

CLOSE TO SLAVERY

Guestworker Programs in the United States



a report by the

Southern Poverty Law Center

About the Southern Poverty Law Center

The Southern Poverty Law Center, based in Montgomery, Alabama, is a nonprofit civil rights organization with more than 250,000 members nationwide. It was founded in 1971 to combat bigotry and discrimination through litigation, education and advocacy. Its Immigrant Justice Project has filed numerous lawsuits and class actions on behalf of migrant laborers and guestworkers in a variety of industries across the South. Mary Bauer, director of the Immigrant Justice Project, is the principal author of this report. Sarah Reynolds, an outreach paralegal, was the primary researcher.



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Executive Summary

In his 2007 State of the Union Address, President Bush called for legislation creating a “legal and orderly path for foreign workers to enter our country to work on a temporary basis.” Doing so, the president said, would mean “they won’t have to try to sneak in.” Such a program has been central to Bush’s past immigration reform proposals. Similarly, recent congressional proposals have included provisions that would bring potentially millions of new “guest” workers to the United States.

What Bush did not say was that the United States already has a guestworker program for unskilled laborers — one that is largely hidden from view because the workers are typically socially and geographically isolated. Before we expand this system in the name of immigration reform, we should carefully examine how it operates.

Under the current system, called the H-2 program, employers brought about 121,000 guestworkers into the United States in 2005 — approximately 32,000 for agricultural work and another 89,000 for jobs in forestry, seafood processing, landscaping, construction and other non-agricultural industries.¹

These workers, though, are not treated like “guests.” Rather, they 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.

Federal law and U.S. Department of Labor regulations provide some basic protections to H-2 guestworkers — but they exist mainly on paper. Government enforcement of their rights is almost non-existent. Private attorneys typically won’t take up their cause.

¹ Department of State, NonImmigrant Visas Issued, 10/01/04 — 9/30/05, available at http://travel.state.gov/pdf/FY2005_NIV_Detail_Table.pdf



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

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;
- forced to live in squalid conditions; and,
- denied medical benefits for on-the-job injuries.

House Ways and Means Committee Chairman Charles Rangel recently put it this way: “This guestworker program’s the closest thing I’ve ever seen to slavery.”²

Congressman Rangel’s conclusion is not mere hyperbole — and not the first time such a comparison has been made. Former Department of Labor official Lee G. Williams described the old “bracero” program — 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.”³ In practice, there is little difference between the bracero program and the current H-2 guestworker program.

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 work visas expire, they must leave the United States. They are, in effect, the disposable workers of the U.S. economy.

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 or the protections of the free market.

The H-2 guestworker program is inherently abusive and should not be expanded in the name of immigration reform. If the current program is allowed to continue at all, it should be completely overhauled. Recommendations for doing so appear at the end of this report.

² U.S. Representative Charles Rangel, speaking on CNN’s *Lou Dobbs Tonight*, Jan. 23, 2007

³ Quoted in Majka, Theo J. and Patrick H. Mooney, *Farmers’ and Farm Workers Movements* (Twayne Publishers 1995) 152.



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.”⁴ 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*⁵ program, which Congress later approved. To assuage critics, proponents of the program asserted

4 “Migrations: A Collection of Views on Mexican Migration to the United States,” Center for Latin American Studies, University of California-Berkeley, available at <http://socrates.berkeley.edu:7001/Outreach/education/migrations2003/index.html>

5 The word “*bracero*” is derived from the Spanish word for “arm,” as in a farm hand or labor for hire. It refers both to the guestworker program operated between 1942 and 1964 and to individual, legally hired Mexican farm workers who participated in the program.



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

that Mexicans, who had been deported en masse just a few years earlier, were easily returnable.⁶ 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.”⁷ Under this program:

- 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 them;
- 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 percent 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.”

6 Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America*, (Princeton University Press 2002) p. 173

7 Cindy Hahamovitch, *The Fruits of their Labor: Atlantic Coast Farmworker and the Making of Migrant Poverty, 1870-1945* (University of North Carolina Press) 168

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 farm-worker 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.⁸



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

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.⁹ 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 force workers onto buses, on which they were removed from the camp and deported. This incident became known as the “dog war.”¹⁰ 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 was 66,000 until 2005, when it was increased substantially by exempting returning workers from those limits.

In 2005, the last year for which data are available, the United States issued about 89,000 H-2B visas¹¹ and about 32,000 H-2A visas. The countries sending the most workers to the United States under these programs were Mexico, Jamaica and Guatemala; about three-fourths are Mexican.¹²

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

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.”

8 David Bacon, *Fast Track to the Past: Is a New Bracero Program in Our Future? (and what was life like under the old one)* published at <http://dbacon.igc.org/Immigrants/17FastPast.htm> (2002)

9 Alex Wilkenson, *Big Sugar: Seasons in the Cane Fields of Florida* (Alfred A. Knopf) (1989)

10 David Bacon, “Be Our Guests,” *The Nation*, September 27, 2004

11 This includes H-2B and H-2R (returning worker) visas.

12 Department of State, NonImmigrant Visas Issued, 10/01/04 — 9/30/05, available at http://travel.state.gov/pdf/FY2005_NIV_Detail_Table.pdf



PART 2

How Guestworker Programs Operate

The United States currently has two guestworker programs under which employers can 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.¹³

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 workplace safety or wage issues.

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.¹⁴

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.

¹³ There are other guestworker programs (such as the H-1B program for more highly skilled workers), but this report focuses only on H-2 workers because current congressional proposals for large-scale guestworker expansion appear most closely aimed at replicating the experiences of the H-2 program.

¹⁴ 8 U.S.C. §1188(a)(1); 1101(a)(15)(H)(ii); 20 CFR Part 655

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

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 “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.”¹⁵

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. (This is called the “three-quarters guarantee.”)
- Receive free housing in good condition 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 percent 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 the employer must pay transportation home.
- Be protected by the same health and safety regulations as other workers.
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.¹⁶

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.

15 20 C.F.R. § 655.102(b)(9)

16 45 C.F.R. § 1626.11

THE H-2B PROGRAM

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

Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers.¹⁷ IRCA, in fact, does not explicitly require such regulatory safeguards, providing only the guidance that the importation of H-2B workers must not adversely affect U.S. workers' wages and working conditions.

And, unlike the H-2A program, the procedures governing certification for an H-2B visa were established not by regulation but rather by internal DOL memoranda (General Administrative Letter 1-95) and therefore were not subject to the public comment and review process required when new federal regulations are adopted. An employer need only state the nature, wage and working conditions of the job and assure the DOL that the wage and other terms meet prevailing conditions in the industry.¹⁸ Because the H-2B wage requirement is set forth by administrative directive and not by regulation, the DOL takes the position that it lacks legal authority to enforce the H-2B prevailing wage.

