

Testimony of Meredith B. Stewart
Southern Poverty Law Center
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U.S. Senate
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*"The H-2B Temporary Foreign Worker Program: Examining the Effects on Americans'
Job Opportunities and Wages"*

Thank you for the opportunity to speak about guest workers who come to the United States as part of the H-2B program and about the U.S. workers whose wages and working conditions are affected by the program.

My name is Meredith Stewart. I am a Staff Attorney at the Southern Poverty Law Center ("SPLC"). Founded in 1971, the Southern Poverty Law Center is a civil rights organization dedicated to advancing and protecting the rights of minorities, the poor, and victims of injustice in significant civil rights and social justice matters. Our Immigrant Justice Project represents low-income immigrants in employment and civil rights cases across the Southeast.

During my career, I have spoken with hundreds of guest workers in many states. The SPLC has represented tens of thousands of H-2A and H-2B guest workers in lawsuits related to their pay and other working conditions. We also published a report in 2013 about guest worker programs in the United States entitled *Close to Slavery: Guestworker Programs in the United States*, which I have attached as Exhibit I to my written testimony.¹

The report discusses in detail the abuses suffered by H-2 guest workers. It is based upon thousands of interviews with workers, research related to guest workers, and the experiences of legal experts from around the country. As the report reflects, guest workers are systematically exploited because the very structure of the program places them at the mercy of a single employer for both their job and continued presence in the U.S. The structural defects in our guest worker programs permit workers to enter the U.S. encumbered with overwhelming debt—debt they incurred to get short-term, low paid work. It provides no realistic means for workers to exercise the few rights they have.

The H-2B (non-agricultural) guest worker program permits U.S. employers to import individuals on a temporary basis from other nations to perform work only when the employer certifies that qualified persons in the United States are not available and the terms of employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.²

¹ *Close to Slavery* was originally released in 2007, but was updated and re-released in 2013.

² 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. §214.2(h)(6)(iv)(A); 20 CFR Part 655.

Prospective H-2B employers must apply to the Department of Labor (DOL) for a temporary labor certification confirming that American workers capable of performing the work are not available and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed American workers. The H-2B program requires the employer to attest to DOL that it will offer a wage that equals or exceeds the highest of the prevailing wage, the applicable federal minimum wage, the state minimum wage, or the local minimum wage to the H-2B worker. The employer also must agree to offer terms and working conditions typical to U.S. workers in the same geographical area.

In practice, the program is rife with abuses. The abuses typically start long before the worker has arrived in the United States and continue through and even after his or her employment here. A guest worker's visa is good only if he or she works for the employer who sponsored the visa. Unlike U.S. citizens, guest workers do not enjoy the most fundamental protection of a competitive labor market — the ability to change jobs if they are mistreated. If guest workers complain about abuses, they face deportation, blacklisting, or other retaliation. Because H-2B guest workers are tied to a single employer and have little or no ability to enforce their rights, they are routinely exploited.

Just as importantly, the appalling wages and working conditions experienced by H-2B workers have a demonstrably depressive effect on the wages and working conditions of U.S. workers in industries employing H-2B workers. As long as employers in low-wage industries can rely on an endless stream of workers, we should expect wages and working conditions in those industries to drop. Our market economy is premised on the idea that a shortage of workers will push the market to increase wages to attract workers from other parts of the economy. Introducing guest workers undermines these market mechanisms, artificially affecting the supply of labor and preventing wage increases that we would expect to see in a healthy market sector. This problem is particularly acute when the workers being introduced into the labor market are vulnerable guest workers who lack the basic labor protections and bargaining power available to U.S. workers.

The government's H-2B program undercuts employers' incentive to hire U.S. workers or make jobs more appealing to U.S. workers by improving wages and working conditions. Not surprisingly, many H-2 employers discriminate against U.S. workers, preferring to hire guest workers, even though they are required to certify that no U.S. workers are available to fill their jobs. It is well-documented that wages for U.S. workers are depressed in industries that rely heavily on guest workers. Astonishingly, the H-2B program does not prohibit the importation of guest workers during periods of high unemployment. Indeed, the unemployment rate in a locality or an industry is not a consideration for DOL in determining whether to certify an H-2B application.

In 2015, this program was more than doubled in size through a rider attached to the omnibus appropriations bill that exempted returning H-2B workers from the program's numeric cap. If this program is permitted to continue at all, it should not be expanded, but rather should be substantially reformed to address the vast disparity in

power between guest workers and their employers.

It is virtually impossible to create a guest worker program for low-wage workers that does not involve systemic abuse and thus erode the wages and working conditions of U.S. workers. The H-2 guest worker program should not be the model for the future flow of workers to this country. If the current H-2 program is allowed to continue, it should be completely overhauled.

I. The H-2B Program Depresses Wages and Working Conditions for U.S. Workers

As laid out in greater detail in Section II, the H-2B program leads to abuse and exploitation of H-2B workers—not because the program attracts “bad apple” employers, but because the very structure of the program lends itself to abuse. Because workers arrive desperately in debt, can work only for their petitioning employer, and are dependent upon that employer for their very right to enter or remain in the United States, H-2B workers are incredibly vulnerable. The abuses suffered by H-2B workers have an impact beyond that experienced by the guest workers, however; they put profound downward pressure on the wages and working conditions experienced by U.S. workers in industries employing H-2B workers.

A. Wages for H-2B Are Set Too Low, Driving Down Wages for U.S. Workers

It is well documented that there are chronic wage and hour abuses involving H-2B workers.³ Since 2004, SPLC has represented guest workers in obtaining settlements and judgments of nearly \$50,000,000. There can be no doubt that the impact of such pervasive wage and hour violations is to depress wages in those industries.

Additionally, DOL H-2B certification data shows that the H-2B program’s prevailing wage rules allow for certification of H-2B workers at wages well below the state and national averages in the overwhelming majority of cases. For example, in FY 2014, there were 2,270 H-2B landscaping jobs certified in Colorado. The average wage certified for those H-2B jobs was \$10.34 per hour. However, the average hourly wage for all landscaping jobs in Colorado in 2014 was \$13.60 an hour, meaning that employers utilizing H-2B workers paid an average of \$3.26 per hour less than prevailing wage rates, undercutting the wages of similarly employed U.S. workers by nearly 25%.⁴ Numerous similar examples could be cited from other industries and other parts of the country.

In December 2014, a federal appeals court found that acceptance by the DOL in 2013 and 2014 of employer wage surveys – a method by which employers can present their own formulas for determining a prevailing wage rate – had caused widespread depression of wages paid to U.S. workers.⁵ The court found that wage surveys created “a

³ See *Close to Slavery*, Chapter 5.

⁴ Daniel Costa, Economic Policy Institute, *The H-2B temporary foreign worker program: For labor shortages or cheap, temporary labor?*, <http://www.epi.org/publication/h2b-temporary-foreign-worker-program-for-labor-shortages-or-cheap-temporary-labor/#epi-toc-8>.

⁵ *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 188 (3d Cir. 2014).

system by which employers are benefitted financially by submitting private surveys to justify wages lower than the [Occupational Employment Statistics] wage” – a wage survey that DOL has called “the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H-2B program.”⁶ The H-2B industry aggressively lobbied to include a rider in the FY 2016 appropriations bill that restricts the DOL from rejecting employer wage surveys even when there is a valid OES wage available for the job. This means wages for H-2B workers will continue to drive down wages for U.S. workers.

When an industry relies on guest workers for the bulk of its workforce, wages fall. Guest workers are unable to bargain for better wages and working conditions. Over time, wages decline and the jobs become increasingly undesirable to U.S. workers, creating even more of a demand for guest workers.

B. Recruitment of U.S. Workers Is Weak at Best, and Often a Sham

Theoretically, employers are allowed to hire H-2B workers only when U.S. workers are not available for the job. In fact, the legal requirements for recruiting U.S. workers are abysmally weak. In practice, recruiters and employers pay only lip service to those requirements, preferring to hire H-2B workers—workers who will be effectively indentured to one employer during the term of their visa.

The legal requirements for recruiting U.S. workers are few. Employers are required to publish advertisements for two days in a newspaper. They must also contact the local union as a recruitment source if the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application. Employers must not reject U.S. applicants for the job opportunity for which the labor certification is sought for reasons other than lawful, job-related reasons.

In practice, employers and recruiters make little effort to locate U.S. workers or keep those they have. A recent BuzzFeed News investigation quoted a labor broker who hired H-2B guest workers for hotel housekeeping jobs as saying “Of course I tried not to hire Americans.”⁷ By the time they have decided to apply for H-2B workers, employers have typically made a business decision to employ those H-2B workers rather than to employ U.S. workers. In one indicative case, the Westin Kierland Resort & Spa in Scottsdale, Arizona – a resort that is part of the \$12 billion Starwood chain – passed over qualified U.S. workers for H-2B workers.⁸ The FY 2016 Appropriations Act defunded DOL’s ability to audit employers’ U.S. recruitment efforts.

In a 2015 case filed by SPLC against a Mississippi landscaping company Culpepper Enterprises, Inc., the employer obtained certification for its H-2B workers in 2014 by promising the government it would pay them \$11.11 per hour and would first

⁶ See *id.* at 189 (citing 76 Fed. Reg. 3452, 3465).

⁷ Jessica Garrison, “All You Americans Are Fired.”, BuzzFeed, Dec. 1, 2015.

⁸ See *id.*

recruit U.S. workers at that same rate. Once the H-2B workers arrived, however, the company only paid them \$7.25 per hour – not the \$11.11 per hour prevailing wage – for their work maintaining the shoulders and medians of highways for the Mississippi Department of Transportation.⁹ The company representative testified in a deposition that they could not find U.S. workers for the job, and the ones they did hire did not stick around. But U.S. workers who applied for and accepted an \$11.11 per hour job cannot be expected to stay on when they learn their actual pay is almost \$4 per hour less than what the employer promised. Culpepper’s H-2B workers, on the other hand, whose legal status was tied to their employer, did not have the ability to move on to another job.

In addition to the lower wages employers pay H-2B workers, employers have powerful financial reasons to prefer foreign workers to Americans. H-2B workers are not eligible for unemployment compensation, making them cheaper to employ than U.S. workers. Employers of H-2B workers also save by not having to pay for benefits such as health care. During a jury trial last year against H-2B employer, Signal International, a financial expert testified that Signal potentially stood to save over \$22 million, or \$6.96 per worker, per hour, by virtue of its plan to fill nearly 500 welder positions with H-2B workers for 2-3 years instead of hiring U.S. workers.

Fraudulent wage guarantees and other insincere U.S. recruitment efforts coupled with the profitability of using the H-2B program make a true test of the U.S. labor market impossible.

II. Guest Worker Programs Are Inherently Abusive

Abuse of H-2B guest workers often begins in their home countries during recruitment. When recruited to work, workers are often forced to pay enormous sums of money to obtain the right to be employed at the low-wage jobs they seek in the United States. It is not unusual, for example, for a Guatemalan worker to pay more than \$5,000 in fees to obtain a job that may, even over time, pay less than that sum. Workers from other countries may be required to pay substantially more than that. Asian workers have been known to pay as much as \$20,000 for a short-term job under the program. Unregulated foreign labor recruiters in home countries make false promises to workers about the H-2B jobs and visas. Only after the workers have paid high recruiting fees and arrive in the U.S. do they learn the less rosy truth.

Because most workers who seek H-2 jobs are indigent, they typically have to borrow the money at high interest rates. Guatemalan workers routinely tell us that they have had to pay approximately 20% interest *per month* in order to raise the needed sums. In addition, many workers have reported that they have been required to leave collateral — often the deed to a vehicle or a home — in exchange for the opportunity to obtain an H-2 visa. Jacob Joseph Kadakkarapally paid nearly \$15,000 for the opportunity to work at Signal International. To earn the required fee he pawned his wife’s jewelry, spent his

⁹ *Carrilo Ramirez, et al. v. Culpepper Enterprises, Inc., et al.*, No. 3:15-CV-00409-CWR-FKB (S.D. Miss. filed June 5, 2015).

life's saving, and borrowed money from his father-in-law. This sort of debt leaves workers incredibly vulnerable once they are in the United States.

Once the H-2B workers arrive in the United States, they labor in a system akin to indentured servitude. Because they are permitted to work only for the employer who petitioned the government for them, they are extremely susceptible to being exploited. If the employment situation is exploitative, the worker's sole lawful recourse is to return to his or her country. Because most workers take out significant loans to travel to the United States for these jobs, as a practical matter they are forced to remain and work for employers even when they are subjected to shameful abuse.

Guest workers routinely receive less pay than the law requires. In some industries that rely upon guest workers for the bulk of their workforce — seafood processing and forestry, for example — wage-and-hour violations are the norm, rather than the exception. These are not subtle violations of the law but the wholesale cheating of workers. We have seen forestry crews paid as little as \$2 per hour, each worker cheated out of hundreds of dollars per week. Already in 2016, H-2B workers represented by SPLC won nearly \$2.5 million in back wages and other damages. A class of hundreds of H-2B workers from Jamaica settled a lawsuit with a South Carolina luxury golf resort, Kiawah Island Inn Company, for \$2.3 million.¹⁰ Similarly, an Alabama seafood processor R&A Oyster Company, Inc., was ordered to pay more than \$30,000 in back wages and liquidated damages to eighteen H-2B guest workers for its failure to pay the minimum wage for every hour worked.¹¹ Even when workers earn the minimum wage and overtime, they are often subject to contractual violations that leave them in an equally bad situation, such as crippling pay deductions for housing and transportation.

Another common problem workers face is that they are brought into the United States too early, when little work is available. Similarly, employers often bring in far too many workers, gambling that they may have more work to offer than they actually do. Because the employers are not generally paying the costs of recruitment, visas, and travel, they have little incentive not to overstate their labor needs. Thus, in many circumstances, workers can wait weeks or even months before they are offered the full-time work they were promised. Given that workers bring a heavy load of debt, that many must pay for their housing, and that they cannot lawfully seek work elsewhere to supplement their pay, they are often left in a desperate situation. A FY 2016 Appropriations rider defunded DOL's ability to enforce a regulation that would guarantee H-2B workers a minimum of three-fourths of the hours they were promised. That regulation would have gone far to protect H-2B workers from sinking further into debt as they languish in the United States waiting for work to begin.

¹⁰ *Moodie v. Kiawah Island Inn Co.*, No. 15-1097 (D.S.C. 2015); Tone Bartelme, *Kiawah and Jamaican Workers Reach \$2 million Deal to End Lawsuit*, The Post & Courier, June 3, 2016, <http://www.postandcourier.com/20160603/160609794/kiawah-and-jamaican-workers-reach-2-million-deal-to-end-lawsuit>.

