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# INHOSPITABLE HOSTS: FUNDAMENTAL FLAWS IN RECRUITMENT PRACTICES OF H-2A GUEST WORKERS AND RECOMMENDATIONS FOR CHANGE

*Elyse T. Watkins\**

## I. INTRODUCTION – RECRUITMENT REVEALED

Every year thousands of transnational, temporary agricultural workers leave their home country to harvest crops for ten months in the United States (“U.S.”).<sup>1</sup> These migrant workers are employed in low-wage, temporary jobs in the U.S. on H-2A visas for agricultural work.<sup>2</sup> Although the H-2A program includes some basic requirements to protect foreign workers from exploitations, the structure of the H-2A program—including the dependence of H-2A workers on their employers—is inherently flawed and leads to a system filled with widespread abuse.<sup>3</sup>

Often, a workers’ experience with U.S. agribusiness begins with the recruiter. The recruiter’s level of involvement in the recruitment and migration process varies. Some recruiters simply connect the worker with the employer and petition for a visa interview at a U.S. consulate, leaving the worker to sort out the logistics.<sup>4</sup> Another recruiter may (might) organize passport documentation, setup consular appointments, arrange travel logistics, and provide room and board throughout the process.<sup>5</sup> Although recruiters can protect migrant workers by removing them from

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<sup>1</sup> *H-2A Guestworker Program*, FARMWORKER JUST., <http://www.farmworkerjustice.org/content/h-2a-guestworker-program> (last visited Nov. 10, 2015).

<sup>2</sup> Etan Newman, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUST.,

<http://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf> (last visited Nov. 10, 2015).

<sup>3</sup> *H-2A Guestworker Program*, *supra* note 1.

<sup>4</sup> *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. 13, [http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed\\_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf](http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf) (last visited Nov. 10, 2015) [hereinafter *Recruitment Revealed*].

<sup>5</sup> *Id.*

abusive workplaces, or even organizing repatriation, the migrants' dependence on them for so many services also creates many opportunities for exploitation and abuse.<sup>6</sup> Creating debt through exorbitant fees incurred by the worker at the point of recruitment services is a major source of the exploitation.<sup>7</sup> These debts can subsequently tie the worker to both an exploitive employer and recruiter.<sup>8</sup>

The current recruitment process is often opaque, sometimes corrupt, and largely lacking in accountability. "The lack of transparency in the process obscures worker exploitation and shields those responsible for the abuse from liability."<sup>9</sup> Additionally, the actions of recruiters in foreign countries pose a multijurisdictional enforcement issue.<sup>10</sup> Thus, "the existing recruitment system is an intricate web that is often difficult for workers and their advocates to untangle."<sup>11</sup> The complex recruitment system, in addition to the legally documented H-2A guest workers exclusion from U.S. labor and employment laws, make these guest workers feel less like guests and more like intruders—despite carrying government issued work visas authorizing them to work within the United States.<sup>12</sup> The U.S., therefore, should provide oversight, protections, and enforcement of the H-2A visa program.

Part II of this article will address the history of the agricultural guest workers in the United States, as well as the legal rights of the guest workers provided by the H-2A visa. Part III illustrates the realities and abuses of H-2A visa holders by labor recruiters and employers. Part IV demonstrates the need for effective changes to the H-2A program. Finally, part V recommends a dual approach to increase oversight, strengthen protections, and better enforce the H-2A system.

<sup>6</sup> Dovelyn Rannveig Agunias, *What We Know: Regulating the Recruitment of Migrant Workers*, MIGRATION POLICY INST. (Sept. 2013), <http://www.migrationpolicy.org/research/what-we-know-regulating-recruitment-migrant-workers>.

<sup>7</sup> Dovelyn Rannveig Agunias, *What We Know About Regulating the Recruitment of Migrant Workers*, 6 MIGRATION POL'Y INST. 4 (Sept. 2013), available at <http://www.migrationpolicy.org/research/what-we-know-regulating-recruitment-migrant-workers> (follow hyperlink "download brief").

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Recruitment Revealed*, *supra* note 4, at 12.

<sup>10</sup> Newman, *supra* note 2, at 22.

<sup>11</sup> *Recruitment Revealed*, *supra* note 4, at 12.

<sup>12</sup> Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program's Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 186 (2004).

## II. THE H-2A AGRICULTURAL GUEST WORKER PROGRAM

### A. *The History of Agricultural Guest Worker Programs*

#### 1. *Slave Labor*

The search for cheap farm labor nearly always begins abroad. Since the beginning of colonization, the importation of slavery enabled colonies to exploit a productive workforce while minimizing labor costs. When the international slave trade ended in the United States in 1808, internal slave trading continued, and the slave population would eventually peak at four million before abolition by the Thirteenth Amendment in 1865.<sup>13</sup> Similar issues occurred in the nineteenth century as growers established farms on the frontier using low paid Chinese, Filipino, and Japanese workers.<sup>14</sup> These foreign farm laborers had weak immigration statuses, economic hardships, and faced racial discrimination, leading to the deprivation of bargaining power and political clout with the United State government.<sup>15</sup>

#### 2. *The First Bracero Program*

The first bracero program was an agreement between the United States and Mexico in 1917, which allowed more than 70,000 Mexican farmworkers to enter the U.S. temporarily to work on sugar, beet, and cotton farms.<sup>16</sup> The bilateral agreement was made to supplement a labor shortage crisis in the agriculture industry caused by World War I.<sup>17</sup> Although the program ended in 1921, many of the workers, known as Braceros, ( meaning “one who works with his arms” in Spanish) stayed in the United States because employers refused to pay for their transportation home.<sup>18</sup> Subsequently, when the Great Depression occurred, foreign

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<sup>13</sup> *The Abolition of the Slave Trade: Introduction*, N.Y. PUB. LIBRARY, <http://abolition.nypl.org/home/> (last visited Nov. 10, 2015); Lincoln Mullen, *These Maps Reveal How Slavery Expanded across the United States*, SMITHSONIAN.COM (May 15, 2014), <http://www.smithsonianmag.com/history/maps-reveal-slavery-expanded-across-united-states-180951452/?no-ist; Amendment XIII: Abolition of Slavery>, NAT'L CONSTITUTION CTR., <http://constitutioncenter.org/constitution/the-amendments/amendment-13-slavery-abolished> (last visited Nov. 10, 2015).

