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The United States Guest worker Program: The Need for Reform

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NOTES

The United States Guestworker Program: The Need for Reform

ABSTRACT

Although often marginalized, guestworkers are an integral part of the United States economy. In 2006 alone, the U.S. government certified visas for 18,736 temporary workers. The program expanded in subsequent years and continues to grow each year. Despite its broad scope, huge impact on the labor force, and the extensive existing legislation regarding it, the guestworker program has permitted most employers of guestworkers to eschew the regulations or find loopholes, resulting in a system that is largely exploitative. Abuse of workers begins in their home countries, intensifies during the period of employment, and often continues even after employment terminates. Workers frequently fail to earn enough money to cover their basic needs while in the United States or to repay the debts they incurred in order to travel to the United States.

The U.S. guestworker program is structured in a way that promotes abuse, exploitation, and injustice. It needs to be amended. First and foremost, new legislation must enhance guestworkers' access to justice by lifting current restraints on federally funded lawyers and permitting aggrieved workers to remain in the United States long enough to prosecute their claims. Second, the law must hold U.S. employers liable for abuses perpetuated by those acting on their behalf. They cannot hide behind willful blindness and disclaim responsibility for their employees. Third, the Department of Labor (DOL) must begin to adequately enforce the protections in place to prepare employers for legislation enhancing their obligations to their workers. Finally, the legislation must alter the existing balance

of power and create a way to ensure that employers fulfill their contractual obligations.

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I. INTRODUCTION

Recently, immigration emerged in the national conscious with the passage of SB-1070, Arizona's controversial immigration bill.¹ Although both the bill² and the nationwide response focus almost exclusively on undocumented immigrants, the immigration problem extends much deeper. Concerns over illegal immigrants overshadow the problems with existing programs and legal foreign workers and visitors. Any type of comprehensive immigration reform must go beyond the simple distinctions between legal and illegal, and documented and undocumented. It must recognize that the system is failing both groups. This Note addresses one group specifically: workers lawfully in the United States on H-2 visas. This guestworker program desperately needs reform.

The official guestworker program began in 1952,³ and in 2006, the U.S. government certified visas for 18,736 temporary workers.⁴ Despite the large number of workers certified yearly, both the public and the government focus instead on curtailing the illegal workforce.⁵ Promising comprehensive immigration reform in his 2007 State of the Union Address, President Bush admonished foreign-born workers for "sneak[ing] in" and emphasized the need to give employers a way to ascertain the legal status of those they hire.⁶ The President did not mention the appropriate avenue for legal workers.⁷ He did not address issues relevant to the protection of guestworkers or express

1. See, e.g., *Over One-Thousand March and Rally in Oregon Against Arizona Law*, CAUSA BLOG (May 29, 2010, 7:19 PM), <http://causaoregon.blogspot.com/2010/05/one-thousand-march-and-rally-in-oregon.html>.

2. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 113.

3. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

4. U.S. DEP'T OF LABOR, FOREIGN LABOR CERT. DATA CTR., CASE DISCLOSURE DATA (2006), available at <http://www.flcdatcenter.com/casedata.aspx> (listing certified H-2A and H-2B workers).

5. See, e.g., President George W. Bush, State of the Union Address (Jan. 23, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012301075.html> (discussing illegal immigration).

6. *Id.*

7. See *id.* (discussing the need to "establish a legal and orderly path for foreign workers to enter [the United States]," but offering no details on the appropriate avenue).

concern over the program's failure to protect the rights of legal guestworkers.⁸

A brief description of the experiences of a few guestworkers provides a framework for the program and its shortcomings. Carmelo Fuentes, a guestworker in North Carolina, feared losing his job and visa to a faster worker. He felt extreme pressure from his boss to continue working and ignored signs of dehydration. He labored until a heat stroke shut down his internal organs and caused severe brain damage.⁹ In Louisiana, a group of Mexican guestworkers, expecting to work in Arkansas in forestry, arrived in the United States where the crew leader immediately confiscated their passports and sent them to Louisiana to pick sweet potatoes.¹⁰ They lived in an abandoned two-story house with no heating or blankets, and they were rarely paid.¹¹ If they did receive a check, it was often as little as \$70 for an eighty-four hour workweek.¹² The crew leader demanded a \$1,600 bribe for the return of their passports.¹³ Unable to pay, the workers fled, but are still working to recuperate their legal documents.¹⁴

There are tomato pickers working in Immokalee, Florida who pick two tons of tomatoes to earn \$50 a day.¹⁵ Grapefruit pickers there climb twelve-to-eighteen foot high ladders stuck into soggy soil, reach into the branches to twist fruit from its stem, and stuff it into a pick sack that can weigh up to one hundred pounds, while often earning as little as \$56 a day.¹⁶ Unlike those crossing the border illegally, these people are nameless and faceless to the American public. Migrant workers live silently in conditions that are often horrifying.¹⁷ Undocumented workers remain silent because their employer or supervisor can call immigration at any time and have them deported.¹⁸ In contrast, documented guestworkers fear immigration enforcement because the structure of the guestworker

8. See *id.* (discussing the enforcement of immigration laws "at the worksite" and suggesting the establishment of a "temporary worker program," while only addressing the "need to resolve the status of illegal immigrants").

9. Leah Beth Ward, *Desperate Harvest: N.C. Growers' Trade in Foreign Farm Workers Draws Scrutiny*, CHARLOTTE OBSERVER, Oct. 30, 1999, at A1.

10. S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 38 (2007).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. John Bowe, *NOBODIES: Does Slavery Exist in America?*, NEW YORKER, Apr. 21, 2003, at 106, 106.

16. *Id.* at 106-07.

17. See *id.* at 106 (describing squalid living conditions).

18. See generally *id.* (describing guestworkers' distrust of immigration officials).

program deprives them of the security a visa ostensibly grants.¹⁹ While it is hard to imagine U.S. citizens living similarly without engendering public outrage and governmental response, thousands of legal guestworkers do it every day.²⁰

Despite the frequency with which exploitation occurs, there have been very few high-profile legal actions highlighting cases of guestworker abuse. Various circumstances unique to foreign workers make such cases extremely difficult to prosecute.²¹ Existing legislation creates disparity in bargaining power that is often insurmountable, and guestworkers remain anonymous and oppressed. This Note focuses on H-2A agricultural workers as they face great obstacles under the current regulations. It examines the various reasons guestworkers are poorly protected and proposes several ways to improve their situation. Part II examines the history of guestworkers in the United States and identifies patterns of abuse deeply rooted in the program's history. Part III analyzes current legislation and demonstrates its shortcomings. Part IV suggests several potential ways to improve the program.

II. FROM *BRACEROS* TO H-2S: NEW NAME, SIMILAR PROBLEMS

A. *History of the Guestworker Program*

An understanding of the modern guestworker program and the current approach of the United States towards foreign workers requires an examination of its history. The first Mexican guestworkers arrived in the United States in 1917 in response to the Immigration Act of 1917, which waived many immigration requirements for temporary workers.²² Within four years, more than 72,000 foreign workers lived and worked in the United States.²³ By

19. See *Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. 53–57 (2007) [hereinafter *Hearing*] (prepared statement of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO) (noting that a guestworker can easily lose his status by leaving his job).

20. *Bowe*, *supra* note 15, at 122–24 (discussing the apathetic response of American companies who buy crops from guestworker employers).

21. See, e.g., *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 284 (5th Cir. 2009) (finding that the employer did not have knowledge of recruiter practices, the court did not hold the employer liable for reimbursing recruiting fees); *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1232–34 (11th Cir. 2002) (describing the legal status of wronged workers); *Catalan v. Vermillion Ranch Ltd.*, No. 06–CV–01043–WYD–MJW, 2007 WL 38135, at *1 (D. Colo. Jan. 4, 2007) (acknowledging the difficulty of prosecuting these cases).

22. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877–78.

23. Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005).

