further, to maintain U.S. working conditions, certain fundamental employee rights, such as workers' compensation, could be guaranteed to all workers, no matter where they work.

The provision that H-5A workers can't be used during a strike or lockout is fine as far as it goes. However, similar provisions in existing law have been read very narrowly to apply only to the direct replacement of workers who are currently on strike or being locked out. To prevent use of this program to avoid worker demands for better conditions the strike or lockout protection could be broadened to cover the replacement of workers who were discharged during the course of a labor dispute.

The bill currently contains a requirement of preference for U.S. workers, prior to hiring an H-5A worker. To prevent replacement of last year's immigrant workers with a new group this year as a way of avoiding worker demands, to treat newly legal workers equivalently to other workers and to avoid bringing in new workers when suitable workers are in the country already, this preference could be extended to include any authorized worker currently in the country, including H-5A's and H-5B's. Where United States workers who have job preference are referred to jobs, but not hired, the employer could be required to report the basis for rejecting the worker.

A provision prohibiting fees for recruitment or transportation of newly recruited H-5A workers would help avoid the imperative for the recruiter industry in Mexico and other sending countries to try to continue sending workers in excess of need in order to profit from doing so. Presumably, if the workers couldn't be charged (though enforcement will be a challenge), then employers would pay for recruiting, and there would be some incentive not to pay for recruiting more workers than needed.

Successful measures to control illegal immigration at the border will require collaboration with sending countries, especially Mexico. There are reasonable grounds to believe that the prospect of legal status for its transnational workers might induce such collaboration. The bill somewhat vaguely refers to bilateral agreements with sending countries, but does not require them. H-5A workers should be admitted only under terms of bilateral agreements with sending governments that require collaboration on border control and compliance with the laws of the sending government.

3. Can new workers really choose?

There are a number of aspects of the program that would likely, as a practical matter, severely limit the mobility of H-5A workers, and, thus, tend to indenture them to their original employers, rather than allowing them to become the free agents in the market that the bill envisions.

Putting control of who can obtain a visa under H-5A in hands of the foreign recruiters for employers is an invitation to exploitation.

First, is the requirement that, to obtain a visa, an H-5A worker would have to procure a job offer from abroad from a U.S. employer. While matching the admission of a worker to an available U.S. job isn't necessarily a bad idea, in light of the oversupply of labor issue discussed above, placing the choice of which workers are able to apply for the visa in the hands of employer representatives operating in other countries is a recipe for worker abuse. Workers will be charged under the table to get on the list. "Activist" or "untrustworthy" workers need not apply. This provision will empower the recruitment networks in Mexico and other countries to make the most important decisions in workers' lives. The cost will be dear. Could selection of who gets a visa to fill positions that employers say they need be placed in neutral hands? Perhaps allotted through a lottery system?

The penalty fee provisions of the bill will cause dependence and exploitation.

The "penalty" fees are prohibitively expensive and will create even greater opportunities for exploitation of workers by allowing employers to front the original fee and recoup it from wages, probably at steep effective interest rates. During the first few weeks of work, this is likely to result in little net income, and thus greater vulnerability. It may also create an alternative coyote system with recruiters fronting the

fee, and selling the workers into the market. Those workers who are able will likely incur debt, often at usurious rates of interest and secured by family assets (or personal safety of family members) in the home country. The need to repay these debts makes workers desperate and dependent.

If H-5A workers are recruited in Mexico by U.S. employers, it is illegal as a matter of Mexican law to charge workers fees for immigration expenses; these are the responsibility of the employer under Article 28 of the national Ley Federal de Trabajo. Though US recruiters routinely ignore this provision, it is a little peculiar to say that we are trying to “legalize” the system of labor exchange with a system that overtly assumes that Mexican labor protections will be ignored. Similarly, Guatemalan law requires that those recruiting in Guatemala pay all transportation costs of workers from their home to the place of work. It further requires that employers post a bond sufficient to cover the costs of repatriation of the worker back to Guatemala and to cover any claims made. Article 34 of Decree No. 14—41 of the Congress of the Republic of Guatemala. Again, a system that is predicated on violation of other countries’ laws is clearly problematic.

