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TESTIMONY

ON: THE BORDER SECURITY, ECONOMIC OPPORTUNITY AND
IMMIGRATION MODERNIZATION ACT, S.744

TO: U.S. SENATE COMMITTEE ON THE JUDICIARY

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DATE: APRIL 22, 2013

Testimony before the U.S. Senate Committee on the Judiciary
Monday, April 22, 2013

Hearing on the Border Security, Economic Opportunity and Immigration Modernization Act

Statement of
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Good morning, Chairman Leahy, Ranking Member Grassley and distinguished members of the Senate Judiciary Committee. Thank you for this opportunity to testify on the less-skilled worker visa program in the Border Security, Economic Opportunity and Immigration Modernization Act. My name is Tamar Jacoby, and I'm president of ImmigrationWorks USA.

ImmigrationWorks USA is a national federation of small and medium-sized business owners from across the sectors that hire less skilled immigrant workers: hospitality, food processing, cleaning, maintenance and construction, among other industries. Our network consists of 25 state-based, pro-immigration business coalitions. These local groups fight for better immigration law in their states and in Washington and work to educate the public about the economic benefits of immigration. Their shared goal: to bring the legal intake of less-skilled immigrant workers more into line with the nation's labor needs.

I'm here today on behalf of my members to express our support for the Border Security, Economic Opportunity and Immigration Modernization Act. We applaud the eight Senators and staff who came together to craft the legislation. It's a thoughtful, ambitious blueprint, proof positive that the art of compromise is still alive in the Senate. Many of my members are particularly pleased to see Republican lawmakers engaging as equal partners in the effort to pass immigration reform, and we are grateful to all eight Senators for their commitment to pragmatism and bipartisanship – pragmatism and bipartisanship evident on virtually every page of the bill.

We believe the legislation would make for dramatic improvements in the workings of the nation's dysfunctional immigration system and look forward to supporting passage. But we also hope the measure can be improved, most importantly by increasing the size of the less-skilled worker W Visa program so that it works to prevent future illegal immigration, diverting today's unauthorized immigrant influx and replacing it with a legal labor force.

I'm going to use my time today to address three issues:

Number One: The nation's need for less-skilled immigrants and the contribution they make to the U.S. economy, not just filling critical jobs for which there are not enough willing and able Americans, but also supporting jobs for U.S. workers up and downstream in the local marketplace.

Number Two: The design of the less-skilled worker W Visa program in the Border Security, Economic Opportunity and Immigration Modernization Act, which we find innovative and ingenious – a break-the-mold 21st century temporary worker visa program.

Number Three: Our concerns about the size of the program, which I and many of my members fear may not be adequate to prevent illegal immigration in the future.

The economic benefits of less-skilled immigration

Americans who are skeptical about the nation's need for immigrant workers often frame the issue as a contest between U.S. workers and the foreign-born. These skeptics make claims about competition and displacement and adverse wage effects. But this is not the reality in the U.S. today. In fact, immigrants, high and low-skilled, fill labor market niches for which there are not enough willing and able Americans. And by filling these niches, which are generally at the top and bottom of the job-skills ladder – PhD engineer, for example, or busboy and farmworker – immigrants make U.S. workers, who are more likely than newcomers to occupy the middle rungs of the ladder, more productive.

The most powerful force driving low-skilled immigration today is not in Mexico or Central America or elsewhere beyond our borders. It's the changing nature of the U.S. workforce.

American families are having fewer children. U.S. fertility rates have declined dramatically since the 1960s and are now well below replacement level. For U.S.-born women, the rate is currently 1.7 percent – some 20 percent lower than what's needed to maintain the size of the population and eventually replace the existing workforce.

Meanwhile, a second factor, baby boomers are retiring. The numbers are stunning: a full 10,000 older workers are now leaving the workforce every day, and that rate is expected to continue through the next 15 years.

Third and perhaps most important, the younger workers coming up behind the baby boom generation are much more educated than their parents. In 1950, 64 percent of American workers were high school dropouts willing to do physically demanding, low-skilled work. Today, the figure is less than 10 percent. More than 60 percent of Americans have some postsecondary education, whether college or vocational training. And the number graduating from college is 25 times greater today than it was in 1950.

