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Guest Worker Programs Are No Fix For Our Broken Immigration System: Evidence from the Northern Mariana Islands

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Abstract:

The creation of a large-scale unskilled guest worker program has been a prominent element of comprehensive immigration reform proposals in recent years. This year it was featured as one of the “four pillars” of a reform framework endorsed by the Obama Administration. The principal ills that are cited as justifying immigration reform include the deterioration of border security, the violence associated with human smuggling, and the widespread mistreatment of unauthorized immigrants. Many believe that a large-scale guest worker program will help to resolve these problems by providing a lawful channel to divert the flow of unauthorized workers. This article argues that such faith defies the evidence. Namely, a guest worker program will not quell the flow of unauthorized workers or secure the border, and will inevitably be accompanied by exploitation and abuse of guest workers, among other problems, even if it includes greater worker protections than existing programs.

This article reaches these conclusions by examining past and present federal unskilled guest worker programs, as well as the guest worker program run by the Northern Mariana Islands, a Commonwealth of the United States. The Northern Marianas’ guest worker program had in place many of the worker safeguards proposed by recent reform bills, and yet it, like all federal programs to date, contributed to widespread worker exploitation, depressed wages, predatory employment practices, a tremendous backlog of labor cases, and a high incidence of human trafficking. The Northern Marianas’ example illustrates that even a “worker friendly” guest worker program will not solve the ills associated with unauthorized immigration, but, rather, will serve to perpetuate them with the aid of state apparatus.
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Dorothy E. Hill

Never under any condition should this nation look at an immigrant as primarily a labor unit. He should always be looked at primarily as a future citizen.

-- Theodore Roosevelt, 1917

I. Introduction

The Obama Administration has promised to take on immigration reform in 2010. What is fueling this latest reform effort, and all other recent efforts, is the formidable problem of the 10.8 million undocumented immigrants who currently reside in this country, and the countless undocumented immigrants to come. The principal ills that are cited as justifying reform include the national security threat presented by an unsecure

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1 Assistant Professor of Lawyering at Albany Law School; Assistant Attorney General for the Commonwealth of the Northern Mariana Islands from 2005 to 2007. Many thanks to Alicia Ouellette, Christine Chung, Linda Berger, Bruce Ching, Andrea Doneff and the participants in the Albany Law School Faculty Scholarship Workshop for insightful comments about drafts of this article, and to Jim Benedetto, Jerry Cody, Arin Greenwood, Gil San Nicolas, Dean Tenorio, and countless others from the CNMI for the many spirited conversations that planted the seed for this article. Thanks also to Kevin Rautenstrauch, Ari Zivyony, and Sita Legac for their excellent research assistance, and to Greg Hrbek for fantastic editing.


border that is breached by thousands of unauthorized immigrants each year,\(^5\) the violence associated with human smuggling, and the widespread mistreatment of unauthorized immigrants.\(^6\) Adding to the sense of urgency surrounding calls for reform is the extraordinary legislation just passed by the state of Arizona which criminalizes moving about the state without documents demonstrating one’s citizenship.\(^7\) There is also the

\(^{5}\) While debating the 2006 Comprehensive Immigration Reform Act (hereinafter, CIRA 2006), senators repeatedly cited the need for a “secure border” with Mexico as one justification for reform. See 152 CONG. REC. S4530-49 (daily ed. Feb. 12, 2004).

\(^{6}\) Evaluating a Temporary Guest Worker Program, Hearing before the Subcommittee on Immigration, Border Security and Citizenship Before the Judiciary Committee, 108th Cong. 1-3 (2004) (statement of Sen. McCain, Member, Senate Committee on the Judiciary). In his testimony in support of comprehensive immigration reform, Senator McCain repeatedly discussed a recent apprehension of 158 undocumented immigrants by local police who had been held in wretched conditions in an Arizona house without proper plumbing or access to food as reason to engage in comprehensive immigration reform. Sen. McCain ended his remarks with the words, “It is time we all got together and sat down and came up with a common proposal and acted before we go out in the August recess . . . and hundreds more will die; thousands more will be in houses in Phoenix living in human waste and being killed and mistreated.” Id. at 3; see also, Statement of Senator Jon Kyl, id. at 31 (referring to this same incident, but adding that the article did not mention the “assault, battery, [and] rape . . . that frequently occurs with regard to the people who are being held.” See also, Statement of Eduardo Aguirre, Director, U.S. Citizenship and Immigration Services, Department of Homeland Security, id. at 18 (arguing that the establishment of a temporary worker program would free up DHS personnel from “problems with unlawful workers,” so they can devote more resources to thwarting terrorists and criminals).