1930, the United States housed more than 300,000 legal Mexican workers and as many as one million undocumented workers.²⁴ However, as the economy crashed during the Great Depression, Mexican workers experienced backlash.²⁵ Between 1929 and 1932, the United States sent 345,000 Mexican workers home.²⁶

After the Depression, the U.S. government re-welcomed Mexican workers and quickly implemented the *Bracero* Program, which was a series of bills and agreements with Mexico relaxing immigration requirements for temporary workers.²⁷ Through a bilateral agreement between Mexico and the United States, the program brought Mexican workers to the United States to perform temporary agricultural work and then return home.²⁸ The program permitted up to 50,000 workers to enter each year and, as written, expired at the end of World War II, if not earlier.²⁹ However, subsequent bilateral treaties between the United States and Mexico extended the program through 1964.³⁰ Although many historians believe that the *Bracero* Program was a response to wartime labor shortages, ample evidence exists to support the proposition that farmers lobbied for the system to avoid paying higher wages.³¹ A report by the Center for Immigration Studies argues that because the New Deal programs paid growers to plant less, “by the end of the 1930s [U.S.] farm workers were more likely to be poor, homeless, and marginally employed than ever before.”³² Thus, growers became accustomed to “a great over-supply of workers,” desired to continue paying low wages, and lobbied hard for a bill that maintained the status quo.³³

24. Kimi Jackson, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Sheepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1274–75 (2000).

25. *Id.* at 1275.

26. *Id.*

27. See Act of Apr. 29, 1943, Pub. L. No. 45, 57 Stat 70 (appropriating funds for a guestworker program); see also Act of Aug. 9, 1946, ch. 934, 60 Stat. 969 (extending the program through June 1947); Farm Labor Supply Appropriation Act of 1944, ch. 16, 58 Stat. 11 (allocating funds for the program).

28. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL’Y 79, 84 (2004).

29. Bryce W. Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 899 (2008).

30. *Id.*

31. Compare ERASMO GAMBOA, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942–1947*, at xiii (1990) (citing the labor shortage as the catalyst for the *bracero* system), with Cindy Hahamovitch, *The Politics of Labor Scarcity: Expediency and the Birth of the Agricultural “Guestworkers” Program*, CTR. FOR IMMIGR. STUD. (Dec. 1999), <http://www.cis.org/AgriculturalGuestWorkersProgram-LaborScarcity> (arguing that contemporary rumors of a labor shortage were politically motivated fiction).

32. Hahamovitch, *supra* note 31.

33. *Id.*

Employers recognized the desirability of workers that were disposable, easily manipulated, and willing to work harder for less.³⁴ This attitude prevails today.

Citizens of the United States paid little attention to migrant farmworkers until 1960 when Edward Murrow broadcasted *Harvest of Shame*, a documentary detailing the plight of domestic farmworkers, the abuses faced by foreign guestworkers, and the injustices presented by the *Bracero* Program.³⁵ Regardless of the motivation underlying the *Bracero* Program's adoption, widespread agreement exists that the program resulted in rampant employer abuses.³⁶ As summarized by Harry Anderson, guestworkers "worked for whom they were told, at whatever tasks they were told, under whatever wages and working conditions . . . and when they were no longer wanted, they were shipped back to Mexico."³⁷

In 1952, Congress encompassed the *Bracero* Program into the H-2 visa, which was a program within the new Immigration and Nationality Act (INA).³⁸ The INA made the visas available to all foreign workers, not just Mexican workers, and it provided a legal avenue for both agricultural and non-agricultural temporary workers to enter the United States.³⁹ The new, more stringent program authorized the Secretary of Labor (Secretary) to approve visas only upon a showing that no qualified domestic worker was available and that the employment of the guestworkers would not affect wages or working conditions of domestic workers.⁴⁰ The H-2 program also required employers to provide guestworkers with adequate housing and pay the Adverse Effect Wage Rate (AEWR).⁴¹ The AEWR is determined by the Department of Labor (DOL) and represents the lowest wage that can be paid to a guestworker without having a negative impact on the domestic work force.⁴² The H-2 program was underutilized for twenty years, but the limited historical record is full of instances of abuse as growers preferred guestworkers, not

34. *Id.*

35. *See CBS Reports: Harvest of Shame* (CBS television broadcast Nov. 26, 1960).

36. *See, e.g.*, S. POVERTY LAW CTR., *supra* note 10, at 2.

37. HENRY P. ANDERSON, *THE BRACERO SYSTEM IN CALIFORNIA*, at intro. (Arno Press 1976) (1961).

38. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (codified as amended at 8 U.S.C. § 1101(a)(15)(H)(ii) (2006)).

39. *See id.* (making no distinctions with regard to national origin or type of labor).

40. *Id.* § 1188(a)(1).

41. 20 C.F.R. § 655.120 (2010) (Adverse Effect Wage Rate); *id.* § 655.122(d) (housing).

42. *Id.* § 655.103(b) (defining Adverse Effect Wage Rate); *see, e.g.*, Notice of Adverse Effect Wage Rates (AEWRs), 72 Fed. Reg. 7909 (2007) (setting Adverse Effect Wage Rates for 2007).

necessarily because they were cheaper, but because of their vulnerability and the growers ability to wield "absolute control" over them.⁴³ Moreover, employers routinely ignored the housing and wage requirements that the program mandated.⁴⁴ Faced with growing public opposition, pressure from labor unions, and concerns of civil rights groups, Congress promulgated stricter immigration requirements with the Immigration Act of 1965.⁴⁵

B. *The Current System*

In 1986, Congress divided the guestworker program into two parts: the H-2A program regulating agricultural workers and the H-2B program regulating non-agricultural workers.⁴⁶ The statute purported to divide the classes of workers in response to the DOL's "experience with employer abuse of migrant and seasonal agricultural workers."⁴⁷ The DOL thought the division was necessary based on an erroneous belief that H-2A workers had fewer skills and less education, making them more dependent on contractual protections.⁴⁸ To qualify for an H-2A visa, a worker had to prove residence in a foreign country, their intention to return to that country, and an agreement that their presence in the United States would be only "to perform agricultural labor or services, as defined by the Secretary of Labor."⁴⁹

Twenty C.F.R. § 655 governs the H-2A program labor certification process⁵⁰ and the Secretary makes the final decision whether to grant the H-2A or not. The regulation's articulated purpose is to provide the Secretary with sufficient information to determine the following prior to granting any H-2A visa:

(a) [W]hether there are sufficient able, willing, and qualified United States . . . workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H-2A workers); and

43. Jackson, *supra* note 24, at 1277.

44. *Id.*

45. Immigration Act of 1965, Pub. L. No. 89-236, § 201, 79 Stat. 911, 911.

46. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b) (2006)).

47. See Martinez v. Reich, 934 F. Supp. 232, 237 (S.D. Tex. 1996) (explaining the DOL's rationale for separating agricultural and non-agricultural workers).

48. See *id.* (noting that the DOL "issued separate procedures for agricultural workers because of its experience with employer abuse of migrant and seasonal agricultural workers").

49. 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

50. See generally 20 C.F.R. § 655 (2010) (regulating the entire H-2 program).

(b) Whether the employment of H-2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.⁵¹

Under the INA and accompanying regulations, the Secretary may not certify workers unless both conditions are met.⁵² The Secretary is responsible for setting the AEW, that is the minimum wage that the DOL determines is necessary to ensure that the wages of similarly situated domestic workers will not be harmed by the presence of the foreign workers.⁵³ The DOL designed the regulation to give preference to and protect domestic jobs by ensuring employers do not underpay guestworkers.⁵⁴ The language of the preamble reflects the position that permeates the INA: foreign laborers are less valuable than domestic workers, and employers should only hire them when no other workers are available.⁵⁵

The statute and its implementing regulations impose additional restrictions on the Secretary's ability to certify H-2 visas. The Secretary cannot certify workers if (1) the labor shortage is due to a strike or lockout; (2) the grower violated a term of a past certification during the previous two years; (3) the grower failed to assure the Secretary that it would provide workers' compensation insurance; or (4) the grower did not make efforts to recruit U.S. workers.⁵⁶ If the conditions are met, certification will be issued "no later than thirty calendar days before the date of need" for labor.⁵⁷ Further, employers must attempt to recruit U.S. workers by offering a contract meeting the jurisdiction's wage and benefits standards or the standard offered to the guestworker, whichever is higher.⁵⁸ Employers must file the H-2A application and the specifics of the job offer, including the terms and conditions, at least forty-five days before workers are needed.⁵⁹ Additionally, the employers must file a copy of the offer with the employment service industry.⁶⁰ This verifies that the employer complied with the DOL standards. If the employer fails to file forty-five days in advance, the Employment and Training Administration

51. *Id.* § 655.100.

