BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Administrative Changes Needed To Reduce Employment Of Illegal Aliens

In 1977 the Department of Labor began a program of investigations directed at employers of illegal aliens (undocumented workers). Its purpose was to ensure that employers maintain compliance with labor standards, thereby removing benefits that, according to Labor officials, would accrue from using undocumented workers at exploitative wage rates.

Many undocumented workers employed at wages above established minimums would not be affected by Labor's program. Furthermore, if the program were to operate as Labor intended, it would not greatly deter the employment of nonagricultural undocumented workers because there are no penalties against employers knowingly using undocumented workers.

Labor's separate undocumented worker program will not be effective until there are statutory sanctions against establishments knowingly employing these workers. However, legislation to establish such sanctions should be delayed until the Select Commission on Immigration and Refugee Policy has reported its findings to the Congress.

HRD-81-15
JANUARY 30, 1981

Request for copies of GAO reports should be sent to:

U.S. General Accounting Office
Document Handling and Information
Services Facility
P.O. Box 6015
Gaithersburg, Md. 20760

Telephone (202) 275-6241

The first five copies of individual reports are free of charge. Additional copies of bound audit reports are $3.25 each. Additional copies of unbound report (i.e., letter reports) and most other publications are $1.00 each. There will be a 25% discount on all orders for 100 or more copies mailed to a single address. Sales orders must be prepaid on a cash, check, or money order basis. Check should be made out to the "Superintendent of Documents".

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-200935

To The President of the Senate and the
Speaker of the House of Representatives

This report examines the impact that the Department of Labor's program for reducing the employment of illegal aliens has had in six States. The report also describes the problems associated with a program that lacks penalties for use against nonagricultural employers who knowingly employ illegal aliens. We made this review to determine what effect Labor's program has had on reducing the employment of illegal aliens.

Copies of this report are being sent to the Secretary of Labor; the Attorney General; the Director, Office of Management and Budget; and other interested parties.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

ADMINISTRATIVE CHANGES NEEDED TO REDUCE EMPLOYMENT OF ILLEGAL ALIENS

D I G E S T

In a time of high unemployment, more American citizens are being displaced from the work force by undocumented workers (illegal aliens employed in the United States). Illegal aliens are flowing into the country at an increasing rate, and the problem of undocumented workers is nationwide, no longer confined to the southwest border or to farm labor.

Efforts to combat the problem have had limited success. The Department of Labor lacks the necessary enforcement tools to deter employers from hiring nonagricultural undocumented workers, and employers making a practice of hiring such workers remain virtually free from punishment.

In August 1977, the President proposed that the Congress enact legislation making the hiring of undocumented workers subject to civil and/or criminal penalties. This legislation was not enacted. Without a deterrent against employers, Labor's efforts to reduce the employment of undocumented workers are hampered. (See pp. 1 and 17.)

THE PRESIDENT'S PLAN

In addition to prohibiting the hiring of undocumented workers, the President's proposal would have:

--Intensified enforcement of both the Fair Labor Standards Act and the Farm Labor Contractor Registration Act, concentrating on areas where there is extensive hiring of undocumented workers.

--Adjusted the immigration status of certain undocumented aliens residing in the United States.

--Substantially increased the resources available to prevent illegal immigration along the southern border and other entry points.

--Promoted continued cooperation with nations that are major sources of undocumented workers by helping to improve their economies and strengthening controls over alien smuggling rings. (See p. 1.)

LABOR PROGRAM TO REDUCE EMPLOYMENT OF UNDOCUMENTED WORKERS

In response to the President's proposal and a Labor appropriation request, the Congress authorized 260 additional employees for Labor to begin investigations of establishments in low-wage, high-turnover industries most likely to hire undocumented workers and to strictly enforce the Farm Labor Contractor Registration Act, which prohibits recruiting and hiring undocumented workers for farm work.

Labor's program is based on the assumption that employers are exploiting large numbers of undocumented workers. By enforcing minimum wage and overtime requirements, Labor believed that there would be no incentive for hiring such workers. However, this assumption is not generally valid; as a result, Labor's program has had little impact on the hiring of undocumented workers when their wages are above established minimums.

GAO examined 606 completed Labor investigations and Immigration and Naturalization Service records. It found that Labor did not concentrate enough of its investigations on companies where the Service found undocumented workers. Instead, Labor focused on wage complaints received from employees, which would ordinarily be investigated during routine enforcement efforts. (See p. 9.)

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

ADMINISTRATIVE CHANGES NEEDED TO REDUCE EMPLOYMENT OF ILLEGAL ALIENS

D I G E S T

In a time of high unemployment, more American citizens are being displaced from the work force by undocumented workers (illegal aliens employed in the United States). Illegal aliens are flowing into the country at an increasing rate, and the problem of undocumented workers is nationwide, no longer confined to the southwest border or to farm labor.

Efforts to combat the problem have had limited success. The Department of Labor lacks the necessary enforcement tools to deter employers from hiring nonagricultural undocumented workers, and employers making a practice of hiring such workers remain virtually free from punishment.

In August 1977, the President proposed that the Congress enact legislation making the hiring of undocumented workers subject to civil and/or criminal penalties. This legislation was not enacted. Without a deterrent against employers, Labor's efforts to reduce the employment of undocumented workers are hampered. (See pp. 1 and 17.)

THE PRESIDENT'S PLAN

In addition to prohibiting the hiring of undocumented workers, the President's proposal would have:

--Intensified enforcement of both the Fair Labor Standards Act and the Farm Labor Contractor Registration Act, concentrating on areas where there is extensive hiring of undocumented workers.

--Adjusted the immigration status of certain undocumented aliens residing in the United States.

--Establishing strike forces to uncover wage exploitation of workers, including undocumented aliens. (See p. 14.)

--Implementing a coordination and referral system with the Immigration and Naturalization Service. (See p. 17.)

--Establishing procedures for using Mexican consulates to distribute back wages to Mexican nationals who left this country. (See p. 25.)

--Testing a procedure in which employers would agree to voluntarily deposit into the U.S. Treasury as miscellaneous receipts back wages due employees who cannot be located. (See p. 25.)

However, additional statutory and administrative changes are needed if the Federal program to deter the hiring of undocumented workers is to be effective.

CONCLUSIONS

Many undocumented workers earn at or above prevailing minimum wage rates and those who receive less tend to refrain from complaining. Labor is precluded from acting against employers when wages exceed established minimums. Therefore, it is doubtful that the improvements made, or to be made, in the program's administration will significantly reduce the flow of undocumented workers into this country. (See pp. 7 and 17.)

The Service is responsible for enforcing immigration laws and acting on matters related to undocumented workers. Labor is responsible for ensuring that workers receive the minimum wages required by law. In view of the limited impact Labor has had on employment of undocumented workers and its evident reluctance to identify such workers, GAO believes that Labor should direct its efforts to enforcing the Fair Labor Standards Act.

Labor's compliance officers were not authorized to question employees covered by the Fair Labor Standards Act about their U.S. citizenship status. Some of Labor's alternative procedures to identify such workers have resulted in incorrect assessments of employees' alien status. (See p. 9.)

Because the Service had more leads than it could handle in areas of high concentrations of undocumented workers, it may not have been able to act on additional Labor referrals. (See p. 10.)

Employers were permitted to retain back wages owed to undocumented workers who could not be found. (See p. 24.)

Farm labor contractors generally did not prepare required written documentation that workers were either U.S. citizens or aliens authorized to work in the United States. (See p. 28.)

Labor erroneously believed it did not have authority to question whether farm labor contractor employees were U.S. citizens or aliens authorized to work in the United States. (See p. 30.)

Labor had a substantial backlog of cases awaiting prosecution for farm labor contractors' violations of the Farm Labor Contractor Registration Act. (See p. 31.)

While GAO was conducting its review, Labor took several steps to improve the undocumented worker program. Its actions include:

--Using the Service's leads and records, as well as information from alien detainees, in selecting establishments for determining compliance with labor laws. (See p. 13.)

AGENCY COMMENTS

The Department of Justice agreed with GAO's recommendations, which it believes will reduce the employment of undocumented workers. (See pp. 21 and 27.)

Labor stated that it concurred with GAO's proposal regarding the issuance of instructions authorizing compliance officers to make direct inquiries of farm laborers as to their eligibility for employment. Procedures to guide compliance officers in making such inquiries were issued by Labor in May 1980. (See p. 37.)

Labor agreed that action was needed, and it said that action had been taken, to reduce the backlog of cases for prosecution of violations of the Farm Labor Contractor Registration Act. (See p. 38.)

Labor questioned the validity of some of GAO's conclusions based on data examined during the initial stages of a program's operations. In general, Labor believed that, after implementation of additional procedures and formulation of more effective policies, its undocumented worker program has had a positive impact, although one that is admittedly difficult to measure.

GAO believes that the primary incentive for illegal immigration is employment. No Federal sanctions exist to use against employers who knowingly hire illegal aliens. Consequently, employers can hire illegal aliens for nonagricultural work without fear of punishment from Immigration and Naturalization Service investigation efforts. Also, Labor's investigations result only in employers, if caught in violations of minimum wage and overtime provisions, being required to pay to undocumented workers the illegally withheld wages that they should already have

Both agencies should continue to exchange information necessary to ensure that employers pay workers in accordance with minimum wage and overtime laws and that undocumented workers are identified and dealt with according to immigration laws. Except for this information exchange, continuing a separate undocumented worker program in Labor will not have a substantial impact until statutory sanctions are legislated against establishments knowingly employing undocumented workers. (See p. 17.) However, such sanctions should be delayed until the Select Commission on Immigration and Refugee Policy has completed its current study and reported its findings. (See pp. 23 and 25.)

RECOMMENDATIONS TO THE CONGRESS

The Congress should amend the Fair Labor Standards Act to require that back wages resulting from violations of the act found to be due employees, who cannot be located, be deposited in the U.S. Treasury as miscellaneous receipts. (See p. 26.)

RECOMMENDATIONS TO THE SECRETARY OF LABOR

The Secretary should:

--Enforce the regulations requiring farm labor contractors to show evidence that they made a bona fide inquiry into each prospective employee's status as either a U.S. citizen or alien authorized to work in the United States. (See p. 36.)