specter of an increasingly militarized southern border, currently patrolled by more than 20,000 Border Patrol agents and National Guard troops, and fortified by more than 370 miles of fence. And the tightened border controls have led to a surge in migrant deaths as border-crossers are forced deeper into the desert to circumvent the fence and dodge agents and troop. One proposed solution to these problems that will inevitably be part of any comprehensive immigration reform package is a large-scale unskilled guest worker program. Indeed, the introduction of such a program was cited as one of “four pillars”

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See Chad C. Haddal, CONG. RESEARCH SERV., RS32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL, 11-12 (2010) (reporting that the number of Border Patrol agents assigned to the southern border increased from 3,555 in 1992 to 20,119 at the end of FY 2009); Randal C. Archibald, Obama to Send Up to 1,200 Troops to Border, N.Y. TIMES, May 25, 2010, available at http://www.nytimes.com/2010/05/26/us/26border.html (reporting that President Obama planned to send an additional 1,200 National Guard troops to the Southwestern border to assist with border security). It has been recognized by many that enforcement alone cannot resolve the problem of unauthorized immigration. See Evaluating a Temporary Guest Worker Program, Hearing before the Subcommittee on Immigration, Border Security and Citizenship Before the Judiciary Committee, 108th Cong. 1-3 (2004) (statement of Senator Craig) (noting that between 1965 and 2004, the number of Border Patrol agents had increased from 3,000 to 10,000, yet unauthorized immigration had not abated).


Some recent guest worker bills would also allow undocumented immigrants already in the United States to be eligible for a guest worker visa, thus directly reducing the number of undocumented immigrants already residing in the U.S. See, e.g., Andorra Bruno, CONG. RESEARCH SERV., RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS (2010) (hereinafter, “2010 CRS Guest Worker Report”) 34, 37-39 (discussing the H-5B visa that was proposed in S.1033/H.R. 2330 (2005) (commonly referred to as the McCain-Kennedy Bill) and would have been available to

Generally, guest worker programs allow aliens to enter the host country for a defined period to work, but not to settle.\footnote{I have chosen to use the term “guest worker” because it is a term used in many countries to refer to unskilled temporary workers, although the term is euphemistic in most cases. \textit{See} 2010 CRS Guest Worker Report 1.} The world over, unskilled guest workers typically perform the “3-D jobs: dirty, dangerous, and difficult.”\footnote{PHILIP MARTIN, ET AL., \textit{MANAGING LABOR MIGRATION IN THE TWENTY FIRST CENTURY} (Yale U. Press 2006) (hereinafter, “\textit{MANAGING LABOR MIGRATION}”); \textit{see also} News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries (Aug. 20, 2009) \url{http://www.bls.gov/news.release/cfoi.htm}.} To date, such programs in the U.S. have been small in scale and designed to fill perceived gaps in the country’s labor force, not to serve as a significant component of the nation’s immigration policy.\footnote{See The U.S. Commission on Immigration Reform, \textit{IMMIGRATION AND THE CNMI} 4 (1997) (describing U.S. immigration policy as centering around the admission of immigrants for permanent residence and eventual citizenship). Also notable is that guest (or temporary) workers in the U.S. are referred to as “nonimmigrants” under the Immigration and Nationality Act (because they are not on a path to migrating permanently to this country), and that guest worker programs are administered by the Department of Labor, not the USCIS. \textit{See} 8 U.S.C.A. 1101(a)(15).} To meet these specific labor goals, all have tied guest workers’ visa status to their continued employment with a single employer, and have provided no path to
citizenship. Additionally, these programs have all lacked effective government oversight or accessible and meaningful avenues to enforce guest worker rights. These and other factors have led to widespread abuses of guest workers, including wage theft, dangerous working conditions, and substandard housing. Program after program has been compared to the institution of slavery.