¹¹ *Fuentes Cordova, et al. v. R&A Oyster Co., Inc. et al.*, No. 14-00462 (S.D. Ala. 2014); The Times Picayune, *Seafood Company to Pay Back Wages to Migrant Workers*, Mar. 18, 2016, http://www.nola.com/politics/index.ssf/2016/03/seafood_company_to_pay_back_wa.html.

Guest workers who are injured on the job face significant obstacles in accessing the benefits to which they are entitled. First, employers routinely discourage workers from filing workers' compensation claims. Because those employers control whether the workers can remain in, or return to, the United States, workers feel enormous pressure not to file such claims. Second, workers' compensation is an *ad hoc*, state-by-state system that is typically ill-prepared to deal with transnational workers who are required to return to their home countries at the conclusion of their visa period. As a practical matter, then, many guest workers suffer serious injuries without any effective recourse.

The guest worker program also permits the systematic discrimination of workers based on age, gender and national origin. At least one court has found that age discrimination that takes place during the selection of workers outside the country is not actionable under U.S. laws.¹² Thus, according to that court, employers may evade the clear intent of Congress that they not discriminate in hiring by simply shipping their hiring operations outside the United States — even though all of the work will be performed in the United States.

Many foreign recruiters have very clear rules based on age and gender for workers they will hire. One major Mexican recruiter openly declares that he will not hire anyone over the age of 40. Many other recruiters refuse to hire women for field work. Employers can shop for specific types of guest workers over the Internet at websites such as www.labormex.com, www.maslabor.com, or www.mexican-workers.com. One website advertises its Mexican recruits like human commodities, touting Mexican guest workers as people with “a good old fashioned work ethic” who are “very friendly and easy to work with.”¹³

In order to guarantee that workers remain in their employ, many employers refuse to provide workers access to their own identity documents, such as passports and Social Security cards. This leaves workers feeling both trapped and fearful. We have received repeated reports of even more serious document abuses: employers threatening to destroy passports, employers actually ripping the visas from passports, and employers threatening to report workers to Immigration and Customs Enforcement if those workers do not remain in their employment.

Even when employers do not overtly threaten deportation, workers live in constant fear that any complaint on their part will result in being sent home or not being rehired. Fear of retaliation is a deeply rooted problem in guest worker programs. It is also a wholly warranted fear, since recruiters and employers hold such inordinate power over workers, deciding whether a worker can continue working in the United States and whether he or she can return.

¹² *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001). For a discussion of this case, see Ruhe C. Wadud, *Note: Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C.J. Int'l Law & Com. Reg. 335 (2001).

¹³ See, e.g., *Mexican Workers*, www.mexican-workers.com/why-foreign-workers.htm (last visited June 6, 2016).

Last year, H-2B workers from India won a \$14 million jury verdict against their employer, Signal International, and labor recruiters for a human trafficking scheme that lured the workers into paying thousands in recruitment fees in exchange for the false promise of green cards.¹⁴ This recruitment fee debt, combined with H-2B workers' inability to change employers under the terms of their H-2B visas, created a vulnerability to coercion that the traffickers exploited. When workers complained, Signal publically rounded them up, fired them, and threatened them with deportation.

When the petitioner for workers is a labor recruiter or broker, rather than the true employer, workers are often even more vulnerable to abuse. These brokers typically have no assets. In fact, they have no real "jobs" available because they generally only supply labor to employers. When these brokers are able to apply for and obtain permission to import workers, it permits the few rights that workers have to be vitiated in practice.

Finally, we have received repeated complaints of sexual harassment by women guest workers. Because of their vulnerability, guest workers are unlikely to complain about these violations. Public wage and hour enforcement has minimal practical impact because overstretched labor standards enforcement agencies can follow up on only a small fraction of violations.

III. DOL and DHS's Efforts to Better Protect U.S. and H-2B Workers Have Been Stymied by Employers Seeking to Maintain the H-2B Program as a Source of Cheap, Unregulated Labor

For the past several years, DOL and the Department of Homeland Security (DHS) have published regulations that better protect H-2B and U.S. workers. Many of those measures have been completely blocked or gutted by employer-driven litigation¹⁵ and appropriations measures.¹⁶

DOL and DHS's most recent attempt to implement better protections – the 2015 H-2B Rule – faced a similar fate.¹⁷ The 2015 Rule provided H-2B workers with a guaranteed number of hours worked – three fourths of the hours promised to them – to better protect workers from sinking into debt as a result of being "benched" by their employer in the United States. The 2015 Rule also included more robust protections for

¹⁴ *David v. Signal Int'l, LLC*, 257 F.R.D. 114 (E.D. La. 2009) (H-2B visa welders and fitters trafficked to Gulf Coast); Peg Brickley, *Accused of Labor Trafficking, Oil Rig Repairer Files for Bankruptcy*, <http://www.wsj.com/articles/signal-international-files-for-bankruptcy-1436787503>.

¹⁵ *See, e.g., Bayou Lawn & Landscape Servs., et al. v. Solis, et al.*, No. 3:12-cv-00183 (N.D. Fla. filed Apr. 16, 2012) (suit to block the 2012 H-2B comprehensive regulations); *Bayou Lawn & Landscape Servs., et al. v. Solis*, 3:11 cv445 (N.D. Fla. filed Sept. 21, 2011) (suit to block 2011 H-2B Wage Rule); *Louisiana Forestry Ass'n, Inc., et al. v. Solis*, No. 11-01623 (W.D. La. Sept. 7, 2011) (suit to block 2011 H-2B Wage Rule) (same).

¹⁶ Continuing Appropriations Resolution, 2013, H.J. Res. 117, Public Law No. 112-175 (Sept. 28, 2012); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011); Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Div. F, Title I § 110, 125 Stat. 786 (2011).

¹⁷ Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,042-01 (Apr. 29, 2015).

U.S. workers; for example, it requires employers to treat their U.S. workers working alongside H-2B workers equally and allows DOL to audit employers to ensure they are engaging in legitimate U.S. recruitment. Unfortunately, the FY 2016 appropriations riders blocked DOL's ability to enforce these critical protections.¹⁸

The FY 2016 Appropriations riders also vastly expanded the H-2B program by exempting returning workers from the statutory cap of 66,000 H-2B workers per year. This expansion occurred even though there is no evidence of labor shortages in the top H-2B industries. The 15 industries employing the most H-2B workers have high unemployment rates, most being at or around double digits. In the top H-2B occupation, landscaping, the unemployment rate averaged 12.7% in 2013-2014, more than double the 2014 national average unemployment rate of 6.2%.¹⁹ A program that is as dysfunctional and harmful to workers as the H-2B program should not be expanded.

IV. Substantial Changes Are Necessary to Reform These Programs

The SPLC report *Close to Slavery* offers detailed proposals for reform of the current H-2 guest worker programs. The recurring themes of those detailed recommendations are that federal laws and regulations protecting guest workers from abuse must be strengthened, federal agency enforcement of guest worker programs must be strengthened, and Congress must provide guest workers with meaningful access to the courts.

The SPLC recommends that Congress take the following actions:

- Congress should not include changes to the H-2B visa program in any omnibus or appropriations measure other than to restore DOL's funding to protect U.S. workers by verifying that employers conducted U.S.-based recruitment or ensuring that U.S. workers receive at least the same wages and benefits as H-2B workers.
- Congress should enact protections to regulate the recruitment of workers. Congress should make clear that the systematic discrimination entrenched in this program is unlawful. Congress should regulate recruitment costs and should make employers responsible for the actions of recruiters in their employ. Any such regulation must make the employer who selects a recruiter responsible for the actions of that recruiter. Doing so is the only effective means of avoiding the severe abuses that routinely occur in recruitment. Holding employers responsible for their agents' actions is not unfair: if those hires were made in the U.S., there is no doubt that the employers would be lawfully responsible for their recruiters' promises and actions. Making the rules the same for those who recruit in other countries is fair, and it is the only way to prevent systematic abuse.

¹⁸ See language included in the Labor HHS (S. 1695) and DHS (S. 3128) bills.

¹⁹ See Costa, *supra* note 4.

- Congress should also make H-2B workers eligible for federally funded legal services. There is simply no reason that these workers – who have come to the U.S. under the auspices of this government sponsored plan – should be excluded from eligibility.
- Congress should make the H-2B visa fully portable to other employers, at least under some circumstances.
- Congress should create a means by which workers may obtain visas or deferred action when they need to remain in or return to the U.S. to enforce their rights. Employers currently control workers’ right to be here. That means when workers bring suit, or file a workers compensation claim, the employers have extraordinary control over that process.
- Congress should provide a pathway to permanent residency for guest workers and their families so they may become full members of our community.
- Enforcement should include a private federal right of action to enforce workers’ rights under the H-2B contract.
- Lastly, Congress should provide strong oversight of the H-2B program. Congress should hold additional hearings related to the administration of guest worker programs.

A review of available evidence would amply demonstrate that this program has led to the shameful abuse of H-2B workers and has put downward pressure on the wages and working conditions offered to U.S. workers. Congress must not allow that abuse to continue.

Conclusion

The H-2B program as it currently exists lacks worker protections and any real means to enforce the protections that exist. Vulnerable workers desperately need Congress to take the lead in demanding reform. The goal of this subcommittee should be to make effective protections for the wages and working conditions of American workers that Congress intended in creating the H-2B program. Continuation or expansion of the H-2B program thwarts that intention.

Thank you again for the opportunity to testify. I welcome your questions.

EXHIBIT

CLOSE TO SLAVERY

Guestworker Programs in the United States

2013 EDITION





About the Southern Poverty Law Center

The Southern Poverty Law Center, based in Montgomery, Alabama, is a nonprofit civil rights organization founded in 1971 to combat bigotry and discrimination through litigation, education and advocacy.



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The Southern Poverty Law Center initially published *Close to Slavery* in 2007. With this 2013 version, the report has been updated and revised to reflect changes in the legal and policy landscape as well as to provide more recent stories about the exploitation of guestworkers in the H-2 program.

Executive Summary

In the debate over comprehensive immigration reform, various policymakers and business groups have suggested that Congress create a new or expanded guestworker program to ensure a steady supply of foreign workers for industries that rely on an abundance of cheap labor.

Congress should look before it leaps. The current H-2 program, which provides temporary farmworkers and non-farm laborers for a variety of U.S. industries, is rife with labor and human rights violations committed by employers who prey on a highly vulnerable workforce. It harms the interests of U.S. workers, as well, by undercutting wages and working conditions for those who labor at the lowest rungs of the economic ladder. This program should not be expanded or used as a model for immigration reform.

Under the current H-2 program overseen by the U.S. Department of Labor (DOL), employers brought about 106,000 guestworkers into this country in 2011 — approximately 55,000 for agricultural work and another 51,000 for jobs in forestry, seafood processing, landscaping, construction and other non-agricultural industries.

But far from being treated like “guests,” these workers are systematically exploited and abused. Unlike U.S. citizens, guestworkers do not enjoy the most fundamental protection of a competitive labor market — the ability to change jobs if they are mistreated. Instead, they are bound to the employers who “import” them. If guestworkers complain about abuses, they face deportation, blacklisting or other retaliation.

Bound to a single employer and without access to legal resources, guestworkers are routinely:

- Cheated out of wages;
- Forced to mortgage their futures to obtain low-wage, temporary jobs;
- Held virtually captive by employers or labor brokers who seize their documents;
- Subjected to human trafficking and debt servitude;
- Forced to live in squalid conditions; and
- Denied medical benefits for on-the-job injuries.

Former House Ways and Means Committee Chairman Charles Rangel put it this way: *“This guestworker program’s the closest thing I’ve ever seen to slavery.”*¹

Congressman Rangel’s conclusion is not mere hyperbole nor the first time such a comparison has been made. Former DOL official Lee G. Williams described the old “bracero” program — an earlier version of the guestworker program that brought thousands of Mexican nationals to work in the United States during and after World War II — as a system of “legalized slavery.”² On paper, the bracero program had many significant written legal protections, providing workers



“This guestworker program’s the closest thing I’ve ever seen to slavery.” CHARLES RANGEL, FORMER HOUSE WAYS AND MEANS COMMITTEE CHAIRMAN

with what historian Cindy Hahamovitch, an expert on guestworker programs, has called “the most comprehensive farm labor contract in the history of American agriculture.”³ Nevertheless, the bracero workers were systematically lied to, cheated and “shamefully neglected.”⁴

In practice, there is little difference between the bracero program of yesterday and today’s H-2 guestworker program. Federal law and DOL regulations provide a few protections to H-2 guestworkers, but they exist mainly on paper. Government enforcement of guestworker rights is historically very weak. Private attorneys typically won’t take up their cause. And non-agricultural workers in the program are not eligible for federally funded legal services.

The H-2 guestworker system also can be viewed as a modern-day system of indentured servitude. But unlike European indentured servants of old, today’s guestworkers have no prospect of becoming U.S. citizens. When their temporary work visas expire, they must leave the United States. They are, in effect, the disposable workers of the U.S. economy.

U.S. workers suffer as a result of these flaws in the guestworker system. As long as employers in low-wage industries can rely on an endless stream of vulnerable guestworkers who lack basic labor protections, they will have little incentive to hire U.S. workers or make jobs more appealing to domestic workers by improving wages and working conditions. Not surprisingly, many H-2 employers discriminate against U.S. workers, preferring to hire guestworkers, even though they are required to certify that no domestic workers are available to fill their jobs. In addition, it is well-documented that wages for U.S. workers are depressed in industries that rely heavily on guestworkers.

This report is based on interviews with thousands of guestworkers, a review of the research on guestworker programs, scores of legal cases and the experiences of legal experts from around the country. The abuses described here are too common to blame on a few “bad apple” employers. They are the foreseeable outcomes of a system that treats foreign workers as commodities to be imported as needed without affording them adequate legal safeguards, the protections of the free market, or the opportunity to become full members of society.

When the Southern Poverty Law Center published the first version of this report in 2007, we recommended reform or repeal of the H-2 program. Unfortunately, even after the enactment of modest reforms in recent years, guestworker programs today are still inherently abusive and unfair to both U.S. and foreign workers.

In the past several years, the DOL has proposed two sets of regulations to better protect non-agricultural H-2 workers – one related to wage rate guarantees and one more comprehensive set of regulations. These regulations also would better protect the jobs and wages of U.S. workers. Unfortunately for workers, neither set of regulations has gone into effect; employers have filed multiple lawsuits challenging them, and Congress has effectively blocked implementation of the new wage regulations. For workers, then, the abuses continue unabated.

It is virtually impossible to create a guestworker program for low-wage workers that does not involve systemic abuse. The H-2 guestworker program should not be expanded in the name of immigration reform and should not be the model for the future flow of workers to this country. If the current H-2 program is allowed to continue, it should be completely overhauled. Recommendations for doing so appear at the end of this report.