Even for H-5B workers currently in the country, the need to find the resources to pay the very significant penalties will force great dependence upon employers who are willing to finance an application. Then, the need to repay debt will make it very difficult for the worker to be able to leave work or risk losing it in order to assert workplace rights.

If the imposition of these fees on desperately poor workers is a political necessity, some steps could still be taken to soften their impact. Since raising this money is such a burden without benefit of employment, and most likely will be paid out of wages earned in the United States, why not make the penalty payable over time? Compliance would be largely assured, since a failure to pay would put the worker out of status, and end the visa. The rate of payment might be tied to current earnings, so the worker can change jobs (or risk being fired for asserting work rights) without falling out of status because of not being able to make a payment.

If workers are not permitted to pay over time, the law should make it explicit that deduction resulting in payment below applicable minimum wage (FLSA or state) is illegal. *See Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). Another alternative would be to prohibit garnishment or offset against future wage payment to recoup advances of money to pay the penalty.

The Need to Stay Employed to Remain in Status will Significantly Reduce the Labor Mobility of H-5A workers

H-5A workers cannot remain unemployed for more than 45 days. After that time the worker must leave the U.S., and if she does not do so, is barred from future participation. This time period is not extended due to injury, retaliation or other job-related termination.

A 45-day period will exclude most farm workers, many construction workers and landscapers. It is not clear whether this would apply to striking workers. Given that the average current period of unemployment is many weeks longer than 45 days, workers will be reluctant to risk retaliatory firing for collective action or otherwise asserting rights. Workers with occupational injuries would not be able to access treatment and vocational rehabilitation services in the United States. Under current language, an employer could discharge an employee who complains and the employee will have to leave before any agency could possibly process the complaint, and well before civil litigation could be heard. There would be an incentive to delay settling legal claims and other workplace disputes until the worker is forced to leave the country.

Possible solutions to this problem would be to ensure that any lost time due to industrial injury does not count against the 45 days until a workers compensation claim is finally denied. (A similar provision is in AGJOBS). Similarly, unemployment would not count if the worker has filed an administrative or civil complaint filed alleging retaliation, discrimination, underpayment of wages, etc., until a finding of no merit. The bill could establish a W (“Whistleblower”) visa available to workers that file claims. Extending the limit to 90 days would bridge a lot of seasonal work.

Workers who are Favored by their Employer Should not Move to the Front of the Line for Receiving Permanent Status.

The bill seems to allow employers to petition for permanent status for their workers immediately, while a worker is able to petition on her own only at the end of the second, three-year visa. Employers should not be able to endow workers with a lawful permanent resident visa earlier than the worker could otherwise apply. This creates undesirable dependence on a single employer, and would allow employers leverage to manipulate workers who will want early consideration for the sake of immigrating family members. While threats of retaliation about this are prohibited, this protection only takes effect after the petition is filed. An employer could promise to apply after a period of “loyal” service, and keep workers hanging. Setting a fixed time at which any worker who has met the program’s requirements can apply would reduce this risk. If employers are allowed to petition early, then the worker’s union should also be given standing to do so.

The new annual electronic employment verification system is likely unworkable and expensive to extend to all workers, and if limited to these immigrant workers, will likely create even more discrimination.

Anyone who has had a credit card understands that data systems, even in the age of computers, are not infallible. Some workers who are eligible to work will not be listed or will not be properly listed in a manner that matches the official record. This will cause workers difficulty in staying in and seeking

employment. If electronic verification is limited to H-5 workers, the extra burdens for employers may result in discriminatory treatment. Expansion of annual verification to all workers is the first step to a national ID, and may create even more incentives to work off the clock and thereby both increase minimum wage and overtime violations and reduce tax revenues to states and the federal government. The Social Security Administration is not equipped to handle this burden, nor should resources be transferred to it to do so when it is already having difficulty meeting its statutory obligations. Workers in states using SSA to do a secondary hand verification in instances of “suspected” identify theft wait months for correction of records and meanwhile are not eligible for unemployment compensation; the comparable impact if this verification were expanded to all workers annually would be for workers to be ineligible to work. H-5A workers would be required to leave the country after 45 days.