Nevertheless, many politicians and business interests – including the Chamber of Commerce, and even the World Bank – have made the inclusion of a guest worker program a centerpiece of their immigration reform agenda. Even some immigrant

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16 See discussion, infra, Section III.
17 See discussion, infra, Section III.
19 See SPLC Report at p. 1; see also, Lou Dobbs Tonight (CNN television interview Jan. 23, 2007 with Rep. Charles Rangel) (describing the H-2 guest worker programs as “the closest thing I’ve ever seen to slavery”)
21 See, e.g., Janet Murguia, A Change of Heart on Guest Workers, WASH. POST, Feb. 11, 2007, at B7 (available at http://www.washingtonpost.com/wp-
advocacy and labor rights groups – long harsh critics of guest worker programs – have softened their opposition to including a guest worker program as part of a comprehensive immigration reform package.\(^{21}\) For many in the immigrant and labor communities, this shift is seen as a reasonable and necessary compromise, far superior to the military-style, enforcement-only approach to reform that has gained favor in recent years.\(^{22}\) For some others, a guest worker program represents a modern evolution from a nationalist to a cosmopolitan perspective that shows “equal concern to all” across borders by providing impoverished people from other countries a legal means to access the relative plenty in the U.S.\(^{23}\) Still others, including many immigrants themselves, have come to support a large-scale guest worker program because of the possibility it presents for accommodating the increasingly transnational character of many immigrant lives, that is, ones that feature more circular patterns of migration, and retain more firmly planted roots in the country of origin than in the past.\(^{24}\)

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\(^{22}\) See, e.g., Howard F. Chang, Guest Workers and Justice in a Second-Best World, 34 U. DAYTON L. REV. 3, 6-7 (2008) (describing expansion of guest worker programs as a “politically realistic, second-best alternative” to present policy of exclusion).

\(^{23}\) See Manuel Pastor & Susan Alva, Guest Workers and New Transnationalism: Possibilities and Realities in an Age of Repression, 31 SOC. JUST. 92, 92-93 (2004); Scott Bittle, et al., PUBLIC AGENDA, A PLACE TO CALL HOME: WHAT IMMIGRANTS SAY NOW ABOUT LIFE IN AMERICA at 40 (2009).
The emerging support among the immigrant and labor communities is conditioned upon an assumption of a reformed guest worker program. The authors of recent comprehensive immigration bills with a guest worker component, most notably Senators John McCain and the late Edward Kennedy in their 2005 bill, have also been cognizant of the problematic history of guest worker programs, and have made concerted and thoughtful efforts to design programs with more safeguards and worker rights. The McCain-Kennedy guest worker proposal allowed employees to change jobs, created an administrative complaint system, and established more government oversight. It also created a path to earned citizenship (referred to as “earned adjustment”). Most comprehensive immigration reform bills since then have included these reforms in the guest worker component of the bill; it is likely that a similar program will be included in any reform package to come.

25 See, e.g., Chang, supra note 23 at 7-8 (advocating for reformed guest worker programs, calling particularly for mobility as a means to prevent guest worker abuses); Janet Murguia, A Change of Heart on Guest Workers, WASH. POST, Feb. 11, 2007 at B7 (available at http://www.washingtonpost.com/wp-dyn/content/article/2007/02/09/AR2007020901947.html) (stressing that the proposed program La Raza supported (CIRA 2007) contained far more protections than past or current programs).

26 S.1033, 109th Cong. (2005); 152 CONG. REC. S 4936 (daily ed. May 23, 2006) (Senator Kennedy speaking in favor of the bill noted that “Immigrant workers are among the most vulnerable in our Nation. While performing society’s most difficult and dangerous work, they face abuse by employers, the denial of basic rights, and economic exploitation. In negotiating the McCain-Kennedy bill, we took great care to include protections that will halt these alarming trends and ensure fair wages and working conditions for guest workers.”).

27 See discussion, infra, Section III.


29 See generally, 2010 CRS Guest Worker Report.
The evidence presented in this article establishes that a large-scale unskilled guest worker program of the type under consideration, even with McCain-Kennedy-style safeguards, would not end immigrant worker abuse or quell the flow of unauthorized immigrants, at least in the absence of a terrific, and untenable dedication of resources. In addition, it would likely create a host of new problems, some created by the very safeguards designed to protect guest workers. It would also mark a significant step back in the nation’s slow but steady legislative march toward curtailing exploitation of workers, culminating in 2000 with the passage of the federal Trafficking Victims Protection Act. As such, a guest worker program should not be part of immigration reform, not even as a second-best compromise.