While the employer is obligated to offer full-time employment that pays at least the prevailing wage rate, none of the other substantive regulatory protections of the H-2A program apply to H-2B workers. There is no free housing. There is no access to legal services. There is no "three-quarters guarantee." And the H-2B regulations do not require an employer to pay the workers' transportation to the United States. •

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.

SELECTED DIFFERENCES IN REGULATORY SAFEGUARDS FOR H-2A WORKERS AND H-2B WORKERS	H2A	H2B
50% Rule	yes	no
3/4 Guarantee	yes	no
Free Housing	yes	no
Social Security Tax Exemption	yes	no
Eligible for LSC-Funded Legal Services	yes	no

¹⁷ See *Martinez v. Reich*, 934 F. Supp. 232 (D. Tex. 1996)

¹⁸ GAL No. 1-95 (IV)(D) (H-2B); See DOL ETA Form 750



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 agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America.

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 entirely unregulated recruiting business can be quite lucrative. With more than 121,000 such workers recruited in 2005 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

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.

Overwhelming debt is a chronic problem for guestworkers. Although U.S. laws do provide some obligation for employers to reimburse workers for their travel and visa costs,¹⁹ in practice it is rare that guestworkers are fully reimbursed. Most struggle to repay their debt, while interest accrues.

19 See *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228, 1237 (11th Cir. 2002); 20 C.F.R. § 655.102(b)(5)(i)



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.

These obstacles are compounded when employers fail to offer as many hours of work as promised — a common occurrence.

Guatemalan guestworkers represented by the Southern Poverty Law Center paid an average of \$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, 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

The Recruiting Bonanza

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

A deposition in a lawsuit filed by the Southern Poverty Law Center provides a glimpse into this world, in which workers pay thousands of dollars to recruiters in their countries for the right to work in low-wage jobs in the United States.¹

The lawsuit, filed in 2006, contends that Decatur Hotels and its president, F. Patrick Quinn III, violated the Fair Labor Standards Act when the company failed to reimburse guestworkers for the exorbitant fees paid to aggressive labor recruiters working as agents of the hotel chain.

When Decatur Hotels, which owns 15 luxury hotels in New Orleans, decided to import up to 290 guestworkers to fill hotel jobs vacated by Hurricane Katrina evacuees, the company hired a Baton Rouge-based company called Accent Personnel Services Inc. Accent advertises on its website that it helps businesses obtain government approval to employ guestworkers and also recruits them.

Virginia Pickering, president and owner of the company, testified in a deposition that Accent earned \$1,200 for each

person recruited to work for Decatur Hotels — \$300 each from Decatur Hotels and another \$900 each from recruiters working in Peru, Bolivia and the Dominican Republic. That means that if Decatur imported the full 290 workers for which it was certified by the Department of Labor, Accent would have earned nearly \$350,000. Accent did not have to pay for travel or visa costs out of those fees.

Each of the workers paid between \$3,500 and \$5,000 to cover recruiting fees, travel and visas. Like many other guestworkers, they plunged their families into debt to raise this money. For most workers, it was more than a year's salary.

The guestworkers soon found out they could not earn enough to make ends meet — much less pay back their debts. The recruiters had promised a minimum of 40 hours of work per week and plenty of overtime. Instead, they found themselves working about 25 hours a week, sometimes far less.

Even though desperate for wages, these workers are prohibited by law from seeking alternative employment.

"It is modern-day slavery," said Daniel Castellanos Contrera of Peru.

Another worker, who did not want to be identified because of the possibility of being blacklisted, said, "People came with debts and children to support — and the illusion that this would help their future. In the end, we have only bigger problems and deeper debt."

¹ *Castellanos-Contreras v. Decatur Hotels, LLC*, E.D. Louisiana, Case No. 06-4340, filed August 2006

H-2B jobs in the United States is to visit a loan shark, who will likely charge exorbitant interest rates. Many of these workers report having been charged 20 percent interest *each month*. Given that the pine tree planting season is three months long and workers often earn less than \$1,000 per month, they have little hope of repaying the debt doing the work for which they were hired.

The fees paid by these Guatemalan workers amount to far more than the actual cost of travel and visas. Roundtrip airline tickets can be bought for \$500 to \$600. A visa typically costs \$100. Assorted other fees may add several hundred. The remainder is often pocketed by the recruiter or the agency for which he works.

In addition, the majority of Guatemalan forestry workers interviewed by the Southern Poverty Law Center 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. Some workers have been required to pay as much as \$1,000 to secure the return of their deed. 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.

The story told by Alvaro Hernandez-Lopez is typical of guestworkers recruited from Guatemala. In 2001, at age 45, he came to the United States to work for Express Forestry Inc. in the Southeast. He continued coming for two more planting seasons. “What I earned planting trees in the States was hardly enough to pay my debt,” he said. “It was really hard for us to fight to get to the States legally and then not earn any money. We were told we had to leave our deeds to get the job. On a blank paper we had to sign our names and hand over our deeds. They said that if we didn’t sign this paper they wouldn’t bring us to the States to work.”

Forestry worker Nelson Ramirez, also from Guatemala, describes a similar experience when he signed up to work for Eller and Sons Trees Inc. in 2001. A labor recruiter required that his wife sign a paper agreeing to be responsible if he were to break his contract. “I didn’t understand exactly what this threat meant but knew that my wife would have to sign if I was going to get the visa,” Ramirez said. “The work was very hard, but I worried about leaving because my wife signed this form to get me the job and I worried about her.”

These tactics are not limited to any particular industry or country. Recruits in some parts of the world are required to pay even greater sums of money to obtain guestworker visas. Some Thai and Indonesian workers imported to North Carolina on H-2A visas, for example, each paid \$5,000 to \$10,000 or more for the right to be employed in short-term agricultural jobs at less than \$10 per hour. In practice, they were not paid even that.



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.

WORKERS PAY UP TO \$5,000 FOR POST-KATRINA HOTEL JOBS

Following Hurricane Katrina, a major hotel company in New Orleans, Decatur Hotels LLC, decided to arrange for H-2B guestworkers to fill hotel jobs that had been vacated by employees who apparently were driven from the city by the massive destruction. In its request to the Department of Labor for permission to hire up to 290 guestworkers, the company claimed to “have offered work to hurricane evacuees” but “no one applied.”²⁰

Agents for the company, however, found plenty of willing workers in Peru, Bolivia and the Dominican Republic. Each recruit paid between \$3,500 and \$5,000 to come to the United States for hotel jobs — maintenance, housekeeping, guest services, etc. — that were scheduled to last just nine months. According to the terms of the written contract, each would have to work full-time for three to four months just to recoup the recruiting fees, not counting any interest on loans they may have taken out. When they arrived, they found they were not even able to work full-time with the hotels, making their situations even more desperate.