--Act more aggressively to reduce the backlog of prosecution cases involving violations of the Farm Labor Contractor Registration Act. (See p. 36.)

paid. If undocumented workers are not located, employers generally keep the wages they illegally withheld. A separate undocumented worker program will not have a substantial impact until statutory sanctions are legislated against establishments knowingly employing undocumented workers. (See p. 18.)

ABBREVIATIONS

FLCRA	Farm Labor Contractor Registration Act
FLSA	Fair Labor Standards Act
GAO	General Accounting Office
INS	Immigration and Naturalization Service

Contents

President Carter stated that FLSA, which mandates payment of minimum wages and provides other employee protections, would be strictly enforced and that civil and criminal penalties would be sought more frequently by the Government. He added that the Government's inability to fully enforce FLSA has resulted in the hiring of undocumented workers at subminimum wages, thereby often displacing American workers. Although the Immigration and Naturalization Service (INS), within the Department of Justice, traditionally handles matters dealing with aliens, the program proposed by the President was intended to have the Department of Labor require employers to comply with the labor standards laws to help remove economic incentives for hiring undocumented workers. The President also said that FLCRA, which prohibits the recruiting and hiring of undocumented workers for farm work, would be strictly enforced by Labor. The Departments of Justice and Labor were expected to work closely in exchanging information developed in their separate enforcement activities.

ESTABLISHMENT OF UNDOCUMENTED WORKER PROGRAM

During supplemental appropriation hearings in September 1977--before the Subcommittee on Labor, Health, Education, and Welfare, House Committee on Appropriations--Labor officials stated that 260 additional personnel were necessary to conduct an enforcement program against employers in low-wage, high-turnover industries where Labor believed both FLSA violations and employment of undocumented workers existed.

The program's purpose was to reduce employers' economic incentive to hire undocumented workers by enforcing wage and hour standards. According to Labor officials, a high complaint backlog and limited personnel prevented them from conducting the program with the existing staff. Moreover, employees in these industries normally did not file complaints--either because they were not aware of their rights, because they were afraid to complain for fear of losing their jobs, or because they feared being identified as undocumented workers. Investigations under Labor's program were to be routine FLSA and FLCRA compliance investigations with no special effort made to identify undocumented workers. In February 1978, Labor received congressional authorization to hire 260 additional employees, including 225 compliance officers to implement a special enforcement program aimed at employers of undocumented workers.

CHAPTER 1

INTRODUCTION

Although reliable statistics are not available, it is estimated that between 2 and 12 million undocumented aliens are in the United States. Undocumented aliens are persons of foreign origin who have entered the United States unlawfully or who, after legal entry, have violated the terms of their admission, generally by overstaying and/or accepting unauthorized employment. In general, undocumented aliens are thought to be a cheap source of labor which, when readily available, adversely affects wage standards and working conditions of American workers. Undocumented alien workers are believed to displace American workers, which adds to the already serious unemployment problem. The undocumented alien worker problem is no longer limited to the southwest border or to agricultural employment.

PRESIDENT CARTER'S MESSAGE TO THE CONGRESS

On August 4, 1977, President Carter submitted a proposal to the Congress setting forth actions intended to help reduce the increasing flow of undocumented aliens into this country and to regulate the millions of undocumented aliens already here. The proposal intended to:

--Make the hiring of undocumented aliens unlawful.

--Significantly increase enforcement of the Fair Labor Standards Act (FLSA) and the Farm Labor Contractor Registration Act (FLCRA) targeted to areas where many undocumented alien hirings occur.

--Adjust the immigration status of certain undocumented aliens residing in the United States.

--Substantially increase resources available to control the southern border and other entry points to prevent illegal immigration.

--Promote continued cooperation with nations that are major sources of undocumented aliens, to improve their economies and their controls over alien smuggling rings.

ADMINISTRATION OF THE UNDOCUMENTED WORKER PROGRAM

The Wage and Hour Division, within Labor's Employment Standards Administration, administers the undocumented worker program of FLSA and FLCRA enforcement. Compliance officers, stationed at 89 area offices and 262 field stations throughout the United States and in Puerto Rico, enforce the program through wage record reviews and employer and employee interviews. Labor also obtains program data from and coordinates with INS.

OBJECTIVES, SCOPE, AND METHODOLOGY

We made this review to determine the impact of Labor's program on the undocumented worker problem. At Labor, we reviewed 606 undocumented worker closed case files to determine the methods used to select establishments for investigation, results of investigations, coordination between Labor and INS, and results of Labor referrals to INS of suspected undocumented workers.

The 606 cases included 191 cases closed during Labor's pilot program between July 1 and December 31, 1977, and 415 cases closed during the fiscal year ended September 30, 1979. At 7 of the 10 Labor area offices where we performed work, we reviewed all closed cases during the two periods. However, because of the large inventory of closed cases at the other three area offices, we limited our review to 65 percent of the cases closed during the pilot period (34 of 52 cases) and 37 percent of the cases closed during fiscal year 1979 (70 of 188 cases). The results of our review at the three area offices were consistent with the results of closed cases reviewed at the seven area offices.

At INS, we reviewed records of area control operations and selected for analysis establishments that had a history of undocumented worker abuse, in either repeat violations or numbers of undocumented worker apprehensions. Businesses investigated under Labor's undocumented worker program were compared with INS records to determine if the establishments had a history of repeatedly hiring undocumented workers. We spoke with Labor and Justice officials regarding the material obtained during our review.

Between July 1 and December 31, 1977, Labor conducted a pilot program of undocumented worker enforcement and completed 1,000 investigations. After approval of its funding request, Labor initiated a permanent program on July 1, 1978. During the last quarter of fiscal year 1978, 837 undocumented worker investigations were made. About 13,000 investigations were planned for fiscal year 1979 and 15,000 each year thereafter.

FAIR LABOR STANDARDS ACT

FLSA, originally enacted in 1938, sets standards for minimum wage, overtime pay, and other worker protections. On January 1, 1980, workers covered by FLSA became entitled to a minimum hourly wage of $3.10. Previous minimum wage rates for January 1, 1979, and 1978, respectively, were $2.90 and $2.65. FLSA also provides that employees covered under the act must be paid at least 1-1/2 times their regular hourly rate for each hour above the maximum allowable (usually 40 hours a week). Other FLSA provisions establish equal pay, child labor, and employer recordkeeping requirements. FLSA does not prohibit the employment of undocumented workers.

FARM LABOR CONTRACTOR REGISTRATION ACT

FLCRA, as amended, requires farm labor contractors, their full-time or regular employees, and other users of migrant labor to observe certain rules in the employment of migrant workers and to register with Labor before they begin contracting. A "farm labor contractor" is any person who, for a fee, either for himself/herself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers for agricultural employment.

The act, which was intended to improve conditions for migrant farm workers, prohibits farm labor contractors from knowingly employing undocumented workers. Farm labor contractors are required to determine whether migrant workers are U.S. citizens or lawful resident aliens and must maintain applicable written documentation of the evidence on which they relied, such as a birth certificate, naturalization certificate, or alien registration receipt card.

CHAPTER 2

MINIMUM WAGE STANDARDS NOT EFFECTIVE TOOL TO ENFORCE UNDOCUMENTED WORKER PROGRAM

Our review of the undocumented worker program showed that nonagricultural undocumented workers apprehended by INS generally received wages above FLSA minimums. Thus, Labor's undocumented worker program, designed to reduce an employer's economic incentive to hire undocumented workers by enforcing wage and hour standards, is ineffective against employers complying with wage and hour standards. Labor referred names of some suspected undocumented workers to INS for followup action, but such referrals often were of little use because INS had a large backlog of leads or the referral incorrectly identified an undocumented worker.

In the early stages of the undocumented worker program, Labor based its investigations on complaints received from workers rather than from INS leads, and limited coordination occurred between Labor and Justice. Later, Labor improved its program by making greater use of INS data in scheduling investigations, periodically visiting INS detention centers and staging areas, 1/ and establishing strike forces 2/ in several localities to investigate employers' possible wage exploitation of workers, including undocumented workers.

From July 1, 1977, to July 31, 1979, Labor completed 13,774 undocumented worker program investigations. These investigations resulted in findings of about $21 million in illegal minimum wage and overtime underpayments affecting about 139,000 workers. We believe, however, that most of these workers were probably not undocumented workers because most investigations were based on workers' complaints. Undocumented workers normally do not complain to Labor about FLSA violations because they fear detection, apprehension, and possible deportation.

1/Detention centers are used to detain persons held by INS for lengthy periods because they cannot be quickly deported from the United States. Staging areas are temporary overnight holding facilities for persons awaiting a determination of deportation or removal to a detention center.

2/Labor's strike forces consist of 4- to 13-member teams of experienced compliance officers.

Our review was conducted at Labor and INS offices shown below, which were selected to assure adequate geographic coverage of the program, with particular emphasis on those areas in which INS apprehended the largest number of undocumented aliens:

--Labor and INS headquarters, Washington, D.C.

--Labor regional offices in Massachusetts, New York, Illinois, and Texas.

--Labor area offices in Massachusetts, Connecticut, New York, New Jersey, Illinois, and Texas.

--INS district offices in Massachusetts, Connecticut, New York, New Jersey, Illinois, and Texas.

Several Labor officials stated that most undocumented workers, except for agricultural workers, are paid the minimum wage or higher. They added that failure to pay undocumented workers proper overtime in accordance with FLSA would more likely occur. However, overtime violations are difficult to prove if employers maintain erroneous or incomplete records or if undocumented workers remain silent in fear of being detected.

INS district office officials told us that very few apprehended undocumented workers in nonagricultural jobs earn less than FLSA minimum wages. For example, Chicago INS district office officials said they concentrate on locating and arresting undocumented workers in jobs in high-wage industries that would be attractive to U.S. citizens. They did not believe that there were many undocumented workers in the Chicago area who were paid below FLSA minimum wage. The director of the Portland, Maine, INS district office gave us a cross-section of jobs and wages of undocumented workers apprehended during 1979 within his district. Many of these occupations (as shown below) would be considered desirable by U.S. citizens because they paid substantially more than the prevailing minimum wage. However, Labor cannot take economic action against employers of undocumented workers in these occupations if wages meet or exceed established minimums.