In Section II, this article makes the case for employing an evidence-based approach to the question of whether a guest worker program should be a component of comprehensive immigration reform. It argues that this methodology is critical when one of the targets of the legislation is a group as marginalized as unskilled guest workers. In Section III, this article lays a foundation for considering the evidence, beginning first with a discussion of the country’s largest unskilled guest worker program to date, the Bracero program, along with existing federal unskilled guest worker programs, and the problems associated with these programs. It then lays out recent proposals for reform, focusing on McCain-Kennedy style proposals that seem the most likely to gain traction in

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30This article does not speak to the possibility of programs that radically depart from the models that have existed to date. Jennifer Gordon has begun to envision such a program. Under her proposed framework, international labor organizations would take the lead role in governing and monitoring guest worker programs, and the participants would be “transnational labor citizens.” Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 505 (2007). While even Gordon has acknowledged that conditions are not quite ripe for transnational labor organizations to assume control over immigration, the model she has proposed could, one day, transform immigration policy. *Id.* at 570.
the upcoming months and years. Section IV then turns to the evidence: the guest worker program of the Commonwealth of the Northern Mariana Island (the CNMI). This program was unique in the United States because the CNMI controlled its own immigration from 1976 until November 28, 2009, and during that time established a sweeping guest worker program. 31 This article will demonstrate that the CNMI’s guest worker program had far more worker protections than comparable federal programs, including more employment mobility and an accessible, generally effective administrative complaint system. In this way, the CNMI program resembled the McCain-Kennedy style programs that will likely be included in any forthcoming comprehensive reform package. 32

Notwithstanding safeguards such as these, the CNMI’s guest worker program was notorious. In the last two decades, the CNMI was synonymous with sweatshops. 33 Reports of widespread unpaid wages, squalid working and living conditions, and

31 See The Covenant to Establish a Commonwealth of the Northern Mariana Islands, Pub. L. No. 94-241, 90 Stat. 263 (1976) reprinted in 48 U.S.C. § 1801 at § 503(a). This anomaly came to an end on November 29, 2009, when the federal immigration laws are extended to the CNMI pursuant to Title VII of the Consolidated Resources Act of 2008. For further discussion of this Act see infra, Section II. The CNMI enacted the NWA in 1983, modeling it after a nonresident workers law that had been part of the Trust Territory Code. 3 N. Mar. I. Code § 4411 et seq. (1983); Protection of Resident Workers Act, 49 Trust Territory Code § 1 et seq. (1970).


33 See Lured by jobs ‘in the U.S.’, workers denied even basic human rights; ‘Factories of hell’ in paradise, S. CHINA MORNING POST 1999 (HONG KONG).
oppressive, inhumane work rules, were endemic. The CNMI program also spawned a
host of other problems, including a predatory trade in sponsorships by businesses and
individuals who would charge fees to give workers a fictitious job so that they could
remain in the CNMI, and a tremendous backlog of labor cases. It was also marked by a
high incidence of human trafficking.

Section V compares the CNMI guest worker example with McCain-Kennedy
style programs. The CNMI program offers important lessons for those considering
crafting such a program because it featured many of the safeguards considered key to
reforming guest worker programs. It will demonstrate that the example is relevant and
should be taken into account even though the CNMI program did not contain a path to
citizenship. In theory, such a path is transformative in that it recasts guest workers as
members of a class of potential citizens, rather than an outsider caste of permanent
laborers. However, in practice, earned adjustment is not transformative. For the period
that the guest workers are guest workers, they will still be a disenfranchised laboring
class, and the possibility of earned adjustment will likely strengthen employers’ hands,
and thus create the potential for even more exploitation than under traditional programs
that contain no possibility of adjustment. As such, the problems that defined the program
in the CNMI will almost certainly accompany any large-scale federal program.

Section VI explores the connection between exploitation and guest worker
programs. In this section, the article considers why all U.S. unskilled guest worker
programs past and present, including one run by a far-flung U.S Commonwealth, have all
resulted in widespread abuse of guest workers. It argues that this result is inevitable

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34 See discussion, infra, Section IV.
because, by design, unskilled guest worker programs rely on poor migrants’ economic, cultural and linguistic vulnerability to maximize their economic output. As such, unskilled guest worker programs are not a solution to the ills associated with unauthorized immigration, but, rather, serve to perpetuate these ills with the aid of state apparatus. They should therefore not be a component of comprehensive immigration reform.