“Every one of us has to sell things in order to have the money to come here,” said Francisco Sotelo Aparicio, who came from Peru to work for Decatur Hotels. “I sold some of my land, my belongings, and we leave our families to try to come out ahead. ... We want to keep working legally, but it is very hard to do so when we make such little money and have so much debt. We become desperate.”

In many cases, the only way for guestworkers to make enough money to repay their debt is to seek additional employment — but that is illegal. The guestworker system permits them to work only for the employer who arranged with the Department of Labor to import them.

Many of the workers interviewed by the Southern Poverty Law Center know full well that they will be unable repay their recruiting debt because their pay is so low and the jobs are seasonal or temporary.

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. So even though they risk being cheated, many workers are willing to take that chance. Most perceive the guestworker program as their best chance to get to the United States and provide a better life for their families. These desperate workers are easily deceived by recruiters.

In a few cases, guestworkers have told the Southern Poverty Law Center, employers have simply

20 *Castellanos-Contreras v. Decatur Hotels, LLC*, E.D. Louisiana, Case No. 06-4340, filed August 2006

provided a backdoor for migrant workers to get to the United States. Once here, they overstay their visas, becoming unauthorized workers, or “jump” contract by going to work elsewhere. Even though expensive, the cost to the worker commonly is less than what it would cost to enter the United States illegally. Certainly it is less dangerous to enter with an H-2 visa than to attempt to cross the border unlawfully.

Some employers seek long visa periods, claiming to have eight or 10 months of work, for example, when they actually have only two to three months of work to offer. The period after which the employer has no work to offer but when the visa is still valid is referred to by many workers as the “tiempo libre” or “free period.” Numerous workers have told the Southern Poverty Law Center that their employers explicitly advised them that they were free to seek work elsewhere during this period. While that clearly violates immigration law, workers often believe themselves to be in legal status, because their visa appears valid and because they were given permission by their employer. For some employers, this is the only way they are able to continue to attract a workforce year after year, since the wages are so low and the costs of recruitment so high.

One employer sued by the Southern Poverty Law Center had extensive notes showing the deposits left by workers in order to secure their jobs. Next to one worker’s name was written: “he only wants the visa to travel to Florida. He must leave a 5000 deposit.” Clearly, these are visas available for sale.

As long as the guestworker system relies on a series of unregulated foreign recruiters, it is subject to this sort of wanton selling of visas.

A prohibition on charging fees to workers for recruitment or transportation would help

Irla

In December 2000, Irla’s husband left his small town in Guatemala for the first time to work in the United States. With an H-2B visa in hand and a job planting pines in the forests of the South, he hoped to earn enough money to make a better life for his family.

He incurred debt to pay about \$1,000 in fees to a recruiter and was told to leave the deed to his house with a lawyer in town to guarantee his return when the seven-month visa expired.

He didn’t earn much money planting pines. But after three months, the planting season ended and he found other jobs. He worked in a factory, harvested grapes and worked in tomato and tobacco fields. Only at this point was he able to send more money home. To some guestworkers, this is known as the “visa libre” period, and recruiters sometimes promise such opportunities even though this type of arrangement violates the rules of the guestworker system.

“We all knew the men would not earn much in the actual planting season,” Irla said. “My husband and the others would work their three months with the planting company and then would find other work. My husband could not afford to send money to us or to pay his debt until he had a different job.”

Irla’s husband continued to go to the United States every season for the following four years. The deed to his home stayed in the hands of the lawyer in Guatemala. Many other women in Irla’s community were in the same situation. They stayed at home to care for the children, waiting patiently for money that rarely arrived.

“We do this for our kids,” Irla said. “We have to work so they can eat, and it is not the same when the husband is not here.”

After completing his fifth three-month planting season in the United States, Irla’s husband again found other work. On the way to his job, he was killed in a car accident. At 32, he left five children behind. The last time Irla saw him was in November 2004.

Even after five years, he still owed about \$700.

“He should have earned a lot of money with all that time in the United States,” Irla said. “There were no earnings to show. Now I am working without him for our five kids. I think it will take me about three years to pay this debt. I am the only one working for the food.”

The lawyer will not give Irla back the deed to their house until she repays the debt. “If I don’t pay this debt they say they will take my house.”

Irla now wishes he had remained in Guatemala picking coffee. “It would have been better if he had not gone and we could have just eaten greens and tortillas. I would rather have him here now.”

Next to one worker's name was written: "he only wants the visa to travel to Florida. He must leave a \$5000 deposit." Clearly, these are visas available for sale.

negate the financial incentive for the recruiting industry in Mexico and elsewhere to send more workers than are needed. Presumably, if the workers could not be charged, then employers would pay for recruiting, and they would recruit only the number of workers needed.

Unfortunately, it is hard to imagine enforcing such a rule. For example, until recently, one U.S. embassy 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.

A fundamental problem with the guestworker system is the requirement that a worker may travel to the United States on an H-2 visa only after he has a job offer from a U.S. employer. Placing this power in the hands of employer representatives operating in other countries is a recipe for worker abuse. •



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

	MEXICO	GUATEMALA	EUROPE
H-2A	28,563	87	323
H-2B	60,258	3,681	4,919



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.²¹ 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 Southern Poverty Law Center has received dozens of reports of this practice and has, in the course of its legal representation of workers, confirmed that it is routine. 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 Southern Poverty Law Center 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.”²²

Juan, a forestry worker, said, “The boss took our passports and kept them. He took them as soon

21 Unlike H-2A workers, those with H-2B visas must pay Social Security and Medicare taxes but have no prospect of receiving benefits under the programs. They also are subject to federal income tax withholding.

22 Deposition of Sandy Thomas, page 77, *Recinos-Recinos v. Express Forestry, E.D. Louisiana*, Case No. 05-1355



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

as we arrived from Mexico. We would ask for them and he would always say no. When we got paid, we would want to go cash our pay checks. The boss would say, ‘Go talk to the driver and he’ll change them for you.’ They would not give us our passports to cash our pay checks. They would say that the higher company office ordered them to do this. My passport gives me permission to be here so no one will bother me because I am legal. I cannot prove I am legal if I do not have my passport.”

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 Southern Poverty Law Center also has encountered numerous incidents where employers destroyed passports or visas in order to convert workers into undocumented 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 the U.S. Immigration and Customs Enforcement agency as a means of asserting control over the 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.