Nationality	Occupation	Wages
Canada	Carpenter	$ 5 hourly
Canada	Dry wall worker	12 hourly
Canada	Truck driver	800 weekly
China	Cook	545 monthly
China	Cook	135 weekly
Colombia	Yacht captain	800 monthly
El Salvador	Restaurant manager	11 hourly
Germany	Camp counselor	50 weekly
Greece	Pizza parlor worker	4 hourly
Guyana	Nurse's aide	4.50 hourly
Malaysia	Neurohistologist	10,000 yearly
Pakistan	Laborer	3.25 hourly
Philippines	Nurse	283 weekly
Taiwan	Chemist	16,400 yearly
Uganda	Disc jockey	5 hourly
United Kingdom	Secretary	4 hourly

STATISTICS SHOW UNDOCUMENTED WORKERS GENERALLY RECEIVE MINIMUM WAGES REQUIRED BY LAW

The basic assumptions underlying Labor's undocumented worker enforcement program are that (1) employers are exploiting undocumented workers by not paying FLSA minimum wages and (2) through strict enforcement of wage and hour laws, an employer's incentive to continue such exploitation would be reduced. However, INS records show that, except for agricultural work, employers generally pay undocumented workers at or above FLSA minimum wage rates.

For many years, INS district offices have maintained records of hourly wages earned by undocumented workers apprehended by INS agents. The hourly wages have been categorized in recent years into four groups--less than $2.50, $2.50 to $4.49, $4.50 to $6.49, and more than $6.49. Statistics from seven INS district offices show that most undocumented workers apprehended by INS during fiscal years 1977 and 1978 earned more than $2.50 hourly. For example, as shown in the following table, of 59,728 undocumented workers apprehended by INS in fiscal years 1977 and 1978, 46,952 (79 percent) were paid $2.50 or more hourly. The FLSA minimum hourly wage rate was $2.30 from October 1, 1976, to December 31, 1977, and $2.65 from January 1 to September 30, 1978.

INS office	Fiscal year 1977 Total	Fiscal year 1977 Number earning $2.50 or more	Fiscal year 1978 Total	Fiscal year 1978 Number earning $2.50 or more
Boston	1,269	1,116	847	784
Hartford (note a)	351	312	498	459
Chicago (note b)	5,770	4,753	6,013	5,567
Houston	5,270	3,936	4,420	4,107
San Antonio	4,642	1,927	6,225	4,465
Newark (note c)	2,186	1,919	2,413	2,312
New York City	10,207	7,566	9,617	7,729
Total	29,695	21,529	30,033	25,423

a/Includes April through September 1977. Data not available before April 1977.

b/Does not include the INS suboffices in Hammond, Indianapolis, and Milwaukee.

c/Includes March through September 1977. Data not available before March 1977.

Court for the District of Columbia ruled against INS in a search that resulted in the arrest of undocumented workers. The court ruled that search warrants did not authorize the investigators to arrest employed undocumented workers, but that they should use valid "arrest" warrants, not "search" warrants.

If Labor had authority to identify undocumented workers, through questioning, it could (1) give INS more accurate data to obtain arrest warrants and (2) reduce or eliminate referrals to INS of suspected undocumented workers who later are proved documented. As shown below, INS district offices generally had large backlogs of pending leads (referrals) received primarily from the public alleging the presence of thousands of illegal aliens. Unless Labor makes more accurate Labor referrals, they will be of little use to INS.

INS district office	Backlog of pending INS leads as of December 31, 1978	Number of aliens reported
New York, N.Y.	4,649	7,367
Newark, N.J.	4,517	8,945
Chicago, Ill.	7,951	41,376
Houston, Tex.	2,728	27,840
San Antonio, Tex.	1,221	3,349
Boston, Mass.	321	483
Hartford, Conn.	286	524
Total	21,673	89,884

At two of three Labor area offices in Chicago, suspected undocumented workers were referred to INS using such criteria as:

--Large numbers of non-English-speaking employees.

--Employees with different surnames residing at the same address.

--Employees telling the compliance officer that certain individuals were undocumented.

--Experience or intuition of the compliance officer.

In tracing 31 Labor referrals of suspected undocumented workers in three Chicago area establishments, we found that, after INS investigations were completed, only 2 of the 31

LIMITED EFFECTIVENESS OF LABOR'S UNDOCUMENTED WORKER PROGRAM

Our review of 606 Labor investigations showed that improvements were needed in implementing the undocumented worker program.

Program directed primarily to complaints received rather than self-directed investigations

The Congress authorized additional staff for Labor to undertake a directed (self-initiated) program of investigations against employers of undocumented workers. However, 397 of the 606 undocumented worker investigations reviewed were undertaken as a result of complaints received. Consequently, Labor generally used the added staff in responding to employee labor complaints, which would have been investigated during normal FLSA enforcement activity.

With INS assistance, each Labor area office developed a list of industries commonly employing undocumented workers. In some cases, Labor received from INS names of establishments that were known to be employing undocumented workers, but such information generally was not used in scheduling establishments for investigations.

Labor area offices generally did not investigate establishments that INS records showed had a history of employing undocumented workers.

Labor's procedures for identifying undocumented workers unsound

FLSA does not give Labor explicit authority to question workers about their alien status or to preclude their continuing employment. As a result, Labor instructed its compliance officers not to question the workers' alien status. Yet, compliance officers are instructed to be alert to any circumstances that indicate the employment of undocumented workers for referrals to INS. If Labor had authority to identify undocumented workers through questioning, it could give INS more specific evidence of employers' hiring of undocumented workers.

INS' use of search warrants to enter a place of employment has come under question. In Blackie's House of Beef, Inc., v. Castillo 467 F. Supp. 170 (1978), the U.S. District

workers. Use of INS investigation techniques, along with the establishment of basic criteria for identifying suspected undocumented workers by Labor compliance officers, could improve the reliability of referrals to INS.

LIMITED COORDINATION BETWEEN DEPARTMENTS OF LABOR AND JUSTICE

President Carter's undocumented alien message stated that the Departments of Justice and Labor were to exchange information developed in their enforcement activities. Since INS administers and enforces immigration laws, including the apprehension and deportation of undocumented workers, close coordination between INS and Labor regarding the location of undocumented workers needs to be an essential element of the program. We noted, however, that coordination between the two Departments was minimal in the undocumented worker FLSA program.

Generally, Labor headquarters, regions, and area offices made some effort to establish liaison with INS during the pilot program, but such contacts were not carried over into the follow-on program. Coordination between the INS district offices in Chicago, Boston, Hartford, Houston, and San Antonio and the Labor area offices during the follow-on program was almost nonexistent and little information was exchanged. In fact, the assistant district directors for investigations in the INS district offices in Chicago, Boston, and Hartford, as well as several supervisory investigators in the Houston district office, were unaware of Labor's follow-on program.

The types of liaison and coordination we were looking for but did not find were:

--Labor area offices using INS records to schedule FLSA investigations of companies that habitually use undocumented workers.

--INS giving Labor feedback showing results of investigations on suspected undocumented workers referred by Labor area offices.

--INS transmitting to Labor data relating to apprehended undocumented workers employed at less than minimum wage levels.

workers were undocumented. Many of the referrals apparently were made because the surnames were of Hispanic origin.

In the Houston and San Antonio area offices, Labor compliance officers used some of the following criteria to identify undocumented workers:

--Employees without social security numbers.

--Employees with Hispanic surnames or first names uncommon to the United States.

--Employees who ran away when approached.

--Employees unable to read or write English.

Referrals from Labor's Houston area office did not include names of suspected undocumented workers and thus were not considered of much value by INS.

At the Bronx area office, the criterion used was a "gut feeling" based on employees' undelivered mail and the lack of social security numbers. An official in INS' New York district office responsible for monitoring leads received from Labor's area offices stated, in April 1979, that suspected undocumented worker referrals received from Labor had not been productive because names of suspected aliens were not included in the referrals and no explanations were given to let INS know what to look for.

In Labor's Boston and Hartford area offices, little was done to identify undocumented workers. Only one referral was made to INS on the basis of 142 investigations performed between July 1977 and December 1978.

Because compliance officers were prohibited from questioning the resident status of workers, they apparently relied on noting Hispanic surnames or other techniques that often led to referring workers to INS who were U.S. citizens or validly documented aliens. Such tactics not only raised questions of discrimination, but also wasted INS investigators' time.

The INS Assistant Commissioner, Investigations, stated that a list of names Labor suspects are undocumented workers could be helpful because it would facilitate requests for warrants. He said that INS would, if requested, instruct Labor on techniques it uses to identify suspected undocumented

found none in 12, and did not investigate the other 23 because of higher priorities.

We obtained additional data that showed Labor completed 9,054 FLSA undocumented worker investigations from July 20, 1979, to February 20, 1980, which resulted in employers' agreeing to pay back wages of $8,410,328 to 69,161 employees. Labor did not maintain data showing what sources were used in selecting establishments for undocumented worker investigations and whether they were based primarily on complaints.

Detention center and staging area operations

A Labor pilot program aimed at obtaining leads for undocumented worker investigations from undocumented alien detainees was successfully tested at an INS detention center in Brooklyn, New York. Later, in November 1979, Labor personnel were assigned to regularly visit three INS detention centers and seven INS staging areas where undocumented aliens were held. The procedure involved visiting the sites two or three times a week to interview detainees about possible wage and hour violations at establishments where they were formerly employed. Data obtained, along with a review of INS records available at these facilities, provided a basis for scheduling Labor's undocumented worker investigations. Data are currently being collected by Labor regional offices to evaluate this operation.

Strike forces

In February 1979, a new strike force team composed solely of Labor personnel was established in New York City to concentrate its investigative efforts on 400 contractors employing more than 10,000 Chinese workers in the garment industry. The objective is to deal with the wage exploitation of workers, including undocumented workers. This strike force concept was expanded to seven other locations, and as of April 7, 1980, the following actions had been taken.

In Labor's New York region, the following coordination efforts occurred:

--Compliance officers visited INS New York City and Newark district offices to review Forms 213, Record of Deportable Aliens. Also, arrangements were made to have all Forms 213 concerning undocumented aliens employed in Nassau and Suffolk Counties sent to Labor's Hempstead area office.

--Labor conducted a pilot program at the INS Brooklyn Detention Center to identify possible wage violations from interviews with apprehended undocumented workers.

LABOR'S ADMINISTRATION OF UNDOCUMENTED WORKER PROGRAM IMPROVED DURING OUR REVIEW

On November 6, 1979, Labor issued instructions to compliance officers listing, in order of priority, the sources to be used in selecting establishments for enforcement of FLSA and other labor standard laws in industries and localities where undocumented workers have traditionally been found:

--Complaints from detainees at INS detention centers.