II. Evidence as a Tool for Crafting Transformative Legislation

Daniel Ibsen Morales has argued that the nation’s contemporary immigration policy has become characterized by “discord” and “schizophrenia.” The central example Morales points to in support of these characterizations is the hundreds of miles of fence that has been built along the United States / Mexico border to prevent unauthorized immigration even though at least 40% of unauthorized immigrants arrive in the United States by legal avenues, and then overstay their visas. And, the fence building continues notwithstanding growing evidence that it has not decreased unlawful immigration, only led to considerably more migrant deaths as those seeking to cross the border must follow more treacherous routes. Morales attributes this irrationality to the nation’s high regard for “ordered liberty,” which “privileges the democratic will” over effective solutions and ties the hands of administrative authority, curtailing the mediating effect administrative expertise might bring to bear. He notes that in embracing the “strictest kind of order” in the realm of immigration (and in others), the divide between

37 Id. at 27.
those who enjoy the liberties and rights of the nation, and those to whom they are foreclosed, has grown wider.\textsuperscript{39}

The federal government’s approach to the CNMI’s guest worker program stands as another example of the nation’s schizophrenic approach to immigration reform. For more than a decade, Congress has tried numerous times to wrest control over immigration from the CNMI based on concerns about the abuses associated with its guest worker program. (The efforts finally succeeded in November 2009).\textsuperscript{40} In 1997, the U.S. Commission on Immigration Reform, in a report about the CNMI, described its large-scale guest worker program as “antithetical” to U.S. immigration principles and democratic ideals. The report stated,

\begin{quote}
The Commonwealth of the Northern Mariana Islands (CNMI) immigration system is antithetical to the principals that are at the core of the US immigration policy. Over time, the CNMI has developed an immigration system dominated by the entry of foreign temporary contract workers. These now outnumber US citizens but have few rights within the CNMI and are subject to serious labor and human rights abuses. In contrast to US immigration policy, which admits immigrants for permanent residence and eventual citizenship, the CNMI admits aliens largely as temporary contract workers who are ineligible to gain either US citizenship or civil and social rights within the commonwealth. Only a few countries and no democratic society have immigration policies similar to the CNMI. The closest equivalent is Kuwait.

The end result of the CNMI policy is to have a minority population governing and severely limiting the rights of the majority population who are alien in every sense of the word.\textsuperscript{41}

Similarly, in support of another effort to take control of the CNMI’s immigration in 1999, Senator Murkowski charged that the CNMI’s guest worker
\end{quote}

\textsuperscript{39} Id. at 86.
\textsuperscript{40} Pub. L. No 110-229 reprinted in 48 U.S.C. § 1801 at § 503(a), pursuant to Title VII of the Consolidated Resources Act of 2008.
\textsuperscript{41} U.S. Commission on Immigration Reform, IMMIGRATION AND THE CNMI at 4 (1997).
program failed to comport with the “American tradition of employing U.S. workers in private jobs that promote the growth of a middle class,” and disdainfully described it as a system of “importing and exploiting a rolling stream of alien workers, without permanent immigrant status or family ties, in low-paid permanent positions . . . .”

Finally, in one of the many oversight hearings held by Congress in 2007 in the lead up to passing the federal legislation that ended the CNMI’s local control of its immigration, then Deputy Assistant Secretary of the Interior for Insular Affairs, David Cohen, described the guest worker program in the CNMI as having “created a great risk of exploitation and abuse in the CNMI.” He further cautioned:

Our experience tells us . . . that excessive reliance within the CNMI on a foreign, low-wage work force creates a risk of abuse. That risk could be overcome with a high level of effort, vigilance and resources, but it would probably be difficult to sustain such efforts under the CNMI’s current fiscal and economic conditions. . . .And eliminating the most overt forms of abuse will not necessarily eliminate subtler forms of exploitation that arise when foreign employees have little power and a great deal to lose if they assert even the limited rights that they have.

Remarkably, at nearly the same time, in some other Capitol hearing room, lawmakers were considering introducing a federal large-scale unskilled guest worker program as part of comprehensive immigration reform that would have looked very similar to the CNMI program the government was preparing to dismantle. In addition,