Together, these three factors – smaller families, baby boom retirements and what economists call the "educational upgrading" of the U.S. workforce – have had a dramatic effect on the pool of Americans available to fill low-skilled jobs. It's no accident that the service-sector employers who make up the lion's share of my membership are constantly complaining about the difficulty they have finding workers. The pool they have to draw on is shrinking, and has been for several decades. For those seeking to hire unskilled men of prime working age – high-school dropouts aged 25-34 – the supply of U.S.-born workers is half the size it was as recently as 1970.

But many U.S. businesses still need less-skilled workers to meet customers' needs and remain competitive. If anything, demand for less-skilled workers is growing. In 1955, 25 cents of every dollar spent on food was spent in a restaurant; today, the figure is 50 cents out of every food dollar. Restaurant and food-service employment is expected to grow by 11 percent over the next decade, but the 16-to-24 year old workforce that typically fills restaurant jobs will grow by only 4 percent.

The shortfall is even more dramatic in the care professions. According to the Bureau of Labor Statistics, the two fastest growing occupations in America are home-health aide and personal-care aide. Both will expand by more than 70 percent between now and 2020. Combine this with the nation's future need for nurses' aides and child-care workers – also

low-skilled, physically demanding work – and the total projected demand adds up to 1.9 million new jobs. This sounds good: 1.9 million new jobs. The problem: it's more than the total number of Americans who are expected to enter the labor force between now and 2020 – just 1.7 million. As Michael Clemens and Lant Pritchett point out in a recent study issued by the Center for Global Development, in coming years, the need for low-skilled care workers alone will outstrip the growth of the entire U.S. labor force. And given continuing trends – smaller families, baby boom retirements and the educational upgrading of the U.S. workforce – not many American parents are likely to be raising their children to aspire to jobs of this kind.

Bottom line: we need less-skilled immigrant workers. We're going to need them increasingly in the years ahead. And far from taking jobs from Americans, by and large they support and create jobs for U.S. workers. Because immigrant workers are different from Americans – in this case, less skilled, less educated, generally with poorer English and less suited to jobs that require communications or management skill – they tend to complement U.S. workers, filling empty niches and producing a well-rounded workforce that can fill jobs across the skill spectrum.

Low-skilled immigrant workers allow restaurants to expand and the restaurant industry to grow, creating jobs for U.S.-born chefs, U.S.-born waiters, U.S.-born restaurant managers and accountants. A restaurant's expansion also creates more work for other businesses up and downstream in the local economy, whether food producers or janitorial services or local designers and architects. The availability of low-skilled immigrant labor has enabled millions of American women to work outside the home in recent decades. And in coming years, low-skilled immigrant health care workers will position more Americans to take advantage of better health care jobs: doctors, nurses and lab technicians, among others.

These are givens – all but inexorable demographic and educational trends that are changing the U.S. workforce to create a continuing demand for low-skilled foreign workers. It's not a fixed or entirely predictable need: economic trends and technology, among other factors, will influence its magnitude in coming years. And these workers represent an increasingly small part of the U.S. economy. Remember, most U.S. workers are becoming more educated and better skilled, and on the whole, the kinds of jobs on offer in the U.S. are becoming more sophisticated.

But the question remains – a burning question: how in the years ahead is the nation going to fill this ongoing need for less-skilled immigrant workers?

The W Visa program

The Gang of Eight Senators that crafted the Border Security, Economic Opportunity and Immigration Modernization Act faced a daunting challenge in creating a less-skilled worker visa program.

Guest worker programs has proved problematic in the past, both in the U.S. and in Europe, giving rise to the well-known quip that there's nothing more permanent than a temporary foreign worker. Existing U.S. temporary worker programs offered little to build on. Both existing low-skilled programs – H-2A and H-2B, both for seasonal workers only – are regarded by many employers as too cumbersome and bureaucratic to be useful, and both are disliked by labor advocates, who claim they foster a new form of indentured servitude. The Gang of Eight sought to craft a program that would prove workable through future decades, flexible enough in size to accommodate the ups and downs of the business cycle and meet U.S. labor needs, which could change significantly in future years. And in this

realm as others, the Senators strove to find an equitable balance: a new program that would provide employers with a stable, reliable, legal labor force, while protecting labor rights – the rights of less-skilled U.S. workers and the incoming foreign labor force.