PART 1

A Brief History of Guestworkers in America

Foreign-born workers have been significant contributors to the U.S. economy for centuries.

From the early 1800s until the outbreak of World War I, millions of European immigrants — Irish, British, Germans, Italians, Scandinavians, Russians, Hungarians and others — arrived in the United States, and their labor helped fuel the country’s economic and geographic expansion. For most of this period, under the Naturalization Act of 1790, the borders were open and there were no numerical limits on immigration. The first major attempt to regulate or stem the flow of these workers came in 1882, when Congress passed the Chinese Exclusion Act to ban the employment of Chinese laborers.

During the latter half of the 1800s, following the end of the Mexican-American War in 1848, tens of thousands of migrant workers from Mexico began arriving. Unlike their European and Asian counterparts, they were able to move freely across the border to temporary jobs in ranching, farming, mining and other industries, and then, in many cases, back home again. The establishment of the U.S. Border Patrol in 1924 made access to jobs in the United States more difficult for Mexican workers, however, and for the first time they were seen as “illegal aliens.”⁵ But there remained no numerical limits on legal immigration from Mexico until 1965.

World War I brought migration from Europe largely to a halt and created a greater demand for Mexican labor. Soon afterward, the Great Depression arrived and Mexican workers were seen as a threat to American jobs. More than 500,000 people, including some United States citizens, were forcibly deported.

The onset of World War II created another labor shortage, and Mexican workers were again called upon to fill the void.

THE BRACEROS

In 1942, the U.S. State Department reached a bilateral agreement with Mexico creating the *bracero*⁶ program, which Congress later approved. To assuage critics, proponents of the program asserted that Mexicans, who had been deported en masse just a few years earlier, were easily returnable.⁷ This program was designed initially to bring in a few hundred experienced laborers to harvest sugar beets in California. Although it started as a small program, at its peak it drew more than 400,000 workers a year across the border. A total of about 4.5 million jobs had been filled by Mexican citizens by the time the *bracero* program was abolished in 1964.

Interestingly, the program had many significant written legal protections, providing workers with what historian Cindy Hahamovitch, an expert on guestworker programs, has called “the most comprehensive farm labor contract in the history of American agriculture.”⁸ Under this program:



Labor organizers in the 1950s exposed widespread abuses of migrant farmworkers.

- Employers were required to have individual contracts with workers under government supervision;
- Workers had to be provided housing that would comply with minimum standards;
- Workers had to be paid either a minimum wage or prevailing wage, whichever was higher;
- If employers failed to pay the required wages, the U.S. government would be required to support the workers;
- Employers had to offer at least 30 days of work; and
- Transportation costs were to be shared by the workers, the growers and the government.

But the bracero program did not look so rosy in practice. Mexican workers, who generally did not read English, were often unaware of contractual guarantees. And there were numerous reports of employers shortchanging workers — just as in today’s H-2 guestworker program.

The Mexican workers, who were called braceros, also had 10% of their pay withheld, ostensibly to pay for a Social Security-type pension plan. The money was to be deposited into a Mexican bank on behalf of the workers. It was never paid, however. Several lawsuits have been filed to recover what is now estimated to be hundreds of millions of dollars owed to Mexican workers.

In 1956, labor organizer Ernesto Galarza’s book *Stranger in Our Fields* was published, drawing attention to the conditions experienced by braceros. The book begins with this statement from a worker: “In this camp, we have no names. We are called only by numbers.” The book concluded that workers were lied to, cheated and “shamefully neglected.” The U.S. Department of Labor officer in charge of the program, Lee G. Williams, described the program as a system of “legalized slavery.”

The availability of braceros undermined the ability of U.S. workers to demand higher wages. During the 1950s, growers brought in braceros when their U.S. workers either went on strike or merely threatened to do so. In the late 1950s and early 1960s, Cesar Chavez mounted farmworker protests over the program and later said that organizing the United Farm Workers would have been impossible had the bracero program not been abolished in 1964. The grape strike in which the union was born, in fact, began the following year.⁹

The bracero program is now widely believed to have contributed greatly to patterns of unauthorized immigration to the United States from Mexico.

After the bracero program was dismantled in 1964, foreign workers could still be imported for agricultural work under the H-2 sections of the Immigration and Nationality Act. The H-2 program had been created in 1943 when the Florida sugar cane industry obtained permission to hire Caribbean workers to cut sugar cane on temporary visas. The appalling conditions experienced by sugar cane cutters have been well-documented.¹⁰ In one well-publicized incident, on November 21, 1986, Caribbean H-2 sugar cane cutters stopped work on a large sugar plantation in south Florida, objecting to the work conditions. Workers reported that the company had tried to pay a rate lower than what was promised in the work contract, and more than 300 workers refused to go to work as a result. The company called in the police, who used guns and dogs to



More than 4.5 million jobs were filled by Mexican braceros between 1942 and 1964. A Department of Labor official in charge of the program called it a system of “legalized slavery.”

force workers onto buses, on which they were removed from the camp and deported. This incident became known as the “dog war.”¹¹ It has come to symbolize for many people the potential for extreme abuse in a guestworker program that permits employers to control the worker’s right to remain in the United States.

The H-2 program was revised in 1986 as part of the Immigration Reform and Control Act, which divided it into the H-2A agricultural program and the H-2B non-agricultural program. There are no annual numerical limits on H-2A visas. The annual limit on H-2B visas is currently 66,000.¹² In 2011, the last year for which data are available, the United States issued about 55,000 H-2A visas and about 51,000 H-2B visas. The countries sending the most workers to the United States under these programs were Mexico, Jamaica and Guatemala; about 80% are Mexican.¹³

As will be shown in this report, this current guestworker system is plagued by some of the same problems as the discredited bracero program.



PART 2

How Guestworker Programs Operate

The United States currently has two guestworker programs under which employers are authorized to import unskilled labor for temporary or seasonal work lasting less than a year: the H-2A program for agricultural work and the H-2B program for non-agricultural work.¹⁴

Although the H-2A and H-2B programs offer different terms and benefits, they are similar in one significant way: Both programs permit the guestworker to work only for the employer who petitioned the Department of Labor (DOL) for his or her services. If the work situation is abusive or not what was promised, the worker has little or no recourse other than to go home. That puts the worker at a distinct disadvantage in terms of future opportunities in the United States, because his ability to return during any subsequent season depends entirely on an employer's willingness to submit a request to the U.S. government. In practical terms, it means that an employee is much less likely to complain about wage violations or other abuses.

Under federal law, employers must obtain prior approval from the DOL to bring in guestworkers. To do that, employers must certify that:

- There are not sufficient U.S. workers who are able, willing, qualified and available to perform work at the place and time needed; and
- The wages and working conditions of workers in the United States similarly employed will not be “adversely affected” by the importation of guestworkers.¹⁵

The H-2 visas used by guestworkers are for individuals only and generally do not permit them to bring their families to the United States. This means that guestworkers are separated from their families, including their minor children, for periods often lasting nearly a year.

THE H-2A PROGRAM

The H-2A program provides significant legal protections for foreign farmworkers. Many of these safeguards are similar to those that existed under the widely discredited bracero program, which operated from 1942 until it was discontinued amid human rights abuses in 1964. Unfortunately, far too many of the protections — as in the bracero program — exist only on paper.

Federal law and DOL regulations contain several provisions that are meant to protect H-2A workers from exploitation as well as to ensure that U.S. workers are shielded from the potential adverse impacts, such as the downward pressure on wages, associated with the hiring of temporary foreign workers.

H-2A workers must be paid wages that are the highest of: (a) the local labor market's

The fundamental legal protections afforded to H-2A workers do not apply to guestworkers under the H-2B program.

“prevailing wage” for a particular crop, as determined by the DOL and state agencies; (b) the state or federal minimum wage; or (c) the “adverse effect wage rate.”¹⁶

H-2A workers also are legally entitled to:

- Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised (the “three-quarters guarantee”);
- Receive free housing in good condition and meals or access to a cooking facility for the period of the contract;
- Receive workers’ compensation benefits for medical costs and payment for lost time from work and for any permanent injury;
- Be reimbursed for the cost of travel from the worker’s home to the job as soon as the worker finishes 50% of the contract period. The expenses include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract or is terminated without cause, the employer must pay transportation and subsistence costs for returning home;
- Be protected by the same health and safety regulations as other workers; and
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.¹⁷

To protect U.S. workers in competition with H-2A workers, employers must abide by what is known as the “fifty percent rule.” This rule specifies that an H-2A employer must hire any qualified U.S. worker who applies for a job prior to the beginning of the second half of the season for which foreign workers are hired.

THE H-2B PROGRAM

The protections afforded to H-2B workers are not as robust as those provided — at least on paper — to H-2A workers. The DOL has attempted to improve these protections in recent years, but its efforts have been consistently blocked by employers and Congress.

For the first time, the DOL enacted substantive regulations that provide some minimal labor protections for H-2B workers in 2008.¹⁸ These regulations require employers to recruit U.S. workers before importing temporary workers, pay H-2B workers the prevailing wage rate, and offer H-2B workers a “full-time” job opportunity. Nevertheless, the 2008 regulations lack many of the fundamental legal protections afforded to H-2A workers, such as reimbursement of the workers’ transportation costs to the United States and the “three-quarters guarantee.” The 2008 regulations also provide for a methodology of establishing the H-2B wage rate that the DOL has determined has a depressive effect on U.S. worker wages.

The DOL proposed a new wage regulation in 2011 and new comprehensive H-2B regulations in 2012 that include stronger protections for U.S. and H-2B workers. The 2012 regulations would require employers to engage in more aggressive recruitment of U.S. workers and to treat U.S. and H-2B workers who are similarly employed equally.¹⁹

Under the 2012 regulations, H-2B workers:

- Would be reimbursed for the cost of travel from the worker’s home to the job as soon as the worker finishes 50% of the work period provided in the job order;
- Would be reimbursed for any visa processing fees in the first work week;

Efforts to protect vulnerable guestworkers from exploitation have been met with hostility by employers seeking to maintain the H-2 program as a source of cheap, unregulated labor.

- Would receive the “three-quarters guarantee”;
- Could not be charged recruitment fees, which decreases the likelihood of working conditions akin to debt servitude; and
- Would be expressly protected from human trafficking and retaliation.

These provisions represent a vast improvement over the existing regulations, but, unfortunately, none of them have ever gone into effect. The DOL’s attempts to implement these increased protections for U.S. and H-2B workers have been met with hostility by employers and members of Congress seeking to maintain the H-2B program as a source of cheap, unregulated labor. Employers, in a series of lawsuits, have asserted that the DOL has no authority to regulate employers’ use of the H-2B program *at all*.²⁰ As a result, workers are not currently protected by any of the important regulations that the DOL has recently issued for the H-2B program.

Moreover, unlike H-2A workers, H-2B workers are denied access to legal and other basic services and benefits. H-2B workers, aside from those who work in the forestry industry, do not have access to federally funded legal services. Additionally, none of the current H-2B regulations require employers to provide workers’ compensation or other injury insurance coverage despite high workplace injury rates in industries that rely heavily on H-2B workers.²¹

Selected Differences in Regulatory Safeguards for H-2A Workers and H-2B Workers

H-2B guestworkers, who labor in non-agricultural industries such as forestry, seafood processing and tourism, do not have the same fundamental legal protections as H-2A agricultural workers.

	H-2A	H-2B 2008 Regs	H-2B 2012 Regs
50% Rule	Yes	No	No
3/4 Guarantee	Yes	No	Yes
Free Housing	Yes	No	No
Reimbursement of Transportation Costs to U.S.	Yes	No	Yes
Protections Against Retaliation	Yes	No	Yes
Social Security Tax Exemption	Yes	No	No
Eligible for LSC-Funded Legal Services	Yes	No*	No

* H-2B workers in forestry occupations are entitled to LSC-funded legal services.



PART 3

Recruitment: Exploitation Begins at Home

The exploitation of H-2A and H-2B guestworkers commences long before they arrive in the United States. It begins, in fact, with the initial recruitment in their home country — a process that often leaves them in a precarious economic state and therefore extremely vulnerable to abuse by unscrupulous employers in this country.

U.S. employers almost universally rely on private individuals or agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America.²⁴

These labor recruiters usually charge fees to the worker — sometimes thousands of dollars — to cover travel, visas and other costs, including profit for the recruiters. The workers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract.

The largely unregulated recruiting business can be quite lucrative. With more than 106,000 such workers recruited in 2011 alone, tens of millions of dollars in recruiting fees are at stake. This financial bonanza provides a powerful incentive for recruiters and agencies to import as many workers as possible — with little or no regard to the impact on individual workers and their families.

WORKERS START OFF DEEPLY IN DEBT

Overwhelming debt is a chronic problem for guestworkers. Typically, guestworkers arriving in the United States face a fee-related debt ranging from \$500 to well over \$10,000. Many pay exorbitant interest rates on that debt. When that's the case, they have virtually no possibility of repaying the debt by performing the work offered by the employer during the term of the contract.

Although U.S. laws do provide some obligation for employers to reimburse workers for their travel and visa costs,²⁵ in practice it is rare that guestworkers are fully reimbursed.²⁶ Most struggle to repay their debt, while interest accrues. These obstacles are compounded when employers fail to offer as many hours of work as promised — a common occurrence.

Over the past decade, the SPLC has represented Guatemalan guestworkers who are recruited to work in the forestry and pine straw industries. These workers have been routinely subjected



The U.S. forestry industry recruits many of its guestworkers from Huehuetenango in Guatemala, where many indigenous people live in extreme poverty with few opportunities to earn wages.

to exploitative recruitment tactics, often by the same recruiters who have consistently escaped liability for their actions. This is true despite the Department of Labor's recent efforts to better regulate the H-2 program, including enacting regulations that prevent employers from knowingly engaging recruiters who charge fees to workers. In reality, these incremental regulatory changes have not stopped recruitment abuse in guestworker programs.²⁷

Guestworkers from Guatemala generally pay at least \$2,000 in travel, visa and hiring fees to obtain forestry jobs in the United States. Guatemalans are recruited largely from Huehuetenango, an extremely poor region where many indigenous people live. Often illiterate,

The Recruiting Bonanza

The recruitment of guestworkers is a lucrative business for the companies that help U.S. employers obtain cheap foreign labor.

A lawsuit filed by the Southern Poverty Law Center (SPLC) opens a window into this world, in which workers pay thousands of dollars to recruiters in their countries for the right to work in unskilled and semi-skilled jobs in the United States.²²

The lawsuit, filed in 2008, contends that the marine fabrication and services company Signal International, and the company's labor recruiters and lawyers, violated anti-racketeering, anti-trafficking, and wage and hour protections by charging guestworkers exorbitant fees based on false promises, refusing to reimburse those fees, and then using the guestworkers' resulting debt as a tool to prevent them from leaving, effectively forcing them to put up with dismal working and living conditions.