Even when employers do not overtly threaten deportation, 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. In 1964, the Mexican-American labor organizer and writer Ernesto Galarza found that despite the prevalence of workers’ rights violations, only one in every 4,300 braceros complained.²³

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]”²⁴ Human Rights Watch also found evidence of a “campaign of intimidation” against workers to discourage any exercise

²³ Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (Rosicrucian Press (1964) at 17; See also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers from Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J. 575, 585 (2001)

²⁴ Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (ILR Press) 2000 at 148

of freedom of association by the workers. The U.S. Government Accountability Office (formerly the General Accounting Office) similarly reported in 1997 that H-2A workers “are unlikely to complain about worker protection violations, such as the three-quarters guarantee, fearing they will lose their jobs or will not be accepted by the employer or association for future employment.”²⁵

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.²⁶

Fear of retaliation among workers is a constant concern — and one that is warranted. There is no question that many H-2 employers take full advantage of the power they hold over guestworkers. •



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.

25 *Changes Could Improve Services to Employers and Better Protect Workers*. GAO/HEHS 98-20, pp 60-61

26 David Bacon “Be Our Guests,” *The Nation*, September 27, 2004



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 \$5.15 per hour.

Legal Services attorneys have represented H-2A workers in hundreds of lawsuits against their employers. And more than 20 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.

To understand the wage and hour issues faced by workers, it is useful to examine two industries — forestry and seafood processing — that have become reliant on guestworkers for the majority of their labor. It is no coincidence that in both industries wage and hour violations are the norm, rather than the exception.

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 \$6 an hour to more than \$10 per hour, depending on the year and the state — 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. 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.²⁷ 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.

²⁷ Clark W. Lantz, et al., *A Guide to the Care and Planting of Southern Pine Seedlings*, United States Department of Agriculture, Forest Service Southern Region, Management Bulletin R8-MB39, Revised October 1996, page 24.



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

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 Southern Poverty Law Center 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 Center has concluded that this industry systematically underpays its workers.

Escolastico De Leon-Granados, an H-2B worker from Guatemala, said he was consistently 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 guestworkers, this exploitation has continued largely unfettered for many years.

In an attempt to reform this widespread wage abuse, the Southern Poverty Law Center has filed four class action lawsuits against large forestry contractors since 2004. To date, two of those lawsuits have been settled, resulting in contractors agreeing to pay back wages to class members and change the way they do business.²⁸ Two other cases are pending.²⁹ Substantially similar allegations have been made in lawsuits filed by other advocates, several of which were settled with payment or entry of judgment.³⁰

SEAFOOD WORKERS

In the seafood industry, workers in Virginia and North Carolina have filed at least 12 lawsuits against 10 companies since 1998. Most of the lawsuits contain virtually identical allegations: that workers were paid on a piece rate; that they did not earn the minimum wage; that there were unlawful deductions for tools, travel and uninhabitable housing taken from their pay; and that they were not paid overtime wages for hours worked over 40 in a week.³¹

28 *Salinas-Rodriguez v. Alpha Services LLC*, Civil Action No. 3:05-CV-440WHB-AGN, U.S. District Court for the Southern District of Mississippi, Jackson Division; *Recinos-Recinos v. Express Forestry*, Civil Action No. 05-1355-11(3), U.S. District Court for the Eastern District of Louisiana. As part of the settlement agreement with Express, the Southern Poverty Law Center agreed to include a statement from the company in any written material announcing the settlement. The statement says the “defendants have stated that they decided to settle this case to avoid the costs and hassles of future litigation.”

29 *Leon-Granados v. Eller and Sons Trees, Inc.*, Civil Action No. 1:05-CV-1473-CC, U.S. District Court for the Northern District of Georgia, Atlanta Division and *Rosiles-Perez v. Superior Forestry*, Civil Action No. 1:06-CV-0006U.S. District Court for the Middle District of Tennessee, Columbia Division

30 See *Perez-Perez, et al. v. Progressive Forestry Services, Inc., et al.*, Civ. No 98-1474-K1 (D. Or.); *Moreno-Leon v. Franklin Stanley*, U.S. District Court for the Western District of Arkansas, El Dorado Division, Case No. 99-1002; *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas; Case No. 03-6002; *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017, *Martinez-Mendoza v. Champion International Corporation*, 330 F.3d 1200 (11th Cir. 2003); *Lizarraga-Ruiz v. Georgia-Pacific Corp.*, 88 Fed.Appx. 382 (11th Cir. 2003)

31 See *Zamora v. Shores and Ruark Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia C98CV:501; *Maria Demesia Aboyte v. Shores*

Virtually all of these cases were settled before trial. While a few were settled on confidential terms, a number of the settlements required the payment of substantial sums of money to the workers. In one case, *Zamora v. Shores and Ruark Seafood, Inc.*, workers sued an employer that had been twice cited by the U.S. Department of Labor (DOL) for failing to pay minimum wage and overtime wages to its workers. Each time the company was fined by the DOL it continued this unlawful practice. Even so, the DOL continued to grant the company's requests to import H-2B workers to process seafood. In 1999, the company paid more than \$103,000, excluding attorneys' fees and costs, to settle a lawsuit filed by 51 workers.³² A second suit ended in the settlement of claims by an additional 10 workers.

These lawsuits and DOL enforcement actions, while limited in scope, illustrate that wage and hour abuses of guestworkers are not a question of a few "bad apple" employers. Rather, when an industry comes to largely rely upon extraordinarily vulnerable guestworkers for the bulk of its labor, there is a race to the bottom in terms of wages to be paid. This creates problems for the workers but also for employers who want to comply with the law, because they are left at a competitive disadvantage relative to employers who cheat their workers. •

Simón*

Simón was recruited in Mexico to work in the sweet pepper and jalapeño fields in Georgia. He worked long hours — up to 70 hours a week. He kept a notebook in which he wrote down the time of day when he started and stopped working so that he could compare it with his pay stub at the end of the week.

He found that the pay stubs did not include all of the hours he worked. Sometimes, as many as 30 hours per week were missing.

"I worried about this," he said. "I had left my town in Mexico to come work here because I needed the money to support my family, and they were not paying us for our work. They were not honoring the contract."

One night a Legal Services employee visited the camp where Simón and the other H-2A workers lived, and he learned that he had a right to earn the federal minimum wage for every hour worked. But when he spoke to his supervisor about the missing hours, he was told he could lose his job if he talked to Legal Services again.

He continued talking to Legal Services, though in another town. When Simón tried to come to the United States the following year, he discovered he had been blacklisted.

