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COMPTROLLER GENERAL OF THE UNITED STATES
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The Honorable John M. Ashbrook
Ranking Minority Member
Labor Management Relations Subcommittee
Committee on Education and Labor
House of Representatives

Dear Mr. Ashbrook:

You recently asked several questions concerning the legality of the Department of Labor's (DOL) Employers of Undocumented Workers (EUW) "Strike Force." Your questions arise in the context of a limitation in the Department's Fiscal Year 1979 appropriation act, which stated:

> "None of the funds appropriated by this title may be used by the Department of Labor to carry out any activity for or on behalf of any individual who is an alien in the United States in violation of the Immigration and Nationality Act or any other law, convention, or treaty of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens"

Public Law No. 95-430, approved October 18, 1978, 92 Stat. 1567, 1571 § 102. The limitation was first enunciated in Public Law No. 95-205, 91 Stat. 1461, a continuing resolution for FY 1978 which incorporated the language of H.R. 7555, 95th Cong., 1st Sess. (1977). The referenced bill included the illegal alien spending restriction. See Cong. Rec. H6022 (daily ed. June 16, 1977). Again, in FY 1980 the limitation was incorporated by reference in DOL's continuing resolution, Public Law No. 96-123, approved November 20, 1979, 93 Stat. 923, 925 § 101(g), citing the terms and conditions in the DOL appropriation bill passed by the House on August 2, 1979, a bill which included the restriction. Although we agree that the language of the restriction is very broad in scope, we do not think that it affects the activities of the EUW Strike Forces.

The so-called Strike Forces are teams of specially trained Wage and Hour compliance officers who investigate the personnel practices of employers in low skill, high turnover industries, where undocumented

workers (meaning illegal aliens who either entered the United States without inspection, overstayed a visa, or violated the conditions of a visa by accepting employment) tend to congregate. Because the investigations are conducted aggressively and intensively in somewhat limited geographical target areas, the term "Strike Forces" has been applied to the compliance teams in the EUW program.

The Strike Forces inspect payroll records and interview employees to determine whether violations of the Fair Labor Standards Act (FLSA) have occurred. The FLSA, 29 U.S.C. § 201 et seq. (1976 & Supp. I 1977) sets forth the minimum hourly wage, limits the number of hours which may be worked, requires premium pay for overtime work, and mandates equal pay for most non-supervisory workers. The Strike Forces were created on the assumption that the temptation is greater to exploit undocumented workers by undercompensating their labor because aliens may not understand their rights under Federal law and also, the fear of discovery and deportation may keep them from demanding or enforcing their rights by requesting an investigation. You noted correctly in your letter that all persons employed, including undocumented workers, are entitled to receive the minimum wage, as the FLSA protects the wages of all non-exempt employees as that term is defined in 29 U.S.C. §§ 203(e) and 213. The existence of an employment relationship does not depend on the employee's legal capacity to accept work.

When Congress enacted the FLSA in 1938, it found the payment of unreasonably low wages to be an "unfair method of competition in commerce." This principle is equally valid today, especially when applied to employers who gain this unfair economic advantage by exploiting those whose ignorance and fear make them natural victims. In addition, employment of undocumented aliens may displace American workers and possibly depress wages and working conditions for all workers. See our report of March 14, 1980, entitled "Illegal Aliens: Estimating Their Impact On the United States," at 7-27.

The Strike Forces seek to eliminate this adverse impact by removing the economic incentive to hire undocumented aliens. Compliance investigators determine the amount of underpayments illegally withheld from employees, require full restitution which is paid over to the employees to the fullest extent possible, and pursue civil and criminal fines and penalties under 29 U.S.C. § 216 (1976) for violations of the FLSA.

The limitation on expenditures to benefit illegal aliens was first incorporated into the Labor Department's funding legislation in FY 1978. The provision which later became section 102 was offered as an amendment by Representative Mario Biaggi of New York during the floor debate on the DOL appropriation bill. In explaining his amendment, Mr. Biaggi commented,

> "Above all this amendment is offered for the protection of American workers--both citizens and legal aliens. We take the time and effort to appropriate billions of dollars for public service jobs. The American taxpayer pays for these jobs. Consequently, the jobs provided should go only to American workers. Illegal aliens should not be permitted to compete for the benefits provided by the Department of Labor nor any other Federal agency."

Cong. Rec. H6022 (daily ed. June 16, 1977).