Following Hurricane Katrina, Signal sought to take advantage of a windfall of rig- and ship-repair jobs, but it lacked the necessary workforce. Signal hired Global Resources, a Mississippi-based labor broker, and Dewan Consultants, a Mumbai-based labor recruiter, to recruit and provide 590 Indian welders and fitters to Signal's Texas and Mississippi shipyards to allow it to take advantage of the business opportunity created by storm damage.

Sachin Dewan, director of Dewan Consultants, testified in a deposition that his firm collected between \$11,000 and \$18,000, and sometimes more, from *each person* recruited to work for Signal. These charges covered the exorbitant recruitment fees, and additional amounts for travel, immigration

applications, and visas. In order to raise the money, the workers took on staggering debt at high interest rates, typically mortgaging the family home and land and pawning personal possessions. According to Dewan, the fees were the equivalent of two to three years' salary for a welder in India. The workers paid so much because the recruiters had told them that Signal had agreed to sponsor them for permanent resident visas that would allow each worker to settle in the U.S. permanently with his wife and children.

Upon arriving at Signal, the workers were distressed to find that conditions were not what they had been led to believe. The guestworkers were housed on Signal's work site in guarded labor camps, housed in cramped 24-by-36-foot trailers, each holding 24 men who shared two toilets. Signal deducted more than \$1,050 per month from each worker's paycheck for room and board, further heightening the workers' stress over whether they could afford to service their debts. Worse yet, Signal eventually announced that it would not apply for the permanent residency visas the workers had been promised.

Because the workers had entered the U.S. on 10-month H-2B visas, they could not earn enough to pay back their debts. Although conditions at Signal were bad, the workers were prohibited by law from seeking alternative employment. Nor could they leave Signal; in the words of one worker, "I couldn't go back to India, still carrying the massive amounts of debts I had incurred to come to the United States. If I was forced to go back, I planned to hang myself once I landed in India, at the airport."

many speak Spanish as their second language, with varying degrees of proficiency. They generally work as subsistence farmers and have virtually no opportunity to earn wages in rural Guatemala. Thus, their only realistic option for raising the funds needed to secure H-2 jobs in the United States is to visit a loan shark, who will likely charge exorbitant interest rates. Given that the season for forestry work is generally three months long and workers often earn so little, they have little hope of repaying the debt doing the work for which they were hired.

In addition, the majority of Guatemalan forestry workers interviewed by the SPLC were required to leave some form of collateral, generally a property deed, with an agent in Guatemala to ensure that the worker will “comply” with the terms of his contract. If a worker violates the contract — as determined by the recruiter — that worker will be fined or threatened. This tactic is enormously effective at suppressing complaints about pay, working conditions or housing. U.S.-based companies deny knowledge of the abuse, but there is little doubt that they derive substantial benefit from their agents’ actions. It is almost inconceivable that a worker would complain in any substantial way while a company agent holds the deed to the home where his wife and children reside.

In 2012, Guatemalan guestworkers recruited to collect pine straw and harvest blueberries in the southeastern United States sought assistance from the SPLC in escaping an exploitative labor situation. The workers had borrowed large amounts of money at monthly interest rates of between 5 and 10% (well over 60% annually) to cover recruitment fees in addition to other pre-employment costs. Several of the workers offered the deeds to their homes as collateral. As one worker explained, “The recruiter told me that I would make \$8.30 an hour and would never run out of work to do. I didn’t realize that I would also have to pay so much money each month for rent, transportation and work supplies. He made it sound like we would earn lots of money, but I wasn’t even able to pay off my debt.” The workers were never reimbursed for their travel and visa expenses. After receiving meager wages and languishing for weeks without work, many of the workers left their jobs in even greater debt as interest on their loans continued to accrue. The workers feared that they would lose their homes, bring shame to their families, or put their lives in danger if they returned to Guatemala without having paid off their debts.

These tactics are not limited to any particular industry or country. SPLC clients from countries across the globe who work in a variety of industries, including hospitality and welding, have reported similar abusive recruitment tactics. In one SPLC case involving H-2B guestworkers from India, *David v. Signal International, LLC*, the recruiter threatened to cancel visas or tear up passports to keep job applicants in the recruitment pipeline. One worker described watching when two workers who had been recruited to work at Signal sought to withdraw from the recruitment process and asked to be refunded the approximately \$10,000 they had each paid. He described how the recruiter refused to refund their fees and drew a big “X” across the visas in their passports. Other witnesses have described how this recruiter threatened to tear up the passports of workers who asked for refunds.

Other advocacy organizations have thoroughly documented deceptive and abusive



Leonel Hernandez-Lopez of Guatemala, like many other guestworkers, was required to leave the deed to his home with recruiters as “collateral.”



Guestworkers recruited from Bolivia, Peru and the Dominican Republic each paid between \$3,500 and \$5,000 to obtain temporary, low-wage jobs in New Orleans hotels after Hurricane Katrina. The hotel owner certified to the U.S. government that no American workers were available.

recruitment activities in a variety of H-2 occupations, including the seafood,²⁸ herder,²⁹ and agriculture³⁰ industries, among others.

Many of the workers interviewed by the SPLC know they are taking a risk by entering into deep debt in exchange for employment in the United States.

This raises the question: Why do workers choose to come to the United States under these terms?

The simple fact is that workers from Mexico, Guatemala and many other countries often have very few economic opportunities. In recent years, rural Mexicans have had an increasingly difficult time making a living at subsistence farming, and in some regions there are virtually no wage-paying jobs. Where jobs exist, the pay is extremely low; unskilled laborers can earn 10 times as much, or more, in the United States as they can at home. Most perceive the guestworker program as their best chance to get to the United States and provide a better life for their families.³¹

Recruiters often exploit workers' desperate economic situation by deceptively promising them lucrative job opportunities and even green cards or visa extensions. These abuses are exacerbated by the inherently disempowering structure of the H-2 program. The program requires that guestworkers work only for the employer who sponsored their visa and that they leave the country when their visa expires. Therefore, once the workers arrive in the United States and the recruiter's deception unravels, they face a tough decision: They can remain in an abusive situation, return to their home country where they have little chance of earning

Candy Brand

Starting in 2003, the Arkansas-based company Candy Brand brought in hundreds of Mexican H-2A workers each year to harvest and pack tomatoes.²³ Many of the workers were from Michoacán, Mexico.

In Michoacán, a powerful, local family controlled the recruitment of Candy Brand workers. According to workers' testimonies, the recruiters routinely charged them between \$275 and \$375 in fees just to have their names placed on a list of eligible workers. Workers from the Mexican state of Tabasco were not only required to pay a similar fee by their local recruiter, but were further extorted by one of the Michoacán recruiters. This recruiter met the workers in Monterrey after their visas were issued and demanded that they pay him an additional \$1,000 just to have their visas and passports returned to them.

"He held my passport up in the air and threatened to cut it if I didn't pay him. I didn't have all of the money he asked for

but he gave me back my passport on the condition I would pay the rest of the money to his son in the United States after I started working for Candy Brand. The recruiters threatened to kill my wife and children in Mexico if I didn't pay," said Juan Pablo Asencio Vasquez, a worker from Tabasco. Reluctant to forgo the money they had already spent for the opportunity to work in the United States, the workers felt they had no other option but to pay these fraudulent and illegal fees.

Many workers arrived in Arkansas deeply in debt. On top of that, their U.S. employer failed to reimburse the workers for their travel and visa expenses and did not pay them overtime or the applicable wage in accordance with the law. With limited economic opportunities in their hometowns in Mexico, many workers knew that they were being cheated by the company year after year but felt they had few other viable options for making a living.

“I wanted to return home but couldn’t afford a plane ticket,” said one worker. “I was really worried about being in the United States illegally and ruining my chances of getting a visa again, but I felt I had no choice. I couldn’t stay at the farm any longer.”

enough money to repay their debt, or leave their employer and become undocumented, risking their ability to return to the United States in the future to work. Tethered to a single employer and often unable to return home due to crushing debt, guestworkers are extremely susceptible to debt servitude and human trafficking.³²

After weeks of scarce work and abusive treatment, Guatemalan workers recruited to work in pine straw and blueberries in 2012 saw no recourse other than to abandon their employer, risking retaliation, blacklisting, and loss of legal status. “I wanted to return home but couldn’t afford a plane ticket,” said one worker. “I was really worried about being in the United States illegally and ruining my chances of getting a visa again, but I felt I had no choice. I couldn’t stay at the farm any longer.” Workers who remain with abusive employers often find themselves in a similar situation when their contract is up. It is not uncommon for workers, desperate to pay off their debt before returning home, to overstay their visas or pay contractors, employers or even immigration attorneys for fraudulent visa extensions.

Regulations prohibiting employers from using recruiters who charge fees do exist, but they are rarely enforced.³³ This is likely because holding international recruiters accountable is nearly impossible when they can easily conceal their overseas activities from government monitoring. For example, two consulates in Latin America routinely asked prospective H-2 workers how much they had paid in recruitment fees, apparently out of concern that a high level of indebtedness would cause workers to overstay their visas in order to repay the debt. Workers were told by their recruiters what the “correct” — that is, false — answer should be, and workers dutifully understated the fees that they have paid.³⁴

In reality, this system is so flawed that small regulatory changes simply have not — and will not — go far enough to put a stop to the lucrative recruitment game. Empowering guestworkers with the ability to switch employers and, eventually, to become full members of our society through a pathway to citizenship will go far toward reducing the control that unscrupulous recruiters and employers exert over guestworkers in the United States. These are basic rights to which guestworkers — who are simply seeking to better their lives by lawfully obtaining employment in the United States — should be entitled.

H-2 guestworkers come to the United States from across the globe, but about 80% are from Mexico, and about nine in 10 come from Latin American countries.

	MEXICO	GUATEMALA	EUROPE
H-2A	51,972	624	326
H-2B	36,179	2,907	2,104



PART 4

Holding the ‘Deportation Card’

The most fundamental problem with guestworker programs, both historically and currently, is that the employer — not the worker — decides whether a worker can come to the United States and whether he can stay.

Because of this arrangement, the balance of power between employer and worker is skewed so disproportionately in favor of the employer that, for all practical purposes, the worker’s rights are nullified. At any moment, the employer can fire the worker, call the government and declare the worker to be “illegal.”

Otto Rafael Boton-Gonzalez, an H-2B forestry worker from Guatemala, has seen first-hand how this works. “When the supervisor would see that a person was ready to leave the job because the pay was so bad, he would take our papers from us. He would rip up our visa and say, ‘You don’t want to work? Get out of here then. You don’t want to work? Right now I will call immigration to take your papers and deport you.’”

Many abuses, perhaps most abuses of guestworkers, flow from the fact that the employer literally holds the deportation card. One of the most chronic abuses reported by guestworkers concerns the seizure of identity documents — in particular passports and Social Security cards.³⁵ In many instances, workers are told that the documents are being taken in order to ensure that they do not leave in the middle of the contract.

The SPLC has received dozens of reports of this practice and has, in the course of its legal representation of workers, confirmed that it is routine.³⁶ While some employers state that they hold the documents for the purpose of “safekeeping,” many have been quite candid in explaining that there is a great risk that workers will flee if the documents are not held. One employer sued by the SPLC stated in her deposition that the company kept workers’ Social Security cards in the office because “if they have their Social Security card, they’ll leave.”³⁷

One SPLC client, an H-2 worker recruited to work in the southeastern United States, reported, “Our employers immediately confiscated our passports. They told us they were going to apply for our visa extensions and Social Security cards. The employers held onto our documents for months, even after telling us that our extensions had been granted. The grower threatened to report us to Immigration if we continued to ask for our passports back.” Without possession of their documents, the workers were fearful of leaving the farm. The worker continued, “Since I couldn’t prove that I was in the country legally, I was nervous to even go out to the store for fear that I would be stopped by the police.” The employers played on the workers’

fears, telling them that they were at risk of getting detained and deported if they went out into the community without documents.

There is no realistic mechanism for workers to recover their identity documents. Numerous employers have refused to return these documents even when the worker simply wanted to return to his home country. The SPLC also has encountered numerous incidents where employers destroyed passports or visas in order to take away workers' proof of legal status. When this happens, there is little likelihood of a worker obtaining assistance from local law enforcement officials. In many jurisdictions, lawyers representing workers advise them to avoid calling police because they are more likely to take action against complaining workers than against the employer.

LIVING IN FEAR

In other instances, employers have quite explicitly used the threat of calling U.S. Immigration and Customs Enforcement as a means of asserting control over workers. For example, in one case where workers refused to work until they received their pay after not having been paid in several weeks, the employer responded by threatening to call Immigration and declare that the workers had "abandoned" their work and were thus "illegal" workers. Such threats are common and are made possible by a system under which visas are issued solely for employment with the petitioning employer.³⁸

In the *Signal* case, when workers organized to demand better conditions, Signal called a meeting of all the guestworkers. As one worker put it, "One of the company officials said that Signal was meeting all of our needs and that if we continued complaining, they would send us back to India." At around 5 a.m. the next morning, Signal employees and security guards grabbed four people, including two workers identified as leaders of the organizing efforts. Signal's senior vice president said in a deposition that the plan was, "don't give them any advance notice, take them all out of the line on the way to work, get their personal belongings, get them in a van and get their tickets and get them to the airport and send them back to India." One of the security guards stated in a document provided during the discovery process that Signal's goal was to make an example of these workers so that guestworkers understood they were not to make trouble. The plan was disrupted only when one of the rounded-up workers attempted suicide, and the police responded to the ensuing uproar.



Employers often confiscate visas and other documents from guestworkers, ensuring they cannot leave their jobs.



Indian workers lured to Gulf Coast shipyards with false promises of U.S. residency demanded better working and living conditions, but the company fired the organizers.

American labor organizer and writer Ernesto Galarza found that despite the prevalence of workers' rights violations, only one in every 4,300 braceros complained.³⁹ In examining the H-2A program in North Carolina, Human Rights Watch 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]."⁴⁰ The North Carolina Growers Association blacklist has been widely publicized. The 1997 blacklist, called the "1997 NCGA Ineligible for Rehire Report," consisted of more than 1,000 names of undesirable former guestworkers.⁴¹

After H-2B workers represented by the SPLC filed a class action lawsuit against the U.S. forestry company Eller and Sons Trees, Inc. for massive wage violations, the company took advantage of the workers' fear of retaliation to coerce them into withdrawing from the case. Only days before the deadline for class members to withdraw, a company agent flew to Guatemala

Josy

In November 2006, Josy* left his town in southern India to travel to the U.S. He had paid approximately \$13,150 to a labor recruiter for what he understood to be a good job at shipyards owned by Signal International, which he believed at the time to be a reputable company, and the chance to settle permanently in the U.S. with his family. In fact, he was traveling on an H-2B visa that would be good only for 10 months, and the job would be nothing like he was promised.

