U.S. House of Representatives
Committee on the Judiciary

Statement of Ana Avendano
Associate General Counsel and Director, Immigrant Worker Program,
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)

To the House Committee on the Judiciary, Subcommittee in Immigration, Border Security, and Claims

June 22, 2006

Chairman Hostettler, Ranking Member Jackson-Lee and Members of the Committee, thank you for the opportunity to address the critically important question: is the Labor Department Doing Enough to Protect U.S Workers? As I will explain in more detail shortly, the answer is a resounding, NO.

The AFL-CIO is a voluntary federation of 53 national and international labor unions. Our affiliates represent more than nine million working men and women of every race and ethnicity and from every walk of life. We are teachers and truck drivers, musicians and miners, engineers, landscapers, nurses, electricians, and more.

We are deeply concerned about the Department of Labor's (DOL) failures to adequately enforce workplace laws, including the protections afforded under the H1-B and other temporary foreign worker programs. I understand that the focus of this hearing is on the way that the DOL reviews and enforces Labor Condition Applications for H1-B visas, and I will address that issue specifically later in my testimony. The DOL's failures go well beyond that specific issue. In fact, the failures are systematic, to the detriment of all workers in our nation, and have caused—and continue to cause—downward pressure on workplace standards across the country and across the economy.

When the DOL fails to enforce any of the statutes under its jurisdiction, all workers suffer. Nowhere is that more evident today than in the Gulf region, where workers involved in the post Katrina reconstruction—both foreign born and US—are being cheated out of their wages by major US companies and forced to work in substandard, unhealthy and unsafe conditions.

In February, a group of worker advocates, including the AFL-CIO met with DOL representatives here in Washington, DC to raise concerns about the ongoing labor and employment violations occurring in the Gulf region. The

worker advocates painted a clear picture of unscrupulous contractors, rampant labor violations and sheer lawlessness in the Gulf region. Prior to the meeting, the advocates provided DOL a list of very basic questions including how many wage claims arising from the post-Katrina reconstruction effort had been filed, the processing time for claims, and various questions concerning DOL outreach efforts to workers. The DOL was unable to respond to any of those questions. The DOL's lack of concern for working conditions in the Gulf was, frankly, appalling.

The DOL's failure to take seriously its law enforcement function in the Gulf region has left workers with no alternative but to rely on private enforcement that is through lawsuits. The Southern Poverty Law Center has filed two class action suits on behalf of thousands of workers in the Gulf who have not been paid at all, or not paid the minimum wage or overtime. But as the Center itself recognizes, "lawsuits alone will not stop the widespread exploitation of workers that is going on in New Orleans. . . The people working in New Orleans to rebuild its schools, hospitals and university buildings need and deserve the protection of the federal government."

The federal government's involvement is particularly important in the enforcement of protections in the context of foreign temporary worker programs, like the H1B program and its unskilled worker counterpart, the H2B program. Workers who are imported into our economy under those programs are at a great disadvantage because, by the very nature of the programs, those workers rely on their employers not only for their jobs, but also for their immigration status. Exploitation of workers in the H1B and H2B programs is thus easier, because if workers complain that they are not being paid what the law requires, or expose other employer violations of law, they not only risk losing their job, but also risk either having to leave the country or remain here unlawfully.

That kind of exploitation harms all workers, including US workers. The temporary foreign workers who are being cheated of their wages do not labor in isolation. They work along side their US-born counterparts in the high technology industry and as teachers and engineers (under H1B visas), and along-side US-born hotel workers, landscapers and service workers (under H2B visas). When employers are able to exploit one class of workers, that exploitation lowers the floor for all workers.

The poultry industry provides a perfect example. Roughly half of poultry workers today are African American, and the others Latino, mostly immigrant. In 2000, the DOL conducted an industry-wide survey of compliance with wage and hour laws. That survey concluded that the industry as a whole was one hundred percent out of compliance with wage and hour laws. Clearly, the African American poultry workers suffered as much as their immigrant counterparts.