It was specifically found that the amendment would not require the Department of Labor to determine the immigration status of any individual, and therefore would not place additional burdens on the Department. However, several members commented during the course of the debate that it was impossible to predict what effect the amendment might have on the other activities of the Labor Department. Specifically cited as an example of potential difficulties were the Department's wage and hour compliance activities. Despite doubt as to the amendment's possible negative impact on FLSA enforcement, it passed in an effort to "keep the pressure on" the Administration to present a comprehensive program dealing with illegal aliens. Cong. Rec. H6025 (daily ed. June 16, 1977) (remarks of Rep. Sisk).

Mr. Biaggi offered his amendment again in FY 1979 appropriation debates, saying,

> "My amendment simply says that where the Federal Government is the employer none of the funds it uses should be for illegal aliens. My amendment is to protect the interests of the workers of this Nation."

Cong. Rec. H5118 (daily ed. June 7, 1978).

In FY 1980 the same amendment was offered with similar discussions relating to public service employment. Cong. Rec. H5444 (daily ed. June 28, 1979). The 1980 amendment also passed the House but the continuing resolution was substituted for and incorporated the alien restriction of the appropriation bill into the resolution.

In determining the scope of the amendment's application, there is a conflict between its plain meaning ("no funds under this title * * * on behalf of" illegal aliens) and its legislative history, which reflects an intent to prevent public service (CETA) employment of illegal aliens without restricting Wage and Hour Division or other DOL activities. The plain meaning of the Biaggi amendment applies the limitation on spending to benefit illegal aliens to all funds appropriated for the Department of Labor, including funds for the Wage and Hour Division. On this basis, if the EUW Strike

Force program is conducted for or on behalf of illegal aliens, the program would be improper. However, for two reasons, we do not believe that the limitation prevents the implementation of this program.

First, Labor does not primarily characterize, and we do not see this program as a program to benefit illegal aliens. According to the Assistant Secretary of Labor for Employment Standards, it is intended to reduce the economic incentive to hire undocumented workers and to penalize employers whose willingness to hire undocumented aliens at reduced wages continues to be the principal magnet luring illegal aliens to this country. At present this is the only Federal sanction which may be imposed against non-agricultural employers of illegal aliens. No Federal law prohibits the employment of undocumented aliens, and the immigration laws specifically provide that employment of an illegal alien does not constitute the criminal offense of "harboring." 8 U.S.C. § 1324(a) (1976). In the long run, then, this program cannot be said to be "on behalf of" illegal aliens; if successful, many fewer illegal aliens will be hired.

The program does ensure that illegally withheld wages are paid over to the affected employees, including those who have returned to their country of origin. These wages are not paid from DOL's appropriation but by the private employer. The only Federal funds involved are those necessary to pay the salaries and related expenses of Strike Force members who attempt to compel employers to restore to employees the earnings which they were wrongfully deprived of. It does nothing to enhance the alien worker's position or rights vis a vis legal American workers or in any way confer on such aliens additional benefits to which they would not otherwise be entitled. See, Matthews v. Diaz, 426 U.S. 67, 68 (1976). This is in sharp contrast to a program extending the benefits of CETA to illegal aliens who would thus be receiving special employment assistance not available to those not qualifying for the program.

Second, on the basis of the legislative history, we do not think the Congress intended this program to be subject to the prohibition of the Biaggi amendment. The amendment was first incorporated into H.R. 7555, 95th Cong., 1st Sess. (1977) and in December of that year, into Public Law No. 95-205, 91 Stat. 1461. It was thus already in effect at the time the EUW program was first proposed. In February 1978, 7 months after adopting the amendment and two months after it became law, Congress provided the funds to institute the Employers Undocumented Workers program in a Supplemental Appropriation. Public Law No. 95-240, 92 Stat. 111, H.R. Rep. No. 95-644, 95th Cong., 1st Sess., 26. Because funding of EUW occurred after the restriction was in place and has continued in subsequent appropriation acts, the nonapplicability of the aid to illegal alien prohibition is the only conclusion which can reasonably be drawn. 19 Comp. Gen. 832 (1940).

You asked several other legal questions, the premise of which is the impropriety of the EUW program. Because we feel that the Strike Force program is not in conflict with DOL's funding legislation, it is not necessary to specifically address those questions. By agreement with Mr. Stephens of your staff, your factual questions on staffing and budget for the EUW program (part II of your request) are being researched by our Human Resources Division. A reply to those questions will be supplied under separate cover. We hope this information is useful to you in considering the FY 1981 DOL appropriation bill.

Sincerely yours,

Milton J. Socolar

For the Comptroller General
of the United States