<sup>14</sup> PHILLIP MARTIN, IMPORTING POVERTY?: IMMIGRATION AND THE CHANGING FACE OF RURAL AMERICA 20-23 (2009).

<sup>15</sup> Newman, *supra* note 2, at 12.

<sup>16</sup> MARTIN, *supra* note 14, at 23-24.

<sup>17</sup> Newman, *supra* note 2, at 12.

<sup>18</sup> *Id.*

workers were seen as a threat to domestic workers, and subsequently nearly a half-million of the former Braceros were repatriated to Mexico.<sup>19</sup>

### 3. *A New Bracero Program*

The next bracero program was an agreement between the United States and Mexico in 1942, which was initially designed to bring a few hundred Mexican laborers to harvest sugar beets in California.<sup>20</sup> Like the first program, the agreement was designed to ameliorate the labor shortage caused by World War II by allowing U.S. employers to import temporary agricultural laborers from Mexico.<sup>21</sup> Despite the agreement's modest beginning, at its peak it drew more than 400,000 workers a year across the border.<sup>22</sup> By the time of the program's abolition in 1964, Mexican workers had filled 4.5 million jobs.<sup>23</sup>

From one perspective, the Braceros merely replaced the labor of men sent off to war. From another perspective, the Braceros replaced and encouraged bias against organized black farmworkers.<sup>24</sup> "Accustomed to workers disciplined by the starvation wages of the Depression years, growers were outraged to find black workers uncooperative and organized. They demanded the importation of foreign workers who could be deported for refusing to work, and their demands were heeded."<sup>25</sup> Thus from the beginning, the purpose of importing Mexican farmworkers was to exploit them for profit.

The bracero program had legal protections in place for Mexican farmworkers, such as the available methods of recruitment, transportation, standards of health care, wages, housing, food, and the number of hours

<sup>19</sup> Garry G. Geffert, *H-2A Guestworker Program: A Legacy of Importing Agricultural Labor*, in *THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY* 113, 115 (Charles D. Thompson & Melinda F. Wiggins eds. 2002); *Teaching*, BRACERO HIST. ARCHIVE, <http://braceroarchive.org/teaching> (last visited Nov. 10, 2015); Guerra, *supra* note 12, at 188.

<sup>20</sup> Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, S. POVERTY L. CTR. 3 (2013), <http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf>.

<sup>21</sup> Newman, *supra* note 2, at 12; Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 190, 194 (Juan F. Perea ed. 1997).

<sup>22</sup> Bauer, *supra* note 20, at 3.

<sup>23</sup> *Id.*

<sup>24</sup> Guerra, *supra* note 12, at 189.

<sup>25</sup> *Id.* (quoting Cindy Hahamovitch, *Standing Idly By: "Organized" Farmworkers in South Florida During the Depression and World War II*, in *THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY* 89, 89 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds. 2002)).

the Braceros were allowed to work.<sup>26</sup> The Mexican government even demanded that there should be no discrimination against Braceros.<sup>27</sup> Despite these regulations, the bracero program became notorious for the widespread abuse of foreign workers due to growers and the U.S. government ignoring the regulations, thereby subjecting migrant laborers to the most oppressive working environments.<sup>28</sup> Because of their inability to read in English, most Braceros were unaware of the terms of their contracts.<sup>29</sup> For example, many Braceros were cheated on their wages, lived in unsanitary conditions, were transported in unsafe vehicles, and denied access to healthcare.<sup>30</sup>

Due to this lack of bargaining power, Braceros were unable to increase their wages, which in turn caused unattractive, stagnated prevailing wages for domestic workers as well.<sup>31</sup> Thus, the availability of Braceros undermined the ability of U.S. workers to demand higher wages. Consequently, Congress abolished the program in 1964, but foreign workers were still imported under the H-2 programs, which were created in 1943 when the Florida sugar cane industry hired Caribbean workers to cut sugar cane on temporary visas.<sup>32</sup>

The H-2 guest worker programs were similar to the bracero program, but lacked government-to-government agreements.<sup>33</sup> In 1986, the H-2 program was revised and changed significantly as part of the Immigration Reform and Control Act, which simplified the application process and separated the H-2 program into two temporary worker programs: H-2A for agricultural workers and H-2B for non-agricultural workers.<sup>34</sup> In 2012, the United States issued about 65,000 H-2A visas.<sup>35</sup> In continuing its predecessor's traditions, the H-2A guest worker program is afflicted by some of the same problems as the discredited bracero program.

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<sup>26</sup> Bauer, *supra* note 20, at 4; Guerra, *supra* note 12, at 190.

<sup>27</sup> Carrasco, *supra* note 21, at 195.

<sup>28</sup> Newman, *supra* note 2, at 12; Guerra, *supra* note 12, at 190.

<sup>29</sup> Bauer, *supra* note 20, at 4.

<sup>30</sup> Newman, *supra* note 2, at 12.

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.*; Bauer, *supra* note 20, at 4.

<sup>33</sup> Newman, *supra* note 2, at 13.

<sup>34</sup> Bauer, *supra* note 20, at 5; Guerra, *supra* note 12, at 191.

<sup>35</sup> Alan Gomez, *In Immigration Fight, Farm Visas Provide an Opening*, USA TODAY (Mar. 17, 2013, 5:20 PM), <http://www.usatoday.com/story/news/nation/2013/03/17/immigration-guest-workers/1946699/>.

B. *The H-2A Visa*

The McCarran–Walter Immigration and Nationality Act established the current H-2A guest worker program in 1952, and allows the Attorney General to issue visas for temporary agricultural labor.<sup>36</sup> H-2A visas are temporary visas that allow United States employers to hire temporary foreign workers for agricultural jobs in the United States if there are not enough domestic workers available to do those jobs.<sup>37</sup> The purpose is “to assure agricultural employers an adequate labor force while at the same time protecting the jobs of U.S. workers.”<sup>38</sup> Accordingly, domestic employers who cannot find or retain local employees for low wage agricultural work apply with the United States Government to hire foreign workers, with 83% of these workers coming from Mexico.<sup>39</sup> The Immigration Reform and Control Act of 1986, which simplified the application process for an H-2A visa, later reformed the Immigration and Nationality Act.<sup>40</sup>

To acquire an H-2A visa, an employer first applies and gains approval from the Department of Labor and then files the application “stating that there are not sufficient workers who are able, willing, qualified, and available, and that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.”<sup>41</sup> This adverse effect is the “downward pressure on wages, associated with the hiring of temporary foreign workers.”<sup>42</sup> Once the Department of Labor certifies a lack of domestic workers, the employer obtains approval from the Department of Homeland Security and then acquires the visas from the State Department.<sup>43</sup>

<sup>36</sup> Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2015).