The benefits of this system are likely to minimal, as compared to employer costs and the burdens on individual workers and the public’s rights to privacy. The burden must be on the employer and SSA. If verification comes back negative, there can be no immediate obligation for the employer to terminate. An employer wanting to terminate on this basis must be required to ask for secondary confirmation. An appeal process complying with due process must be created. If the record still comes back invalid, and the worker files an appeal or request for correction of records, she must remain work-authorized and the employer prohibited from using this basis to terminate employment until SSA affirmatively decides that the worker is not authorized. Sanctions for employers’ misuse of system, recoverable by the worker would help prevent discrimination and abuse.

4. Will the labor protections find meaningful enforcement?

Administrative Remedies are Inadequate and Meaningful Enforcement By DOL Is Unlikely Given Current Procedures and Staffing.

In the draft bill, most—if not all—enforcement authority is vested in the Department of Labor. Its available enforcement capabilities are inadequate for existing responsibilities and prioritized for other issues.

Further, under the bill, DOL would only have investigative authority after it concludes that there is reasonable cause to do so. This puts the burden on the employee/complainant to establish proof before the an investigation even begins. Labor legislation has long recognized that workers are not on an equal footing with employers, particularly when it comes to records and burdens of proof. It will be virtually impossible for a worker to come forward with proof of disparate pay, discrimination or retaliation based on anything other than her own statements and hearsay evidence provided by other workers. Access to employer records is critical and can only be guaranteed through an administrative process that requires at least preliminary investigation by DOL, or vests in the worker the right to subpoena records.

To the extent that DOL enforcement is a part of the system, the burden of proof must ensure that DOL will investigate any claim filed. This would require an express administrative process that guarantees

an administrative hearing on any *bona fide* claim filed. A possible model might be the Office of Special Counsel process for citizenship discrimination or an administrative hearing process similar to those under some state laws. A fraud enforcement unit that would randomly audit employers and conduct audits based on tips and confidential complaints would increase compliance. A true commitment to these protections would include an appropriation specifically for enforcement of the Labor Protections included in the bill.

Due to inadequate staffing and resources, it is unlikely that agency enforcement will ever prove to be effective, so the establishment of a private right to enforce the protections of the statute discussed below is the only meaningful mechanism for enforcement.

The Bill Lacks Any Monetary Penalties Payable to Workers.

Any system of enforcement will depend heavily for its success on the participation of individuals affected by violations in enforcement action. Yet there are no incentives for workers to bring forward complaints of violation. Civil penalties against violators do not go to the injured parties. Since wage loss will be relatively low for unskilled workers, and other injuries hard to quantify, effective enforcement will require institution of civil penalties, collectable by injured workers, for violation of labor standards. Workers who file and follow-through with complaints against their employers lose time from work and often have to incur travel and other costs that they cannot recoup through an administrative process. Employers rely on the fact that the cost-benefit analysis of pursuing such a complaint does not warrant doing so. A relatively small penalty payable to the successful complainant would both compensate workers for the loss of use of their wages or benefits and at least partially offset the costs of pursuing a claim.

The Key to Effective Enforcement of Labor Standards Will Be the Creation of an Express Private Cause of Action That Can Be Asserted in State or Federal Court Coupled with Access to Private Attorneys and Legal Services Advocates.

Express Creation of a Private Right of Action Should be Included.

As noted above, the administrative remedy included in the bill is not likely to provide a process that either protects the workers or punishes employers that violate the law. Even if it is re-tooled it will only be a complete remedy if it is augmented by a private right of action. Recent judicial decisions make it doubtful that such a cause of action would be inferred under current language. This would leave both U.S. workers and new immigrants dependent upon an under-funded, overburdened administrative agency to process their claims. The burdens on the agency will be increased by the fact that many low wage workers are not English speaking, change their jobs and residences frequently and often cannot be reached by telephone. An express cause of action would allow both U.S. and H-5A workers access to the courts.

Meaningful Access to Legal Representation Is Critical to Enforcement.