--Leads received from local INS offices.

--Leads obtained from INS records at detention centers.

Labor selected three INS detention centers and seven INS staging areas for implementing the priority system in selecting establishments for undocumented worker investigations. Labor assumed that most investigations would be scheduled on the basis of the above priority selection criteria. However, these sources may be supplemented with investigations of establishments in industries known to employ undocumented workers or with leads or complaints obtained from other sources.

From November 1979 to March 1980, about 400 suspected undocumented workers were referred to INS. On March 21, 1980, a Labor official said that INS found 162 undocumented workers within the referrals.

We were also told that, in the same period, Labor referred 61 establishments to INS as suspected employers of undocumented workers. INS found undocumented workers in 26 establishments,

Houston strike force

We questioned the chief of the Houston area strike force to determine methods used and results of strike force operations. The force was composed of eight full-time employees who operated in teams of two when visiting establishments. Activities were concentrated in the construction industry because of its reputed use of undocumented workers. Each team included a Spanish-speaking investigator, which enhanced undocumented workers' discussions with Labor personnel because they could converse in Spanish and because of publicity which asked for cooperation and promised that employee names would not be referred to INS.

The strike force team completed 242 investigations and obtained employer agreements to pay $510,624 of back wages to 2,064 employees. Since the total findings were $640,078, litigation was not necessary because of the high degree of employer acceptance. INS personnel are not included in the strike force teams, so it is not known how many, if any, of the 2,064 employees were undocumented workers.

We were advised that Labor has no sure way of determining which employees are undocumented workers, but even if alien status could be quickly determined, it would be useless because:

--Labor cannot require an employer to terminate the employment of undocumented workers.

--Labor cannot impose penalties on employers for hiring undocumented workers.

--INS cannot respond to all undocumented worker referrals from Labor because of backlogs.

The strike force chief said that the names of about 30 establishments were referred to INS as suspected employers of undocumented workers but he did not know how many were investigated by INS. INS previously advised us that Labor referrals of establishment names were not as useful as names of suspected undocumented workers.

- - - -

We suggested to INS officials that, when recording hourly wage rates of undocumented workers apprehended, a category be established for those earning less than the prevailing FLSA

Staffing	Area	Number of establishments visited and type
10	Chinatown, N.Y.	Started February 1979--investigated 402 ladies garment shops.
10	Northern New Jersey	Started August 1979--108 of 148 investigations were at garment shops and restaurants.
4	Brooklyn, N.Y.	Started September 1979--investigated 36 garment or knitting shops. Strike force deactivated but reactivated in April 1980.
5	Bronx, N.Y.	Started November 1979--investigated 32 garment shops. Strike force deactivated but reactivated in April 1980.
8	Houston, Tex.	Started September 1979--investigated 128 construction and 57 retail employers out of 242 establishments visited. Strike force deactivated in March 1980.
13	Miami/Ft. Lauderdale, Fla.	Started January 1980--investigated 71 restaurants, hotels, and motels out of 81 establishments visited.
8	Dallas/Ft. Worth, Tex.	Started January 1980--investigated 90 construction and 25 food service employers out of 138 establishments visited.
8	Los Angeles, Calif.	Started March 1980.

These strike forces concentrate investigations in industries where undocumented workers are likely to be employed. Business establishments are investigated to ensure that employers pay employees' wages in accordance with wage and hour laws regardless of their citizenship status.

No specific number of undocumented workers was referred to INS. Generally, any referrals to INS concerned establishments and not specific employee names. We were advised that many establishments were investigated as a result of information already developed by INS. Strike force investigations have resulted in employer agreements to pay employees about $1.3 million in back wages.

AGENCY COMMENTS AND OUR EVALUATIONS

Labor comments on program implementation and coordination

On August 11, 1980, in response to our draft report, Labor questioned our review of 606 investigation files completed during the pilot project and during the period between July and December 1978 as being too early in the program to reach valid conclusions on the program's impact on effectiveness. Also, Labor stated that any generalizations or conclusions drawn from our review may not be reflective of existing current enforcement activity. Labor stated that many, if not most, of our original criticisms are no longer valid as a result of the implementation of additional procedures and the formulation of more effective policies.

Labor stated that it does not have the authority to identify undocumented workers under FLSA and, therefore, should not be expected to administer immigration statutes which come under INS' authority. Labor also stated that INS has not been able to respond to Labor referrals partly because of higher priorities during initial stages of the Iranian crisis and because INS apprehension activity was at a standstill for several months during the 1980 census.

As Labor pointed out, our review covered Labor's undocumented worker program during its early stages. However, the nature of our findings are not affected by the passage of time. For example, the fact that many nonagricultural undocumented workers are paid above the minimum wages and INS' investigative backlog, which results in INS not being able to fully act on Labor referrals, probably would not change. Further, INS advised us during the review that referrals from Labor were often not used because they were inaccurate or did not specify names of suspected undocumented workers.

Labor comments on wages received by undocumented workers

According to Labor, we should consider several factors regarding wages paid to undocumented workers. Labor noted that the minimum wage was $2.30 in fiscal year 1977 and $2.65 in fiscal year 1978. Labor added that many of those undocumented workers for whom INS reported hourly wages in fiscal year 1978 of $2.50 or more could have been paid less than $2.65 per hour.

minimum wage. These and other pertinent data could then be used as a basis for reporting the names of aliens and companies employing them to Labor for followup investigation of FLSA compliance. Labor officials later told us that arrangements had been made with INS to give Labor regional offices monthly lists of establishments that had undocumented workers being paid at or below the minimum wage. An INS official also advised us that instructions were sent to INS regional offices to require all district/sector offices to send information to the local Labor office about undocumented aliens arrested by INS who also earned less than the FLSA minimum wage.

CONCLUSIONS

It is doubtful whether any improvements made in administering the FLSA undocumented worker program would result in accomplishing the President's intent of markedly reducing the flow of undocumented workers into this country because:

--Many employers pay nonagricultural undocumented workers wages above established wage minimums and, therefore, will not be affected by Labor's undocumented worker program.

--Many jobs held by undocumented workers are considered desirable by U.S. citizens, but Labor is precluded from acting against employers when wages exceed established minimums.

--The small number of Labor's suspected undocumented worker referrals and subsequent confirmation of illegal status by INS indicates that Labor's program has had little impact in reducing the employment of such workers. In addition, in areas of large undocumented worker concentrations, INS has large backlogs of leads. Consequently, additional Labor referrals may not be acted on.

We believe that Labor and INS should continue to exchange information necessary to carry out their respective objectives of ensuring that employers pay workers' wages in accordance with wage laws and that undocumented workers are identified and dealt with according to immigration laws. Other than the exchange of information between Labor and INS, we believe that continuing a separate undocumented worker program will not have a substantial impact until statutory sanctions are legislated against establishments knowingly employing such workers. (See ch. 3.)

though INS may not validate all the wage information received from undocumented workers, it is--to our knowledge--the only wage data available on undocumented workers, and we have no basis for questioning its accuracy.

Labor comments on strike force activities

Labor stated that its strike force program, which has the objective of reducing the economic incentive to employ undocumented workers, has been highly successful. Strike force activities, which are highly visible and have generated considerable publicity, have focused on geographic areas and industries where undocumented workers are known to be employed. Labor stated that over 1,390 strike force program investigations have been completed with about $3.7 million in monetary violations found where employers have agreed to pay workers $1.6 million. Labor expects the agreement-to-pay amount will increase substantially as several investigations are closed following litigation.

Although the strike force team statistics and accomplishments seem impressive, there is no assurance that the objective of reducing an employer's incentive to employ undocumented workers has been achieved because Labor has little or no knowledge of the number of undocumented worker violations. Labor's program was pilot tested in July 1977, but as of August 1980, it had not established a target date as to when or how it will measure the impact its program is having.

The primary incentive for illegal immigration is employment. Labor has no definitive method for determining which employees are undocumented workers. Even if an alien's status could be quickly determined, it would be of little value because Labor cannot require employers to terminate the employment of undocumented workers and cannot impose penalties on employers for hiring such workers. Also, INS cannot respond to all undocumented worker referrals from Labor because of backlogs. We continue to believe, therefore, that continuing a separate undocumented worker program will not have substantial impact until statutory sanctions are legislated against establishments knowingly employing undocumented workers.

Seven INS district offices we visited apprehended 29,695 undocumented workers, of whom 21,529 (or 72 percent) were paid more than the minimum hourly wages applicable to the fiscal year 1977 period. In addition, many undocumented workers earning less than the $2.50 hourly cutoff established by INS could still have received above the minimum wage of $2.30 during fiscal year 1977. Admittedly, in fiscal year 1978, some undocumented workers classified by INS as earning more than $2.50 hourly could have received less than the minimum wage of $2.65 hourly. However, it seems reasonable to us to assume that the high rate of undocumented workers receiving above the minimum wages in fiscal year 1977 would have continued in fiscal year 1978.

Labor referred to our statement that the INS district office in Chicago concentrates on locating and arresting undocumented workers in jobs in high-wage industries that would be attractive to U.S. citizens. Because almost 20 percent of the cases in our sample were from the Chicago area, Labor concluded that our sample was statistically biased in favor of undocumented workers earning $2.50 or more per hour. We do not believe that our sample was biased because the Chicago district office was the only INS office of the seven we visited which concentrated its investigations against undocumented workers in high-wage industry jobs.

Labor stated that it encountered several problems in attempting to interpret the data we collected from INS reports because undocumented workers were asked only for their hourly rate of pay without knowledge of whether reported rates were accurate or if payment was made for all hours worked. Labor also questioned whether several other aspects relating to wages--such as overtime, piece rates, and Government contract work--which would not have been obtained by INS, affected compliance with FLSA. Labor stated that, in many cases, undocumented workers could be paid above the FLSA minimum wages and yet not be paid the proper wages under Government contract statutes, such as the Davis-Bacon Act and the Service Contract Act. Labor further stated that, because we did not consider these facts, any conclusions based on INS records are potentially misleading.

Although INS may not validate wage information obtained from undocumented workers, during our review INS stated that in some cases, such as nonimmigrant aliens who accept unauthorized employment, it will obtain a statement from an employer regarding the hourly wages paid to an alien. Even

CHAPTER 3

DETERRENTS INADEQUATE AGAINST EMPLOYERS OF UNDOCUMENTED WORKERS

Our review of the undocumented workers program showed that deterrents against employers of such workers are inadequate. INS' activities, involving the discovery and deportation of undocumented workers, are a temporary inconvenience to employers rather than an effective deterrent. In addition, employers are permitted to retain back wages due unlocated undocumented workers.