"When I talked with the contractor in Mexico, he said that I could not go back to work for the company. He told me it was because I had talked with Legal Services. I had other co-workers who had talked with Legal Services who had the same problem and were not allowed on the list to return to work."

and Ruark Seafood, Inc., U.S. District Court for the Eastern District of Virginia; *Alcaraz-Garcia v. Gloucester Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia, 4:00CV69; *Soto-Lopez v. J& W Seafood of Virginia, Inc.*, U.S. District Court for the Eastern District of Virginia, 3:98CV792; *Perez-Sandoval v. International Seafood Distributors, Inc.*, U.S. District Court for the Eastern District of Virginia, 3:99-cv-00691; *Perez-Segura v. Bay Water Seafood, Inc.*, U.S. District Court for the Eastern District of Virginia; *Quiroz-Losoya v. Shores And Shores, Inc. t/a Virginia Packing*, U.S. District Court for the Eastern District of Virginia, 99CV133; *Rosa Isabel Miranda Garcia v. Gloucester Seafood, Inc.*, United States District Court for The Eastern District Of Virginia, 4:03CV39; *Beltran Benitez, et al. v. Sea Safari, et al.*, U.S. District Court for the Eastern District of North Carolina, 2001; *Fonseca Aguilar, et al. v. Carolina Seafood Ventures, et al.*, U.S. District Court for the Eastern District of North Carolina, August 2002; In re *Stephenson*, U.S. Bankruptcy Court for the Eastern District of Northern Carolina, October 2002

32 See Lawrence Latane III, "Fifty-One Workers Will be Paid Back Wages", *Richmond Times Dispatch*, July 10, 1999

“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.”¹

As a practical matter, the substantive wage rates set forth

in the H-2 visa programs are illusory and unenforceable.²

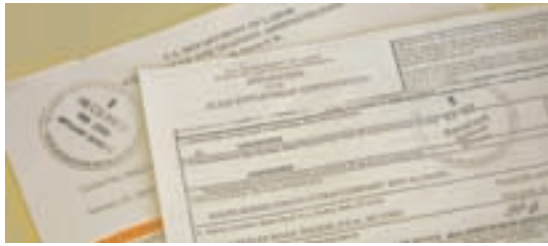
H-2B workers often face an even worse situation with regard to wages than H-2A workers. Under the law, they are entitled only to the “prevailing wage” for their work; there is no adverse effect wage rate for those workers. Of course, even though these workers are entitled to payment of prevailing wages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

In the forestry industry, prevailing wages in recent years have actually fallen, not only adjusted for inflation but in real terms. For example, in 2005 the prevailing wage rate for tree planters in all counties of Alabama was \$9.20 per hour; in 2006, the wage rate was only \$7.29 in Dale County, Alabama; other counties had similar decreases. There are two explanations for this trend. First, the DOL has recently modified its methodology for determining the prevailing wage in a way that is extremely favorable for employers.

Second, when an industry relies on guestworkers for the bulk of its workforce, wages tend to fall. Guestworkers are absolutely unable to bargain for better wages and working conditions. Over time, wages fall and the jobs become increasingly undesirable to U.S. workers, creating even more of a demand for guestworkers.

1 Bruce Goldstein, *Guestworker Policy: H-2A Program Adverse Effect Wage Rates Are Too Low*, Farmworker Justice, May 2006, available at www.fwjjustice.org/Immigration_Labor/H2abDocs/FAQAEWR.doc

2 See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guestworkers from Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J. 597-616; see also Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)



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. 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 percent 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 its need for workers and overstated 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.³³

In the H-2B program, there is no regulation of the number of hours that must be guaranteed to workers. The DOL, in fact, asserts that it has no authority to enforce the provisions of an H-2B contract under most circumstances. 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

33 Office of Inspector General, *Evaluation of the North Carolina Growers Association*, March 31, 2004. See also Leah Beth Ward *Lax Regulations Trouble Critics of Labor Pipeline, Desperate Harvest*, *Charlotte Observer*, November 1, 1999.

“Every one of us took out a loan to come here. We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie.”

under these circumstances. Fundamental to the problem is that the worker is not free to shop his labor to any other employer.

It is extremely common for seafood processing employers to seek more laborers than they can use. They routinely apply for workers in their plants for periods longer than needed for their seasons, as they are unsure exactly when their season will begin or end. As a result, many guestworkers have no work for three or four weeks at the beginning or end of their visa term. For low-wage workers desperately in debt, this can be devastating.

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 legal protections afforded to H-2A workers, such as free housing and eligibility for federally funded legal services.

Another common form of misclassification involves employers who 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. Again, there is virtually no recourse for a worker in this

Angela*

Angela was studying psychology in the Dominican Republic when she decided to become a guestworker in a New Orleans hotel, in part to earn money to pay medical bills for her cancer-stricken mother.

Like most guestworkers, Angela was promised plenty of work. She would need it, because she had taken on \$4,000 in debt to pay the fees necessary to obtain the job and the nine-month H-2B visa.

“Every one of us took out a loan to come here,” she said. “We had planned to pay back our debt with our job here. They told us we would have overtime, that we could get paid double for holidays, that we would have a place to live at low cost, and it was all a lie.”

When she arrived in New Orleans in April 2006, she was given a desk job at the hotel, earning \$6 an hour. She worked full-time, with some overtime, for the first month. But then her hours started dwindling; soon she was working only 15 to 20 per week, earning an average of \$120 per week. She hardly had enough money to eat three meals a day after paying for housing and transportation.

“We would just buy Chinese food because it was the cheapest. We would buy one plate a day for about \$11 and share it between two or three people. Sometimes we would eat bread and cheese. Sometimes we would make rice.”

Her visa did not allow her to seek other employment, not even a part-time job and she fell deeper in debt.

She felt trapped by debt and by the promise she had made: She and her mother had signed a guarantee that she would finish the contract — or pay \$10,000. If she could not pay, the recruiters would take her mother’s belongings.

“I felt like an animal without claws — defenseless. It is the same as slavery.”

“There are some people that believe the guestworker program is a good idea, but it is not. ... You put all your savings and hope into what this work promises and you accept the small amount of hours they give, the poor working conditions, and the low pay.”

Angela’s plans are ruined. “I cannot even talk to my mother about all of the troubles I have been having because I don’t want her to worry and feel sicker. This is the other part that I have to swallow. It’s like you are in hell and you are closed in and you don’t know where the exit is. It’s terrible.”