52. *Id.* § 655.0.

53. *See supra* notes 41–42 and accompanying text.

54. *See* § 655.0(a)(3) ("This . . . subpart[] shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible.").

55. *See id.*

56. *Id.* § 655.122(e) (workers' compensation); *id.* § 655.135(b)–(c) (strike and recruiting); *id.* § 655.182 (previous violations).

57. *Id.* § 655.160.

58. *See id.* § 655.120 (requiring the employer to pay the highest of several standard wages).

59. *Id.* § 655.130(b).

60. *Id.* § 655.130(a).

(ETA) of the DOL must deny the certification due to insufficient time to investigate whether there is an available domestic workforce.⁶¹

After filing with the ETA, the regulations require that both the employer and the state agency begin to recruit domestic workers.⁶² In cases of emergency, the ETA may waive the forty-five day requirement.⁶³ The regulation provides only the malleable standard of "good and substantial cause" to help the ETA determine what constitutes an emergency sufficient to permit a waiver.⁶⁴ Otherwise, if the employer complies with the regulations governing certification, the ETA decides whether to grant or deny the application thirty days before the date for which the employer requested the workers.⁶⁵

To comply with the regulations, the job offer, at a minimum, must include provisions setting a wage higher than or equivalent to minimum wage, must provide for working conditions in compliance with relevant Occupational Health and Safety Administration [OSHA] standards, and must give workers' compensation insurance.⁶⁶ After the worker completes 50 percent of the contract, the statute requires that the employer reimburse the guestworker for "transportation and daily subsistence" costs incurred between their home country and the farm.⁶⁷ However, H-2A workers are not guaranteed all of the contractual protections of domestic workers. The statute only requires employers to guarantee employment for three-fourths of the total contract period.⁶⁸ Once the workers arrive in the United States, they are tied to the employer for whom the visa was procured.⁶⁹ If they wish to leave that grower for any reason, including abuse, they lose their visa and must return directly to their country of origin, even though they may only receive three-fourths of their promised contract.

III. REALITIES OF THE PROGRAM

Although the regulations and statutory provisions were designed to safeguard the rights of guestworkers, they are poorly enforced, enforced inconsistently, or, simply by their plain language, demand enforcement that benefits employers at the expense of guestworkers. The exploitation begins at home, with corrupt recruiters charging

61. *Id.* § 655.161(a) (listing failure to comply with § 655.130(b) as a ground for denial).

62. *Id.* § 655.143.

63. *Id.* § 655.134.

64. *Id.*

65. *Id.* § 655.160.

66. *Id.* § 655.122(d)–(e).

67. *Id.* § 655.122(h)(1).

68. *Id.* § 655.122(i).

69. S. POVERTY LAW CTR., *supra* note 10, at 41.

high fees for jobs in the United States.⁷⁰ When the workers arrive in the United States, the abuse intensifies. Foreign workers legally in the United States are extremely vulnerable and often fail to receive basic legal protections. Guestworkers are isolated geographically, linguistically, and socially from the rest of the U.S. population.⁷¹ After abuse occurs, the guestworkers rarely seek a legal remedy, and those that do have extremely limited access to legal resources.⁷² Few private lawyers are willing to take these cases, and most legal aid services affordable to guestworkers are federally funded Legal Service Corporations (LSCs) and subject to many constraints.⁷³ Despite facing breaches of contract, inhumane working conditions, and crimes amounting to human trafficking, workers are unable to consistently or meaningfully gain access to the American legal system to vindicate their rights or police the guestworker system.⁷⁴

Some government officials recognize the need for change. Speaking to the House Committee on Education and Labor in 2007, Representative and Chairman Charles Rangel declared that the practices of many employers “not only undermine living standards; they ruin lives.” Rangel described the program generally as “the closest thing we have in this country to modern day slavery or indentured servitude.”⁷⁵ The report issued by the Committee recommended reworking the statute to improve conditions and prevent the worst forms of exploitation.⁷⁶ Despite widely documented cases of abuse at all stages of the guestworker experience, three years later, the laws remain the same, the enforcement remains inconsistent, and guestworkers remain vulnerable to exploitation.

70. *Hearing, supra* note 19, at 53 (prepared statement of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO).

71. *See Ashby, supra* note 29, at 920 (noting linguistic isolation of guestworkers).

72. S. POVERTY LAW CTR., *supra* note 10, at 2.

73. *See id.* at 30–31 (noting the inability of LSC attorneys to participate in class actions).

74. *Id.*

75. *Hearing, supra* note 19, at 3 (statement of Rep. George Miller, Chairman, H. Comm. on Educ. and Labor).

76. *See id.* at 22–23 (statement of Baldemar Valasquez, Founder and President, Farm Labor Org. Comm.).

[R]emove the prospects for any money changing hands in Mexico. . . . [M]ak[e] the employer jointly liable for a recruiter's action. . . . [A] worker should be afforded the same labor rights as any other worker. . . . [A] worker should be allowed to obtain a temporary residence or at least to adjust a visa where he will not have to repeat an application process.

Id.

A. Paying to Get Here

Problems first surface in the guestworkers' native country. While employers navigate the system guided by the DOL, guestworkers are generally embroiled in a much more complicated process at home. Just to be considered for an H-2 position, foreign nationals pay exorbitant amounts to local recruiters who are often hired by the U.S. employers themselves.⁷⁷ Nearly all H-2 employers procure workers through these local recruiters.⁷⁸ Unfortunately, "[i]n exchange for thousands of dollars in fees, unscrupulous labor recruiters lure workers to the United States by promising them good jobs and a better life."⁷⁹ These recruiters make money charging potential workers exorbitant fees, sometimes in the thousands of dollars, in exchange for placing the worker's name on the H-2 roster.⁸⁰ The fees sometimes cover travel to the United States and the price of the visa, but always leave a large profit for the recruiter.⁸¹ Most prospective workers must borrow funds and many take on high-interest loans to pay this fee.⁸² Moreover, some recruiters require the workers to leave collateral, such as the deed to their land, to ensure compliance with the labor contract.⁸³ The workers then lose the deed to their land if they do not complete the contract.⁸⁴ Therefore, guestworkers have a very strong incentive to continue working despite horrible conditions.

On average, workers arrive to work a low-paying farm job in the United States with debt up to \$10,000, and it is extremely difficult to repay their debt performing the work their visa authorizes.⁸⁵ For example, Guatemalan guestworkers represented by the Southern Poverty Law Center paid \$2,000 in fees prior to arriving in the United States.⁸⁶ Similarly, workers arriving at the Decatur Hotel in Louisiana paid between \$3,500 and \$5,000 in fees to local recruiters

77. *E.g.*, *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1244–45 (11th Cir. 2002) (describing recruitment fees).

78. S. POVERTY LAW CTR., *supra* note 10, at 9–12.

79. *Hearing*, *supra* note 19, at 2 (statement of Rep. George Miller, Chairman, H. Comm. on Educ. and Labor).

80. *Id.* at 11–12 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty Law Ctr.).

81. *See generally id.* (discussing recruitment programs and collection of fees in excess of potential wages).

82. *Id.* at 12 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty Law Ctr.).

83. *See De Leon-Granados v. Eller & Sons, Inc.*, 497 F.3d 1214, 1217 (11th Cir. 2007) (discussing recruitment abuses).

84. *See id.* (stating that some guestworkers were required to post collateral in order to gain employment).