The Senators largely succeeded in my estimation. The W Visa program is a thoughtful, creative blueprint – vital bipartisan recognition that we as a nation need a less-skilled foreign labor force to fill jobs when there are no willing and able Americans. Presented as a drawing without a key to indicate its size or scale, the program would inspire high praise.

Among its innovative and ingenious features:

Free movement of workers within the program. In contrast with other, existing U.S. temporary worker programs, employers would not sponsor workers for W visas, and workers would not be tied to specific jobs or specific employers. A foreign worker could not enter the country without a job offer from a U.S. employer. But once workers have entered the country, they would be free to change jobs at will, accepting work from any employer who had been approved to participate in the program – who had tried to hire U.S. workers and demonstrated a bona fide labor need.

This innovation is a win-win for willing workers and willing employers. For workers, the possibility of quitting is the foundation of all other labor rights: leverage to bargain for better wages, working conditions, promotions and other benefits. For employers, the new model offers more flexibility in managing the size of their labor force and also the possibility of hiring in real time without repeating a cumbersome government application process.

A floating cap. In contrast to existing temporary worker programs, the W Visa yearly quota would not be fixed legislatively. Congress would mandate an initial limit. But in future years, the cap is designed to adjust automatically in response to changing U.S. labor needs. The number of visas issued would float upward in good years when the economy needs more foreign workers and downward in down years, when labor demand decreases and more Americans are out of work.

What's more, the Senators recognized, even a floating cap might not always accommodate the changing needs of the wide variety of U.S. employers who rely on immigrant workers. The government isn't omniscient, the economy is dynamic – and some employers in some sectors will need workers even in economic downturns. The Senators solved this problem with a so-called "safety valve," intended to provide relief for employers who cannot find workers even when the annual visa quota has been met or unemployment in the metro area where the job is located is higher than 8.5 percent. At that point, employers can no longer use the regular program. But they can still petition to hire a foreign worker, provided they are willing to pay a higher wage and take additional steps to try to recruit U.S. workers.

Streamlined and easy to use. Employers who participate in the program would be required to try to hire Americans first. They would have to complete a variety of specified recruitment steps, whether advertising in a local newspaper or visiting a jobs fair or posting open slots on the internet, among other options. They would have to pay foreign workers the same or slightly higher wages than they pay comparable U.S. workers. And compliance with these and other program requirements would be monitored by rigorous government audits. But in contrast to existing temporary worker programs, applying for a W Visa slot would be a relatively simple, streamlined, predictable process. Most significantly for employers, it would be based on attestation rather than certification – and as result less costly, more timely and less vulnerable to the whims of government adjudicators.

An option to earn permanent status. If the patterns of the past are any guide, workers who participate in the new program are likely to come to the U.S. with a range of goals and motives. Some will seek to work for a while and then return to their home countries, armed with new skills and a nest egg with which to build a home or start a business. Others, particularly those who do well while in the United States, may decide they want to settle permanently. The Gang of Senators wisely acknowledge this reality and attempt to accommodate it.

The initial W visa would be temporary: good for three years. But just as high-skilled H-1B temporary visa holders can eventually transition to permanent visas, so low-skilled workers in the W Visa program can eventually become eligible to apply for green cards under the new merit-based point system created elsewhere in the Border Security, Economic Opportunity and Immigration Modernization Act.

This provision too would be a win-win for willing workers and willing employers – and for the United States. For workers, it would mean flexibility and choice. For employers, it would open the possibility of retaining and promoting valued workers. For the United States, it would combine the benefits of a temporary worker program and those of the nation's traditional way of immigration – the melting pot model based on permanent residence and assimilation.

Bottom line: my members and other employers like them find much to admire in the new W Visa program. By and large, the program is well designed and carefully crafted. It promises to meet employers' needs while protecting U.S. workers. It would be relatively easy to use for the vast majority of employers who desperately want a legal way to hire less-skilled foreign workers, while disadvantaging those who continue to flout the law and punishing them with stiff penalties.