* Not real name



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

circumstance, as the DOL denies that it has any enforcement authority to address these kinds of abuses and H-2B workers are ineligible for federally funded legal services. As a practical matter, the 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 his home construction business, where they performed skilled carpentry work at far less than the prevailing wage.³⁴

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

34 Interview with Mary Lee Hall, Legal Aid of North Carolina



PART 7

Injuries without Effective Recourse

Guestworkers toil in some of the most dangerous occupations in the United States.³⁵ Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are more than 10 times the national average.³⁶ 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. Because workers' compensation is a state-by-state scheme, with varying rules, 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.³⁷

³⁵ Bureau of Labor Statistics, *Census of Fatal Occupational Injuries*, at 13 (2005) (Forestry, agriculture, and construction rank two, six, and ten, respectively, in the fatality rate.)

³⁶ *Id.*

³⁷ See Sarah Cleveland, Beth Lyon and Rebecca Smith, *Inter-American Court of Human Rights Amicus Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers' Migrant Status*, 1 *Sea of J. of Soc. Just.* 795 (2003). See also Cathleen Caron, *Portable Justice and Global Workers*, 40 *Clearinghouse Review* 549, XX (January-February 2007)



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.

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 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.”³⁸ (internal citations omitted)

Such policies obviously disproportionately impact 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.”³⁹

38 Cleveland, Lyon and Smith, *supra*. at 819

39 Tom Knudson and Hector Amezcua, “The Pineros, Part 1” *Sacramento Bee*, November 13, 2005

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.”

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.

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.

They also face the implied and real threat of blacklisting.

A 1999 study by the Carnegie Endowment for International Peace reported that “[b]lacklisting of H-2A workers appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment process. Workers report that the period of blacklisting now lasts three years, up from one year earlier in the decade.”⁴⁰

Filing a workers’ compensation claim is often the end of the only paying employment available to a worker. Workers generally file such a claim only when they perceive that the gravity of their injury will itself interfere with their ability to work again. If the injury appears temporary and the worker believes he will recover, he often takes the chance of not filing a claim to preserve his option for future employment. •

40 See Demetrios Papademetriou and Monica Heppel, *Balancing Acts: Toward a Fair Bargain on Seasonal Agricultural Workers*, *International Migration Policy Program, Carnegie Endowment for International Peace* (1999) p. 13



PART 8

Lack of Government 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 Department of Labor (DOL) declined by 14 percent between 1974 and 2004, and the number of completed compliance actions declined by 36 percent. 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.⁴¹ 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.”⁴²

This decline in enforcement has particularly grave consequences for guestworkers, who are far more vulnerable to abuses than U.S. workers and in great need of government protection.⁴³

Conspicuously absent from proposals to expand guestworker programs — including proposals to create hundreds of thousands, or millions, of new guestworker positions — is any discussion about a substantial increase in the federal budget for the DOL and the Occupational Safety and Health Administration to ensure that guestworkers are protected on their jobs.

The rights of guestworkers can be enforced in two ways: through actions taken by government agencies, mainly the DOL, and through lawsuits filed by private attorneys, federally funded Legal

41 Brennan Center for Justice, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, Economic Policy Brief, No. 3, September 2005

42 *Id.*

43 See Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. Int’l L. & Com. Reg. 521, 522 (2002)

Services (H-2A workers only) or non-profit legal organizations like the Southern Poverty Law Center.

Workers face high hurdles to obtaining justice through either method.

Government enforcement has proven largely ineffective. The DOL actively investigates only H-2A workplaces. In 2004 the DOL conducted 89 investigations into H-2A employers.⁴⁴ Today, there are about 6,700 businesses certified to employ H-2A workers.

There are currently about 8,900 employers certified to hire H-2B workers, but there do not appear to be any available data on how many investigations the DOL conducts of these employers. Evidence suggests it is far fewer than the number of H-2A employers investigated, particularly given the DOL's stance that it is not empowered to enforce the terms of an H-2B worker's contract. The Southern Poverty Law Center's extensive experience in the field suggests that there were not many.

Though violations of federal regulations or individual contracts are common, DOL rarely instigates enforcement actions. And when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers. The Government Accountability Office reported in 1997 that the DOL had never failed to approve an application to import H-2A workers because an employer had violated the legal rights of workers.⁴⁵

Government officials have demonstrated a lack of will to address even 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.⁴⁶

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



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.

44 Lornett Turnbull, "New State Import: Thai Farmworkers" *The Seattle Times*, February 20, 2005. See also Andrew J. Elmore, *Reconciling Liberty and Sovereignty in Nonprofessional Temporary Work Visa Programs: Toward a Non-subordination Principle in U.S. Immigration Policy* (unpublished 2007, on file with authors)

45 See General Accounting Office, *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers*, (December 1997)

46 Interview with Lori Elmer, Legal Aid of North Carolina

Guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.

Guatemalan men employed by this forestry company were killed on the way to work when their van crashed into a river in Maine.⁴⁷

As a practical matter, the nature of the guestworker program makes 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.

TRANSPORTATION COSTS

In addition, there are requirements that DOL refuses to enforce. In 2001, the 11th U.S. Circuit Court of Appeals, in *Arriaga v. Florida Pacific Farms*⁴⁸ found that guestworkers' payment of transportation and visa costs effectively brought their wages below the minimum allowed. The employer was thus obligated to reimburse workers those costs in the first week of work, to the extent that those expenditures effectively cut into the workers' receipt of the minimum wage. This is now settled law in the 11th Circuit, and other courts have followed with similar rulings.⁴⁹ However, even in the states within the 11th Circuit's jurisdiction — Alabama, Florida and Georgia — the DOL has refused to enforce the ruling and has failed to protect workers when they need it most.⁵⁰

The DOL also takes the position that it cannot enforce the contractual rights of workers, and it has declined to take action against employers who confiscate passports and visas.

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 — and even if private attorneys would take their cases — and most will not — guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights. In one lawsuit the Southern Poverty Law Center filed, a labor recruiter threatened to burn down a worker's village in Guatemala if he did not drop his case.⁵¹

While H-2A workers are eligible for representation by federally funded Legal Services lawyers, these lawyers are prohibited from handling class actions lawsuits. Given workers' enormous fears of retaliation and blacklisting, any system that relies on workers asserting their own legal rights is unlikely to bring about systemic change. Having access to class action litigation would at least

47 *Id.*

48 305 F.3d 1228 (11th Cir. 2002)

49 *De Luna-Guerrero et al. v. North Carolina Grower's Ass'n.*, 338 F. Supp. 2d 649, 662 (E.D. N.C. 2004) (H-2A guestworkers); *Martinez-Bautista v. D&S Produce*, 447 F. Supp. 2d 954, 963-964 (E.D. Ark. 2006) (H-2A guestworkers)

50 See, e.g. *Luna-Guerrero v. North Carolina Grower's Association*, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005)

51 *Recinos-Recinos v. Express Forestry, Inc.*, 2006 U.S. Dist. LEXIS 2510 (D.La. 2006)

permit cases to be brought by one or two workers brave enough to challenge the system.