His investment represented a huge sum that Josy's meager salary in India as a welder could not begin to cover. Putting up his family's land and home as collateral, he borrowed the bulk of the money at a 14% interest rate; his family pawned heirloom jewelry, which has huge cultural significance in India, to raise most of the rest.

"When we arrived at the Signal labor camp, I was horrified and stunned to see the living conditions," Josy said. "Twenty-four men slept in one room with bunk beds. There were only four showers, two toilets, and two sinks for twenty-four men.

The space was incredibly cramped, and there was very little room to walk."

The Signal labor camp was in an isolated location. Signal did not allow the guestworkers to have visitors in the camp. Guards were stationed at the gate to ensure that no visitors entered. "I felt like we were living in a jail," Josy said.

When workers complained about the situation to Signal management, they were told they were lucky to be in the United States because in India people live like animals. "But I had no other option [but to keep working at Signal]," Josy said, "because I had so much debt and needed to work to pay it off."

Josy's first child was born shortly after he arrived in the United States. He was unable to travel home to see his newborn daughter, but the desire to take care of her fueled him to keep fighting through the indignities and hardships too common in the guestworker program.

* Not real name

to attend a hiring meeting for prospective workers. At this meeting, the company agent informed the workers that the lawsuit would hurt both the company and the workers and presented them with forms to opt out of the case. Fearing that the company would not rehire them if they did not sign, the majority of the workers complied. As Irlamar Aguilar Martinez, a class member in attendance, testified, “the American asked who wanted to sue the Eller and Sons company or who didn’t want the company to come to an end. People voted by raising their hand as the American and [the Guatemalan recruiter] observed.” Never intending to withdraw from the case, Irlamar signed the form because the recruiter told her: “With this the boss will see that you are in need of a visa.” The court later declared the opt-out forms submitted by workers at the hiring meeting invalid because they had been improperly obtained.

Despite modest reforms to the H-2 program intended to prevent these tactics in recent years, fear of retaliation among workers is a constant concern — and one that is warranted. As long as a worker’s visa is tied to a single employer and that employer “holds the deportation card,” guestworkers’ legal rights will, in practice, exist only on paper.



Workers live in constant fear that any bad act or complaint on their part will result in their being sent home or not being rehired. Fear of retaliation is a deeply rooted problem in guestworker programs.



PART 5

Wage and Hour Abuses

Despite federal law requiring the payment of the Adverse Effect Wage Rate to H-2A workers and the prevailing wage rate to H-2B workers, in practice many guestworkers earn substantially less than even the federal minimum wage of \$7.25 per hour.

Legal Services attorneys have represented H-2A workers in hundreds of lawsuits against their employers. And more than 50 lawsuits have been filed on behalf of H-2B workers across the nation in recent years, many by the Southern Poverty Law Center. Given that only a handful of lawyers provide free legal services to these low-wage workers, these numbers reflect a grave problem: Employers using the services of guestworkers in many industries routinely violate basic labor laws.

The SPLC has encountered rampant wage theft in the agricultural, forestry, pine straw, and hospitality industries. Additionally, allegations of wage theft in other industries that rely heavily on guestworkers, such as seafood processing,⁴² landscaping⁴³ and carnivals,⁴⁴ have been made in lawsuits and administrative complaints filed by advocates throughout the country.

Wage theft of guestworkers in low-wage occupations can take various forms. Common practices include minimum wage violations disguised by complicated piece-rate pay schemes, underreporting of hours, failure to pay overtime, and making unlawful deductions from workers' pay. According to the law, employers must cover the costs of items that principally benefit the employer, such as work tools, safety equipment, and — in most parts of the country — workers' travel and visa expenses to come to the United States. Yet, employers routinely fail to reimburse workers for their travel and visa expenses,⁴⁵ and they frequently make deductions from workers' paychecks for items that are for the benefit of the employer.⁴⁶ These practices, as well as more overt forms of wage theft, such as the underreporting of hours, result in the chronic underpayment of wages, exacerbating guestworkers' already precarious situation in the United States.

FORESTRY WORKERS

Although an H-2B contract between employer and worker specifies a minimum hourly wage — the prevailing wage, which has run in recent years from approximately \$7.30 an hour to more than \$12 per hour, depending on the year and the state — guestworkers employed as tree planters are more often paid by the number of seedlings they plant. They are told that they are expected to plant at least two bags of 1,000 seedlings each in an eight-hour day, a task that is often impossible.



Guestworkers in some industries are systematically cheated out of wages they earn, even when they carefully document their hours.

Payment ranges from \$15 to \$30 per bag.

An experienced hand-planting crew can average 1,500 well-planted seedlings per person per day. On rough sites, a worker might average just 600 trees per day; in open fields, a worker might plant up to 2,000 in a day.⁴⁷ At the average rate of 1,500 trees, a worker could earn between \$22.50 and \$45 a day, far less than the legally required wage. By law, the employer is obligated to make up the difference between the bag rate and the prevailing wage rate. This is rarely done.

Most workers report working between eight and 12 hours a day. But they rarely, if ever, earn overtime pay, despite the fact that they often work six full days a week and average well over 40 hours. In addition, they are routinely required to purchase their own work-related tools and incur other expenses and deductions, unlawfully cutting into their pay.

Virtually every forestry company that the SPLC has encountered provides workers with pay stubs showing that they have worked substantially fewer hours than they actually worked. Relying on interviews with more than 1,000 pine tree workers, the SPLC has concluded that this industry systematically underpays its workers.

Escolastico De Leon-Granados, an H-2B worker from Guatemala, said he was consistently

Julia

In spring 2009, Julia* arrived in Florida on an H-2B visa to work as a hotel housekeeper. She was recruited in Jamaica by a recruiter who promised her good wages, affordable housing, and full-time work. She paid nearly \$1,500 for recruitment and visa fees, airfare, and other transportation expenses for the opportunity to work in the United States — money she had to borrow. When Julia arrived, she was surprised to discover that she would actually be working for a hospitality subcontractor at an entirely different hotel than the one that had sponsored her visa.

After nearly one month of working 40 hours or more a week cleaning hotel rooms, Julia and her co-workers had not received a single paycheck. Deeply in debt from their travel and visa expenses, and without any income in the United States, Julia and her co-workers were forced to eat the food that the hotel guests left behind in the rooms. They also relied on the few workers who had relatives in the United States to purchase food and provide them with transportation to the grocery store from their isolated apartment complex.

When the workers finally did receive a paycheck, it was for much less than what they were owed based on the hours they had worked, and it did not include overtime pay. The employers had also made excessive deductions for rent, transportation, and unexplained “miscellaneous fees,” which lowered the workers’ pay below the federal minimum wage. In addition, the employers failed to reimburse the workers for their travel and visa expenses, as required by law.

One day, Julia and her co-workers gathered to protest the wage theft to their employers. Some workers threatened to leave. The employers warned the workers that if they left the hotel premises or looked for a second job, they would be deported.

“I was so devastated by our situation. I wanted to go home, but I couldn’t because I had no money. I also couldn’t get another job. I came to the United States to work so I could help my family and save to go back to school. I had never been treated so badly before, and I felt like there was nothing I could do about it.”

* Not real name



An Arkansas company cheated tomato harvesters out of hundreds of thousands of dollars after they each paid up to \$3,500 in travel, visa and recruitment fees to obtain the jobs.

underpaid while working for Eller and Sons Trees, Inc. “We worked up to 12 or 13 hours and we could only plant 1,300 or 1,500 seedlings,” he said. “Our pay would come out to approximately \$25 for a 12-hour workday. At the end of

the season, I had only saved \$500 to send home to my family.”

Because of the lack of enforcement by government officials and the vulnerability of guest-workers, this exploitation has continued largely unfettered for many years.

FARMWORKERS

In 2007, the SPLC filed a class action lawsuit against the Arkansas-based tomato operation Candy Brand, LLC for failing to comply with federally mandated wage protections in addition to the terms of the workers’ contracts.⁴⁸ The company relied on hundreds of Mexican H-2A workers each season to harvest and pack tomatoes.

The workers each paid up to \$3,500 in travel, visa and recruitment expenses for the opportunity to work in the United States. The company’s agents in Mexico had promised the workers decent wages. Rather than the hourly pay rate they were promised, however, the employers paid the workers who harvested tomatoes a flat rate of \$50 a day. Under this pay scheme, the workers made less per hour than the Adverse Effect Wage Rate to which they were entitled as H-2A workers. Over the course of five years, the company cheated the tomato harvesters out of hundreds of thousands of dollars.

Candy Brand profited further by denying overtime compensation to its packing shed workers. “I often worked in the packing shed from 6 a.m. to 11 p.m. without a single day of rest,” said Juan Pablo Asencio Vasquez. “Our schedule was exhausting but we never received any additional compensation for the long hours we worked. After about a month, I approached the boss and told him that I was worried since I still had not been able to recoup the money I spent to come to the U.S. He said there was nothing he could do.”

Candy Brand also violated the law by failing to reimburse workers for the money they spent on visa fees and transportation costs from their hometowns in Mexico to Arkansas, effectively bringing their first week’s pay below the federal minimum wage. From 2003 to 2007, the company underpaid H-2A workers by more than \$1 million by illegally shifting the burden of these expenses to its workforce.

After reaching a settlement agreement in December of 2011, workers succeeded in recovering \$1.5 million in back wages and damages for a class of more than 1,800 workers. Despite the overwhelming evidence of worker exploitation presented in the lawsuit, the Department of Labor has continued to certify the tomato company (under the new name of Clanton Farms, LLC) to bring in H-2A workers for the tomato harvest.

In an attempt to stop this widespread wage abuse, the SPLC has filed seven class action lawsuits against large H-2 employers since 2004. To date, four of those lawsuits have been settled, resulting in employers and contractors agreeing to pay back wages to class members and change the way they do business.⁴⁹ One case on behalf of forestry workers resulted in an \$11 million judgment.⁵⁰ The Candy Brand case, discussed above, resulted in a \$1.5 million judgment for the tomato workers. One case is still pending.⁵¹

“Some days we had to spend much of the day clearing brush to make the land able to be planted. We were not paid at all for [this time]. We also never received overtime pay, despite the fact that we worked much more than 40 hours per week.”

ARMENIO PABLO-CALMO, H-2B WORKER FROM GUATEMALA.



Wages Set Too Low

Federal regulations require employers who hire H-2A workers to pay at least the highest of the state or federal minimum wage, the local “prevailing wage” for the particular job, or an “adverse effect wage rate” (AEWR).

The AEWR was created under the bracero program as a necessary protection against wage depression. The Department of Labor (DOL) issues an AEWR for each state based on U.S. Department of Agriculture (USDA) data.

The AEWR has often been criticized by farmworker advocates as being too low. Farmworker Justice explains why:

“First, the USDA survey that DOL uses for the AEWR measures the average wage rates. Employers that have a hard time finding U.S. workers should compete against other employers by offering more than the average wage to attract and retain workers. Second, the AEWR is based on the previous year’s wage rates and does not reflect inflation. Third, the USDA surveys of the average wage include the 55% or more of farmworkers who are undocumented, so the wages are depressed compared to what they would be if only U.S. citizens and authorized immigrants had the job. In addition, the AEWR’s, by themselves, also do not prevent employers from imposing very high productivity standards that desperate foreign workers will accept but that would cause U.S. workers to insist on higher wages.”⁵²

H-2B workers often face an even worse situation with regard to wages than H-2A workers. Under the law, they are entitled only to the “prevailing wage” for their work; there is no adverse effect wage rate for those workers. Of course, even though H-2B workers are entitled to payment

of prevailing wages and to employment in conformity with required minimum terms and conditions as provided for in the employer’s labor certifications, federal law provides no real remedy when these rights have been violated.

The purpose of the prevailing wage is to ensure U.S. worker wages are not depressed by the influx of foreign workers to the U.S. labor market, but the current methodology for calculating the H-2B prevailing wage rate is doing the exact opposite. In fact, under the current methodology, the wages of H-2B workers are in some industries almost \$4 to \$5 lower than the average wage for those occupations, a situation that inevitably places downward pressure on U.S. worker wages.⁵³ The DOL itself determined that the current H-2B wage rule degraded the wages of U.S. workers and, in response, proposed a new rule that would better protect U.S. worker wages.⁵⁴ This new rule has been attacked by employers in the courts, and its implementation has been effectively blocked by Congress, largely due to the efforts of a few vocal senators and representatives from states with industries that rely heavily on H-2B workers. As a result, a wage rule that directly contravenes its purpose — to protect U.S. worker wages — is still in effect today, resulting in the gross underpayment of wages to hundreds of thousands of H-2B and U.S. workers.

But this is not the only reason that the H-2B wage rule is harming U.S. workers: When an industry relies on guestworkers for the bulk of its workforce, wages tend to fall. Guestworkers are generally unable to bargain for better wages and working conditions. Over time, wages decline and the jobs become increasingly undesirable to U.S. workers, creating even more of a demand for guestworkers.



PART 6

Contract Violations

A chronic problem faced by guestworkers is that employers recruit too many of them, a situation that leads to workers not being able to earn as much as they were promised.

Because the workers themselves, not the employers, absorb most of the costs associated with recruitment, employers often grossly exaggerate their labor needs when seeking Department of Labor (DOL) approval to import workers. In 2011, the DOL inspector general found that several large forestry employers in Oregon “significantly overstated their actual need for foreign workers.”⁵⁵ To be sure, sometimes employers genuinely do not know months ahead of time exactly how many workers they will need, and they may worry that some workers will leave.

Under the H-2 program, employers are obligated to offer full-time work when they apply to import foreign workers; anything less will not be approved by the DOL. There is virtually no enforcement of this requirement in practice, however.

DOL regulations require that H-2A workers be guaranteed 75% of the hours promised in the contract — a provision called the “three-quarters guarantee.” That does not mean employers always comply. Many of the terms in a worker’s job offer are simply not honored. The DOL’s inspector general found in 2004 that the North Carolina Growers Association overstated both its need for workers and the length of the period of employment, factors that likely led workers to abandon their contracts early and not receive the return transportation to which they were lawfully entitled.⁵⁶

In the H-2B program, there is no regulation of the number of hours that must be guaranteed to workers. The DOL included the “three-quarters guarantee” in its newly proposed H-2B regulations, but those regulations are currently blocked as a result of employer-driven legal challenges. Requiring employers to guarantee H-2B workers a certain number of hours is important because the DOL generally will not enforce the provisions of an H-2B job order, and some courts have held that an H-2B job order is not an enforceable contract.⁵⁷ Thus, if a worker arrives in the United States on an H-2B visa and is offered no work for weeks on end (and this has occurred many times) that worker has virtually no recourse. He may not lawfully seek employment elsewhere. He likely has substantial debts on which he must continue to make payments. As an H-2B worker, he more than likely is obligated to pay for housing; certainly, he must pay for food.