DEPARTMENT OF JUSTICE OPERATIONS HAVE NOT PREVENTED USE OF UNDOCUMENTED WORKERS

President Carter's August 4, 1977, message to the Congress proposed a set of actions to help reduce the increasing flow of undocumented workers into this country. One of the President's proposals was to make it unlawful to hire undocumented aliens, with the Department of Justice's enforcement against employers who engage in a pattern or practice of such hiring. Legislation to make such hiring unlawful has not been enacted.

We visited seven INS district offices to determine what effect INS operations had on employers of undocumented workers. INS felt that the deterrent effect of its enforcement activities is that an employer that loses many workers as a result of INS discovery and deportation of undocumented workers will lose time and money in training replacements. We found, however, that such INS actions are more of a temporary inconvenience than an effective deterrent. INS district office files contained many cases of employers' continued employment of undocumented workers, even though INS operations were repeatedly directed against them. For example:

--Operations against an Illinois factory in January 1976 resulted in the apprehension of 35 undocumented workers. In September 1978, another investigation resulted in the apprehension of 20 more such workers.

--Three separate operations against an Illinois factory in 1976 resulted in 37 apprehensions of undocumented workers. In January 1978, another investigation resulted in the apprehension of 20 more.

Department of Justice comments

On August 13, 1980, in response to our draft report, the Department of Justice stated that its concern focused on our discussion relating to past and present interactions between Labor and INS. In general, Justice said that the report accurately depicts these interactions and that increased coordination and exchange of information concerning undocumented workers will benefit both Departments in enforcing their respective laws.

EMPLOYERS PERMITTED TO RETAIN BACK WAGES DUE UNLOCATED UNDOCUMENTED WORKERS

Under FLSA, Labor collects back wage judgments due employees only when the Government has instituted wage suits against employers. Most FLSA violation cases are settled out of court. However, any back wages due an employee who cannot be located are retained by the employer. Because of their desire to remain undetected, many undocumented workers who are due back wages cannot be located, and the employers retain the back wages.

For example, of 171 undocumented worker investigation cases at three Chicago area offices, Labor determined that back wages of $320,191 were owed to 1,854 employees. Employers agreed to pay back wages of $251,944 to 1,472 employees. However, 268 of the 1,472 employees (18.2 percent) could not be located, and the employers retained the back wages. The following cases further illustrate the situation.

--A Chicago area restaurant was found to owe back wages of $1,830 for minimum wage violations and $9,011 for overtime violations to 44 employees. Twenty-one employees were paid $2,530. The back wage payment status of one employee could not be determined. The other 22 employees were not located, and the employer retained the remaining back wages. Of the 22 employees who could not be located, 19 had Hispanic surnames. The Labor compliance officer's report stated that all Mexican employees due back wages were deported in July 1978.

--Another Chicago area restaurant was found to owe back wages of $2,264 for minimum wage violations and $8,694 for overtime violations to 69 employees. Although the employer agreed to pay the back wages, the file indicated that only 19 employees were paid $3,606. Six employees received notification but did not pick up their money. The other 44 employees were not located. Nineteen of the unlocated employees had Hispanic surnames, and an area office official advised us that their names would be referred to INS. The employer retained the back wages due the unlocated employees.

--From November 1972 to January 1977, INS conducted 20 operations against a Texas prestressed concrete firm with 190 undocumented worker apprehensions. The most recent INS operations in 1977 and 1978 resulted in 31 apprehensions.

--From July 1970 to June 1977, INS conducted 62 operations against a Texas contractor with 130 undocumented worker apprehensions. Six recent operations in 1977 and 1978 resulted in 13 apprehensions.

--From March 1972 to December 1978, INS conducted 26 operations against a New Jersey laminating firm that resulted in 76 apprehensions. Fifteen of these operations were conducted during 1978 and resulted in 31 apprehensions.

The INS Assistant Commissioner, Investigations, advised us that, when undocumented workers are apprehended at worksites, employers are temporarily inconvenienced, but without sanctions against the hiring of such workers, there is little or no deterrent to prevent future hirings.

- - - -

There are no sanctions against employers who knowingly hire undocumented workers. In a prior report to the Congress, "More Needs to be Done to Reduce the Number and Adverse Impact of Illegal Aliens in the United States" (B-125051, July 31, 1973), we recommended passage of a pending bill that would make it unlawful to knowingly hire illegal aliens. The bill was not enacted.

While we believe that penalties are still needed, we recognize that sanctions against those who hire undocumented workers without a simple and reliable system of identification unfairly burdens employers. To deal with this problem, alternatives have been suggested, such as issuance of a tamper-proof social security card or distribution of a national identity card.

Public Law 95-412 established a Select Commission on Immigration and Refugee Policy, composed of four Cabinet members, eight Congressmen, and four Presidential appointees. This Commission is to examine and make recommendations for overhauling the U.S. immigration laws and submit a final report to the Congress by March 1981.

we believe that such legislation should be deferred pending the report by the Select Commission on Immigration and Refugee Policy. 1/

We believe that the Congress should enact legislation to require that, when employees cannot be located and are due back wages from FLSA violations, the wages be deposited in the U.S. Treasury as miscellaneous receipts. We do not believe that employers have any incentive to voluntarily deposit such funds in the Treasury. Such legislative action would create some deterrent to employers who may pay undocumented workers less than FLSA requires because of their transitory status in the hope of retaining any back wages Labor determines are due.

RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend FLSA to require that back wages resulting from violations of the act found to be due employees--whether undocumented or legally entitled to work in the United States--who cannot be located, be deposited in the U.S. Treasury as miscellaneous receipts.

AGENCY COMMENTS AND OUR EVALUATION

Labor's comments on back wage collections and increased litigation efforts

Labor offered no substantive response to our recommendation regarding the deposit of back wages due employees, who

---

1/On November 5, 1980, we issued a report to the Congress, "Prospects Dim for Effectively Enforcing Immigration Laws" (GGD-81-4). The review objectives were to assess INS' ability to control the influx of illegal aliens under existing laws, policies, and procedures and to identify impediments to effective immigration law enforcement. The report stated that the Congress will be asked, on the basis of the Select Commission's work, to consider recommendations and legislation to change immigration laws, policies, and procedures. Expectations are that a rational and humane policy will be developed that will still limit the number of immigrants to be accepted. To the extent that it contains limitations, the policy's objectives will not be fully achieved unless the United States improves its ability to enforce the immigration laws.

--A Texas lumber company was found to owe minimum wage and overtime back wages of $3,700 to 38 employees. The employer retained back wages of $1,469 due 20 employees because they could not be located. Two of the 20 employees were considered to be undocumented workers because the company timebooks contained their hours under the identity of "wet #1" and "wet #2." (The term "wet" was the employer's abbreviation of the word "wetback," which commonly refers to a Mexican laborer who illegally enters or is brought into the United States to work.) The back wages due the two undocumented workers amounted to $474. The area office informed INS of the company's apparent use of undocumented workers.

--A chain of three restaurants in the San Antonio area was found to owe back wages of $5,192 to 62 employees for minimum wage violations and $6,388 for overtime violations. Forty-three of these employees due back wages of $6,536 could not be located. Many of the 43 employees had Hispanic surnames. The compliance officer's report stated that, through conversations with employees, it was inferred that undocumented aliens had worked in the restaurants. The employer retained all back wages due the unlocated employees.

In August 1979, Labor notified us that its Dallas region had tested a pilot program using the Mexican Consulate in Dallas to distribute back wage checks to Mexican nationals who left the country. In January 1980, Labor implemented this program throughout the country.

Also, working with the solicitor's office, Labor's Dallas region is testing a procedure whereby, in nonlitigation cases, employers are asked to sign a stipulation to the effect that, if the workers cannot be located, back wages will be paid into the U.S. Treasury as miscellaneous receipts. The employer, however, is under no obligation to sign the stipulation.

CONCLUSIONS

The effectiveness of Labor's undocumented worker program has been, and probably will continue to be, limited because it lacks effective deterrents against employers knowingly using undocumented workers. There are no sanctions against employers hiring such workers. Accordingly, legislation is needed to provide sanctions against employers engaging in a pattern or practice of hiring undocumented workers. However,

CHAPTER 4

ADMINISTRATIVE IMPROVEMENTS NEEDED TO PRECLUDE EMPLOYMENT OF UNDOCUMENTED WORKERS AS FARM LABORERS

Our review of Labor's administration of FLCRA showed that improvements are needed to prevent the employment of undocumented workers as farm laborers as intended by the act. We found that:

--Farm labor contractors generally do not prepare written documentation--as required by the regulations implementing FLCRA--that workers are either citizens or aliens authorized to work in the United States.

--Labor erroneously instructed its compliance officers--in their efforts to assure compliance with FLCRA--that they did not have the authority to ascertain from farm laborers whether they were citizens or aliens authorized to work in the United States.

--Labor had a substantial and increasing backlog of prosecution cases of farm labor contractors' violations of FLCRA.

FLCRA requires that the Secretary of Labor issue certificates of registration to individuals applying and qualifying under the law to be farm labor contractors. However, the Secretary may refuse to issue and may suspend, revoke, or refuse to renew a certificate of registration to any such contractor if found to have knowingly recruited, employed, or used the services of any person who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment in the United States.

REQUIRED EVIDENCE OF WORKERS' ELIGIBILITY FOR EMPLOYMENT NOT OBTAINED BY FARM LABOR CONTRACTORS

Federal regulations implementing FLCRA require that farm labor contractors show evidence that they made a bona fide inquiry into each prospective employee's status as either a U.S. citizen or an alien lawfully authorized to

cannot be located, into the U.S. Treasury as miscellaneous receipts. Labor said only that it is "considering its position" on this matter. In the absence of arguments to the contrary, we continue to believe that the legislation proposed would be a beneficial complement to Labor's authority to institute legal actions against employers who violate FLSA. Enactment of such legislation would, in our view, make clear to employers that FLSA violations will result in definite loss of revenues as a result of either litigation brought by employees or Labor, or prelitigation agreements with Labor arising out of such statutory violations.