In addition, H-2A workers are specifically exempted from the major statute designed to protect agricultural workers in the United States from abuse and exploitation — the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Adopted in 1983, it replaced the Farm Labor Contractors Registration Act of 1963, which was enacted in the wake of the Edward R. Murrow film about farmworkers, *Harvest of Shame*, aired by CBS during Thanksgiving in 1960. Among other things, the AWPA provides migrant farmworkers a legal mechanism to enforce the terms of the promises made to them and the other terms of their agreement in federal court. But the powerful protections of that law are not available to H-2A workers.

For H-2B workers, the situation is perhaps even more dire. Although they are in the U.S. legally and are financially eligible, they 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.

Typically, workers will make complaints only if they are so severely injured that they can no longer work, or once their work is finished. They quite rationally weigh the costs of reporting contract violations or dangerous working conditions against the potential benefits.

As a result, far too many workers are lured to the United States by false promises only to find that they have no recourse. •

Tobacco Workers

In 2005, H-2A farmworkers who had worked in Kentucky filed a complaint with the Department of Labor (DOL) about the conditions they had experienced on the job. The workers alleged that the tobacco grower illegally farmed out the workers to other growers who were not authorized to participate in the H-2A program. The workers further alleged that, after a period of heavy rains, the grower plowed under more than a third of her tobacco crop. The complaint stated that, because the grower now needed fewer laborers, she fired two of her H-2A workers on the pretext that they were doing poor work.¹

The fired workers were lucky enough to locate a legal services organization, which assisted them in filing a detailed eight-page complaint against the grower with the DOL. The workers complained about being illegally fired and about not being paid all the wages and reimbursements owed them under the H-2A program.

When the legal services lawyer periodically called the DOL to check on the status of the investigation, he was told inconsistent things, including that the investigator had gone out to conduct an immediate investigation and that the complaint had not yet been assigned to an investigator. In fact, the DOL waited nearly six months before sending an investigator to look into the allegations. During that six-month interval, the alleged legal violations became more than two years old — and the DOL has a policy that it will not investigate claims that are more than two years old. As a result of the DOL's failure to conduct a timely investigation, the workers' theoretical rights were effectively nullified.

¹ Workers' complaint and DOL response on file with the author.



PART 9

Labor Brokers

Many large employers who rely on guestworkers increasingly are attempting to avoid responsibility for unlawful practices by obtaining workers indirectly through a subcontractor. 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.

A lawsuit filed by the Southern Poverty Law Center (SPLC) against the food giant Del Monte vividly illustrates this problem.

The class action lawsuit was filed in 2006 on behalf of migrant farmworkers who were systematically underpaid while working in south Georgia for Del Monte subsidiaries. The plaintiffs are Mexican guestworkers as well as domestic farmworkers who were recruited to plant and harvest vegetables at Del Monte operations.⁵²

These workers were promised and were entitled to receive the Adverse Effect Wage Rate, which is established by the Department of Labor (DOL) each year to ensure that the employment of foreign workers does not drive down wages paid to U.S. workers. The plaintiffs, who are indigent farmworkers, left their homes and families and spent considerable sums of money to travel to Georgia to work for Del Monte. In their suit, the workers assert that they were consistently cheated out of the wages to which they were entitled. But despite the fact that they labored on Del Monte farms and lived in housing provided by Del Monte, the company claims none of the workers were its employees. The district court has yet to rule on the merits of the workers' wage claims.

Del Monte, in fact, accepts no responsibility for the workers because Del Monte was not the company that petitioned the government for the H-2A workers. The petitioner, rather, was a crew leader — a person with no fields, no crop, no farm, no housing and no capital.

Increasingly, the people bringing guestworkers into the United States are not the companies that end up using the labor, even though the entities applying to DOL for permission to import workers

⁵² *Hector Luna, et al. v. Del Monte Fresh Produce (Southeast) Inc., et al.*, U.S. District Court for the Northern District of Georgia, Atlanta Division, Case No. 1:06-cv-02000-JEC

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.

are required to prove a shortage of U.S. workers for available positions. Given that labor brokers have no actual “jobs” available, it is difficult to fathom that they are suffering from a shortage of workers. The DOL is approving these applications anyway.

In Florida, the majority of H-2A applications are now submitted through such intermediaries. This trend greatly concerns guestworker advocates because it permits the few protections provided for these workers to be vitiated in practice. Having a legal remedy against a labor contractor with no assets is no remedy at all.

Two recent lawsuits illustrate how labor brokers traffic in vulnerable foreign workers whom they hire out to a variety of different employers. These 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 they are not paid and their movements are restricted, they typically have no recourse whatsoever.

GUATEMALANS HELD CAPTIVE

According to a lawsuit filed in February 2007, 12 Guatemalan guestworkers claim they were held captive by agents for Imperial Nurseries, one of the nation’s largest wholesalers of plants and shrubs. 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. 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.⁵³

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.”⁵⁴

In a similar case, lawyers with Legal Aid of North Carolina are representing a group of Thai workers who have filed for immigration relief as victims of trafficking. These workers also have filed a federal lawsuit against a company called Million Express Manpower Inc. They claim the company held them captive — sometimes watching over them with guns — in North Carolina and in New Orleans, where they were transported to help demolish flooded buildings after Katrina.

These cases are symptomatic of a flawed program that encourages the private trafficking of foreign workers with barely any government oversight. •

53 Nina Bernstein, “Federal Lawsuit to Accuse Nursery of Bait-and-Switch with Guatemalan Workers,” *The New York Times*, Feb. 8, 2007

54 Id.



PART 10

Systematic Discrimination

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

In fact, one federal appellate court has placed its stamp of approval upon such discrimination. In *Reyes-Gaona v. NCGA*,⁵⁵ 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 recruits 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. 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 Equal Employment Opportunity Commission (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., 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. That case is pending in federal court.⁵⁶

Similarly, clients of the Southern Poverty Law Center who worked for Decatur Hotels, a luxury hotel chain in New Orleans, in February 2007 filed a complaint with the EEOC charging systematic discrimination on the basis of national origin. In that case, the employer filed three sepa-

55 250 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)

56 See *Olvera-Morales v. Sterling Onions*, 322 F. Supp. 211 (N.D.N.Y. 2004)

rate applications with the DOL to seek workers. Each job classification in the applications was to be paid at a different wage — \$6.02 per hour for Bolivians, \$6.09 per hour for Dominicans and \$7.79 per hour for Peruvians. The rate that workers were paid was based solely on their national origin, regardless of the kind of work they actually performed.