The ramifications to the worker of being deprived of work for even short periods are enormous under these circumstances. Fundamental to the problem is that the worker is not free to shop his labor to any other employer.



In some instances, workers never receive a contract or are forced to sign a contract that they do not understand.⁵⁸ “When I arrived to the U.S., the employer handed me a contract and told me to sign it,” said one pine straw worker. “I didn’t get the chance to look it over because I felt pressure to sign it right away. I spent a lot of money just to come to the U.S. and didn’t want to risk my job by causing any problems right away.” If workers cannot understand the terms of the contract — or worse — they are never given a contract, then it is highly unlikely that they will attempt to enforce employer compliance with contract guarantees, even assuming any exist. Other factors, including fear of retaliation and lack of access to enforcement mechanisms, means contractual promises, in practice, rarely provide H-2 workers with any meaningful security.

MISCLASSIFICATION

Other contract violations are routine. One of the most common is that of misclassification. This occurs most often when workers who should be characterized as H-2A workers (because, for example, they are picking produce in the field) are instead brought in as H-2B workers (and labeled as packing shed workers, for example). This results in workers being paid substantially less than the wage rate they should lawfully be paid. It also results in the workers being denied the substantially better benefits and legal protections afforded to H-2A workers, such as free housing and eligibility for federally funded legal services.

In another common form of misclassification, employers simply misstate the kind of work H-2B employees will be performing, so that the prevailing wage rate is set for one kind of work, such as landscaping, when the workers actually will be doing work that warrants a higher prevailing wage rate, such as highway maintenance.⁵⁹ Again, there is virtually no recourse for a worker in this circumstance because the DOL generally under-enforces these kinds of abuses and H-2B workers are ineligible for federally funded legal services. As a practical matter, the

Employers violate guestworker contracts with impunity, frequently misclassifying workers to avoid paying higher wages.

“We just sat around the house day after day. We were desperate for work, but the grower warned us that if we tried to work for anyone else, he would call Immigration and have us deported. We could hardly afford to buy food. On a few occasions, we went out into the woods to look for herbs to eat.”

only thing that workers can do, then, is to receive far less than they are legally entitled to under the law.

Lawyers for guestworkers in North Carolina report numerous accounts of H-2A workers who were deliberately sent by their employers to work on other operations owned by employers or their relatives, operations that would have to pay U.S. workers substantially more than the Adverse Effect Wage Rate. In one case, several H-2A Christmas tree workers were assigned by their employer to work in a home construction business, where they performed skilled carpentry at far less than the prevailing wage.⁶⁰

This is just one more way that employers can exploit the guest-worker system for profit — and the vast majority of workers can do nothing about it.

Cirilio

Cirilio* is one of about 85 workers from Guatemala who traveled to the southeastern United States in 2012 to bale pine straw and harvest blueberries. Making only about \$10 to \$40 a week in coffee production in Guatemala, Cirilio was eager for the opportunity to earn higher wages in the United States. “My wife had been sick and we needed money to pay off loans for her medical treatment. We also hoped that this opportunity would also help bring us closer to our dream of building a house together and starting a family,” he said. Already deeply in debt due to his wife’s illness, Cirilio took out additional loans to pay for the \$2,000 in travel, visa and recruitment expenses.

When Cirilio arrived in the United States, his employers confiscated his passport and withheld it for the duration of his employment. Cirilio initially worked long hours baling pine straw, often leaving the house before dawn and working until sunset. Cirilio was never reimbursed for his travel or visa expenses, and his wages were further reduced by excessive deductions: Employers automatically deducted \$200 from his check each month for rent and transportation, and Cirilio spent about \$40 to \$60 of his own money per week on string used for tying pine straw bales.

Cirilio’s situation became even more desperate when he began working for a blueberry grower. “After the first week or so, the work really slowed down. The employer had too

many workers and there was hardly anything for us to do.” Legally prohibited from seeking work elsewhere, Cirilio was at the mercy of his employer. “We just sat around the house day after day. We were desperate for work, but the grower warned us that if we tried to work for anyone else, he would call Immigration and have us deported. We could hardly afford to buy food. On a few occasions, we went out into the woods to look for herbs to eat.”

While Cirilio was in the United States, his wife in Guatemala gave birth to their son, who died soon after birth. “Since I wasn’t making any money, I couldn’t even give him a proper funeral. I was so sad and frustrated.” As his wife’s health deteriorated after the loss, Cirilio told the grower that he wanted to return to Guatemala to care for his wife. “He told me that I couldn’t leave because he needed me to stay on the farm and work.”

Cirilio stayed for a little while longer, but the work did not pick up. “I felt trapped. My debts were mounting, but I was scared to leave the farm without my passport. I didn’t want to get deported and ruin my chances of getting another visa in the future.” Despite his fears, Cirilio eventually felt compelled to abandon the farm, leaving his passport behind. “I just wanted to go back to Guatemala but I couldn’t even afford the plane ticket.”

* Not real name



PART 7

Injuries without Effective Recourse

Guestworkers toil in some of the most dangerous occupations in the United States.⁶¹ Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are seven times the national average.⁶² Unfortunately, when H-2 workers suffer injuries on the job, all too often they are denied access to appropriate medical care and benefits. Those who are seriously injured face enormous, often insurmountable obstacles to obtaining workers' compensation benefits.

In most instances, guestworkers are entitled to workers' compensation benefits — on paper, at least.

The reality is that many injured guestworkers are not able to obtain the benefits to which they are entitled under this system. Only the H-2A program requires employers to provide workers' compensation coverage throughout the United States. For H-2B workers, workers' compensation coverage depends on the laws in the state where the worker is employed. Because workers' compensation rules vary by state, some states are more accessible to transnational workers than others. And workers often lack the knowledge needed to negotiate the complex system in order to have benefits continue when they leave the United States.

There simply are no clear rules in the H-2 regulations guaranteeing that workers' compensation benefits will continue after an injured worker returns to his home country. Indeed, the insurance carrier of one large company employing substantial numbers of guestworkers has a policy of affirmatively cutting off workers when they leave the United States, which they inevitably must do. This inhibits the workers' ability to gain access to benefits and provides a financial incentive for employers to rely on guestworkers.⁶³

Some states (for example, New Jersey) mandate that examining physicians be located in the state where an injury occurred. This means that injured workers have difficulty obtaining benefits while in other states and in their home countries. Some states require workers to appear in the state for hearings. And most states do not have clear rules permitting workers to participate by telephone in depositions and hearings before the workers' compensation body. These rules



Guestworkers perform some of the most difficult and dangerous jobs in America, but many who are injured face insurmountable obstacles to obtaining medical treatment and workers' compensation benefits.

put guestworkers at an enormous disadvantage in obtaining benefits to which they are entitled. As a practical matter, workers also 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. In 2003, a group of civil rights and immigrant rights groups filed an amicus brief with the Inter-American Court of Human Rights relating to the treatment of immigrants in the United States. Among their many complaints: the discrimination against foreign-born workers in the state-by-state workers' compensation scheme. That brief states:

“Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits. In those states, whenever the family member is living outside the United States and is not a United States citizen, the family members do not receive the full death benefits award. There are several ways in which states limit compensation to nonresident alien beneficiaries. Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Pennsylvania, and South Carolina). Some states restrict the types of non-resident dependents who are eligible to receive benefits as beneficiaries (Arkansas, Delaware, Florida, Kentucky, Pennsylvania). Other states limit coverage based on: The length of time a migrant has been a citizen (Washington), or the cost of living in the alien resident beneficiary's home country (Oregon). Alabama denies benefits to all foreign beneficiaries.”⁶⁴ (internal citations omitted)

Such policies obviously disproportionately affect the families of guestworkers killed on the job.

FORESTRY INJURIES COMMON

The forestry industry illustrates the problems many guestworkers face in gaining access to benefits. Getting injured on the job — either in the forest or in the van traveling to and from the forest — is a common occurrence for tree planters. They rarely receive any compensation for these injuries.

In their 2005 investigative series about guestworkers in the forestry industry, journalists from the *Sacramento Bee* wrote, “Guest forest workers are routinely subjected to conditions not tolerated elsewhere in the United States. ... They are gashed by chain saws, bruised by tumbling logs and rocks, verbally abused and forced to live in squalor.”⁶⁵

Leonel Hernandez-Lopez of Guatemala was working as a tree planter in 2004 when he cut his right knee badly on the job. “I was very sick for 30 days, with six stitches on my wound,” he said. “I never received any help from the company, even having to pay for my own medicine from my own pocket. All the while I had to keep paying rent on the hotel room where I was staying, even though I made no money. ... The only thing I received from the company was belittling, humiliation, mistreatment and bad pay.”

Mexican forestry worker Jose Luis Macias was spraying herbicides in 2005 and took a bad fall after stepping on a branch that snapped. “I fell backwards down about five meters and my leg ended up bent underneath me,” he said. “The supervisor told me, ‘Get up, get up,’ so that I would continue working. When he saw I did not want to get up, he said, ‘Don't be a stupid wimp,’ so I had to keep spraying. My leg was swollen and I asked the crew leader to take me to the doctor. He told me ... he didn't have time to be taking me to the doctor. Finally I went to

the doctor on my own. I have thousands of dollars in medical bills and I have never received any money for the time I lost from work. This was more than a year ago and my leg still swells, hurts and I almost can't work."

The pressure on workers to keep injuries to themselves is tremendous. Again, this is related to employers' absolute control of the right of guestworkers to be present in, work in and return to the United States.

Workers who report injuries are sometimes asked to sign forms saying they are quitting. They are told that if they sign and go home, they may be allowed to come back the following year.

Injuries and workplace hazards are prevalent in other H-2B industries too. An investigation by Centro de los Derechos del Migrantes and American University Washington College of Law of the working conditions of female H-2B workers in Maryland's crab processing plants found that "[w]ork-related injuries are common." Virtually all of the workers interviewed reported having been cut while working; many reported having "injured themselves due to the sharp knives, crab claws, and the hurried pace of work." Some employers discouraged the workers from properly treating their cuts, putting them at risk of contracting a potentially fatal infection caused by seaborne bacterium. In violation of federal Occupational Safety and Health Act requirements, most employers failed to provide workers with protective gloves. The vast majority of workers received no formal training by employers on safe crab-picking techniques.

While H-2B crab workers are entitled to workers' compensation under Maryland state law, the investigation concluded that "most of these workers are not aware that they may be entitled to these claims, and even if they were, they lack the legal resources to pursue the claim, and fear retaliation by their employer."⁶⁶

Under the H-2 system, it is simply too easy for employers to cast aside injured workers with impunity.



Enrique Napoleon Hernandez-Lopez cut his thumb while planting trees but didn't receive medical attention for seven days. He spent 14 days in the hospital for an infection and nearly lost his thumb.



PART 8

Labor Brokers

Many large employers who rely on guestworkers attempt to avoid responsibility for unlawful practices by obtaining workers indirectly through a labor contractor.⁶⁷ This use of labor brokers puts workers at greater risk of abuse and makes enforcement of their rights even more difficult than it is already.

Increasingly, the entities bringing guestworkers into the United States are not the companies that end up using the labor. This practice has devastating results for both U.S. and H-2 workers. The participation of these entities – known as labor brokers or contractors – in the H-2 program is fundamentally at odds with the purpose of the program, which is to allow employers to bring in foreign labor on a temporary basis and only when they show there is a shortage of U.S. workers for the job. Because job contractors have a permanent, year-round need for workers to supply to their employer-clients rather than a temporary need, their participation in the program erodes the built-in protections for U.S. workers. The DOL itself has concluded that a “job contractor’s ongoing need is by its very nature permanent rather than temporary.”⁶⁸ The DOL is approving job contractor applications anyway.

Job contractor involvement in guestworker programs is also problematic for foreign workers. H-2 workers, who usually speak no English and have no ability to move about on their own, are completely at the mercy of these brokers for housing, food and transportation. No matter how abusive the situation, even if workers are not paid and their movements are restricted, they typically have no recourse whatsoever. Having a legal remedy against a labor contractor with no assets is no remedy at all. And it is extremely difficult for workers to get meaningful redress for violations of their rights from the ultimate employers when the employers can evade liability by shifting the blame to the contractors.

Recognizing these problems, the DOL has attempted to better regulate – though not prohibit – the involvement of job contractors in the H-2A and H-2B programs in recent years. Unfortunately, these efforts have either fallen short or been defeated by employer challenges. In 2010, the DOL enacted new regulations that require farm labor contractors to list the employers that will actually be using the labor on their application for the temporary labor.⁶⁹ The regulations also require labor contractors that apply for H-2A workers to post a bond. In theory, these measures should prevent sham companies with no assets from obtaining H-2A workers and hiring out their labor. In practice, however, farmworker advocates report that labor contractors are

circumventing these protections by supplying fraudulent information to the DOL, including claims that they are growers or employers, to avoid the bond requirement.

Under the current H-2B regulations, job contractors may petition for H-2B workers by demonstrating that the ultimate employer, rather than the contractor, is experiencing a temporary labor shortage. The DOL has attempted to change this practice by proposing regulations that require job contractors to establish their own temporary labor shortage and to file applications jointly with their employer-clients as a pre-condition of applying for H-2B workers. These regulations have been blocked, however, by employer-driven legal challenges.

Two lawsuits illustrate the problems with the involvement of labor brokers in the H-2 programs. In these cases, labor brokers brought in vulnerable foreign workers whom they hired out to different employers with devastating results.

GUATEMALANS HELD CAPTIVE

According to a lawsuit filed in February 2007, 12 Guatemalan H-2B workers claim they were held captive by labor brokers and agents of Imperial Nurseries, one of the nation's largest wholesalers of plants and shrubs.⁷⁰ The men had been recruited to plant pines in North Carolina, but after they arrived in the state, they were transported by van to Connecticut and forced to work nearly 80 hours a week in nursery fields. They were housed in a filthy apartment without beds, and instead of the \$7.50 an hour they were promised, they earned what amounted to \$3.75 an hour before deductions for telephone service and other costs reduced their pay even further. Their passports were confiscated, they were denied emergency medical care, and they were threatened with deportation and jail if they complained. Some of the workers escaped without their passports and soon were replaced by fresh recruits from Guatemala. Eventually, one of the workers managed to explain his situation to the congregation of a local church, which helped him find legal aid.⁷¹

In a statement to *The New York Times*, a lawyer representing Imperial Nurseries said the allegations "relate to the conduct of an independent farm labor contractor which was responsible for compensating its employees."⁷²

Job contractor fraud and abuse of H-2B workers is also a problem in the hospitality industry, which increasingly relies on H-2B workers for its labor supply.⁷³ In 2010, guestworkers in



Marvin Coto and 11 other Guatemalan men were recruited to plant pines in North Carolina but claim they were held captive and forced to work 80 hours a week, for \$3.75 an hour, at a Connecticut nursery.