<sup>37</sup> *Jornaleros Safe*, JORNALEROS SAFE (Apr. 2013), [http://www.globalworkers.org/sites/default/files/Infographic\\_Jornaleros-SAFE.pdf](http://www.globalworkers.org/sites/default/files/Infographic_Jornaleros-SAFE.pdf).

<sup>38</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-89-3, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS, at 12 (1988), *available at* <http://www.gao.gov/assets/150/147036.pdf>.

<sup>39</sup> 8 U.S.C. § 1101; JORNALEROS SAFE, *supra* note 37.

<sup>40</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301 (codified as amended at 8 U.S.C. § 1188 (2000)); Guerra, *supra* note 12, at 191.

<sup>41</sup> *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, UNITED STATES DEP'T OF LABOR, <http://www.dol.gov/elaws/elg/taw.htm> (last updated Sept. 2009).

<sup>42</sup> Bauer, *supra* note 20, at 6.

<sup>43</sup> *Executive Summary: Mexican H2A Farmworkers in the U.S.: The Invisible Workforce*, JORNALEROS SAFE 8, <http://www.globalworkers.org/sites/default/files/EXECUTIVE%20SUMMARY%20Jornaleros%20SAFE.pdf> (last visited Nov. 10, 2015).

Federal laws and Department of Labor regulations do exist to protect H-2A workers from exploitation, as well as to safeguard U.S. workers from adverse impacts.<sup>44</sup> 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 Department of Labor] and state agencies; (b) the state or federal minimum wage; or (c) the ‘adverse effect wage rate.’”<sup>45</sup> This prevents the undercutting of domestic workers’ wages and the offering of substandard wages to foreign workers.<sup>46</sup> Many employers, however, violate wage requirements.<sup>47</sup>

H-2A workers are legally entitled to receive at least three-fourths of the total hours promised in their contract (the “three-fourths guarantee”).<sup>48</sup> The three-fourths guarantee requires that employers provide recruited workers with employment opportunities for at least three-quarters of the number of hours in the job offer, or otherwise pay for any deficiency, with an exception for “Acts of God.”<sup>49</sup> This provision protects against “over-recruitment,” which drives down wages, and assures migrants who travel long distances that the job will be worthwhile.<sup>50</sup> Like the wage violations, however, “many [H-2A] workers are not paid [what] they are promised under the three-fourths guarantee.”<sup>51</sup>

H-2A workers must receive free housing in good condition, as well as meals, or access to a cooking facility, for the period of the contract.<sup>52</sup> These requirements prevent hardships and homelessness due to the lack of “temporary accommodations in rural areas.”<sup>53</sup> Too often, however, the housing requirement is not met and workers live in poor and unsanitary conditions due to a lack of oversight.<sup>54</sup> Furthermore, farm owners prevent farmworker advocates from “meeting [with] workers in their homes” because the owners claim the home and land “is their private property.”<sup>55</sup>

H-2A visa holders must receive workers’ compensation benefits for medical costs, payment for lost time from work, and payment for any

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<sup>44</sup> See 20 C.F.R. § 655.122 (2015); 45 C.F.R. § 1626.11 (2015).

<sup>45</sup> Newman, *supra* note 2, at 15.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 20 C.F.R. § 655.122(i).

<sup>49</sup> Newman, *supra* note 2, at 15.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 20 C.F.R. § 655.122(d) (2015); 20 C.F.R. § 655.122(g) (2015).

<sup>53</sup> Newman, *supra* note 2, at 15-16.

<sup>54</sup> See *id.* at 16.

<sup>55</sup> *Id.*



permanent injury.<sup>56</sup> The inclusion of workers' compensation is designed to prevent the burden of healthcare for work related injuries from falling on both domestic and foreign workers.<sup>57</sup> In practice, however, "employers [can] send injured foreign workers home" and thereby successfully block the foreign worker's access to the workers' compensation benefits.<sup>58</sup>

H-2A workers must be reimbursed for the cost of travel from the worker's home to the job as soon as the worker finishes fifty percent of the contract period.<sup>59</sup> This requirement enables the recruitment of migrant workers from outside of an employer's immediate location, reduces the traveling debts incurred by H-2A workers on their journey to the United States, and guarantees that foreign workers can afford to return home.<sup>60</sup> Additionally, H-2A visa holders must be protected by the same health and safety regulations as other workers, and are eligible for federally funded legal services concerning matters related to their employment as H-2A workers.<sup>61</sup>

Farm owners must offer wages, conditions, benefits, and follow certain procedures that protect domestic farmworkers.<sup>62</sup> Employers are prohibited from discriminating against domestic workers and must "replace any H-2A worker with an available domestic worker, up to the mid-point of the H-2A worker's contract period."<sup>63</sup> Thus, H-2A visa holders are not guaranteed employment through the contract end date until the mid-point is reached. Employers must also circulate job offers through the U.S. Employment Service and participate in recruitment practices, like placing local newspaper or radio ads, in order to attempt to hire domestic workers.<sup>64</sup>

Positive recruitment for domestic workers, however, rarely happens in a manner likely to lead to the hiring of local workers. Employers place tiny classified ads that run during the middle of the week, or play radio commercials that run early in the morning.<sup>65</sup> Other strategies used include

<sup>56</sup> See 20 C.F.R. § 655.122(e) (2015).

<sup>57</sup> Newman, *supra* note 2, at 16.

<sup>58</sup> *Id.*

<sup>59</sup> 20 C.F.R. § 655.122(h) (2015).

<sup>60</sup> Newman, *supra* note 2, at 16.