My main concern and that of my members: that the W Visa program may not be large enough to accommodate U.S. labor needs in years ahead and as a result may not succeed in replacing the existing flow of illegal immigrants with a legal labor force.

A program that will work for the future?

The W Visa program will be used by a relatively small number of willing workers and willing employers – a few hundred thousand workers at most, out of the 150 million that make up the U.S. economy. But these direct beneficiaries are far from the only Americans who need the program to succeed.

Without a workable temporary visa program, the nation can have no hope of ending illegal immigration. New intensified border enforcement can help control the flow. So can workplace enforcement, and my members welcome the E-Verify mandate in the Border Security, Economic Opportunity and Immigration Modernization Act. Like most employers, my members would welcome the government's help distinguishing new hires who are eligible to work in the U.S. from those aren't, as long as their businesses are not liable when the E-Verify system is inaccurate. And together, the enforcement mechanisms stipulated by the legislation should create a new environment. But ultimately, the best antidote to illegal immigration is a legal immigration system that works, meeting unmet U.S. labor needs with an adequate supply of foreign workers.

We learned this lesson the hard way – or should have learned it – over the last three decades. An overwhelming majority of the 11 million unauthorized immigrants living in the U.S. today would rather be here legally. They came and stayed illegally only because, when

work beckoned, there was no lawful way for them to enter the country – under existing law, there is effectively no visa program, temporary or permanent, for less-skilled foreigners who want to work year-round and have no family in the U.S. to sponsor them. Lawmakers considered creating such a visa program the last time they overhauled the immigration system, in 1986 – but they failed to do so. If we repeat that mistake this year, failing to create a legal way for low-skilled workers to enter the country in the future, in 10 or 20 years we're going to find ourselves in exactly the same predicament we're in today – wondering what to do about a *new* 11 or 12 or who knows how many million unauthorized immigrants.

Bottom line: the most important question – the threshold test – about the W Visa program is whether or not it will be ample enough to accommodate the nation's foreign labor needs in the decades ahead.

How to anticipate what those needs will be? Most scholars attempting to do so use a methodology based in part on the flows of recent decades.

According the Mexican Migration Monitor developed by researchers at the University of Southern California and the Colegio de la Frontera Norte in Tijuana, from 2003 to 2009, more than 350,000 unauthorized Mexican immigrants entered the U.S. every year to take jobs for which there were no willing or able Americans. At the height of the housing boom, in 2006 and 2007, the number exceeded 650,000. Even in 2011, with the economy still sluggish and uncertain, 150,000 workers came to fill unmet demand.

The Migration Policy Institute looks at different years, uses a different measure and proposes a somewhat different estimate – of the net inflow. But according to this calculation, more than 450,000 Mexican immigrants came to the U.S. every year in the decade from 1990 to 2000. Between 2000 and 2007, the annual average was 280,000. And in the decade ahead, assuming continued soft growth, MPI predicts that demand will range from 230,000 to 330,000 workers a year.

Will the W Visa program be able to accommodate these projected labor needs? Not, certainly, in its first four years, when the annual quota will start at 20,000 workers and rise year by year to 75,000. In subsequent years, the size of program is intended to ebb and flow in response to changing U.S. workforce needs, as measured by employer demand, national economic indices and the deliberations of a newly created research bureau. But under the act, the upper limit is 200,000 permits a year – still seemingly not enough if the past is any guide and expert projections of demand are accurate.

Other uncertainties further cloud the calculus, among them the complexity of the legislation. There are some potential exemptions and exceptions to the quotas that could prove significant. The Gang of Eight proposes to admit the spouses of W Visa holders and allow them to work in the United States. There is a small additional allotment of visas – up to 10 percent of the overall annual quota – for meat, poultry and fish cutters and trimmers. And by definition, the safety valve would increase annual admissions.