Labor questioned our statement that there has been no significant increase in litigation efforts against employers of undocumented workers who are identified as being in violation of FLSA requirements. According to Labor, it does not keep statistics in a manner that would indicate whether the employers sued for violations of FLSA also employ undocumented workers. Labor added that FLSA provides no statutory authority to proceed against employers based solely on their employment of undocumented workers. Labor also stated that litigation under FLSA has increased--in fiscal year 1979, 1,180 suits were filed under FLSA, while in fiscal year 1980, this figure has increased to about 1,400--an increase of 220 (19 percent).

Labor is correct in stating that its litigation under FLSA has increased. Although Labor's records do not indicate which FLSA litigation action involved employers of undocumented workers, litigation action involving employers of undocumented workers probably also increased. Accordingly, the statement in our draft that there has been no significant increase in litigation efforts against employers of undocumented workers has been deleted.

Department of Justice comments

The Department of Justice agreed with our conclusion that legislation regarding sanctions against employers who knowingly hire undocumented workers should not be enacted until the Select Commission on Immigration and Refugee Policy established under Public Law 95-412 has completed its work.

Justice added that it has no specific comments to offer regarding our recommendations because they relate to matters not under its purview, but it believes the recommendations will help reduce the employment of undocumented workers.

LABOR ERRONEOUSLY LIMITED COMPLIANCE OFFICERS' AUTHORITY TO INVESTIGATE WORKERS' ELIGIBILITY FOR EMPLOYMENT

Labor officials told us that compliance officers did not have authority to question employees hired by farm labor contractors about their eligibility to work in the United States. Labor officials stated that they had refrained from questioning farm labor contractor employees about their citizenship because of INS instructions. They were unable, however, to furnish documentation supporting this position.

During our discussions with the Labor officials, we cited section 7 of FLCRA, which authorizes Labor to obtain information and, in connection therewith, enter and inspect places and records, question persons, and investigate facts, conditions, practices, or matters as may be necessary or appropriate to determine whether FLCRA violations were committed. We questioned why Labor believed this section of FLCRA did not give it authority to question farm laborers.

Later, on March 9, 1979, Labor's Solicitor wrote to INS' General Counsel requesting an opinion on any perceived legal problems should Labor personnel directly question migrant workers regarding their legal status as U.S. citizens, authorized aliens, etc., to determine farm labor contractors' compliance with FLCRA. The Solicitor added that, in the past, her office had informally advised compliance officers that they could not directly ask the migrant worker for proof of his or her status. Two reasons cited for this Labor position were equal protection guarantees under the Constitution and crossover into INS' jurisdiction.

On April 19, 1979, INS' General Counsel advised the Labor Solicitor that, while INS has authority to enforce the Immigration and Nationality Act relating to an alien's right to be in or remain in this country, Labor has sole authority to enforce FLCRA. The General Counsel added that FLCRA appears to give Labor authority to make inquiries of employees regarding their legal status and their right to work in this country.

On August 21, 1979, Labor's Associate Solicitor, Division of General Legal Services, notified the Wage and Hour Division's Deputy Administrator that FLCRA authorizes full investigations, including the right of compliance officers to make direct inquiries of migrant workers. The Associate Solicitor added:

work in the United States. This requirement can be met by written documentation that reliance was based on such items as a birth certificate, certificate of citizenship, or certificate of naturalization.

Labor instructions for enforcing FLCRA include a requirement that compliance officers determine whether the farm labor contractors made the required bona fide inquiry. However, at the three Labor area offices in our review that made FLCRA investigations, we were told that compliance officers generally accepted a farm labor contractor's oral statement that all employees were eligible for employment without inspecting the contractor's files for written documentation of such eligibility. Labor officials advised us that it is often impractical to expect farm labor contractors to maintain such records because they literally work out of the back of a truck.

Notwithstanding Labor officials' views that it may be impractical to require farm labor contractors to maintain records, Senate Report No. 93-1295 on the FLCRA amendments of 1974 clearly states that such records should be maintained. The report states:

> "* * * it is the intention of the Committee [on Labor and Public Welfare] that all contractors must evidence some affirmative showing by making a bona fide inquiry of whether a prospective employee is a United States citizen, a lawfully admitted permanent resident, or a nonimmigrant authorized to work in the United States."

- - - -

On May 27, 1980, Labor issued regulations on additional documents acceptable as evidence of a bona fide inquiry of employability status under FLCRA. For example, one means of establishing employability for U.S. citizens would be for farm labor contractors to obtain a copy of a declaration signed by the applicant (farm laborer) and countersigned by an offical of the U.S. Employment Service. The declaration, filed with the Employment Service, would attest that the farm laborer is a U.S. citizen and would state the place and date of birth, social security number, and names and addresses of three adult citizens who can verify the applicant's citizenship. The applicant would be subject to prosecution for perjury.

be punished by a fine not to exceed $10,000 or sentenced to prison for not more than 3 years, or both.

FLCRA also provides for a civil penalty of not more than $1,000 for each violation committed by a person under the act or regulations promulgated under the act. FLCRA procedures state that any person assessed a civil penalty:

--Will be afforded an opportunity for an agency hearing.

--May obtain review by the U.S. district court after an agency hearing.

--After failing to pay an assessment after it becomes a final and unappealable order, will be subject to action by the Attorney General in the appropriate U.S. district court to recover the assessed amount.

The following cases illustrate delays in Labor's prosecution of FLCRA violations.

Case A

Acting on a complaint received from a migrant worker, San Antonio area office compliance officers made an investigation during May and June 1978 of a farm labor contractor operating on a farm near Del Rio, Texas. The complainant had stated that, when he asked the farm labor contractor to pay him the Federal minimum hourly wage of $2.65 to work on the farm, he was told that there were "plenty of illegals that would work for even less than $2.00 per hour."

Initial investigation indicated that many suspected undocumented workers were employed at the farm. Later, compliance officers, accompanied by 11 INS border patrol agents, returned to the farm and apprehended 32 undocumented workers. Evidence showed that about 100 undocumented workers had been working on the farm before the joint Labor and INS investigative visit.

All violations found were considered first offenses because the farm labor contractor had not been investigated before. However, Labor area officials recommended that full civil penalty assessments be made because of the severity of violations, including:

"However, in view of the obviously sensitive nature of the inquiries to be made where citizenship or entitlement to work in this country are involved, I would caution your office to take steps to insure that the compliance officers are not subject to any possible liability as a result of their inquiries. For example, the compliance officer should make the same inquiries of all workers in the crew so as to avoid possible allegations of discrimination. It should also always be remembered that the purpose of such questions is to determine if the contractor's obligations have been met and not to determine if the worker has violated any immigration laws."

SUBSTANTIAL BACKLOG OF PROSECUTION CASES

Our review of Labor's enforcement of FLCRA showed that Labor had a substantial and increasing backlog of prosecution cases against farm labor contractors for violations of the act. The Solicitor's office attributed the backlog to a shortage of staff and other high-priority work.

At the end of fiscal year 1978, 485 FLCRA violation cases were pending in the Office of the Solicitor's Division of General Legal Services. By October 1979, the case backlog increased to 939. The cases were referred to the division from regional offices after farm labor contractors or employers appealed regional decisions that they had violated FLCRA and, unless settled, would be heard by an administrative law judge.

Since October 1979, some cases have been transferred to Labor's regional solicitor offices. On March 25, 1980, 376 cases were pending at the Division of General Legal Services, and 589 cases had been referred to regional solicitor offices for processing.

In enacting FLCRA, the Congress provided strong sanctions to help Labor enforce the act and established procedures for effective execution of the sanctions. FLCRA provides that any farm labor contractor or employee who willfully and knowingly violates any provision of the act should be fined not more than $500 or sentenced to prison for not more than 1 year, or both, and upon conviction for any later violation,

Case B

A compliance officer conducted an investigation at an orange grove in Mission, Florida. The investigation, completed in December 1976, resulted in civil penalty assessments against a farm labor contractor for the following FLCRA violations:

Failure to exhibit registration certificate	$ 50
Failure to post conditions of employment at worksite	25
Failure to provide to workers a statement of amounts contractor received	50
Use of undocumented workers	2,400
	$2,525

On June 3, 1977, the farm labor contractor's attorney requested a hearing. On October 4, 1979, about 2-3/4 years after the initial compliance officer investigation, the case was heard by an administrative law judge, but the farm labor contractor did not appear. The administrative law judge issued a default judgment of $2,525 against the contractor on December 31, 1979.

The judgment became final 30 days after December 31, 1979, and the farm labor contractor and his attorney were so advised on March 20, 1980. The contractor did not respond to the judgment and on October 29, 1980--almost 4 years after the investigation was completed--the case was referred to the regional solicitor for further legal action.

Case C

On May 9, 1977, a compliance officer, accompanied by an Occupational Safety and Health Administration inspector, visited the migrant labor camps of a farmer near Boca Raton, Florida, and noted that the farmer was using the services of five unregistered farm labor contractors and owed unpaid minimum wages of $832 to 49 employees. During the visit, the farmer ordered the compliance officer and inspector from the farm.

On April 4, 1978, Labor's Acting Assistant Regional Administrator for Atlanta notified the farmer that, because of FLCRA and Code of Federal Regulations violations, civil penalties of $7,000 were assessed:

--Undocumented workers were paid far below the minimum hourly wage of $2.65--at a rate of $1.25 or below.

--Undocumented workers were housed in an old warehouse building used for storing sacks and other supplies, which had no windows, beds, or restroom facilities.

--The only water available for drinking and cooking was that hauled in pails from a nearby irrigation ditch, which was also used for bathing.

The compliance officer's investigation report noted that hiring of undocumented workers at poverty wages had an extremely serious economic impact on the local community because potential employees were available for work in the area at the Federal minimum wage. The report concluded that vigorous enforcement and penalty assessments in this case would help INS to deter other farm labor contractors from hiring undocumented workers.

The compliance officer computed civil penalties of $13,250, of which $12,800 applied to the illegal employment of undocumented workers--$400 per worker--as specified in the administrative assessment guide established by Labor. The area office director stated on June 29, 1978, that the full penalty amount should be assessed because the farm labor contractor knew he was violating FLCRA and the information received from reliable sources indicated the violations were flagrant.