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 percent reported that sexual harassment was a major problem on the job.⁵⁷

In 1995, the EEOC 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.”⁵⁸ 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.⁵⁹

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



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.

* Not real name

57 Cited in *Lessons from the Fields: Female Farmworkers and the Law*, Maria Ontiveros, 55 MELR 157, 168 (2003) (study by Maria Elena Lopez Trevino, *The Needs and Problems Confronting Mexican American and Latin Women Farmworkers: A Socioeconomic and Human's Right Issue* (1995)(unpublished on file with author); Maria Elena Lopez Trevino, *A Radio Model: A Community Strategy to Address the Problems and needs of the Mexican American Women Farmworkers* (1989 MS thesis, Cal State University)

58 William R. Tamayo, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law: The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis L Rev. 1075, 1080. (2000)

59 Id.

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.”

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.⁶⁰

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.get-a-worker.com, www.labormex.com, www.landscapeworker.com or www.mexican-workers.com. 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.”

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

60 Interview with Carol Brooke, North Carolina Justice Center; settlement documents on file with author.



PART 11

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.

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 has failed to promulgate any regulations, 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.

In addition, housing for both H-2A and H-2B workers is often located in extremely isolated rural locations, subjecting workers to other kinds of difficulties. 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.

These conditions not only create daily hardships for guestworkers, they increase employers' already formidable power over them.



Migrant workers historically have lived in squalid conditions. Here, old buses were used to house workers in the 1950s.

Hernan was one of six Mexican H-2B workers who traveled to the United States in September 2006 under a contract that called for them to work in the forestry industry in Arkansas. Upon arrival, their employer asked for their passports and visas to “make copies” but never returned them.

Instead of Arkansas, they were taken to a sweet potato farm in Louisiana and left there to work. As it turned out, they were doing H-2A work on H-2B visas and for an employer who had not applied for their visas. Under the law, H-2A workers have more rights and benefits than H-2B workers.

The Mexicans lived in an abandoned two-story house with no door on the hinges and no glass, except for a few broken shards, in the windows.

NO ELECTRICITY

“There was no electricity when we first lived there,” Hernan said. “There was no heat. There were a few mattresses but no blankets. There were only a few pieces of furniture. At night we would push them against the window frames to keep the air out because there was no glass. We told the company we could not sleep well enough at night to even work. When it rained the house leaked. We had to find corners in the house to hide so we would not get wet.

“We were picking sweet potatoes and were paid by the bucket. The first week we were not paid. The second week we were paid \$70. We had been working every day from 5 a.m. to 5 p.m., with 30 minutes for lunch. We had to find a ride to Wal-Mart to get bedding. We hardly had enough money.”

Eventually, the original contractor returned to Louisiana because he heard the workers were complaining about low wages and wanted their passports back so they could go home. The contractor told them that anyone who didn’t like the work could give him \$1,600 and he would return their passports. The workers did not have the money, so they left without telling the contractor — without money and without their passports. Their wives in Mexico began receiving threats from the contractor, who has left messages at a community phone saying that their husbands must each pay him \$2,000 or he will report them to immigration for deportation or incarceration. These six workers are now trying to find a way to get their legal documents returned to them.

A group of about 20 guestworkers from Thailand recently faced an equally 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.⁶¹ When they arrived in August 2005, one of the men acting as a labor broker confiscated their passports, visas and return airplane tickets.

⁶¹ *Muangmol Asanok, et. al. vs. Million Express Manpower Inc. et. al.*, filed Feb. 12, 2007 in the U.S. District Court for the Eastern District of North Carolina

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.

WATCHED BY GUARDS

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.

In 2003, a group of women from Hidalgo, Mexico, traveled to Cocoa, Fla., on H-2A visas to harvest tomatoes. They did not know they would be locked up. “El patron would put a lock on the gate where our trailers were, and he or a trusted worker were the only ones who could open it,” one of the women told the *Palm Beach Post*. Another said, “After a time, they would not let us communicate with other people. Everything was locked up with a key.”⁶²

The Hidalgo women were lucky enough to find lawyers who could help them hold their employer accountable through a class action lawsuit (the settlement of which is confidential). But too often, workers do not have access to legal assistance and must choose between continuing to endure such deplorable abuses or attempting to escape into a foreign land without passports, money, contacts or tickets home.

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



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

62 Christine Evans, “Cocoa Farm Imprisoned Women, Suit Says,” *Palm Beach Post*, Dec. 7, 2003

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 should not be expanded or used as a model for immigration reform. If this program is permitted to continue at all, it should be radically altered to address the vast disparity in power between guestworkers and their employers.

RECOMMENDATIONS

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

- Guestworkers should be able to obtain visas that do not tie them to a specific employer. 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 allowing 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.
- Employers should be required to bear all the costs of recruiting and transporting guestworkers to this country. Federal regulations should be consistent with the 11th U.S. Circuit Court of Appeals decision in *Arriaga v. Florida Pacific Farms*. 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.

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- Congress should require the Department of Labor to promulgate labor regulations for H-2B workers that are comparable to the H-2A regulations. It is unconscionable that H-2B workers do not have even the minimal protections available to H-2A workers.
 - 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 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 nondiscrimination.

RECOMMENDATIONS

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 allowing 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.

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- There should be a massive increase in funding for federal agency enforcement of guestworker protections. Guestworkers are the most vulnerable workers in this country, but there is scant government enforcement of their rights.
 - The Department of Labor should be authorized to enforce all guestworker agreements. The DOL takes the position that it does not have legal authority to enforce H-2B guestworker contracts.
 - The Department of Labor should create a 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 DOL to bring in new workers.

RECOMMENDATIONS

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 are currently not eligible for legal aid services.
- Because of the unique challenges faced by guestworkers, the restriction on federally funded legal services that prohibits class action representation should be lifted.
- Congress should provide a civil cause of action and criminal penalties for employers or persons who confiscate or hold guestworker documents. This common tactic is designed to hold guestworkers hostage.
- Congress should provide a federal cause of action allowing all guestworkers to enforce their contracts.

These reforms are overdue. For too long, our country has benefited from the labor provided by guestworkers but has failed to provide a fair system that respects their human rights and upholds the most basic values of our democracy. The time has come for Congress to overhaul our shamefully abusive guestworker system. •

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CLOSE TO SLAVERY

Guestworker Programs in the United States

WRITTEN BY MARY BAUER

EDITOR • BOOTH GUNTER

RESEARCHER • SARAH REYNOLDS

DESIGN DIRECTOR • RUSSELL ESTES

DESIGNERS • VALERIE DOWNES, CRYSTAL PHILLIPS

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400 WASHINGTON AVENUE
MONTGOMERY, ALABAMA 36104
WWW.SPLCENTER.ORG