But even together, these exemptions and exceptions may not produce a robust addition to the available immigrant labor force. It's unclear how many W visa-holders' spouses will accompany them to the U.S. and choose to participate in the labor force. Married Mexican women currently living in the U.S. are significantly less likely than their husbands to work or be looking for work. As structured, the safety valve is likely to be too expensive for most employers. The wage premium required to participate will vary from occupation to occupation and depend on where the job is located. But it in some cases it will be higher

than 100 percent, and it will often be more than 50 percent. Additionally problematic, any workers admitted under the safety valve will count against the next year's visa quota, limiting how much the safety valve can raise the number of workers in the U.S. at any given time.

There is also a quota within a quota for the construction industry: 33 percent of the overall annual limit – that's 6,600 in the first year of the program – and never, under any circumstances, more than 15,000 workers. This certainly will not be enough for an industry that anticipates adding as many as 350,000 jobs this year and currently relies on immigrants for some 20 to 25 percent of its workforce.

Bottom line: it's hard to predict how many foreign workers the nation will need in years ahead – or even how many the W Visa program would admit. But the quotas mandated in the legislation – 20,000 to 200,000 registered slots a year – appear inadequate to accommodate future needs. And these limits raise serious questions about whether the program will work as intended to divert today's illegal immigration into legal channels.

What sorts of changes would eliminate this uncertainty? It's beyond the scope of this testimony to develop detailed improvements to the program, but among the ideas that might be considered:

- A larger footprint to start. Few scholars who study the problem of unauthorized immigration think 20,000 slots will be adequate to replace the current illegal flow even in today's still uncertain economy.
- A more flexible upper limit. Why the arbitrary 200,000-visa cap that bears so little relation to past low-skilled immigrant flows? One possible way to create some leeway: a returning worker exemption like the one incorporated in the past in the H-2B seasonal temporary worker program – an exemption that would be reinstated in the H-2B program by the Border Security, Economic Opportunity and Immigration Modernization Act.
- A formula that gives more weight to employer efforts to recruit U.S. workers. Surely, this is the closest and most accurate measure of whether there are indeed willing and able Americans available to take low-skilled jobs.
- Don't try to pick economic winners and losers. Why should the construction industry be subject to a quota within a quota? Why should other industries get a special allotment? These arbitrary distinctions could have dire consequences for individual employers as the construction industry ramps up after years of severe contraction. They would severely limit construction growth in years ahead – just as the industry is poised to take off and drive the rest of the economy toward full recovery. And they are likely to create incentives for unauthorized employment, as immigrants who enter the country to work in sectors other than construction gravitate, lawfully or not, to higher-paying construction jobs.
- A safety valve that's financially within reach for employers. The safety valve should be expensive – that's the intent, it's a special accommodation – but not prohibitively so. And it should not be structured in a way that benefits large, well-financed employers at the expense of smaller, weaker businesses. As is, not only will many smaller business be barred by cost from participating in the safety valve; they will also have limited access to workers the following year when the number of visas

issued this year under the safety valve limits the number available under the normal program.

- Revisit the program after five years. The W Visa program is a bold experiment – a significant departure from any existing temporary worker program. Its design is highly promising, but like any new idea, it is sure to need tweaking after a few years of operation. The new research bureau, the quotas, the mathematical formula designed to expand and contract the program should all be reexamined – and perhaps more than once. My members would adamantly oppose an automatic sunset. The unpredictability produced by the prospect of a sunset would deter many if not most employers from entering the program in the first place. But the new system should be assessed and if needs be adjusted in coming years.

Conclusion

In closing, I'd like to underscore how much I and my members appreciate the work of the Gang of Eight Senators who crafted the Border Security, Economic Opportunity and Immigration Modernization Act. Most of the ImmigrationWorks members I've consulted agree: the W Visa program is significantly better than the status quo – no program. The new system reinvents the very definition of guest worker. It would be market-based but respectful of labor rights, easy to use but tough on those who abused the privilege, a boon for willing workers and willing employers – a breakthrough design that could become a model for other temporary worker programs in the U.S and abroad.

Our concerns about the size of the program, while significant, can be readily addressed. Indeed, some improvements, like a returning worker exemption, could be incorporated – if political considerations require it – without changing the overall statutory limit on the size of the program.

Thank you again for this opportunity to testify. My members and I look forward to working with members of this committee and others in Congress to improve the W Visa program and pass the Border Security, Economic Opportunity and Immigration Modernization Act.