<sup>61</sup> 20 C.F.R. § 655.122(a) (2014); 45 C.F.R. § 1626.11(a) (2014).

<sup>62</sup> U.S. GENERAL ACCOUNTING OFFICE, GAO/PEMD-89-3, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS 13 (1988), available at <http://www.gao.gov/assets/150/147036.pdf>.

<sup>63</sup> Guerra, *supra* note 12, at 192-93.

<sup>64</sup> *Id.* at 193.

<sup>65</sup> *Id.*

dreadful descriptions of the job to discourage any local interest, and to conduct interviews in a hostile manner.<sup>66</sup>

Unfortunately, too many of the protections available to H-2A workers exist only on paper. Despite the available protections, when an H-2A worker finds that the work situation is abusive and/or not as promised, the only realistic recourse available to the worker is to go home.<sup>67</sup> When the worker leaves prematurely, the worker places himself in a disadvantageous position 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” asking that the worker return.<sup>68</sup> Thus, the H-2A worker’s dependence on the sponsorship of the employer for future employment creates a situation in which an employee is much less likely to complain about wage violations or other abuses.

In addition to the dependence on the employer for future work opportunities in the United States, other obstacles H-2A farmworkers face include ineffective enforcement and exclusion from U.S. labor laws.<sup>69</sup> The number of scattered regulations, combined with the fact that there are several bureaucratic levels with various governmental departments involved in the enforcement of H-2A regulations, leaves both the H-2A visa holder and the government agent in obscurity, creating difficulty in determining compliance.<sup>70</sup> Furthermore, the H-2A system says absolutely nothing about remedying noncompliance.<sup>71</sup> Even more shocking, the Department of Labor allows self-investigation by employers accused of violating regulations.<sup>72</sup> The ambiguity and lack of guidance creates a bias in favor of the employer.

Although H-2A visa workers are now provided the ability to sue in federal court if the terms and conditions of their employment contract are violated, the filing of a federal lawsuit is not a practical option.<sup>73</sup> First, most H-2A visa workers are unfamiliar with their rights, and are therefore unaware of when and how they can enforce their rights through private litigation.<sup>74</sup> Second, H-2A workers are entitled to federally funded Legal

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<sup>66</sup> *Id.* at 194.

<sup>67</sup> Bauer, *supra* note 20, at 6.

<sup>68</sup> *Id.*

<sup>69</sup> Guerra, *supra* note 12, at 195.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 196.

<sup>72</sup> *Id.*

<sup>73</sup> 45 C.F.R. § 1626.11(a) (2014); Bauer, *supra* note 20, at 40.

<sup>74</sup> Bauer, *supra* note 20, at 40.

Services lawyers, but are prohibited from bringing class action lawsuits.<sup>75</sup> Finally, due to the workers' fears of retaliation and blacklisting by their employer, whom the migrant worker is tied to, a worker is unlikely to bring a case challenging the system alone.<sup>76</sup>

H-2A farmworkers are also excluded from U.S. labor laws.<sup>77</sup> H-2A visa holders are exempt from the National Labor Relations Act, which provides protections for workers who strike, organize, and bargain collectively.<sup>78</sup> H-2A visa holders are also exempt from the overtime provisions of the Fair Labor Standards Act, as well as the Migrant and Seasonal Agricultural Worker Protection Act.<sup>79</sup> Although H-2A workers are eligible for legal representation in federal court by Legal Aid attorneys, employers deny communication between Legal Services lawyers and H-2A workers.<sup>80</sup> Thus, when the terms of their contract are violated, H-2A workers' access to the legal remedy is blocked by an employer who can fire, blacklist, and send home a temporary farmworker who most likely has acquired debts during the recruitment process.

### III. RECRUITMENT REALITIES AND ABUSES OF THE H-2A VISA HOLDER

#### A. *The Private Recruitment Process*

As globalization progresses, workers are eager to move across national borders in order to secure employment unavailable in their locality. Within this labor market, recruitment bridges the gap between the employer and prospective migrant workers.<sup>81</sup> The role of the recruiter is to guide the migrant worker through the immigration process, match the worker with an employer, and inform the worker of the job and living conditions.<sup>82</sup> Thus, when a domestic employer has received certification for a certain number of H-2A visas, an employer usually hires labor recruiters to locate the workers who will apply for these visas.

<sup>75</sup> 45 C.F.R. § 1626.11(a); Bauer, *supra* note 20, at 40.

<sup>76</sup> Bauer, *supra* note 20, at 40-41.

<sup>77</sup> See Guerra, *supra* note 12, at 197.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 45 C.F.R. § 1626.11(a); Guerra, *supra* note 12, at 197.

<sup>81</sup> Agunias, *supra* note 7, at 2.

<sup>82</sup> *Id.*

Generally, recruiting is irregular and informal.<sup>83</sup> The level of involvement by labor recruiters in the recruitment and migration process varies widely. “Some recruiters organize the passport paperwork, the consular appointment, travel, and room and board during the process. Other recruiters simply connect the worker with the employer by petitioning for a visa interview at a U.S. consulate in Mexico, but leave the worker to arrange all other logistical components.”<sup>84</sup> In addition to using recruiters, employers sometimes use staffing agencies and lawyers to act as recruiters by either directly locating the migrant agricultural worker, or by subcontracting with a recruiter to find workers.<sup>85</sup> Nearly all H-2A employers rely on recruiters to find available agricultural workers in their home countries and organize their visas and transportation to their employment in the fields.<sup>86</sup>

There are several models of recruitment used in the H-2A visa system. The first is the employer-Mexican recruiter-worker model.<sup>87</sup> Here, the employer contracts directly with Mexico-based recruiters and the recruiter then locates workers to fill the job.<sup>88</sup> The second is the employer-American recruiter-Mexican recruiter-worker model.<sup>89</sup> The employer hires a U.S. based recruiter who subcontracts a Mexico-based recruiter to assist in the efforts to fill the employer’s job vacancies.<sup>90</sup> The third is the employer-American recruiter-American recruiter-Mexican recruiter-worker model.<sup>91</sup> Here, the employer hires an American recruitment agency and that agency subcontracts a second American recruitment agency.<sup>92</sup> The second recruitment agency subcontracts a Mexican recruiter to help find workers.<sup>93</sup> The fourth is the employer-American recruiter-worker model.<sup>94</sup> The employer hires an American recruitment agency that then directly tracks down workers to fill the job vacancy.<sup>95</sup> The fifth is the employer-worker model.<sup>96</sup> Here, the employer asks the temporary migrant workers to recruit

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<sup>83</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 11.