85. S. POVERTY LAW CTR., *supra* note 10, at 9.

86. *Id.* at 10.

and soon discovered they did not earn enough money to survive, let alone pay off the debt.⁸⁷ The Decatur workers sought help through the court system, but the Fifth Circuit found that employers were not liable for the expenses workers incurred prior to their arrival.⁸⁸ The laws create a system in which workers are completely dependent on employers, desperate for work, and scraping by to survive and pay off their debts. Such situations are not the exception, but the norm in the H-2A program.⁸⁹

There is a two-way circuit split over whether or not employers are responsible for repaying workers the cost of pre-employment expenses, such as transportation, visa costs, and recruitment fees.⁹⁰ In any event, growers employing H-2A workers must pay them at least minimum wage, as set by the Fair Labor Standards Act (FLSA).⁹¹ However, the FLSA has a major loophole: it permits employers to pay wages “in cash or facilities,” deducting wages for costs such as room and board.⁹² The rate deducted for such facilities must be reasonable, and nothing can be deducted for facilities that are “primarily for the benefit or convenience of the employer.”⁹³ Regulations specify several facilities considered to be for the benefit of the employer, including equipment for the job and transportation “incident and necessary to the employment.”⁹⁴ Additionally, such costs cannot “cut[] into the minimum wage or overtime wages required to be paid” under the FLSA.⁹⁵ Whether or not employers must pay for high debts incurred in foreign workers’ home countries depends on whether a court or Congress determines that such costs are primarily for the benefit or convenience of the employer.⁹⁶ Consequently, the interpretation of the phrase, “for the benefit of the employer,” is hugely important for a worker struggling to break even.

87. Brief of Appellee-Respondent at 8–10, *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274 (5th Cir. 2008) (No. 07–30942).

88. *Castellanos-Contreras*, 576 F.3d at 284.

89. See S. POVERTY LAW CTR., *supra* note 10, at 2.

90. Compare *Castellanos-Contreras*, 576 F.3d at 284 (holding that the employer “incurred no FLSA liability to reimburse its guest workers for the recruitment fees, transportation costs, or visas fees that they incurred to work in the United States”), with *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1237 (11th Cir. 2002) (holding employers liable for many of the pre-employment expenses incurred “primarily for the benefit of the employer”).

91. 29 C.F.R. § 531.27 (2010).

92. *Id.*

93. *Id.* § 531.3(d)(1).

94. *Id.* § 531.3 (tools); *id.* § 531.32 (transportation).

95. *Id.* § 531.35.

96. See *Arriaga*, 305 F.3d at 1244–46 (emphasizing the importance of the classification of the cost).

*B. Policing the Recruitment Process Is Impossible
Under the Current Law*

Failing to give H-2A workers statutory protections during recruitment leads to many abuses, yet the recruitment process is entirely unregulated.⁹⁷ Employers hide behind the shield of foreign relations, denying responsibility for abuse occurring outside of the United States that is “directly related to the workers’ employment in the U.S. and affects workers’ ability to assert their rights to basic fair treatment in the U.S.”⁹⁸ Portions of the Migrant and Seasonal Agricultural Protection Act (MSPA) govern recruitment practices, but the statute excludes H-2A agricultural workers from its protections, forcing the workers to rely solely on their contracts for protection.⁹⁹ The MSPA requires all recruiters of domestic farm workers to disclose basic information to potential employees, including the place of employment, wage rate, the crops and kinds of activities in which the worker may be employed, the period of employment, transportation, any deductions from pay, the existence of any past or present labor disputes, any connection between the recruiter and the employer, and the availability of workers’ compensation insurance.¹⁰⁰ The MSPA grants a federal cause of action to workers overcharged and misled by recruiters or employers and authorizes the payment of damages.¹⁰¹ Unfortunately, it is limited to U.S. citizens and H-2B workers. H-2A workers, protected only by their contract, do not have guarantees against unscrupulous recruitment practices.¹⁰²

Recruiters enter into relationships with U.S. farmers and agree to compile the list of workers who will receive visas. This control over jobs, which is perceived as desirable, gives recruiters an extreme amount of power; it is common for recruiters to use this power to charge high rates for visa interviews, visas, transportation, and miscellaneous fees.¹⁰³ The U.S. employer never receives money from the recruitment system and the law does not hold employers responsible for foreign recruitment, so the employers have no incentive to demand change.¹⁰⁴ The lack of enforcement has created

97. S. POVERTY LAW CTR., *supra* note 10, at 9–10.

98. *Hearing, supra* note 19, at 15 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty Law Ctr.).

99. *See* Migrant and Seasonal Agricultural Worker Protection Act § 3, 29 U.S.C. § 1802(8)(B)(ii) (2006) (excluding temporary guestworkers from its protections).

100. *Id.* § 1821.

101. *Id.* § 1854.

102. *See* 20 C.F.R. § 655.122 (2010) (listing protections for H-2A workers).

103. *Hearing, supra* note 19, at 22 (statement of Baldemar Velasquez, Founder and President, Farm Labor Org. Comm.).

104. *See* S. POVERTY LAW CTR., *supra* note 10, at 13–14 (arguing for the extension of employer liability through a ban on recruitment fees).

a market for the sale of H-2A visas, and recruiters in workers' home countries are simply selling H-2A visas to the highest bidder.¹⁰⁵ It is difficult to directly enforce U.S. law against the recruiters but, because the MSPA does not cover H-2A workers, employers are not subject to penalties for poor recruitment policies either. The law holds no one accountable for this form of abuse.

The recruiters' role does not end when the guestworkers leave their home country. Workers arrive in the United States, find that the recruiters misled them, "but by then they are deeply in debt and without options."¹⁰⁶ Many left collateral, such as the deed to their land, with the recruiter and virtually all have borrowed enormous sums of money at extremely high interests rates.¹⁰⁷ Others fear for their families and homes, owe money to recruiters that frighten them, and are terrified at the prospect of failing to earn enough money to pay their debts.¹⁰⁸ When workers violate their contracts, as determined by the recruiters, recruiters punish them, charging as much as \$1,000 to get their deed back or increasing the interest rate on the loan.¹⁰⁹ Such behavior deters many workers from complaining about being misled or leaving bad jobs.¹¹⁰ Workers stay on farms even when no work is available and they are not paid, for fear of the recruiter awaiting them at home.¹¹¹

Prosecuting recruiters for breach of contract or fraud is an untenable and costly solution that the government has not employed.¹¹² Without the protections of the MSPA, H-2A workers end up trapped in terrible jobs in the United States. They need to pay their debts and ensure that recruiters return the collateral provided. Employers in the United States are currently not responsible for the actions of the recruiters even though recruiting foreign labor through this system is their own choice.¹¹³ The cycle of disempowerment begins at recruitment and continues throughout the entire H-2A experience.¹¹⁴

However, the H-2A regulations are not completely silent on recruitment. The program requires employers to provide job

105. See *id.* (discussing the high costs of visas).

106. *Hearing, supra* note 19, at 10 (prepared statement of Ray Marshall, Former U.S. Sec'y of Labor, President Emeritus, LBJ Sch. of Pub. Affairs, Univ. of Tex.).

107. *Id.*

108. S. POVERTY LAW CTR., *supra* note 10, at 9-12.

109. See *id.* (detailing how recruiters levy fines arbitrarily in order to control laborers).

110. *Id.* at 11.

111. See *id.* (describing workers' fear of recruiters).

112. See *id.* at 14 ("It is hard to imagine enforcing such a rule.").

113. See *id.* at 42 (describing how proposed legislation would make employers responsible for actions of their recruiters).

114. See *Hearing, supra* note 19, at 22 (statement of Baldemar Valasquez, Founder and President, Farm Labor Org. Comm.) ("[W]e have processed more than 4,000 inquiries, grievances and irregularities over the past 2 years.").

information to workers in a job offer during recruitment, and failure to comply with the disclosed job description means employers may not be recertified.¹¹⁵ However, the few employers questioned about recruitment processes claim ignorance and successfully push the blame onto foreign recruiters, thus avoiding DOL sanctions.¹¹⁶ Compounding the problem, DOL enforcement actions are generally declining. Between 1974 and 2004, the number of DOL investigations of labor complaints declined by 14 percent, while the number of workers covered by the FLSA more than doubled.¹¹⁷ In 2004, the DOL investigated only eighty-nine of over six thousand H-2A employers.¹¹⁸ In 1997, the Government Accountability Office reported that the DOL never declined an application for H-2A workers because of an employer's past violations of the legal rights of workers.¹¹⁹ Further, no independent cause of action exists under the INA and workers cannot be compensated based on violations of H-2A regulations. Guestworkers can only litigate breach of contract claims or violations of the FLSA and hope the DOL initiates an investigation to prevent the employer from continuing in the H-2A program.¹²⁰ However, when the DOL investigates, its actions are only prospective and do not compensate the aggrieved guestworkers.