The men had been recruited to plant pines in North Carolina, but after they arrived in the state, they were transported by van to Connecticut and forced to work nearly 80 hours a week in nursery fields. Their passports were confiscated and they were threatened with deportation and jail if they complained.

Florida filed lawsuits against several high-end hotels in Orlando for egregious wage violations. A labor contractor – Very Reliable Services, Inc. – had fraudulently obtained certification for nearly a thousand H-2B workers and then furnished them to the hotels.⁷⁴ Workers were each allegedly owed wages for more than 160 hours of work they performed at the hotels after the job contractor went defunct and was unable to pay them. In response to the allegations, the hotels claimed they were not responsible for the wage violations. In a statement to the *Orlando Sentinel*, a spokeswoman for one of the defendants – Walt Disney World’s Swan and Dolphin Hotel – said, “The hotel is obviously sympathetic to them, but it is true they’re not employees of the hotel.”⁷⁵ Other lawsuits have alleged similar schemes involving labor brokers in the hospitality industry.⁷⁶

These cases are symptomatic of a flawed program that encourages the private trafficking of foreign workers with insufficient government oversight. Job contractors should be prohibited from obtaining and hiring out guestworkers. If job contractors are allowed to participate in the H-2 program, then the employers that ultimately benefit from the guestworkers’ labor should be held strictly liable for all job contractor abuses.



PART 9

Systematic Discrimination

Discrimination based on national origin, race, age, disability and gender is deeply entrenched in the H-2 guestworker system.

It often begins even before guestworkers are hired and is intended to ensure that U.S. workers are effectively locked out of the job.

Employers may bring in guestworkers only if U.S. workers are unavailable.⁷⁷ As a result, the DOL requires employers to make an effort to recruit U.S. workers before it will approve their application for guestworkers. But because many H-2 employers simply prefer vulnerable foreign workers over domestic workers, employers often engage in discriminatory tactics to weed out U.S. workers.

For example, during an investigation into illegal or fraudulent activities within the H-2B visa program, the U.S. Government Accountability Office found that some employers “preferentially hired H-2B employees over American workers in violation of federal law.” Undercover investigators captured recruiters suggesting tactics that employers could use to discourage U.S. applicants, such as requiring them to demonstrate their ability to run around carrying a 50-pound bag, scheduling interviews before 7 a.m., and requiring drug testing prior to interviews.⁷⁸

One recent case against a large agricultural grower further illustrates how employers discriminate against U.S. workers. After receiving complaints from dozens of U.S. farmworkers, the Equal Employment Opportunity Office (EEOC) filed charges against the agricultural company Hamilton Growers, Inc. (d/b/a Southern Valley Fruit and Vegetable, Inc.) in 2011 alleging that the grower discriminated against more than 600 U.S. workers based on race and national origin. Over the course of three years, the grower fired virtually all of its U.S. employees while continuing to bring in Mexican H-2A workers. The EEOC alleged that the termination of at least 16 African Americans “was coupled with race-based comments by a management official.” The grower also subjected U.S. workers to disparate working terms and conditions, giving them fewer hours or denying them work when guestworkers were allowed to continue working. Upon reaching a settlement in December 2012, U.S. workers succeeded in recovering \$500,000 in back wages and damages.⁷⁹

Employers also routinely engage in discriminatory practices when it comes to hiring guestworkers. In fact, one federal appellate court has placed its stamp of approval upon such discrimination. In *Reyes-Gaona v. NCGA*,⁸⁰ the 4th U.S. Circuit Court of Appeals found that even explicit age discrimination in hiring H-2A workers was not unlawful. In that case, there was little dispute that the recruiter, Del-Al Associates, which recruited thousands of guestworkers to the United States, told Luis Reyes-Gaona, who applied in Mexico to be an H-2A worker in

North Carolina, that it was the policy of the North Carolina Growers Association (NCGA), for whom Del Al was recruiting, that NCGA would not accept new employees over the age of 40. The court found that because this choice had occurred outside the territory of the United States, it was not actionable under the Age Discrimination in Employment Act.

Although it is possible that other courts will reach a different conclusion on this issue, there is little doubt that such discrimination is pervasive.⁸¹ Indeed, the ability to choose the exact characteristics of a worker (male, age 25-40, Mexican, etc.) is one of the very factors that make guestworker programs attractive to employers.

Marcela Olvera-Morales is a Mexican woman who worked as a guestworker in 1999 and 2002. In 2002, the EEOC issued a determination finding reasonable cause to believe that she faced unlawful discrimination on the basis of gender. She alleged that a recruiter – the International Labor Management Corp. (ILMC), which places thousands of guestworkers in U.S. jobs – systematically placed women in H-2B jobs while placing men in H-2A jobs, which provide better pay and benefits. Statistical data showed that the likelihood the gender-based difference in the granting of visas was due to chance was less than one in 10,000.⁸² As part of a 2009 settlement, the ILMC was required to engage in affirmative steps, including ongoing monitoring by the plaintiffs, to ensure that guestworkers who the ILMC placed were not subjected to gender discrimination.

Once in the workplace, it is not uncommon for guestworkers to be subjected to discrimination and harassment.

In 2006, welders and pipefitters coming from India on H-2B visas arrived on the Gulf Coast to work for Signal International, a marine industrial construction company. Although Signal employed hundreds of non-citizen workers, it required only the Indian workers to live on Signal property in cramped and guarded trailers that other Signal employees and Signal management called “the Reservation.” This segregated workforce created an environment in which non-Indian employees felt comfortable referring to the Indian workers as animals or by means of profane language. When

Discrimination is pervasive in the H-2 guestworker program, as employers often seek either men or women to perform certain jobs.



the Indian workers requested better treatment, Signal fired those workers it perceived to be leaders of the effort to seek fair and dignified treatment.

Through the SPLC, the H-2B workers filed complaints with the EEOC charging discrimination on the basis of race and/or national origin. Finding reasonable cause to believe that Signal discriminated and retaliated against the Indian workers on behalf of their race and/or national origin, the EEOC filed a lawsuit against Signal to seek compensation for the workers and to ensure Signal's compliance with federal anti-discrimination laws.⁸³

SEXUAL HARASSMENT

Women are particularly vulnerable to discrimination. Numerous women have reported concerns about severe sexual harassment on the job. There have been no studies that quantify this problem among guestworkers. However, in a 1993 survey of farmworker women in California, more than 90% reported that sexual harassment was a major problem on the job.⁸⁴

In 1995, EEOC representatives met with farmworkers in Fresno, Calif., as part of an effort to develop a more vigorous enforcement program in the agricultural industry. William R. Tamayo, regional attorney for the EEOC in San Francisco, said, "We were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors."⁸⁵ The farmworkers, in fact, referred to one company's field as the "fil de calzon," or "field of panties," because so many women had been raped by supervisors there.⁸⁶

More recently, a study published in 2010 found that among 150 Mexican women and women of Mexican descent who were working the fields of California's Central Valley, 80% said they had experienced some form of sexual harassment.⁸⁷ That same year, the SPLC conducted in-depth interviews with approximately 150 immigrant women working in the U.S. food industry who were either undocumented or had spent time in the United States as undocumented workers. Virtually all of the women said sexual harassment was a serious problem, and a majority had personally experienced some form of it while working in the fields, packinghouses or processing plants. "Many, however, were not even familiar with the concept," the SPLC report, *Injustice on Our Plates*, says, "As less acculturated immigrant women, they struggled to understand the notion of sexual harassment, let alone grasp the means and methods of reporting an incident. Indeed, many were not aware of their rights and seemed to regard incidents of sexual harassment and sexual violence as yet another unpleasant aspect of their job that they had no choice but to endure." The report told the story of one Mexican woman who was brutally raped by a supervisor after her shift at a meatpacking plant but refused to report the attack to police because of her fear of both the police and the rapist. Her complaint to the company was



Norma and other women from Hidalgo, Mexico, took guestworker jobs harvesting tomatoes in Florida only to find they were locked up at night by their employers and not allowed to communicate with others.

One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as “people with a strong work ethic” and “happy, agreeable people who we like a lot.”

met with indifference.⁸⁸

Given the acute vulnerability of guestworkers in general, one can extrapolate that women guestworkers are extraordinarily defenseless in the face of sexual harassment. Indeed, given the power imbalance between employers and their guestworkers, it is hard to imagine how a guestworker facing harassment on the job could alleviate her situation. Assuming that she, like most workers, had taken out substantial debt to obtain the job and given that she would not be permitted to work for any employer other than the offender, her options would be severely limited.

Martina*, a guestworker from Mexico, has first-hand experience with gender discrimination and sexual harassment. She came to the United States with an H-2B visa to process crabs. She knew from past work that men always process oysters and women always process crabs. And the men are paid higher wages than the women. One year Martina was brought in to work during oyster season. When she arrived at the airport, she was met by the plant manager who made it clear that she had been hired to be his mistress. The DOL has approved H-2B visas for this plant for years.⁸⁹

It is no coincidence that these forms of discrimination exist in guestworker programs; many of the recruiting agencies tout the great benefits of hiring workers from one country or another.

Employers can even shop for guestworkers over the Internet at websites such as www.labor-mex.com, www.maslabor.com, www.mexicanworkers.biz, or www.mexican-workers.com. One website advertises its Mexican recruits like human commodities, touting Mexican guestworkers as people with “a good old fashioned work ethic” who are “very friendly and easy to work with.”⁹⁰

When employers are permitted to shop for workers as though they were ordering from a catalog, discrimination is the likely, perhaps inevitable result.

* Not real name



PART 10

Housing

When it comes to housing, guestworkers aren't treated like "guests" of the United States at all. In fact, they are frequently forced to live in squalor. Many find themselves held captive by unscrupulous employers or labor brokers who confiscate their passports, restrict their movements, extort payments from them, and threaten them with arrest and deportation if they attempt to escape.

Under federal regulations, employers hiring H-2A workers must provide them with free housing. The housing must be inspected and certified in advance as complying with applicable safety and health regulations. In practice, the quality of housing provided to H-2A workers varies widely and is often seriously substandard, even dangerous.⁹¹

H-2B workers have even less protection. There are no general federal regulations governing the conditions of labor camps or housing for H-2B workers. State and local laws also generally do not cover housing for H-2B workers. In practice, this means that H-2B workers are often provided housing that lacks even basic necessities, such as beds and cooking facilities.

Because the Department of Labor (DOL) has failed to promulgate any regulations related to H-2B worker housing, employers that choose to provide housing to H-2B workers (and most do, for reasons of practical necessity) are permitted to charge rent. The rent — often exorbitant — is generally deducted from the workers' pay. This often results in workers earning far less than they expected and sometimes substantially less than the minimum wage.⁹²

PROFITING OFF GUESTWORKER HOUSING

When H-2B workers arrived from India to Signal International's shipyards in Louisiana and Texas, they were shocked to see that they would be housed in one-room containers shared by 24 men, each of whom had less than a six-foot-by-six-foot space for himself and his personal belongings. The noise of workers returning from their shifts deprived those not on duty of uninterrupted sleep, and the containers had such limited bathroom access that workers had to rise long before starting work in order to wait in line. As Signal's special projects manager said in an email obtained during the discovery process in a lawsuit filed by the SPLC, "[W]e have serious, endemic plumbing problems in the trailers. ... Behind the walls, under the sinks, in the drains — everything is wrong. Pipes can be pulled apart by hand. Showers leak behind



Guestworkers who had jobs picking tomatoes in South Carolina lived in this “house” in 2005.

the walls, saturating sheetrock, rugs and wooden subfloors with water. Light pressure on the walls leads to them crumbling in certain places, and the wood will soon begin rotting as well.” The same manager described the camp in a journal as “a bacterial breeding ground” due to the stagnant water. For these cramped and dilapidated accommodations — and for food from a mess operation one Signal employee said would be shut down if the state health department ever inspected it — \$1,050 was deducted each month from each worker’s paycheck. Signal deducted the cost of these facilities even if workers found another place to stay. In an email, Signal’s chief financial officer referred to the labor camps as “profit centers” for the company.

In addition, housing for both H-2A and H-2B workers is often located in extremely rural locations, increasing workers’ social isolation and dependence on their employer. In most instances, workers lack both vehicles and access to public transportation. As a result, they are totally dependent upon their employers for transportation to work and to places like grocery stores and banks. Some employers charge exorbitant fees for rides to the grocery store. Much of the housing provided to workers lacks telephone service, isolating workers even further. In some instances, employers have even forbidden workers from having visitors.⁹³ These conditions not only create daily hardships for guestworkers, they increase employers’ already formidable power over them.

The living situation of Guatemalan workers recruited to work in the southeastern United States in 2012 exemplifies how employers seek to further isolate and control their workers. Approximately 85 workers were housed in a crowded, isolated house on their employer’s property. “I slept in a room with about 16 other workers,” said one worker. “There was no air conditioning in the house, and it got really hot and buggy in the summer months. The tap water smelled so foul that we couldn’t drink it. We had to spend some of the little money we made each day on bottled water.” The workers were forced to rely on their employers for transportation to the grocery store because the house was located far from the nearest town or commercial center.

To compound the workers’ isolation, their employer discouraged them from receiving visitors or from leaving the farm on their own. “After a few of the workers were picked up by family members and fled the farm, the employer got really angry and warned us that we couldn’t have any visitors,” one worker said. “He told us that he would call the police or Immigration if we did.” The employer kept close watch on the cars that approached the house and made sure that the gate blocking the road leading to the house was locked every night.

“When work on the farm dried up, I wanted to leave, but I felt trapped,” said another worker.

“I didn’t have my documents or any money. And we were so far away from the town. I didn’t know where to go for help or how to get away. And the crew leader kept a close watch over us at all times. He often warned us that if we left, he would tell the employer and have us reported to Immigration right away.”

WATCHED BY GUARDS

A group of about 20 guestworkers from Thailand faced a similarly desperate situation. According to a lawsuit filed on their behalf by Legal Aid of North Carolina in February 2007, they each paid \$11,000 to obtain agricultural jobs. Recruiters told them, falsely, that they would have employment for three years earning \$8.24 an hour.⁹⁴ When they arrived in August 2005, a man acting as a labor broker confiscated their passports, visas and return airplane tickets.

Initially, they were housed in a local hotel, three men to a room. After a few weeks, the number of rooms was reduced, so that they were living five to a room. Eventually, they were moved to buildings behind the house of the labor broker, where they shared one bath. Some workers had to sleep on the floor. After a few more weeks, their employer began to reduce their food rations, leaving them hungry. Throughout their stay, the Thai workers were told they would be arrested and deported if they escaped. On several occasions, according to the lawsuit, the labor broker and his son displayed guns to the workers.