The case was forwarded to the Wage and Hour Division's Branch of Farm Labor Law Enforcement at Labor headquarters for review in August 1978 because it involved (1) the employment of undocumented workers and (2) civil penalty over $3,000. On March 22, 1979, the Labor Dallas regional office sent a letter assessing civil penalties of $13,250 to the farm labor contractor, and on March 26, 1979, his attorney requested a hearing. On May 2, 1979 (10 months after the farm investigation), the Wage and Hour Division referred the case to Labor's Office of the Solicitor, Division of General Legal Services. On December 12, 1979, a hearing was requested from the office of the administrative law judge. However, before the hearing, the case was transferred to the Dallas regional solicitor's office and on June 12, 1980, that office reached a settlement agreement with the contractor. In the agreement, the contractor admitted to violating FLCRA and agreed not to violate the act in the future and to pay a $1,000 fine.

In the draft of this report submitted to Labor for comment, we concluded that, although Labor had revised its position and no longer prohibited compliance officers from questioning farm laborers about their right to employment, Labor had not issued instructions authorizing them to make such inquiries. We proposed that Labor issue such instructions and, in addition, procedures for the guidance of compliance officers to use in making such inquiries. We stated that these actions should enable Labor to more adequately detect farm labor contractors who violate FLCRA's undocumented worker provisions. As shown in the following section on agency comments, Labor implemented our proposal.

Labor has a substantial and increasing backlog of FLCRA cases awaiting prosecution. We believe that it should act more aggressively to reduce its backlog and prosecute cases more quickly. To the extent that such actions are limited because of staff shortages in the Solicitor's office and other high-priority work, available resources should be concentrated on the more serious violations of FLCRA. Successful prosecutions should be publicized as a deterrent to other farm labor contractors violating FLCRA.

RECOMMENDATIONS TO THE SECRETARY OF LABOR

We recommend that the Secretary strengthen the administration of FLCRA to preclude employment of undocumented workers as farm laborers by:

--Enforcing the regulations requiring farm labor contractors to show evidence that they made a bona fide inquiry into each prospective employee's status as either a U.S. citizen or alien authorized to work in the United States.

--Act more aggressively to reduce the backlog of prosecution cases for violations of the act.

AGENCY COMMENTS AND OUR EVALUATION

Department of Labor comments

Labor disagreed with the proposal in our draft report that regulations be promulgated defining the records farm labor contractors need to maintain to comply with the act's requirements that only workers are recruited who are either

Engaging unregistered farm labor contractor	$5,000
Failing to keep complete and accurate payroll records	1,000
Failing to obtain complete contractor records	1,000
	$7,000

On April 28, 1978, the farmer's attorney requested a hearing. On May 23, 1978, the Branch of Farm Labor Law Enforcement advised the attorney that, when the date, time, and place of the hearing were set, he would be notified. Two years later, on May 23, 1980, the case was transferred from the Division of General Legal Services to the regional solicitor. In September 1980, a settlement agreement was reached with the farmer which provided that the farmer (1) pay a $3,000 fine, (2) admit violating FLCRA, and (3) agree not to do so in the future.

CONCLUSIONS

The enforcement of a requirement that farm labor contractors maintain detailed records on the eligibility for employment of the farm laborers they recruit may be a burden on the contractors because of the lack of recordkeeping facilities. However, we do not believe that Labor's acceptance of oral assurances of compliance from the farm labor contractors is adequate to assure that the (1) contractors are in compliance with FLCRA regulations and (2) congressional intent is being met in that undocumented workers are not being employed.

We do not believe that the recordkeeping requirements need to be complex or extensive. A technique similar to that authorized in the May 27, 1980, regulations--a farm laborer can use a declaration to establish U.S. citizenship for FLCRA employment purposes--could also be applied to recordkeeping requirements for contractors. If the farm laborers' declaration is falsified, they would be subject to prosecution. Similarly, farm labor contractors could be required to maintain a list of all farm laborers they recruit and the basis they use to establish eligibility for employment. The list could be certified by the contractor and be the basis for prosecution if later determined as false. We believe such recordkeeping requirements would not be an undue burden on the contractors or adversely affect Labor's enforcement responsibilities.

to 82 as of June 30, 1980. The backlog reduction was accomplished by filing cases with administrative law judges, negotiating settlements, closing cases that were unsuitable for litigation, or returning the cases for further investigative development.

U.S. citizens or aliens with authority to work in the United States. Labor emphasized that its purpose is to determine not whether the worker has violated immigration laws but whether a farm labor contractor has complied with FLCRA.

Labor stated that, pursuant to section 6(f) of FLCRA, Federal regulations provide that a contractor must make a bona fide inquiry to determine the applicants' records on which reliance of employability is based. Acceptable documents are listed in the Federal regulations. Labor also stated that, if a contractor has written evidence of reliance on the documents listed in the regulations, it will not take action against the contractor for violations of FLCRA unless it can establish actual knowledge that the worker was not authorized to accept employment or actual knowledge of or involvement by the contractor in the obtaining of invalid documents. Labor concluded that the failure to make an affirmative showing of a bona fide inquiry is not cited as a violation of the act or the regulations where all the contractor's employees are U.S. citizens or aliens authorized to work.

We concur with Labor that FLCRA regulations require contractors to show evidence that they made a bona fide inquiry into each prospective employee's status as either a U.S. citizen or an alien lawfully authorized to work in the United States. Accordingly, we deleted the proposal included in our draft report. However, we do not believe that Labor's acceptance of oral assurance of compliance from farm labor contractors meets this requirement and are recommending that Labor enforce the regulations.

Labor agreed with our recommendation that compliance officers should be authorized to question farm laborers about their eligibility for employment and that procedures for making such inquiries should be issued. Labor also stated that compliance officers are now authorized to make direct inquiries of agricultural workers regarding whether the contractor made inquiry into their citizenship or, if alien, their authorization to be employed. Labor issued such instructions in May 1980.

Labor concurred with our recommendation that more aggressive action be taken to reduce the backlog of prosecution cases for violation of FLCRA. Labor stated that the backlog of unprocessed litigation files had been reduced

U.S. Department of Labor's Response to
the Draft General Accounting Office Report
Entitled --

Legislative and Administrative Changes
Needed to Improve Effectiveness of Program
for Reducing Employment of Illegal Aliens

Recommendation

Promulgating regulations defining the records farm labor contractors need to maintain to comply with the Act's requirements that only workers are recruited who are either U. S. citizens or aliens authorized to work in the United States.

Response

The Department does not concur. It should be emphasized that our purpose is not to determine if the worker has violated any immigration law but whether or not the farm labor contractor who has recruited, employed or utilized the services of a worker has complied with the Act by making inquiry as to the worker's status. Section 6(f) of the Act prohibits the knowing employment, recruitment or utilization by a farm labor contractor of persons who are aliens not lawfully admitted for permanent residence or who have not been authorized by the Attorney General to accept employment. Pursuant to this, section 40.51(p) of Title 29, Code of Federal Regulations, provides that a contractor must make a bona fide inquiry to determine the applicant's records of the information on which reliance is based. The documents listed in section 40.51(p) are for the protection of the contractor. If a contractor has written evidence of reliance on the listed documents, the Department will not take action against him for violations of sections 5(b)(6) or 6(f) unless it can establish actual knowledge that the worker was not authorized to accept employment, or actual knowledge of, or involvement by the contractor in the obtaining of invalid documents. The failure to make an affirmative showing of a bona fide inquiry is not cited as a violation of the Act or the regulations where all the contractor's employees are U.S. citizens or aliens authorized to work.

Recommendation

Issuing (1) instructions authorizing compliance officers to make direct inquiries of farm laborers as to their eligibility for employment and (2) procedures for guidance of the compliance officers in making such inquiries.

U. S. Department of Labor

Inspector General
Washington, D C. 20210

AUG 11 1980

Mr. Gregory J. Ahart
Director
Human Resources Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Ahart:

This is in reply to your letter to the Secretary requesting comments on the draft GAO report entitled, "Legislative and Administrative Changes Needed to Improve Effectiveness of Program for Reducing Employment of Illegal Aliens."

The Department's response is enclosed.

The Department appreciates the opportunity to comment on this report.

Sincerely,

Harold W. Bloomfield for
Ronald Goldstock
Acting Inspector General

Enclosure

GAO note: Page references in this appendix may not correspond to page numbers in the final report.

Comments

A. Time Period of the Review

Two hundred and sixty positions were filled in Fiscal Year (FY) 1978, with investigation activity beginning in the fourth quarter of that fiscal year. In January and February 1979, GAO began its review of EUW case files in several of the Wage and Hour Division's Area Offices (AOs).

GAO reviewed 606 investigation files which were completed during the pilot project and during the period beginning in July, 1978, and ending in December, 1978. Several criticisms were made of the administration of the EUW program based on this review. It is important to note that GAO's review began no more than three months after the EUW program was underway.

Additionally, we question the validity of conclusions based on data examined during the initial stages of a program's operations. We also strongly believe that the success or impact of a program cannot be fully or objectively assessed until that program has been in operation minimally for one year.

B. Initial Implementation Problems

It is our contention that in the implementation phase of any major program there are initial problems and complexities which must be recognized and eliminated. Most of GAO's criticisms of the administration of the EUW program were the result of problems which Labor did not have the requisite time to correct or eliminate. Many, if not most, of GAO's original criticisms are no longer valid as a result of the implementation of additional procedures and the formulation of more effective policies. Any generalizations or conclusions drawn from their initial review of 606 investigation files may not be reflective of the existing current enforcement activity.

C. INS/DOL Coordination

Another major topic of discussion is Labor's policy of not questioning employees concerning their status, U.S. Citizenship or legal resident alien under the FLSA. As GAO states in its report (page 4), Labor, during supplemental appropriation hearings, made it clear that no special effort to identify UWs would be made. That was Labor's policy in FY 1977, and that policy remains in effect today. Wage and Hour compliance officers attempt to provide accurate referrals to INS concerning the possible employment of UWs. Labor does not have

APPENDIX I

Response

The Department concurs. Compliance officers are now authorized to make direct inquiries of agricultural workers regarding whether the contractor made inquiry into their citizenship or, if alien, their authorization to be employed. Such instructions were incorporated into the Field Operations Handbook in May, 1980.

Recommendation

Taking more aggressive action to reduce the backlog of cases for prosecution of violations of the Act.