C. The Structure of the Program Allows Abuse

The H-2A program ties workers to a single employer and that employer shapes the worker's experience in the United States.¹²¹ To comply with the statute, the DOL must only certify farmers complying with the terms of employment as defined by 20 C.F.R.

115. See 20 C.F.R. § 655.182 (2010) (describing consequences of violating regulations).

116. See *Hearing, supra* note 19, at 11 (statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty L. Ctr.) (describing as a crucial first step a bill that "regulate[s] recruitment costs, and . . . make[s] employers responsible for the recruiters that they choose").

117. *Lack of Government Enforcement*, S. POVERTY LAW CTR. (Apr. 2007), <http://www.splcenter.org/legal/guestreport/guest8.jsp>.

118. See *Hearing, supra* note 19, at 14 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty L. Ctr.) (noting that in 2007, there were over 6,700 employers using H-2A workers).

119. *Lack of Government Enforcement, supra* note 117.

120. See 8 U.S.C. § 1188(b)(2)(A) (2006) (disqualifying employers who have violated the terms of the program within the past two years from employing guestworkers). However, an employer can only be barred from participation for three years. § 1188(b)(2)(B).

121. See *id.* § 1188(a) (outlining the requirements an employer must meet to qualify for guestworker labor); see also *id.* § 1188(d)(2) (allowing transfer to another employer if the guestworker was brought in by a trade association of which both employers are members).

§ 655.¹²² Certification requires that employers guarantee that they will meet the housing requirements, employment terms, benefits, and other provisions of the regulations. The regulation charges the DOL to exercise due diligence in assuring that the employer is not engaging in fraud or willful misrepresentation with regards to any of the material elements of the employment agreement.¹²³

The implementing regulation requires the administrator of the Office of Foreign Labor Certification (OFLC), located within the wage and hour division of the DOL, to investigate employers and assure that they do not violate any of the program's requirements.¹²⁴ If the OFLC administrator determines that an employer violated any material term or condition of the temporary alien labor certification during a two-year period after approval, the administrator must investigate.¹²⁵ Per the regulation, if the violation is substantial, the employer may not receive guestworker certification for one year. If the farmer is a repeat violator, the DOL may suspend the employer from the program, subject to the discretion of the OFLC administrator.¹²⁶ If the OFLC administrator determines that the violations are not substantial, he may require conformity to special procedures during the subsequent labor certification process, but cannot require the employer to offer higher wages, better working conditions, or greater benefits than those specified by § 655.122.¹²⁷ In the abstract, the regulations in place seem sufficient; in reality, they are ineffectual.¹²⁸

1. Wage and Hour Abuses Are Rampant

The rationale for not extending the protections of the MSPA to H-2A workers is based on contract theory. Under this theory, H-2A workers, like domestic workers, are adequately protected by their contracts, which provide the terms of employment as required under the statute, and by the FLSA, which requires employers to pay at

122. See 20 C.F.R. § 655.122 (2010) (outlining the requirements for H-2A job offers).

123. See *id.* § 655.184 (authorizing DOL officials to investigate potential violations and refer the investigation to the Department of Homeland Security for sanctions).

124. See *generally id.* § 655 (outlining the pertinent rules regarding guestworkers).

125. See *id.* § 655.182 (authorizing the OFLC to investigate violations within a two-year statute of limitations).

126. *Id.* § 655.182(a). "No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision." *Id.* § 655.182(c)(2).

127. *Id.* § 655.183. The regulation does not provide a definition of substantial violation, leaving the interpretation to the discretion of the administrator.

128. See *Hearing, supra* note 19, at 14 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty Law Ctr.) (noting lack of enforcement).

least minimum wage.¹²⁹ In practice, the DOL does not effectively police wage and hour contract abuses and not every breach of contract is severe enough to reach the level of an FLSA violation.¹³⁰ For example, in *Zamora v. Shores and Ruark Seafood, Inc.* guestworkers brought suit alleging wage and hour abuse against an employer that had been cited two times by the DOL for failure to pay minimum wages and overtime wages to his employers.¹³¹ Despite overwhelming evidence of repeated breach of contract, the DOL merely fined the company and recertified it to receive workers the following year.¹³² The OFLC administrator did not find it necessary or appropriate to cut off the employer's access to workers.¹³³

The statute itself requires employers to provide only three-fourths of the wages and hours promised in the contract.¹³⁴ Although this is in the H-2A contracts, workers expect more and act accordingly, so the very structure of the program puts them at risk for not recouping their costs. Many H-2A employers request workers for far more work than they have available,¹³⁵ just in case they need them. As long as the workers receive three-fourths of the promised pay, the employers are not liable.¹³⁶

According to the Brennan Center for Justice, "trends indicate a significant reduction in the government's capacity to ensure that employers are complying with the most basic workplace laws."¹³⁷ Of the thousands of H-2A workers interviewed for the Southern Poverty Law Center report, most reported working between eight and twelve hours per day, six days a week without receiving overtime.¹³⁸ Workers routinely reported that employers required them to purchase their own work-related tools, the expense of which unlawfully drove wages below the minimum wage level required by the FLSA.¹³⁹ Allowing an industry to rely largely on a very vulnerable workforce leads to a "race to the bottom in terms of wages to be paid," a race

129. See 29 C.F.R. § 531.27 (2010) (prescribing the acceptable means of paying the minimum wage).

130. See S. POVERTY LAW CTR., *supra* note 10, at 22–24 (noting various simple methods employers can use to underpay workers with impunity).

131. *Id.* at 20 (citing *Zamora v. Shores & Ruark Seafood, Inc.*, No. C98CV:501 (E.D. Va.)).

132. *Id.*

133. See *id.*; 20 C.F.R. § 655.182(a) (2010) ("The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving certifications . . . if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification . . .").

134. S. POVERTY LAW CTR., *supra* note 10, at 22.

135. See *id.* (noting that employers commonly overstate the hours of work they need).

136. 20 C.F.R. § 655.122(i).

137. S. POVERTY LAW CTR., *supra* note 10, at 28.

138. *Id.* at 18–19.

139. *Id.* at 19.

which hurts both the exploited workers and those employers who desire to comply with the law.¹⁴⁰

Although the guestworker scheme is designed to permit documented immigrants to work in the United States, the structure of the program actually may increase the number of workers illegally working off-visa in the United States, as many attempt to recoup costs with alternate employers.¹⁴¹ This reality is antithetical to the very purpose of the guestworker program.¹⁴² When workers do not receive the hours promised under their contract, workers do not earn enough to cover costs. Their visas are not yet expired but become technically invalid as soon as they leave the employer that originally hired them.¹⁴³ Guestworkers must make the difficult choice between obeying the rules of the program and avoiding the risk of immigration consequences by returning immediately to their home country, or working illegally until their visa expires or they have covered costs.¹⁴⁴

2. The Program's Structure Leads to an Imbalance in Bargaining Power Between the Employer and the Guestworker

As previously mentioned, guestworkers have little power to force their employers to fulfill their contracts. Both the INA and the H-2A program's implementing regulations bind guestworkers to one job and employer. Working for another employer violates the terms of the visa and puts guestworkers out of legal status and at risk for deportation and a subsequent immigration bar.¹⁴⁵ Additionally, if the employer fires the worker for any reason at all, the worker loses his legal status.¹⁴⁶ The employer holds a very powerful "deportation card."¹⁴⁷ Employers also seize documents to wield even greater control over workers' mobility and ability to challenge conditions.¹⁴⁸ Such threats of deportation and seizure of documents are common in the H-2A context: "One of the most chronic abuses reported by

140. *Id.* at 20.