Less than two months after their arrival, some of the workers were taken to New Orleans, where they were put to work demolishing the interiors of hotels and restaurants ruined by the flooding from Hurricane Katrina. They lived in several storm-damaged hotels during their stay, including one that had no electricity or hot water and was filled with debris and mold. It had no potable water, so the workers were forced to use contaminated water for cooking.

During their stay in New Orleans, the workers were guarded by a man with a gun. They also were not paid for the work, so they had no money to buy food. Some were eventually taken back to North Carolina. The men who remained in New Orleans managed to escape with the help of local people who learned of their plight. The other workers also escaped after their return trip.

These are not isolated cases. Time and again, advocates for guestworkers hear these stories. •



The documentary “Harvest of Shame,” broadcast by CBS in 1960, called America’s attention to the callousness with which U.S. agricultural giants treated migrant farmworkers.



PART 11

Barriers to Justice

Guestworkers often face insurmountable barriers to enforcing their legal rights. Even when workers are able to vindicate their rights, they face significant obstacles to meaningful recovery. In practice, this means that very few guestworkers are actually compensated for their losses, and many unscrupulous employers are allowed to continue to import guestworkers with impunity.

The rights of guestworkers can be enforced in two ways: through actions taken by government agencies, mainly the Department of Labor (DOL), and through lawsuits filed by private attorneys, federally funded Legal Services (H-2A workers and H-2B forestry workers only) or non-profit legal organizations like the Southern Poverty Law Center (SPLC).

Workers face high hurdles to obtaining justice through either method. As a result, far too many are lured to the United States by false promises only to find that they have no redress for their injuries.

LACK OF ENFORCEMENT

Government enforcement of basic labor protections has decreased for all American workers in recent decades. The number of wage and hour investigators in the DOL declined by 14% between 1974 and 2004, and the number of completed compliance actions declined by 36%. During this same period, the number of U.S. workers covered by the Fair Labor Standards Act *increased* by more than half — from about 56.6 million to about 87.7 million.⁹⁵ The Brennan Center for Justice concluded in 2005 that “these two trends indicate a significant reduction in the government’s capacity to ensure that employers are complying with the most basic workplace laws.”⁹⁶

Government enforcement of guestworker programs is similarly deficient. In 2011, the DOL certified 7,000 employer applications for H-2A workers⁹⁷ but conducted only 157 investigations into H-2A employers that same year.⁹⁸

The DOL’s monitoring of H-2B employers appears to be even less rigorous. According to a comprehensive list of DOL compliance actions, the Department cited only 27 H-2B employers for violations between 2007 and 2012.⁹⁹ Given that the DOL certifies thousands of employers for H-2B workers each year, this indicates that the DOL is not likely conducting many

investigations into program abuse. The SPLC's extensive experience in the field also suggests that this is the case.

Additionally, as a practical matter, the nature of the guestworker program makes the DOL enforcement of some provisions unrealistic. Regulations, for instance, require employers to provide H-2A workers with a minimum of three-fourths of the hours specified in the contract and to pay for their transportation home. But there is currently no mechanism, such as a certification by the employer, that allows the DOL to effectively monitor whether employers comply with these requirements. After the contract period expires, the worker must leave the country and is therefore not in a good position to take action to protect his rights.

When employers violate the legal rights of workers, the DOL takes little action to stop them from importing more guestworkers. Under program regulations, the DOL is empowered to debar or suspend an employer from participating in the program if the employer commits certain violations.¹⁰⁰ In practice, however, debarment is rare. In 2010, the Office of the Inspector General criticized the DOL's debarment and suspension activities, noting that the DOL "did not consider debarring 178 [foreign labor-certified] individuals or entities with convictions resulting from 42 investigations conducted by the Department's OIG actions."¹⁰¹ Between 2011 and 2013, roughly, the DOL debarred only 22 H-2A employers and six H-2B employers.¹⁰²

Government officials have even demonstrated a lack of will to debar employers that commit the most serious abuses. For example, a forestry contractor was sued in North Carolina on behalf of a group of H-2B tree planters who were housed in a storage shed with only one cold water spigot to share between them. They cooked over fires and with a gas grill through the snowy North Carolina winter. The workers claimed that when they tried to leave, their supervisor locked the gates and refused to let them go unless they repaid money he had lent them to buy sleeping bags and fuel for the gas grill, and paid him rent for a portable toilet.¹⁰³ The DOL's Wage and Hour Division had earlier documented what it called "a woeful history of labor violations," including unsafe living and working conditions and wage abuses. Yet the forestry contractor continued to receive permission to import guestworkers. When the DOL's Employment and Training Administration refused to cancel guestworker services to this employer, North Carolina's monitor advocate, a state official who is supposed to enforce farmworker rights, filed a complaint with the DOL's inspector general. A year and a day after the filing of that complaint, 14 Guatemalan men employed by this forestry company were killed on the way to work when their van crashed into a river in Maine.¹⁰⁴



Guestworkers, like these tree planters, have virtually no way to enforce their rights in the face of widespread abuse.



The SPLC has also witnessed the DOL's failure to sanction law-breaking employers. Even though a large class of H-2A workers represented by the SPLC sued their employer, Candy Brand, alleging egregious wage violations in 2007, and ultimately settled those claims for \$1.5 million, the DOL continues to certify the company (now operating under the name Clanton Farms, LLC) for H-2A workers every year. SPLC clients who still work at the farm report that the company continues to violate wage and hour laws today.

OBSTACLES TO PRIVATE LITIGATION

Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against abusive employers is not a realistic option in most cases. Even if guestworkers know their rights — and most do not — it is rare that workers will have access to an affordable, private attorney who will take their cases. Representation of migrant workers presents unique challenges, including language barriers and the fact that most workers will have to return to their country during the litigation, that tend to dissuade many private attorneys from filing guestworker cases.

Access to federally funded legal services presents other obstacles to guestworker representation.

While H-2A workers and H-2B forestry workers are eligible for representation by federally funded Legal Services lawyers, these lawyers are prohibited from handling class action lawsuits. Given workers' enormous fears of retaliation and blacklisting, any system that relies

UNDERCAPITALIZED EMPLOYERS

Guestworkers are far too often employed by undercapitalized employers and contractors who cheat them out of wages and then claim an inability to pay what courts have ordered is lawfully owed. While the H-2A regulations require farm labor contractors seeking H-2A workers to post a bond, neither of the H-2 programs require employers to post security or supply any proof of solvency before being certified for guestworkers. This lack of oversight has devastating results for guestworkers who take action against law-breaking employers.

Perhaps the starkest example of this was the class action lawsuit brought by H-2B guestworkers from Guatemala and Mexico who worked for forestry contractor Eller and Sons Trees, Inc. Until 2009, Eller and Sons was one of the largest forestry contractors in the United States and one of the largest employers of H-2B guestworkers, importing more than 750 workers per year. In 2008, the SPLC and its co-counsel won a comprehensive legal victory against the company. A

Georgia federal court ruled that Eller and Sons and its owner, Jerry Eller, had engaged in the massive underpayment of a class of approximately 4,000 guestworkers over a 10-year period. The company and Eller stipulated that the damages owed to the class members based on the court's rulings exceeded \$11 million. However, rather than come into compliance with the law and pay workers the back wages they were owed, Eller simply stopped operating the company and filed for personal bankruptcy protection. The corporation had almost no capital investments and Eller had few personal assets available to creditors. Ultimately, the H-2B guestworkers — who are still owed more than \$11 million in unpaid wages — will see very little recovery as a result of the bankruptcy proceedings. Eller and Sons, like other H-2B employers, was never required to post any type of bond or security that would have prevented the guestworkers from suffering this massive wage abuse without any recourse.

A forestry contractor was sued in North Carolina on behalf of a group of H-2B tree planters who were housed in a storage shed with only one cold water spigot to share between them. They cooked over fires and with a gas grill through the snowy North Carolina winter. The workers claimed that when they tried to leave, their supervisor locked the gates and refused to let them go unless they repaid money he had lent them to buy sleeping bags and fuel for the gas grill, and paid him rent for a portable toilet.

on workers asserting their own legal rights is unlikely to bring about systemic change. 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.

For H-2B workers, the situation is perhaps even more dire. Although they are in the U.S. legally and are financially eligible, the vast majority are ineligible for federally funded legal services because of their visa status. As a result, most H-2B workers have no access to lawyers or information about their legal rights at all. Because most do not speak English and are extremely isolated, usually both geographically and socially, it is unrealistic to expect that they would be able to take action to enforce their own legal rights. Moreover, many of these workers have few rights to enforce.

A more fundamental barrier to justice is that guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In the midst of one lawsuit filed by the SPLC, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.¹⁰⁵

This fear may persist even after workers' legal claims have settled. The extent of H-2A workers' fear of blacklisting was made clear to the SPLC during a 2012 trip to Mexico to assist tomato workers in claiming their settlement payments after these workers successfully sued their employer. Even though the lawsuit had been settled, workers were very reluctant to accept the money that was owed to them by the company for fear that the recruiters or the company would find out and retaliate against them by denying them the ability to get visas in the future.

As these examples demonstrate, the structure of the H-2 guestworker program is inherently erosive to workers' rights: When a worker's livelihood — and immigration status for those in the United States — is tied to a single employer, workers will always face nearly insurmountable barriers to enforcing their legal rights.

Recommendations

As this report shows, the H-2 guestworker program is fundamentally flawed. Because guestworkers are tied to a single employer and have little or no ability to enforce their rights, they are routinely exploited. The guestworker program also undercuts the interests of U.S. workers. It should be abolished. It should not be used as a model for immigration reform. If this program is permitted to continue at all, it should be totally revamped to address the vast disparity in power between guestworkers and their employers.

I. Federal laws and regulations protecting guestworkers from abuse must be strengthened:

- ➔ Congress should limit employer use of guestworker programs, particularly during periods of high unemployment. As long as guestworkers are available to employers regardless of the stability of the U.S. economy, employers will have a disincentive to hire U.S. workers.
- ➔ Guestworkers' ability to enter the United States should not be dependent on a particular employer. In addition, workers should be allowed to change employers without sacrificing their visa status, like any other employee can. The current restriction denies guestworkers the most fundamental protection of a free labor market and is at the heart

of many abuses they face.

- ➔ Congress should provide a process to allow guestworkers to gain permanent residency, with their families, over time. Large-scale, long-term guestworker programs that treat workers as short-term commodities are inconsistent with our society's core values of democracy and fairness.
- ➔ Congress should expressly authorize the Department of Labor to oversee and regulate all guestworker programs, and should expressly authorize the Department to issue regulations with the force of law to conduct such oversight.
- ➔ Congress should regulate the recruitment of foreign workers. There is virtually no oversight of international recruitment activities, and the result is rampant fraud and abuse. To combat those abuses, Congress should create a federal agency or commission to monitor international recruiters and the recruitment of foreign workers. Congress also should require that employers bear all the costs of recruiting and transporting guestworkers to this country, including workers' passport expenses. Congress should legislatively override the holding in *Castellanos-Contreras v. Decatur Hotels, LLC*, (5th Circuit), which states that employers are not responsible for the travel and visa expenses of many of their H-2B workers. Requiring guestworkers to pay these fees encourages the over-recruitment of guestworkers and puts them in a position of debt peonage that leads to abuse.
- ➔ Entities acting as labor brokers for employers that actually use the guestworkers should not be allowed to obtain certification from the Department of Labor to bring them in. Allowing these middlemen to obtain certification shields the true employer from responsibility for the mistreatment of guestworkers.
- ➔ Congress should make the employers who ultimately benefit from the workers' labor strictly liable for any abuses during the recruitment process, regardless of whether the recruiter is an agent of the employer.
- ➔ Congress should require employers to pay at least the "adverse effect wage rate" in all guestworker programs to protect against the downward pressure on wages. Guestworker programs should not be a mechanism to drive wages down to the minimum wage.

- ➔ Congress should eliminate the barriers that prevent guestworkers from receiving workers' compensation benefits. Workers currently must navigate a bewildering state-by-state system that effectively blocks many injured workers from obtaining benefits.
- ➔ Guestworkers should be better protected from discrimination on the same terms as workers hired in the United States. Permitting employers to "shop" for workers with certain characteristics outside of the United States is offensive to our system of justice and values of nondiscrimination.

II. Federal agency enforcement of guestworker protections must be strengthened:

- ➔ Congress should require that all employers report to the Department of Labor, at the conclusion of a guestworker's term of employment and under penalty of perjury, on their compliance with the terms of the law and the guestworker's contract. There currently is no mechanism that allows the government to ensure that employers comply with guestworker contracts.
- ➔ Employers using guestworkers should be required to post a bond that is at least sufficient in value to cover the workers' legal wages. A system should be created to permit workers to make claims against the bond. Guestworkers, who must return to their country when their visas expire, typically have no way of recovering earned wages that are not paid by employers.
- ➔ There should be a massive increase in funding for federal agency enforcement of guestworker and U.S. worker protections. Guestworkers are extremely vulnerable workers, but there is scant government enforcement of their rights. U.S. workers are being unlawfully locked out of available jobs with little intervention or oversight from the Department of Labor.
- ➔ The Department of Labor should be authorized to enforce the terms in all guestworker contracts and job orders.

➔ The Department of Labor should create a more rigorous and streamlined process to deny guestworker applications from employers that have violated the rights of guestworkers. Employers who abuse guestworkers continue to be granted certification by the Department to bring in new workers.

III. Congress must provide guestworkers with meaningful access to the courts:

➔ Congress should make all guestworkers eligible for federally funded legal services. H-2B workers, except those in forestry occupations, are currently not eligible for legal aid services.

➔ Congress also should eliminate the “super restriction” that prohibits Legal Services Corporation-funded entities from using even their non-federal money to represent many guestworkers.

➔ Congress should lift the restriction on federally funded legal services that prohibits class action representation. Class actions are the most effective legal tool to change abusive employment practices. They are particularly important as a tool in guestworker cases, where workers are fearful of retaliation if they assert their legal rights.

➔ Congress should provide a federal cause of action allowing all guestworkers to enforce their contracts.

While these reforms will go far toward protecting guestworkers from exploitation, it is clear that guestworker programs are simply too flawed to benefit from small regulatory fixes. In reality, these programs are beyond repair. We are a nation of immigrants, not a nation of temporary workers. Temporary workers who come to the United States make a valuable contribution to our nation. They should be incorporated into our society as full members so that they too are entitled to the same benefits, rights, and protections enjoyed by all workers in the United States. The time has come for Congress to abolish — not expand — our shamefully abusive guestworker system.

ENDNOTES

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CLOSE TO SLAVERY

Guestworker Programs in the United States

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