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> Bauer, *supra* note 20, at 9.

<sup>87</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 11.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

for the available jobs during their annual return to Mexico between seasons.<sup>97</sup> This Note focuses on recruitment in the migrant workers' home countries, outside of the United States.

### 1. *Abuses to Guest Workers*

Temporary migrant workers are especially vulnerable, and particularly susceptible, to abuse. The goal of a migrant worker is to move from a poorer community to a wealthier one, thus multiplying their potential earnings as a result of the migration.<sup>98</sup> These migrant workers are willing to transnationally search for a job due to underdevelopment, unemployment, underemployment, violence, environmental devastation, and restrictions on individual freedoms.<sup>99</sup> Low-wage migrant workers often arrive from impoverished communities—predominantly impoverished rural communities—with limited economic opportunities.<sup>100</sup> Both the workers and their local communities depend upon the repatriation of income earned through the labor of H-2A workers.<sup>101</sup> Therefore, temporary migration is not truly temporary for these workers—constant migration is necessary for survival. This need to escape poverty, combined with the fact that the majority of workers are unaware of their rights as agricultural workers, leaves the worker in a vulnerable position as an easily exploitable individual.<sup>102</sup> These exploitations include: (1) fraud, (2) discrimination, (3) fees, and (4) waitlist and blacklist placement. Since the recruiting process occurs predominantly outside of the United States, it remains largely unregulated.<sup>103</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> U.N. General Assembly, 2013 High-level Dialogue on International Migration and Development, Jan. 24, 2013, *Assessing the Effects of International Migration on Sustainable Development and Identifying Relevant Priorities in View of the Preparation of the Post-2015 Development Framework*, 1, available at

[http://www.un.org/en/ga/68/meetings/migration/pdf/Background\\_paper\\_HLD\\_RT1.pdf](http://www.un.org/en/ga/68/meetings/migration/pdf/Background_paper_HLD_RT1.pdf).

<sup>99</sup> International Labour Organisation, *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report VI, International Labour Conference, 92d Session, Geneva (2004), at 8, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf> [hereafter ILO].

<sup>100</sup> U.N. General Assembly, *supra* note 98, at 1.

<sup>101</sup> *Id.*

<sup>102</sup> JORNALEROS SAFE, *supra* note 37.

<sup>103</sup> Newman, *supra* note 2, at 22.

## 2. *Fraud*

Migrant workers face recruitment fraud due to the lack of available information about their rights, lack of oversight, and lack of transparency.<sup>104</sup> Scam artists offer work opportunities under the H-2A program that do not actually exist. They charge a service fee for finding the fictitious work and then disappear.<sup>105</sup> Without any real way to verify the legitimacy of a person claiming to be a recruiter, migrant workers desperate for work take a chance that the employment offer is valid.<sup>106</sup> “Inevitably, many migrant workers are caught in recruitment fraud schemes and lose hundreds, if not thousands, of dollars with no effective system in place to help them track down or report the thieves who have stolen their money.”<sup>107</sup> Therefore, information asymmetry poses a real issue for guest workers.

An additional fraud by those claiming to be a recruiter includes the sale of a visa “libre” (meaning “free” or “at liberty” in Spanish).<sup>108</sup> The fraudster sells an H-2 visa “libre” to a worker who is told the visa allows him to enter the United States legally and work any job.<sup>109</sup> This type of “visa” is normally the most expensive since it purports to allow the worker the most freedom of mobility.<sup>110</sup> On average, a visa “libre” costs the migrant worker \$1,846.<sup>111</sup> Unfortunately, the same recruiters that offer authentic H-2A visa will also sell H-2 visas “libre.”<sup>112</sup>

Bona fide recruiters can also commit recruitment fraud. In order to attract more migrant workers, recruiters will misrepresent the jobs available.<sup>113</sup> There are no penalties for their misrepresentations because the recruiter lacks accountability and can charge higher recruitment fees for personal benefit.<sup>114</sup> These misrepresentations include higher wages, greater or fewer hours, more optimistic job descriptions, and even the

<sup>104</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 20.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> JORNALEROS SAFE, *supra* note 43, at 15; *Libre*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/translate/spanish-english/libre#libre\\_1](http://www.oxforddictionaries.com/us/translate/spanish-english/libre#libre_1) (last visited Jan. 19, 2015); *At Liberty*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/translate/english-spanish/liberty?q=at+liberty#at\\_liberty](http://www.oxforddictionaries.com/us/translate/english-spanish/liberty?q=at+liberty#at_liberty) (last visited Jan. 19, 2015).

<sup>109</sup> JORNALEROS SAFE, *supra* note 43, at 15.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 16.

<sup>113</sup> *Id.* at 21.

<sup>114</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 21.

industry in which the employee will work.<sup>115</sup> When the worker accepts the recruiter's offer and arrives in the United States to find a completely different employment reality, the worker does not have any legal action to hold the recruiter or employer liable for failing to uphold the terms of the agreement because there is no written contract, or if there is a contract, it was provided only in English.<sup>116</sup> Thus, even if the contract terms correspond with the employment reality, the worker is unable to compare the written terms with the oral terms that he initially agreed.

### 3. *Discrimination*

Recruiters also habitually engage in discriminatory recruitment of guest workers.<sup>117</sup> Women and older adults are significantly absent from the H-2A program.<sup>118</sup> Women comprise more than twenty percent of farmworkers, yet there are little to no women in the H-2A program.<sup>119</sup> Recruiters seek a specific demographic for domestic employers; young males with no family in the United States.<sup>120</sup> This is one factor that makes the H-2A guest worker program attractive to domestic employers; the ability to recruit young men thought to be perfect for agricultural work.<sup>121</sup>

Although domestic employers are prohibited from discriminating against U.S. workers based on race, color, religion, sex, or national origin, some court circuits have found that age discrimination in hiring H-2A workers is not unlawful.<sup>122</sup> For example, the Second Circuit has found that because the age discrimination occurs outside of the United States the discrimination is therefore exempt from litigation.<sup>123</sup> Furthermore, the discrimination of women was unveiled in a class action lawsuit where a labor recruiter chose less qualified male workers for H-2A jobs, and placed women in the less desirable H-2B jobs.<sup>124</sup> This kind of pervasive discrimination easily leads to other types of discrimination against race and

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; JORNALEROS SAFE, *supra* note 37.