141. *See id.* at 13 (noting that many employers even encourage guestworkers to seek other jobs, for which they are not legally documented).

142. *See* 8 U.S.C. § 1188 (2006) (limiting availability of H-2A workers to employers who need them because they cannot find workers otherwise).

143. 8 C.F.R. § 214.2(h)(5)(viii)(C) (2010) ("[A]n alien's stay as an H-2A nonimmigrant is limited by the term of an approved petition."); *see also* 20 C.F.R. § 655.135(i)(1) (2010) (requiring employers to inform H-2A workers that they cannot remain in the United States once their employment has ended).

144. *See* S. POVERTY LAW CTR., *supra* note 10, at 13 (describing one worker's decision to stay in the United States to work other jobs once his visa expired).

145. *Id.* at 1.

146. *See supra* note 141 and accompanying text.

147. S. POVERTY LAW CTR., *supra* note 10, at 15.

148. *See id.* at 15–16 (describing employer's confiscation of guestworker's passport).

guestworkers concerns the seizure of identity documents—in particular passports and social security cards.”¹⁴⁹

When workers leave a bad job or complain, there are repercussions. In 2000, Human Rights Watch, reporting on North Carolina H-2A employers, found “widespread fear and evidence of blacklisting against workers who speak up about conditions, who seek assistance from Legal Services attorneys, or who become active in the [union].”¹⁵⁰ Workers fear that if they complain about conditions, they may lose their jobs or not be hired by U.S. employers in the future. Such fears are not without basis. The North Carolina Growers Association actually keeps a “blacklist,” consisting of names of over one thousand “undesirable” former guestworkers.¹⁵¹ The conclusion drawn by Mary Bauer, of Southern Poverty Law Center, presenting in front of the House Commission on Labor was that “[w]orkers live in constant fear that any bad act or complaint on their part will result in their being sent home or not being rehired . . . [f]ear of retaliation is a deeply rooted problem in guestworker programs.”¹⁵² As explored below, the powerlessness of most guestworkers traps them in situations often amounting to involuntary servitude.¹⁵³

3. Forced Labor

The U.S. Criminal Code, 18 U.S.C. § 1589,¹⁵⁴ makes it a crime to obtain the labor or services of a person:

1. By means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
2. By means of serious harm or threats of serious harm to, that person or another person;
3. By means of abuse or threatened abuse of law or legal process; or
4. By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not

149. *Id.* at 15.

150. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 202 (2000).

151. S. POVERTY LAW CTR., *supra* note 10, at 17.

152. *Hearing, supra* note 19, at 13 (prepared statement of Mary Bauer, Dir., Immigrant Justice Project, S. Poverty Law Ctr.).

153. *See* S. POVERTY LAW CTR., *supra* note 10, at 2 (noting guestworkers are “held virtually captive”).

154. 18 U.S.C. § 1589 (2006).

perform such labor or services, that person or another person would suffer serious harm or physical restraint.¹⁵⁵

Any person working under such conditions is a victim of forced labor and has a private cause of action under 18 U.S.C. § 1595.¹⁵⁶ As discussed above, the treatment endured by many guestworkers amounts to violations of this provision.¹⁵⁷ Recruiters routinely threaten workers or their families if they leave their jobs, many workers are forced to relinquish their passports upon arrival, and threats of deportation are common.¹⁵⁸ In the context of guestworkers, the most common violation of the trafficking statute involves the seizure of documents.¹⁵⁹ To establish document servitude, a violation of 18 U.S.C. § 1592(a) and § 1589(c), a guestworker must prove that the employer or contractor seized the passports in violation of or in an attempt to violate the laws against trafficking.¹⁶⁰ Often, it is the recruiters that violate this section.¹⁶¹ The structure of the H-2A program, as it exists in practice, insulates employers from claims of forced labor and trafficking. Recruiters, the perpetrators of many of the violations, are generally located in foreign countries and thus difficult to prosecute.

Many U.S. employers further distance themselves from liability by employing workers hired by farm labor contractors.¹⁶² The DOL certifies farm labor contractors, who are generally from the same country as the guestworker, to apply for certification to host H-2 workers.¹⁶³ The DOL certifies them, despite the fact that it is impossible for farm labor contractors to comply with the regulations. The contractors have no actual work available and plan to loan the workers to other farmers for a fee.¹⁶⁴ There is no way for farm labor contractors to show a shortage of U.S. workers or the effect on wages, as there is no job available at the time of hiring. If an employer pays a farm labor contractor to use H-2 workers, any failure to pay is a breach of the contract between the employer and the farm labor contractor, and therefore it is not technically a violation of the H-2 regulations. This provides a legal buffer for U.S. employers who fail

155. *Id.* § 1589(a).

156. *Id.* §§ 1589(a), 1595(a).

157. *See supra* Part III.C.2.

158. S. POVERTY LAW CTR., *supra* note 10, at 15; *see supra* Part III.C.2.

159. S. POVERTY LAW CTR., *supra* note 10, at 15.

160. *See, e.g.*, *United States v. Farrell*, 563 F.3d 364, 376 (8th Cir. 2009) (citing 18 U.S.C. § 1592(a) (noting that conviction for document servitude requires showing of intent to withhold documents in violation of the peonage statute)).

161. S. POVERTY LAW CTR., *supra* note 10, at 9–10.

162. *Id.* at 32–33.

163. *Id.*

164. *Id.*

to meet the requirements of their contracts or the FLSA. Making foreign recruiters and farm labor contractors amenable to U.S. jurisdiction is extremely complicated and costly.¹⁶⁵ Recruiters and farm labor contractors also rarely have much money; effectively “having a legal remedy against a farm labor contractor with no assets is no remedy at all.”¹⁶⁶

A 2007 case demonstrates the ability of employers to use farm labor contractors to avoid legal liability. Twelve Guatemalan guestworkers filed the lawsuit. A farm labor contractor recruited the guestworkers, telling them the job was in North Carolina planting pine trees.¹⁶⁷ They arrived in the United States and the farm labor contractor immediately sent them to Connecticut to work eighty-hour weeks in nursery fields while living in a filthy apartment and earning much less than the contract promised.¹⁶⁸ Moreover, the U.S. employer in Connecticut failed to pay the guestworkers for their work. However, because the farm labor contractor employed the workers, their only legal remedy was against the contractor.¹⁶⁹ By using a farm labor contractor’s H-2 workers, the employer escaped liability despite failing to pay the workers.¹⁷⁰ The difficulties associated with bringing a case against farm labor contractors and recruiters, discussed above, combined with the structure of the program limiting the causes of action available to H-2A workers, results in a “flawed program that encourages the private trafficking of foreign workers with barely any government oversight.”¹⁷¹

4. Trafficking Violations Against H-2A Employers Are Difficult to Prosecute Successfully

Under 18 U.S.C. § 1590, anyone who “knowingly recruits, harbors, transports, provides or obtains by any means, any person for labor or services” is in violation of § 1589 of the federal trafficking statute.¹⁷² But, § 1595 gives victims a private right of action against the violator.¹⁷³ Typical violations include the seizure of passports and documents in order to force labor and the luring of workers to the

165. See *Hearing*, *supra* note 19, at 24–25 (prepared statement of Baldemar Velasquez, Founder and President, Farm Labor Org. Comm.) (describing the unscrupulous, unpunished behavior of many foreign recruiters and the difficulty in controlling it).

166. S. POVERTY LAW CTR., *supra* note 10, at 33.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. 18 U.S.C. § 1590 (2006).

173. *Id.* § 1595.

United States to work under false pretenses.¹⁷⁴ As discussed above, recruiters usually commit the actual offense on behalf of the U.S. employer. If the recruiter acts as the agent of the employer, both the recruiter and employer are liable under the statute.¹⁷⁵ Proving agency is challenging, however, because recruiters are difficult to locate and are based in foreign countries.¹⁷⁶ Employers often hire companies to find workers and those companies, in turn, hire local recruiters.¹⁷⁷ This distance makes it hard to prove that the employer played an active role in misleading workers through employing foreign recruiters, making false promises, or failing to provide written contracts. The distance between the U.S. employer and the foreign recruiter provides insulation from many potential trafficking claims.