That type of government compliance effort—that is, industry-wide investigations that do not rely on individual worker complaints--is a key part of a robust and meaningful monitoring system. And it is one that is of particular importance in the context of foreign temporary worker programs. Unfortunately, it is not one from which US workers can currently benefit because the DOL has essentially abandoned that key tool. We have been unable to locate any industry-wide targeted compliance efforts under the current Administration.

It seems clear that the federal government is moving in exactly the wrong direction. Instead of reinforcing mechanisms that would ensure that employers do not import foreign workers in order to depress wages and other labor standards, the government is moving toward simple attestation programs, where the DOL has no significant role, if any at all.

The labor certification process—as flawed as is it--is the last remaining protection that US workers have. That process is designed to ensure that the government agencies with the most expertise on local labor markets and with the greatest ability to find available US workers and determine how employers could recruit job applicants—the State Workforce Agencies—act as the gatekeepers for the temporary foreign worker programs. The certification process is also designed to prevent various harms before the fact, rather than after-the-fact, since there are few, if any adequate remedies available after the fact for those who bear the harm caused by abuses of temporary foreign worker programs. In addition, the inadequacy of after-the-fact enforcement mechanisms mean that there are few disincentives for employers to violate their labor law obligations. An attestation process completely removes the DOL or the SWAs as the independent gatekeeper, thus opening up the foreign temporary workers programs for further employer abuse, subjecting the foreign temporary workers to further exploitation, depriving US workers of gainful employment, and degrading wages and working conditions within the domestic labor market.

We fully agree with Congresswoman Sheila Jackson Lee's concerns that the current requirements may not be enough to protect US workers, even if enforced adequately. We believe that more attestations are not the answer. The attestation structure—in and of itself—fails to meet the essential gatekeeper function.

The DOL has the statutory responsibility for ensuring that employers do not abuse guestworker programs. Because of the exploitative nature of those programs, the DOL should be using every tool available and seeking to make current tools—like the labor certification process—stronger, not weakening it by abandoning its role to an employer attestation process.

The issue of guarding against abuses in guestworker programs is of particular importance now, given that the Senate has adopted an immigration reform

proposal that significantly increases the number of foreign visas available to employers, and abandons the long standing national policy of only allowing employers to import workers to fill seasonal or temporary labor shortages. Indeed, the Senate bill creates a whole new class of temporary foreign workers, the H2C workers, in addition to increasing the number of H1B workers that employers are able to import. Whatever concerns we have now about the lack of enforcement of labor standards in temporary worker programs are sure to be magnified when the new hundreds of thousands of temporary workers are imported into our economy.

These concerns are real and long-standing. The United States has spent years studying and experimenting with guestworker programs, and the resounding conclusion is that guestworker programs are bad public policy. The “Jordan Commission,” for example, which was created by the 1986 Immigration Reform and Control Act to study the nation’s immigration system squarely rejected the notion that guestworker programs should be expanded. In its 1997 final report, that Commission specifically warned that such an expansion would be a “grievous mistake,” because such programs have depressed wages, because the guestworkers “often are more exploitable than a lawful U.S. worker, particularly when an employer threatens deportation if workers complain about wages or working conditions," and because "guestworker programs also fail to reduce unauthorized migration" [in that] "they tend to encourage and exacerbate illegal movements that persist long after the guest programs end."

In conclusion, we fully agree that we must significantly increase the mechanism for ensuring compliance with labor standards. Increased attestations alone are not the answer. We must also ensure that the DOL does not abandon its traditional oversight role and the gatekeeper role that it has exercised through the labor certification process.

Targeted wage and hour investigations in the high technology industry, which is known to hire the most H1B workers, are essential and should be conducted immediately. The data from these investigations will allow Congress to meaningfully assess whether the H1B labor inspection mechanism is adequate to protect both US workers and the foreign workers who labor in those programs.

Thank you and I look forward to your questions.