<sup>117</sup> Bauer, *supra* note 20, at 31.

<sup>118</sup> Newman, *supra* note 2, at 26.

<sup>119</sup> *Id.* at 27.

<sup>120</sup> *Id.* at 26.

<sup>121</sup> *Id.*

<sup>122</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (2012)); Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861 (4th Cir. 2001).

<sup>123</sup> Reyes-Gaona, 250 F.3d at 867.

<sup>124</sup> Olvera-Morales v. Int'l Labor Mgmt. Corp., No. 1:05CV00559, 2008 WL 506090, at \*1 (M.D.N.C. Feb. 20, 2008).

national origin, thus perpetuating the exploitation and abuse of guest workers.

#### 4. Fees

Although recruitment fees are illegal in both the United States and Mexico, it remains common practice for Mexican recruiters to charge fees to workers hopeful for an H-2A visa.<sup>125</sup> Like the variable recruiting methods, illegal fees vary by recruiter as well. Some recruiters charge a one-time, lump sum fee, while others charge the costs for the visa, transportation, and room and board separately.<sup>126</sup> Some recruiters even require that the worker pay a sum more than the cost of the visa directly to the recruiter's personal bank account.<sup>127</sup>

The variation makes it challenging for workers to understand which fees are permitted under the H-2 program and which fees are excessive or illegal.<sup>128</sup> According to a 2009 Centro de los Derechos del Migrante survey, 58 percent of workers reported paying an average of \$590 in recruitment fees.<sup>129</sup> This average fee, however, does not include additional costs such as travel, visa, and other fees incurred to cross the U.S. boarder.<sup>130</sup> Thus, guest workers end up paying hundreds to thousands of dollars in costs for the opportunity to work seasonal, agricultural jobs in the United States where they will often earn a wage similar to the legal minimum wage.<sup>131</sup>

In order to afford the recruitment fees, many visa hopefuls take out loans.<sup>132</sup> Fortunate migrants have friends or family members loan them the required funds, but most go to a private lender, bank, or even the recruiter.<sup>133</sup> Interest rates on these pre-employment loans vary from moderate to high, ranging from five to seventy-nine percent interest.<sup>134</sup> Some lenders also require that the worker provide a deed or title to property as collateral.<sup>135</sup>

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<sup>125</sup> 20 C.F.R. § 655.135(j) (2014); 20 C.F.R. § 655.122(h) (2014); *Ley Federal del Trabajo [LFT]* [Federal Labor Law], *Diario Oficial de la Federación [DOF]* 1 de Abril de 1970, as amended 2013 (Mex); CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 16.

<sup>126</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 16.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 18.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*



These high fees and excessive loans leave the migrant worker in a precarious position. High interest rates put workers in danger of becoming imprisoned in debt, and the collateral requirements can lead to the loss of the worker's fundamental property, like vehicles or homes.<sup>136</sup> Furthermore, when workers with predatory loans arrive in the United States to work, they are then confronted with the additional pressure to earn back the borrowed funds.<sup>137</sup> Subsequently, the necessity to earn back borrowed money can force migrant workers to continue working in hazardous or abusive conditions due to their dependence on the employer and their fear of losing a job acquired through borrowed funds. Moreover, a worker would likely do almost anything to comply with a company or person that holds the deed to the home where his wife and children reside.

##### 5. *Waitlist and Blacklist Placement*

Recruitment fraud includes additional fees for getting on a waitlist in order to be selected to work in the United States.<sup>138</sup> Not only are fees charged to ensure the guest worker is chosen to work in the U.S, but they are charged again for being chosen to work with an H-2A visa.<sup>139</sup> The fee is collected when the worker attempts to be placed on the waitlist, when the worker signs a contract, or before the worker enters the consulate to apply for the visa.<sup>140</sup> The worker is at greater risk if he pays the fee prior to receiving approval for the visa because the worker might not actually receive the visa, and, subsequently, the migrant worker will be denied both the employment opportunity and the money paid in order to receive the opportunity.<sup>141</sup>

Recruiters also have a practice of charging fees to more workers than are actually needed for a job, ultimately placing the workers on a waitlist.<sup>142</sup> Although some workers never receive a visa, they tend to not report the abuse.<sup>143</sup> The left out workers know that some of the people on the waitlist got a job in the U.S., so the left out workers fear that if they report the abuse they will not be chosen for U.S. employment the next time the recruiter is searching for temporary agricultural workers.<sup>144</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> JORNALEROS SAFE, *supra* note 37, at 12.

<sup>139</sup> *Id.* at 14.

<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> JORNALEROS SAFE, *supra* note 43, at 15.

Recruiters employ waitlists and blacklists to control H-2A workers,<sup>145</sup> and charge workers an upfront fee to be placed on a waiting list to receive an H-2A visa.<sup>146</sup> Workers can pay up to \$160 to be placed on such a list.<sup>147</sup> As indicated, this list does not guarantee a visa or agricultural employment in the U.S., but workers understand that placement on the waitlist is the only way they might be chosen to work in the United States.<sup>148</sup>

Blacklists are used to prevent the worker from complaining or reporting abuses and/or poor working conditions.<sup>149</sup> Placement on a blacklist excludes a worker from future employment in the United States.<sup>150</sup> Therefore, an H-2A visa hopeful, who is desperate for work in order to support his family, prefers to keep silent and keep working in abusive conditions or conditions that are not as promised.<sup>151</sup> The disincentive is even more pronounced when the worker knows that any resistance, insubordination, or complaints made will lead to retaliation and the inability to obtain future employment in the United States.<sup>152</sup> Temporary migrant workers have no ability to apply for an H-2A visa independently; they must be sponsored by a domestic employer.<sup>153</sup> Thus, guest workers who report or complain know they will not be offered the opportunity to work the following season, and will therefore not report insufficiencies or abuses.<sup>154</sup>

These abuses are exacerbated by the fact that the H-2A “program requires that guest laborers work only for the employer who sponsored their visa and that they leave the country when their visa expires.”<sup>155</sup> Thus, guest workers are tied to a single employer. Moreover, due to the fees and debts incurred in order to secure the employment, the employee will do nothing to jeopardize their job security.<sup>156</sup> When the guest worker realizes the recruiter’s deception he can either remain in an abusive situation and hope to earn enough money to pay his debt, return home with little to no chance of repaying the debt, or leave his employer and become

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<sup>145</sup> *Id.* at 12.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Newman, *supra* note 2, at 31.