Further, for reasons discussed above, lawyers are less likely to be involved in the plight of guestworkers and, alone, the workers lack the legal expertise to pursue complicated claims.¹⁷⁸ “[A]s a practical matter, workers . . . have an extremely difficult time finding a lawyer willing to accept a case for a guestworker who will be required to return to his or her home country.”¹⁷⁹ The trafficking statute permits victims to apply for continued presence to serve as a witness to prosecute the criminal trafficking claims.¹⁸⁰ If lawyers became involved, it is possible that the workers’ continued presence would lead to more litigation of both trafficking and other civil claims.¹⁸¹

Employers currently have every incentive to create distance between themselves and the guestworkers they employ. The system not only permits this distance, but facilitates it. The DOL simply has not prevented this clever circumvention of the H-2 program rules. Moreover, the structure of the program gives the employers too much power even without such distance. Such a system naturally leads to serious abuses. The H-2A workers’ lack of access to the court system further exacerbates the problem, removing an important incentive for compliance by employers.¹⁸² Given the benefits they accrue, employers are acting in their economic interest to the detriment of guestworkers. The current program inadequately polices abuses and does not incentivize fair treatment of workers. The structure of the program binds workers to employers and jobs, regardless of the

174. S. POVERTY LAW CTR., *supra* note 10, at 15–16.

175. See 18 U.S.C. § 1593A (extending liability to anyone who benefits from another’s violation of 18 U.S.C. §§ 1581, 1592, 1595).

176. See *supra* Part III.C.3 (discussing the distance created between employers and perpetrators).

177. S. POVERTY LAW CTR., *supra* note 10, at 19–20, 32–33.

178. *Id.* at 25–26.

179. *Id.* at 26.

180. 22 U.S.C.A. § 7105(c)(3)(A)(i) (West 2010).

181. See 18 U.S.C. § 1595 (2006) (creating a private cause of action for trafficking victims).

182. S. POVERTY LAW CTR., *supra* note 10, at 31.

employers' behavior, tipping the balance of power grossly.¹⁸³ Meanwhile, U.S. farmworkers are not subjected to such treatment.¹⁸⁴ The disparate treatment of guestworkers reflects a general policy of treating foreign workers as less valuable or less deserving, second-class members of society. The way the DOL implemented the program's rules and regulations reflects a willingness to use workers for necessary labor without providing the protections that are assured to U.S. citizens, a remnant of the *bracero* system.

IV. SOLUTION

The guestworker program radically changed immigration.¹⁸⁵ A complex body of law, filled with loopholes and differing interpretations, replaced the open border and free flow of labor that once existed between Mexico and the United States.¹⁸⁶ This Note demonstrates the failure of the current system; it is neither protecting workers nor reducing the number of individuals working illegally in the United States. A program that fails to serve its stated purpose, while encouraging exploitative behavior on the part of employers, cannot be justified. It needs to be amended or possibly abolished.¹⁸⁷ This Part discusses potential solutions to the most egregious abuses guestworkers face in the United States.

A. *Enhance Access to the Legal System*

1. Allow Legal Aid Attorneys to File Class Actions Against Farmers

Access to the legal system is the most critical component of enforcing rights and protecting interests. Currently, H-2A workers have very limited access and, due to practices such as blacklisting, are often afraid to file claims.¹⁸⁸ Employers with no fear of legal consequences are unlikely to change economically beneficial behavior.¹⁸⁹ Currently, very few lawyers provide free legal services to

183. *Id.* at 14.

184. U.S. DEP'T OF LABOR, *Chapter 3: Income and Poverty*, in THE NATIONAL AGRICULTURAL WORKERS SURVEY, <http://www.doleta.gov/agworker/report/ch3.cfm> (last visited Sept. 26, 2010).

185. See Ashby, *supra* note 29, at 899 (detailing the drastic changes to U.S. immigration patterns upon the implementation of the guestworker program).

186. See Baker, *supra* note 28, at 83 (describing lax enforcement of immigration laws prior to the creation of the *Bracero* Program).

187. See S. POVERTY LAW CTR., *supra* note 10, at 41–46 (arguing for major alterations of the guestworker program).

188. *Id.* at 31.

189. See *id.* (describing how the failure to enforce the laws perpetuates the system of inequality).

H-2A workers, and the majority are federally funded legal aid attorneys.¹⁹⁰ Federally funded legal aid attorneys are not allowed to bring class actions and are limited to bringing FLSA collective actions against farmers that fail to pay large numbers of workers the minimum wage.¹⁹¹ For breach of contract not amounting to an FLSA violation, legal aid lawyers cannot file large class action cases even though the cases sometimes involve large numbers of workers.¹⁹²

Allowing legal aid attorneys to bring class actions may have a deterrent effect on employers. The fear of large-scale litigation alters the cost-benefit analysis behind choosing to breach a standard contract with a large number of guestworkers. Class action lawsuits may garner more publicity, while drawing attention to the horrific experiences of some workers at the hands of employers. Further, workers fearing retaliation and blacklisting may feel more confident and comfortable bringing a class action lawsuit as opposed to acting alone.¹⁹³ Permitting class actions allows many to benefit from one or two brave workers willing to appear as a named plaintiff representing a group.¹⁹⁴

2. Allow Workers to Remain in the United States to Prosecute Their Claims

The INA should include a provision permitting guestworkers with a prima facie employment case against their H-2A or H-2B employer to be eligible for a special visa. This visa will permit them to remain in the United States while their case is pending. Class actions may even prove lucrative in some cases, especially if H-2A workers become included in the MSPA umbrella, which provides for damages, or if the workers have FLSA claims, which permit treble damages in some instances. Private attorneys do not have the same restrictions as legal aid attorneys, but are generally unwilling to take cases of workers who will have to return to their country of origin and will not be in the United States to prosecute their claims.¹⁹⁵ Giving guestworkers meaningful access to the legal system requires permitting them to live and work in the United States for the duration of their case. This will encourage litigation of these claims.

190. *Id.* at 18.

191. *Id.* at 30.

192. *See id.* at 28–31 (detailing the inability of legal aid lawyers to bring a class action suit and the widespread abuse of migrant workers).

193. *Id.* at 30 (“Given the workers’ enormous fears of retaliation and blacklisting, any system that relies on workers asserting their own legal rights is unlikely to bring about systematic change.”).

194. *Id.* at 30–31 (“Having access to class action litigation would at least permit cases to be brought by one or two workers brave enough to challenge the system.”).

195. *Id.* at 26.

A potential criticism of this approach is that it could incentivize workers to fabricate claims in order to receive a more favorable status. To prevent fraud, the DOL should serve as a filter by investigating the claims to determine whether workers qualify for this special visa. If the claims are without merit, they will not be approved. This visa forces the DOL to perform investigations it is already obligated to perform under the statute.

3. Hold Employers Liable for the Actions of Recruiters and Farm Labor Contractors

Currently, many employers are able to avoid liability by creating artificial distance between themselves and guestworkers by hiring middlemen in the form of recruiters and farm labor contractors. Consequently, the recruiters and the farm labor contractors become the principal violators against whom guestworkers must bring their action. These parties are often insolvent, not amenable to suit in the United States, and are not the principal causes of the problem.¹⁹⁶ This scapegoating perpetuates exploitation.¹⁹⁷

In order to combat this decentralization, employers should be held strictly liable for the actions of recruiters and farm labor contractors that provide workers to them. Agency theory leaves too much ambiguity and allows employers to avoid punishment; a bright-line rule will force employers to take action against unfair recruitment practices. A clear rule establishing liability, regardless of the amount of contact between the parties, is necessary to incentivize employers to ensure that workers are treated fairly throughout the process. The burden should be placed on employers because they are regulated by and benefitting from the H-2A program.¹⁹⁸

Once employers are strictly liable for the actions of recruiters and farm labor contractors, it will be much easier for guestworkers that are the victims of trafficking to establish criminal violations of the trafficking statute.¹⁹⁹ This statute includes a provision allowing for a "continued presence" visa for those victims remaining in the country to serve as witnesses in the case. The holder of this visa is eligible to work legally in the United States. This visa can also serve

196. See *id.* at 33 ("Having a legal remedy against a labor contractor with no assets is no remedy at all.")

197. *Id.*

198. See *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1237 (11th Cir. 2002) (discussing the benefits employers accrue).