In order to have access to the legal system, workers must have access to lawyers willing to represent them. A right to court-awarded attorneys' fees would help attract private attorneys. However, in light of the relatively small recoveries that workers will be eligible for, it is unlikely that there will be an adequate number of private attorneys willing to take these cases. There is no principled argument for excluding these workers from eligibility for representation by legal services programs that receive federal funding. They are working legally in the country and pay taxes to support the services. As the Erlenborn Commission concluded more than five years ago, immigrant workers are as needy and deserving of access to these services as others. Yet, because of the general exclusion of aliens in the country on temporary visas from LSC eligibility, H-5 workers will likely be determined to be ineligible, unless eligibility is specifically included in the bill.

The status of H-2B workers is illustrative in this regard. Unlike H-2A workers, H-2B workers are not eligible for federally funded LSC services. Since many states have no non-federally funded legal services programs, most H-2B workers have no practical legal recourse if their employer violates labor laws. In practice, the H-2B program is rife with abuses. The workers are particularly vulnerable to abuses because they tend to be isolated, transient, non-English-speakers unfamiliar with U.S. laws. Unlike H-2A workers, there is no government entity that has a legal obligation to inspect H-2B housing. In most states, there is no governmental entity that sees the protection of the wages and working conditions of H-2B workers as one of its core missions. The wage and hour laws applicable to these workers are routinely violated by employers.

H-5 workers must be guaranteed reasonable access to the courts, regardless of where they are living. Some courts have been unwilling to accommodate workers who have had to return to their country of origin and have issued orders requiring that they must appear for deposition or trial in the jurisdiction or face default. Thus, provisions for allowing workers to remain and work in the U.S. pending the resolution of their administrative or judicial complaints, or to reenter the country to pursue their claims, are imperative. The bill's sole provision in this regard is limited to length of stay permitted for H-5B and H-5A visas. However it is not uncommon to find that complaining workers are unlawfully discharged and/or blacklisted after filing a complaint and the 45-day limit discussed above would result in their having to leave the country if they are unable to find work relatively quickly after their termination. No provision is made to enable workers who have left the country to return easily to give testimony or otherwise pursue their claims.

Additional Protections Are Necessary to Prevent Exploitation Through Use of Labor Brokers

There has been a dramatic increase in the use of labor brokers or contractors in the last decade spawned in part by a desire to eliminate the responsibility for compliance with labor and immigration laws. Workers in industries such as agriculture, janitorial services, data entry, and garment manufacturing are less

and less likely to be directly employed by the company who is benefiting from their labor. This trend will be reinforced by the H-5A program and its reliance on recruitment outside the U.S. Provisions of the bill regulating the use of foreign labor recruiters appear to be drawn from the Migrant and Seasonal Agricultural Workers Protection Act's regulation of farm labor contractors, 29 U.S.C. § 1801 *et seq.* The history of that legislation is instructive. Predecessor statutes were completely ineffective until liquidated damages provisions, enforceable by a private right to sue, with penalties available not only from labor brokers, but also from those who used unlicensed contractors or otherwise violate the act.

AWPA and its predecessor statute, the Farm Labor Contractor Registration Act, Pub.L.No. 88-582, 78 Stat. 920 (1963) (hereinafter, "FLCRA"), were enacted against a backdrop of widespread abuse of migrant laborers, and inadequate state remedies to protect their interests. See, *Migratory Labor Bills: Hearings on S. 521 and Other Bills Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. (1963)*. When FLCRA was amended in 1974 to create a private right to sue for persons aggrieved by violation of the act, the private action was seen by Congress to be of paramount importance to securing compliance with the law, which had been subject to flagrant violation and ineffective administrative enforcement.

It has become clear that the provisions of the Act cannot be effectively enforced. Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception . . . It is quite evident that the Act in its present form provides no real deterrent to violations.