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44 Id.
45 For instance, the Comprehensive Immigration Reform Act of 2006, (S. 2611), which included a large-scale unskilled guest worker program, was engrossed in the Senate on
since gaining control over the CNMI’s immigration system, the federal government is
now in the process of replacing the CNMI’s guest worker program with the arguably
more exploitative H-2A and H-2B guest worker programs, while maintaining the same
“rolling stream of alien workers, without permanent immigrant status or family ties” that
led the federal government to intervene in the first place.\footnote{Press Release, News from the Committee on Natural Resources, House Clears Final
Hurdle for CNMI Immigration Bill (April 29, 2008) (citing the statement of House
Judiciary Committee Chair John Conyers, Jr., also a co-sponsor of the bill, “[e]xtending
federal immigration law to the Commonwealth of the Northern Marianas closes the guest
worker loophole under which so many were held in modern slavery. The Constitution’s
guarantee of freedom must apply everywhere in the United States, no matter how
remote.”); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229,
(implementing, in part, “the Act approving the Covenant to Establish a Commonwealth
of the Northern Mariana Islands in Political Union with the United States of America,”)
Title VII, codified at 48 U.S.C. sec. 1806 et seq. (The law was scheduled to go into
effect on June 1, 2009, although the effective date was later delayed 180 days until
November 29, 2009)). See U.S. Gov’t Accountability Office, GAO-10-553, DHS Should
Conclude Negotiations and Finalize Regulations to Implement Federal Immigration Law
n.5 (2010).}

This dichotomy deserves the attention of those who seek to craft legislation that
will truly fix our broken immigration system, as does the rich body of evidence generated
by the CNMI program. To capitalize on this evidence, scholars and legislators should
employ the evidence-based methodology developed by Ann and Robert Seidman to the
question of whether a large-scale guest worker program should be a part of
comprehensive immigration reform. The Seidmans’ have long argued that legislators’
tendency to gloss over data related to marginalized groups that are a target of legislation

May 25, 2006 (but not passed by the House), see 2005 CONG. U.S. S. 2611, and the
Comprehensive Immigration Reform Act of 2007 (S. 1348), which included a nearly
identical guest worker program as CIRA 2006, was place on the Senate Calendar on May
often leads to the promulgation of ineffective law.\textsuperscript{47} Additionally, they have observed that data gathering and analysis of the existing problem, including the law governing the issue, the institutions enforcing it, and the impact on the target groups, is generally incomplete. To address these shortcomings, the Seidmans have developed an evidence-based approach to drafting legislation (called an “institutionalist legislative theory and methodology,” or “ILTAM”). Key to ILTAM is to first engage in a “careful description” of the existing problem, focusing on the problematic behavior of the targeted group and the implementing agencies, followed by reasoned hypotheses as to the causes of the problem.\textsuperscript{48}

ILTAM finds strong support in legal realism and instrumentalism, and rests on a belief that law can effect social change by inducing desired behaviors.\textsuperscript{49} ILTAM seeks to minimize the difference between “law-in-the-books” and “law-in-action” by encouraging close and meaningful study of the problems prompting the legislative action, the targets of the legislation, and the agencies to be charged with enforcement. In this way, ILTAM aims to lead to the drafting of law that ensures “effective implementation.”\textsuperscript{50} Finally, ILTAM posits that evidence-based legislation might give voice to the less powerful in that it sets in motion a rational discourse such that a critic must come forward with more


\textsuperscript{49}Id. at 464-66.

\textsuperscript{50}Id. at 466-68.
or different evidence to counter a well-supported legislative proposal. Given the extent to which potential guest workers are essentially without voice in this debate, a methodology like ILTAM that considers and values their experiences as guest workers is critical.

Following the evidenced-based methodology, the evidence from the CNMI contributes a piece of factually-grounded, measured discourse to the discussion of unskilled guest workers in what is often an irrational debate. The CNMI evidence builds upon, and throws into even sharper relief, the claims by other scholars that unskilled guest worker programs threaten to do damage to core principles of U.S. democracy, like equality and self-governance.

As Michael Walzer has argued in

51 Id. at 482 (citing JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, 8-42 (Thomas McCarthy trans., Beacon Press 1984)). Communicative action is, in very summary form, a consensual form of social interaction; an individual achieves social goals by gaining consent of others by convincing them that the goal is reasonable and has value. In contrast, strategic action allows an individual to attain a goal, but by playing upon other actors fears and competing goals. See also, Robert B. Seidman, Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory and Practical Reason, 29 HARV. J. ON LEGIS. 1, 20 (1992) (arguing that “[t]he rejection of rationality in favor of power as the principal mode of policymaking reflects the interests of power and privilege”).