Response

The Department concurs. All penalty cases referred to the General Legal Services, Division of the Solicitor's Office in calendar year 1979, and any pre-1979 assessments of the same respondents as cited in 1979, were forwarded to the regions in December, 1979, under the decentralization. The distribution of more than 400 cases to the various Regional Offices and Wage and Hour affords a better opportunity for the prompt processing of such cases rather than retention in the National Office. It should be noted that the Regional Offices, from the inception of the program, were responsible for the preparation of the case and presentation of the case at the Administrative Law Judge hearing.

The backlog of approximately 600 unprocessed litigation files has been reduced as of June 30, 1980, to 82. One hundred and eighty-five cases, in addition to the total 274, have been filed with the administrative law judges. In remaining cases, settlements were negotiated, or the files returned for further investigative development, or closed as unsuitable for litigation.

APPENDIX I

GAO's report states quite clearly, on page 11, that the Chicago INS District Office concentrates its "efforts on locating and arresting undocumented workers in jobs in high-wage industries that would be attractive to U.S. citizens." Chicago apprehensions account for almost twenty percent of GAO's sample. This represents an enormous statistical bias in favor of those UWs earning $2.50 or more in the GAO sample. It is not known how many of the apprehensions in Boston, Hartford, Houston, San Antonio, Newark, and New York City were from high-wage industries. If Chicago is any example, the majority of apprehensions in the sample were from high-wage industries. From this biased sample, GAO concludes that the majority of the non-agricultural workers earn in excess of FLSA minimums. Apparently, the GAO did not realize the inherent weakness of the reported statistics. The reported twenty-one percent of the UWs apprehended who were paid less than the $2.50 per hour could easily have been the only UWs in the sample apprehended in low-wage industries.

On page 11, GAO discusses how UWs in certain high-wage occupations are paid above statutory minimums. Labor realizes that UWs employed in high-wage industries are likely to be paid above the minimum. That is exactly the reason why Labor's investigation activity is directed at low-wage industries, especially during strike force effort. The fact that INS and GAO have concluded that many UWs are paid above statutory minimums helps to prove that Labor has scheduled its investigations correctly. For example, of the total number of establishments investigated by Labor in FY 1979, seventy-five percent were in 11 specific industries which are: (1) vegetable and melon production, (2) fruit and nut production, (3) farm labor contractors, (4) general residential construction, (5) female outerwear production, (6) grocery stores, (7) gasoline service stations, (8) eating and drinking establishments, (9) hotels and motels, (10) laundries, and (11) nursing homes. None of these industry groups could be considered high-wage industries.

GAO concludes that most UWs are employed in high-wage industries because INS records point in that direction. It is no surprise that most UWs have been found in high-wage industries when this is where INS activity is most pronounced. We are not aware of any accurate and reliable studies which purport to show in what industries most UWs are employed.

In a few instances, INS found UWs to be employed in establishments following Labor investigations where monetary violations were found, prior to Labor involvement in the EUW program. The fact that a few instances were uncovered does not prove that this is a common occurrence.

APPENDIX I

the authority to identify UWs under the FLSA. Therefore, Labor should not be expected to administer immigration statutes which come under the authority of INS. Labor could monitor the success of the EUW program much more easily if data could be collected regarding pay practices with regards to specific UWs. The referral and feed-back system and the Detention Center Project are discussed in some detail. It should be mentioned that part of the reason why INS has not been able to respond to Wage-Hour referrals is due to higher priorities during the initial stages of the Iranian crises, and because INS apprehension activity was at a standstill for several months due to the 1980 census. The Detention Center Project has been evaluated by Wage-Hour and was found to be functioning well. The Project will be continued in the future with minor revisions.

GAO states that "The small number of Labor's suspected undocumented worker referrals and subsequent confirmation of illegal status by INS, indicates that Labor's program has had little impact in reducing the employment of such workers." The small numbers cited above indicate only the inherent problems within the referral and feedback process and have little relationship, if any, to the impact of reducing the employment of UWs.

D. Minimum Wages

On page 8 of GAO's report, it is stated that "Our review of the undocumented worker program showed that generally, non-agricultural undocumented workers apprehended by INS received wages in excess of FLSA minimums." This conclusion was the result of an evaluation by GAO of INS records in which apprehended UWs were asked by INS officials about their hourly rates of pay. INS categorized the reported hourly wages into four groups. The first two groups consisted of (1) those UWs paid less than $2.50 per hour and (2) those UW's paid between $2.50 and $4.49 per hour. According to GAO, most of the apprehended UWs were paid more than $2.50 per hour. The UWs were apprehended in FY 1977 and 1978.

There are several factors to consider concerning these reported hourly rates of pay which impact upon the validity of the figures. The MW in FY 1977 was $2.50 and in FY 1978 was $2.65. Many of those UWs who reported hourly wages in FY 1978 of $2.50 or more could have been paid less than $2.65 per hour. The $2.50 or more category is virtually meaningless relative to evaluations of wage payments in excess of the MW for FY 1978. Slightly more than one-half of GAO's sample was for FY 1978. It would be interesting to know in what industries the apprehended UWs were employed.

APPENDIX I

"(t)hey stated that they would not object to such a legislative change." We are concerned that GAO's report may be interpreted as an official position on legislative changes by the Department and the Administration without formal reaction from appropriate levels of the Executive Branch. The Department is considering its position with regard to the legislative changes recommended by GAO.

G. EUW Program Impact

We do not agree with many of the criticisms made about the administration of the program. One overriding concern of Labor, relative to the EUW program, is the lack of any sound data for gauging the impact of the program. Labor remains confident that a positive impact has resulted from its enforcement efforts although it is admittedly difficult to measure this impact. Labor will continue to improve its enforcement activity under the EUW program, and will place special emphasis on developing methods for evaluating effectiveness. Labor's involvement in the EUW program is only now progressing past its first major hurdle, and accurate appraisal of Labor's impact on the EUW program must await the development of accurate measuring devices. Labor will successfully accomplish this task in the near future. The stated purpose of GAO's review as described on page 6 of their report was to determine the impact of Labor's program on the undocumented worker problem. How Labor was expected to have any impact at all on the EUW problem after only 3 to 6 months of enforcement is a rather puzzling question.

H. FLSA Enforcement

The Department questions GAO's statement on page 28 that "...there has been no significant increase in litigation efforts against employers of undocumented workers who are identified as being in violation of FLSA requirements." This Department does not keep statistics in a manner that would indicate whether the employers sued for violations of the FLSA employ undocumented workers. Furthermore, the FLSA provides no statutory authority to proceed against employers based solely on their employment of undocumented workers.

Likewise, we question the statement on page 32 that "...we found no significant increase since 1977 in litigation against employers who used undocumented workers and failed to comply with the FLSA provisions." As previously noted, our records do not indicate which of our FLSA litigation

Several other problems are encountered in attempting to interpret the data collected by GAO from the INS reports. The UWs were asked only for their hourly rate of pay. It is unknown if the rates reported were accurate or if the detainees were paid for all hours worked. It is unknown if there are any Section 3(m) questions which would have the effect of reducing the reported hourly rates below the FLSA minimum. It is unknown if detainees paid piece rates, day rates, salaries or any of a number of different pay methods were paid below, or in excess of, FLSA minimums. Obviously, all detainees were not paid hourly rates. The question of proper payment of overtime is entirely ignored. Many of the monetary violations found by Labor, during investigations scheduled under the EUW program, concern overtime violations. It is also possible for detainees to have worked on Government Contracts which are subject to Service Contract Act (SCA), Public Contract Act (PCA), Davis Bacon and Related Acts (DBRA), and Contract Work Hours and Safety Standards Act (CWHSSA) requirements. In many cases, those UWs could be paid above FLSA minimum wages and yet not be paid the proper wages under Government Contract statutes. Given that these facts were not considered by GAO, any conclusions based on GAO's examination of INS records are potentially misleading.

E. Strike Force Activity

The EUW strike force program has been highly successful. The objective of this program parallels the overall EUW objective of reducing the economic incentive to employ UWs. Strike force activity is highly visible and has generated considerable publicity. Strike force teams have focused their attention on geographic areas and industries where UWs are known to be employed. Over 1,390 investigations have been completed in the strike force program. Approximately $3.7 million has been found in monetary violations. So far employers have agreed to pay $1.6 million. The agreement to pay amounts will increase substantially as several investigations are closed following litigation activity.

F. Legislative Changes

We are requesting that the last two sentences on page 36 of this draft report be deleted. In support of its conclusion that Congress should amend the FLSA to require Treasury deposit of back wages due to employees who cannot be located, GAO states in these sentences that it "discussed such a legislative change with Labor officials" and that

APPENDIX II

U.S. Department of Justice

AUG 13 1980

Washington, D.C. 20530

Mr. William J. Anderson
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Anderson:

This letter is in response to your request to the Attorney General for the comments of the Department of Justice on your draft report entitled "Legislative and Administrative Changes Needed to Improve Effectiveness of Program for Reducing Employment of Illegal Aliens."

The major portion of the report deals with the Department of Labor's program of investigations directed at employers of illegal aliens (undocumented workers). Our concern focused on the comments in the draft report relating to past and present interactions between the Department of Labor and the Immigration and Naturalization Service of the Department of Justice. In general, we believe the report accurately depicts these interactions, and we agree that increased coordination and exchange of information between Labor and Justice concerning undocumented workers will benefit both departments in enforcing their respective laws.

We strongly agree that additional laws not be enacted until the Select Commission on Immigration and Refugee Policy established under Public Law 95-412 has completed its work. With respect to the Immigration and Naturalization Service, the management study required by the fiscal year 1980 appropriation, when completed, may be of additional value in identifying the legislative and administrative changes needed.

Although we have no specific comments to offer regarding the recommendations of the report because they relate to matters not under the purview of the Department of Justice, we do believe the recommendation to the Congress and the recommendations to the Department of Labor will be helpful in reducing the employment of undocumented workers.

We appreciate the opportunity to comment on the report. Should you desire any additional information, please feel free to contact me.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

(201590)

APPENDIX I

involved employers of undocumented workers. Our records do indicate that as a general matter this Department's litigation under FLSA has increased. In FY 1979, 1,180 suits were filed under the FLSA. In FY 1980, this figure will have increased to 1,400-- an increase of 220, or 19 percent. Comparable figures for 1978-79, are not available due to a change in this Department's method of tabulation.

AN EQUAL OPPORTUNITY EMPLOYER

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE,$300

POSTAGE AND FEES PAID
U. S. GENERAL ACCOUNTING OFFICE

THIRD CLASS