S.Rep.No. 1206, 93d Cong., 2d Sess. 3 (1974). Congress identified the lack of a private cause of action as a primary reason for FLCRA's failure. *Id.*; H.R.Rep.No. 1493, 93d Cong., 2d Sess. 1 (1974). Accordingly, one of the "major purpose[s]" of the 1974 Amendments to FLCRA was to "creat[e] a civil remedy for persons aggrieved by violations of the act." *Id.* Congress deemed "an unfettered federal civil remedy" to be "crucial to the effective enforcement of existing law," *id.*, at 7. Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. 112 (1973)(statement of FLCRA co-sponsor Rep. Ford). Aggrieved persons were permitted to sue in federal court, without regard to the amount in controversy or exhaustion of remedies. Upon a showing of intentional violation of the act, they could collect "actual damages, or \$500 for each violation, or other equitable relief." 1974 H.R.Rep. at 11, 20.

The right to sue in federal court was maintained when Congress replaced FLCRA with AWPA in 1982. However, AWPA expanded the class of persons subject to federal duties to include persons who were recruiting or employing workers, whether or not they were labor contractors. Again, the private right to sue was seen to be the key element in obtaining compliance with the protections AWPA sought to provide.

It has long been apparent that neither volunteerism on the part of agribusiness nor the puny enforcement efforts of the Department of Labor can be expected to make a significant difference in the working conditions of farmworkers. Like the FLCRA, the AWPA provides for a private right of action and holds out the prospect of large damage awards against agricultural employers who mistreat their workers. This, I am sure, will prove to be the most important deterrent against the continued abuse of migrant and seasonal farmworkers.

128 Cong.Rec. H10456 (daily ed. Dec. 20, 1982)(statement of Rep. Ford)(emphasis added).

Under the H-5A program, it will be even more difficult to enforce the law against the labor intermediaries, who will be operating outside of the United States. To enforce labor protections effectively, businesses and individuals who use unlicensed labor recruiters must be jointly and severally liable for civil penalties, collectible by injured workers. A bonding requirement, as a condition of licensing would provide additional necessary protection. (Both Mexican and Guatemalan law currently requires employers who are recruiting workers in Mexico to post a bond to guarantee performance of legal requirements.)

Banning the treatment of H-5 workers as independent contractors is helpful. The bigger enforcement issue will be whether the workers, admittedly employees, are employed solely by labor contractors or jointly employed by the business that is actually using their labor. The adoption of the Fair Labor Standards Act definition of “employ” is helpful in this respect, but the case law all turns on facts and circumstances and some cases are successful and others not. At the outset, it isn’t always clear to workers or putative employers as to who will be held responsible for assuring proper conditions of employment. A clear statement holding businesses that use H-5 workers as an integrated part of their enterprise responsible as employers would resolve this ambiguity, assure greater compliance, and reduce litigation.

Conclusion

This critique of the labor protections contained in the McCain/Kennedy bill is written in the spirit of contributing to our collective understanding of the likely effects of its provisions on the real world of low wage workers—immigrant and non-immigrant alike. It is hoped that the remarkable beginning negotiated by the congressional staffs involved can be improved and strengthened to create an immigration system that works fairly for workers and their families and is a source of solidarity and strength in efforts to improve their plight. The bill is a great starting point, so long as it is not viewed by all as the progressive high water mark, from which one-way concessions must inevitably be made to achieve passage. If the realities of immigration politics are such that concessions must be made, it is important that we all understand what is being given up.

The undersigned authors of this analysis bring the unique prospective of a collective 136 years of legal experience representing immigrant workers, mostly in migrant legal services projects. A significant aspect of this work has involved litigation and advocacy with respect to the H-2A and H-2B temporary worker programs. Experience with these programs, and with the implementation of the Immigration Reform and Control Act of 1984, offers significant insight into how the H-5A and H-5B programs proposed in the McCain/ Kennedy bill might actually work in the real world. This analysis of the labor provisions of that bill was prepared to share those perspectives with labor, immigrant advocacy organizations and other allies in the comprehensive immigration reform movement.

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A shorter two page summary of these issues "Worker Concerns about the McCain-Kennedy Immigration Reform Bill, S. 1033" is available at:

http://friendsfw.org/Advocates/Immig/Worker_Concerns_McCain-Kennedy.pdf