<sup>154</sup> *Id.*

<sup>155</sup> Bauer, *supra* note 20, at 12.

<sup>156</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 18.

undocumented and risk retaliation, blacklisting, and loss of legal status. "Tethered to a single employer and often unable to return home due to crushing debt, guest workers are extremely susceptible to debt servitude and human trafficking."<sup>157</sup> The United States should not remain an involuntary accomplice in this illegal recruitment system of fees, predatory debt, and fraud that leads to exploitation and human trafficking.

#### IV. CONCLUSIONS—THE NEED FOR EFFECTIVE CHANGES TO H-2A RECRUITMENT

Private recruitment coordinates the majority of the migration to temporary agricultural work. The current structure of the of the H-2A visa program allows recruiters and employers to erode the rights and dignity of guest workers due to the dependence the workers have on these recruitment players for the visa and numerous other services. From slavery to the bracero program to fees and debts, guest workers have been treated more like indentured servants than like guests. Temporary, migrant farmworkers work in hazardous conditions for low wages. These workers, however, contribute to the U.S. economy and, therefore, deserve respect. The United States is a nation of immigrants and should not be willfully blind to the abuse and exploitation of these migrant workers.

Employers contract with foreign recruiters in order to employ laborers without the protections entitled to domestic workers, and to remain unfettered to recruitment abuse and willfully ignorant of recruitment practices. The informal, complex, multi-party system currently at play in the recruitment of H-2A workers creates an intricate web of protection for both the employers and the recruiters of guest workers. The recruitment system's obscurity in the supply chain leaves the worker, and even those who would attempt to advocate for farmworkers, unsure of whom to hold liable for deceptions and exploitation. This subsequently allows recruiters to consistently escape liability. The inability to monitor the practices of employers and recruiters encourages the exploitation of H-2A migrant workers, and allows employers to ignore the few wage and labor protections provided to guest workers.

The intricate and lax recruitment system is complicated by the international configuration of the recruitment dealings. Partnerships between domestic employers and foreign recruiters limit the legal avenues available to migrant workers and their advocates to seek reparation for

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<sup>157</sup> Bauer, *supra* note 20, at 13.

recruitment abuse.<sup>158</sup> The legal protections available to guest workers within the United States are inapplicable to practices committed outside of the country.<sup>159</sup> Furthermore, Mexican law that prohibits abuses to migrant workers is largely unheeded by the Mexican government.<sup>160</sup>

The United States has little information about recruiters and the recruiting industry due to a lack of monitoring and documenting the H-2A visa recruitment process.<sup>161</sup> The majority of information available derives from advocacy organizations and agencies who have documented deceptive and abusive recruitment activities.<sup>162</sup> Thus, the information available is not standardized or centralized, making access difficult while also fostering incomplete and conflicting records.<sup>163</sup> This hinders policymakers' and advocates' ability to recommend and affect change within the system of recruitment because of the limitations placed on their ability to inform themselves.

The recruitment scheme has been left in the hands of individuals that take advantage of those most desperate for work.<sup>164</sup> The lack of attention the U.S. government has placed on the recruitment process has, "created a vacuum that deceptive recruiters have taken advantage of to obtain millions of dollars by offering non-existent work in the U.S. or visas to cross safely into the United States."<sup>165</sup> The lack of consideration placed on recruitment irregularities supports a structure that exploits guest workers who should be sheltered because of their status as guests. The U.S. government should ensure that H-2A workers are protected from their home country until repatriation.

### A. Recommendations

The current recruitment scheme is inconsistent with the United States' values of democracy and fairness. Thus, to ameliorate the existing recruitment structure, Congress should offer a two prong approach to migrant workers: (1) for migrant workers who want to permanently immigrate to the U.S., offer enough permanent visas to reflect the agricultural employers' need for labor and attempt to fill that labor need

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<sup>158</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 24.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> JORNALEROS SAFE, *supra* note 43, at 18.

<sup>165</sup> *Id.*

from this pool of workers first, and (2) for migrant workers who do not wish to permanently immigrate, fill any remaining labor shortages with this pool of workers. Congress should increase oversight, protections, and enforcement for these temporary workers. This approach will provide the guest worker options and protections, lessen the chance for abuse by recruiters, and allow the agriculture industry permanent workers instead of guest workers.

To ultimately end illegal recruitment fraud and schemes, Congress should end the need for private recruitment by no longer requiring foreign, temporary, agricultural workers to return to their home country every one to three years. Despite the fact that some farm work is seasonal, agricultural work is required year round. Thus, the agriculture industry requires permanent workers, not guest workers. Therefore, Congress should offer permanent visas (“green cards”) to enough migrant workers to reflect agricultural employers’ long-term labor needs.

A green card allows the holder to live permanently in the United States.<sup>166</sup> A green card holder can perform any legal work of his choosing.<sup>167</sup> Most importantly, all laws of the United States, the state of residence, and the local government protect a green card holder.<sup>168</sup> Providing permanent visas instead of temporary H-2A visas will effectively reduce the need of recruiters because the worker will not return to their home country after a job has ended. A reduction in the amount of recruiting will positively correlate with recruitment abuses and exploitation. Furthermore, the green card holder will have the full force of the law when recruiting abuses or any other abuses occur.

Agricultural employers should be required to employ U.S. farmworkers and green card holders before they employ H-2A guest workers. Like the protections the H-2A program’s “fifty percent rule” offers to foreign farmworkers and the mandatory recruitment of U.S. workers offers to domestic farmworkers, employers should not be allowed to prefer guest workers who are more desperate for employment and who lack full rights. Allowing this preference would only continue the status quo of deception and exploitation, as well as maintain the high occurrences of recruitment and, subsequent, fraud and abuse.