199. See 18 U.S.C. § 1592 (2006) (stating that any person who holds another's immigration document in violation of the forced labor provisions is liable under the trafficking statute).

as a model for any visa extended to H-2 workers pursuing legal claims.

4. Improve Department of Labor Investigations

The DOL is not doing an adequate job ensuring that only deserving employers are certified. Investigating more thoroughly before problems arise prevents abuse and limits the number of claim-related visas needed to pursue court claims. A more diligent, better-staffed DOL can enforce the minimal protections offered by the current statute, a critical first step in improving the actual situation of guestworkers. Additional changes could improve the DOL's access to information at minimal cost. The DOL could require employers to make a full report to the DOL of workers' hours and wages. This report could be made under penalty of perjury and serve as a starting point for hunting abusive employers.

B. Amend the Law to Better Protect Guestworkers

1. Do Not Bind H-2 Workers to a Single Employer

The balance of power between H-2A workers and their employers is tilted towards employers, making it impossible for workers to protect themselves, because they are bound to one employer for the duration of their contract.²⁰⁰ If a worker leaves the employer, he loses his legal status.²⁰¹ If an employer is abusive or fails to provide the wages or hours promised, the guestworker must choose between three bad options: going home early and not recouping his costs, remaining with the abusive employer, or working for another U.S. employer illegally. If the worker is caught "off visa," or out of status, the worker faces a five-year bar from participation in the H-2A program.²⁰²

The free labor market can police the practices of employers. Guestworkers should receive time-based, rather than employer-based, visas. Allowing guestworkers to participate in a free labor market may curb many of the abuses they currently face. Employers would not wield as much power over guestworkers if the guestworkers could leave and find other work without potential legal and immigration problems. Under this visa, employers that do not breach their contract could bring action against guestworkers that leave without reason for breach of the contract. On the other hand, when an employer breaches a contract, the guestworker would be free

200. See *supra* note 141 and accompanying text.

201. See *supra* note 141 and accompanying text.

202. 8 U.S.C. § 1188(f) (2006).

to leave and seek employment elsewhere. This change will shift the allocation of power and achieve greater parity between employer and guestworker. At the same time, the visas could still be limited temporally to ensure that the H-2A permit does not become an immigrant visa and remains a non-immigrant work permit.

2. Hold Employers Liable for the Expenses Incurred Procuring Employment and Traveling to the United States

Congress should amend the guestworker program and require employers to bear the costs guestworkers incur procuring employment, such as fees to recruiters, visa costs, as well as the cost of traveling to the United States. Such costs are for the "benefit or convenience of the employer" and incidental to the recruitment program. Therefore, the employer should reimburse workers for these costs.²⁰³ Employers chose to participate in the H-2 program; recruitment and transportation are necessary conditions of that program.²⁰⁴

If the law forces employers to pay for recruitment fees, it will incentivize employers to ensure those fees are fair and reasonable. Interpreting recruitment fees to be for the benefit of the employer will lead to better policing of the most egregious, expensive, and exploitative recruitment practices. This will reduce the need for the DOL to investigate practices in foreign countries by putting the onus on the employer. It will encourage employers to work only with responsible recruiters and to make certain that their workers are not paying unnecessary fees prior to arriving in the United States. Lowered costs at the outset will permit workers to arrive in the United States with fewer debts and obligations. Guestworkers with fewer debts can leave bad jobs without worrying about returning home to face a mountain of debt. An amendment requiring employers to pay these costs helps increase the power of the guestworker vis-à-vis his employer, narrowing the disparity in the balance of power currently permitting employers to behave unjustly.

3. Force Employers to Fulfill 100 Percent of Their Contract

Currently, guestworkers are only guaranteed three-fourths of their promised contract.²⁰⁵ This stipulation encourages employers to

203. *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1237–43 (11th Cir. 2002) (citing 29 CFR § 531.32(c)) (holding employers responsible for cost of transportation and visas, but not recruiting fees).

204. *See id.* at 1241–46 (noting that transportation is necessary, but declining to characterize recruiting fees, instead deciding the issue on the grounds of lack of agency).

205. 20 C.F.R. § 655.122(i) (2010).

exaggerate in their offers of employment, promising more hours and money than they can give.²⁰⁶ Workers are often unable to pay their debts without receiving the full value of their contract.²⁰⁷ Forcing employers to pay the entire contract price will force them to assess more realistically the amount of work they have available, how many workers they need, and how much they can pay guestworkers. This additional information will permit workers to make better decisions regarding whether or not coming to the United States on an H-2 employment contract is a financially sound decision; they will know the exact value of the contract.

4. Extend the Agricultural Worker Protection Act to Cover H-2A Workers

As discussed above, leaving protection of H-2A workers to state contract law and the FLSA insufficiently protects against wage theft, poor housing conditions, document servitude, and other abuses.²⁰⁸ The APWA is another legal mechanism that should enforce all H-2 contracts; it provides punitive civil remedies for employer abuses based on their severity and number.²⁰⁹ Extending the MSPA will increase the value of each H-2A lawsuit, making the cases more attractive to private attorneys. The involvement of private attorneys is crucial for enhancing guestworkers' access to the court system as legal aid services are incapable of handling the magnitude and complexity of many of the cases.²¹⁰ If the MSPA covered H-2A workers, many of their cases would become very profitable for private attorneys.²¹¹ The risk of defending against a large-scale lawsuit may also serve as a deterrent to those employers that do not treat their workers well.

V. CONCLUSION

The situation of many migrant agricultural guestworkers, working legally in the United States through the H-2A program, is abysmal. Faced with wage theft, horrible housing conditions, dangerous working conditions, and breaches of contract,

206. S. POVERTY LAW CTR., *supra* note 10, at 9–10.

207. *Id.*

208. See *supra* Part III (discussing the problems guestworkers encounter).

209. Migrant and Seasonal Agricultural Worker Protection Act §§ 501, 503, 29 U.S.C. §§ 1851, 1853 (2006).

210. See S. POVERTY LAW CTR., *supra* note 10, at 30–31 (describing the difficulties that migrant workers face in obtaining legal representation).

211. See 29 U.S.C. § 1854 (authorizing private rights of action for violations of the MSPA).

guestworkers have limited access to the court system and few remedies available. Unlike their American counterparts whom the MSPA and free market help to protect, H-2A workers have few remedies available and are much more vulnerable. Few lawyers are willing to take their cases and few politicians are willing to stand up for them. Existing legislation fails to protect guestworkers from even egregious exploitation, and the existing regulations often perpetuate the power imbalance between employer and guestworker by strengthening the position of the employer and weakening the guestworkers' ability to change their situation. Guestworkers work in conditions that U.S. workers cannot even imagine. Due to the MSPA, the ability to leave bad jobs and seek other similar employment, and increased ability to procure legal representation, U.S. workers do not have to endure such situations. Unlike domestic farmworkers, guestworkers have difficulty communicating with and accessing attorneys, and also cannot simply leave a bad employer for another without potentially huge repercussions, such as failing to recover their costs or working illegally, "out-of-status." This disparity between domestic and foreign workers is an embarrassment to the United States and a gross miscarriage of justice.

The old *bracero* attitude prevails. Employers are taking advantage of cheap labor when work is available and exploiting guestworkers when it is not; the individual guestworkers are disposable. Given the magnitude of the problem and the failure of existing laws to remedy it, Congress needs to step in and amend the statute. Legislation must strengthen the protections of workers. It must increase the potential remedies and improve access to justice. To do this, the entire program should be changed. Without amending the statute, guestworkers will continue suffering silently.

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