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<sup>166</sup> *Rights and Responsibilities of a Green Card Holder*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> (last visited Jan. 20, 2015).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Fulfilling long-term labor shortages in the agriculture industry with green card holders effectively eliminates the need for continuous recruitment. Once the demand for recruitment is little to non-existent, recruitment abuses will diminish as well. Likewise, discrimination in hiring green card holders for farm work will be illegal because a green card offers protection by all laws of the United States.

Only after the employer hires U.S. and green card workers should the employer then petition the Department of Labor for guest workers. The petition must demonstrate a good faith effort to recruit domestic and green card workers, and justify the need for these temporary, foreign agricultural workers. Thus, employers should first hire from the pool of U.S. and green card candidates, and then justify any remaining labor shortage in order to be able to sponsor any H-2A visas.

Sound public policy requires that the U.S. meet its agricultural labor shortage needs, not with human commodities, but with people who have respect and rights, and who want to establish themselves in the community. Migrant workers will most likely chose the green card over a temporary visa because of the mobility and legal rights the permanent visa provides. A green card does not limit the ability of the cardholder to return to his home country. However, some migrant workers may prefer a temporary work visa because they intend to return home. Thus, the U.S. should also protect those remaining in the H-2A program.

Although a green card provides protection by all laws and the freedom of mobility, some migrant workers do prefer circular migration because they either prefer to not live in the United States, or they have family residing in their home country. Thus, any additional agricultural labor shortages not fulfilled by domestic and green card workers should be filled by a reformed H-2A guest worker program that provides oversight, protections, and enforcement of its laws and regulations. This dual approach will protect migrant workers while filling labor shortages in the agriculture industry. In reforming the current H-2A visa program, Congress should evaluate three broad categories: oversight, protections, and enforcement.

### *B. Increasing Oversight of Worker Protections in the H-2A Program*

The Department of Labor should increase its oversight of the H-2A program and its recruitment practices.<sup>169</sup> In compliance with the aforementioned dual approach, the Department of Labor should

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<sup>169</sup> Newman, *supra* note 2, at 37.

investigate the recruitment strategies of employers who claim a labor shortage so great that H-2A guest workers are required to fulfill the employer's labor needs. The Department of Labor should also commence unannounced visits to all employers who sponsor H-2A visas to ensure compliance with recruitment regulations and to speak with guest workers about their recruitment experience.<sup>170</sup> Likewise, farmworker advocates should not be barred from entering the property due to any private property status in order to confirm compliance and the guest workers' wellbeing. Close oversight and supervision will incentivize employers to ensure their compliance with laws and regulations. Furthermore, the unveiling of recruitment abuse or exploitation of agricultural workers of any kind will be unpopular and, therefore, bad for agribusiness.

### *C. Strengthening Worker Protections in the H-2A Program*

The most important protection that should be available to guest workers is the ability to change employers without sacrificing their H-2A visa status.<sup>171</sup> Employers would not tolerate recruitment fraud and deception if the guest worker was free to find other employment when the terms of the contract are not upheld or conditions are not as described. Furthermore, the employer himself is incentivized to treat the guest workers with respect because the workers are not dependent on the employer. Thus, the allowance of guest workers to transfer jobs would ameliorate many of the current concerns of the recruitment process by empowering the guest worker and discouraging abuse and exploitation.

H-2A employers should be held strictly liable for any and all recruitment costs, including any collateral the worker relinquished. Employers strictly liable for recruitment costs will discourage exploitation and over-recruitment, as well as prevent abusive debt servitude of the guest worker.<sup>172</sup> Likewise, H-2A employers should also be held jointly liable for any recruitment abuse carried out by any recruiter of the employer.<sup>173</sup> A few recruitment policy changes will increase the protections available to guest workers, not only regarding recruitment, but their overall employment experience. These protections will incentivize respect and discourage abuse, and ultimately comport with the ideals of fairness, free market, and democracy.

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<sup>170</sup> *Id.*

<sup>171</sup> Bauer, *supra* note 20, at 42.

<sup>172</sup> *Id.* at 43.

<sup>173</sup> *Id.*; Newman, *supra* note 2, at 39.

*D. Enforcement of Worker Protections in the H-2A Program*

H-2A guest workers should be allowed to file class action lawsuits with federally funded legal services.<sup>174</sup> Class actions are the most effective forms of legal recourse with regard to employment abuses.<sup>175</sup> Additionally, access to class action litigation lessens the fear guest workers have regarding deportation and blacklisting.<sup>176</sup> Thus, the ability to bring a class action would increase the likelihood that guest workers would actually assert their rights.

Employers can deport or blacklist those who complain about abuses, therefore, many guest workers fear retaliation if they assert their legal rights.<sup>177</sup> Congress should view the H-2A visa as a legitimate claim of entitlement to the guest worker and, as such, should afford procedural protections.<sup>178</sup> An administrative agency, such as the Department of Labor, should grant a hearing and find procedural due process prior to the revocation of the H-2A visa and blacklist placement. The procedural protection acquired by the guest worker will prevent retaliatory employers from carelessly sending the worker home, thus preventing future employment in the U.S.

The mistreatment of those in the H-2A temporary foreign agricultural worker program is widespread. More than one hundred thousand workers are affected each year by the H-2A programs appalling recruitment system.<sup>179</sup> The constraints applied to guest workers prevent the migrant workers from protecting themselves and asserting their legal rights. Congress should address this failed recruitment system. The two-fold approach described here will protect guest workers from further recruitment exploitation, and will ameliorate abusive practices in general. These guest workers are valuable contributors to the economy and community. As a nation of immigrants, the U.S. should shelter these guests, not ignore their suffering. Failure to do so will result in continued abuse and exploitation of these guest workers.

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<sup>174</sup> Bauer, *supra* note 20, at 45.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 41.

<sup>177</sup> *Id.* at 1, 45.

<sup>178</sup> See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972); Mathews v. Eldridge, 424 U.S. 319 (1976).

<sup>179</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *supra* note 4, at 29.