52 Guest workers are not wholly without representation. Certainly, the governments of sending countries, most prominently Mexico, do and would likely have some input in the form or implementation of guest worker programs. See, e.g., 2010 CRS Guest Worker Report 14 (noting that the former Bush Administration discussed potential guest worker programs with its Mexican counterpart as part of the two nations “binational migration talks” in 2001). But the potential workers themselves, all of whom are non-citizens, and most of whom are not physically in the U.S., have few means to express their interests or concerns.

53 See e.g., Randal C. Archibald On Border Violence, Truth Pales Compared to Ideas, N.Y. TIMES, June 20, 2010. This article also aims to answer Daniel Ibsen Morales’ call to scholars to “struggle to expose the price” of this liberty, and to provide fodder that can be used to attack the politicians’ “lovely platitudes.” Morales, supra note 35.

connection with guest worker programs, the creation of such a “laboring class,” with sharply limited rights, “introduce[s] opportunities for exploitation and inequalities into social, political, and economic relations that are unacceptable in a democratic society that depends on the ongoing consent of its subjects and an absence of castes.”

Guest worker programs also call directly into question our commitment to liberal democracy by departing from the traditional integrationist aim of U.S. immigration policy. In making this claim, Cristina Rodriguez points to guest workers’ lack of economic and social mobility, and the United States’ lack of reciprocal investment in guest workers, as proof that such programs do not fulfill the needs of immigrant integration. While she allows that a guest worker program might be better than no response to the “persistence of undocumented immigration,” she suggests that its movement away from the traditional goal of integration may result in significant social cleavages. Ruben Garcia has also made the point that guest worker programs represent another ingredient in the “democracy deficit,” that is, the growing power of unelected


55 Rodriguez, supra note 56 at 282 (citing WALZER, SPHERES OF JUSTICE at 58-59).
56 Rodriguez, supra note 56 at 221; S. Rep. No. 106-204 (1999), available at http://frwebgate.access.gpo/cgi-bin/getdoc.cgi?dbname=106_cong_reports&coid+f:sr204.106.pdf (Senator Murkowski, criticizing the CNMI’s guest worker program as failing to comport with the “American tradition of employing U.S. workers in private jobs that promote the growth of a middle class, rather than importing and exploiting a rolling stream of alien workers, without permanent immigrant status or family ties, in low-paid permanent positions, most to be kept almost all the time on their employers’ premises.”).
57 Rodriguez, supra n. 56 at 222-23 (Rodriguez describes the desired endpoint of integration as assimilation, or, a point at which both the immigrants and the host country are changed by each other culturally, economically and ethnically); Id. at 233-40.
58 Id. at 230, 288.
institutions like the World Bank and International Monetary Fund in the global community. He argues that guest workers’ commodification, combined with their lack of voice in the realm of politics or the workplace, leaves them particularly vulnerable. Indeed, he posits that the system of tying guest workers’ immigration status to their continued employment with a single employer leaves their voices even more “muffled” than those of unauthorized workers who are not similarly constrained.

Hiroshi Motomura has pointed to McCain-Kennedy type guest worker proposals that double as a path to earned citizenship as running counter to this nation’s traditional immigration policy aim of encouraging integration and the equal treatment of citizens and immigrants. Motomura contends that such programs, that treat new immigrants tentatively, and as something other than potential citizens upon arrival (or, as he refers to them, as “Americans in waiting”), impede both. According to Motomura, prompt integration -- which he defines not as assimilation into the dominant culture, but as a “reciprocal process in which immigrants change America as much as America changes them,”-- is the best hope for equality. Immigration policies that impede and delay integration, on the other hand, tend to diminish the desire of permanent residents to become full citizens, and, thus, foreclose the possibility that they achieve full equality.

60 Id. at 45.
61 HIROSHI MOTOMURA, AMERICANS IN WAITING 162-65 (Oxford U. Press 2006). See also, Remarks by the President on Comprehensive Immigration Reform, American University School of Public Service, (July 1, 2010), available at http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform (reaffirming our nation’s self-image as “a nation of immigrants -- a nation that welcomes those willing to embrace America’s precepts,” and one that recognizes that the immigrants “helped to make America what it is.”).
62 MOTOMURA, supra n. 61 at 162-65.
with citizens.\textsuperscript{63} This will likely lead to the emergence of “more parochial and less cosmopolitan or democratic” affiliations, like those defined by race or ethnicity, as immigrants seek communities defined by characteristics that are more readily accessible and seem more relevant than citizenship.\textsuperscript{64}

While some scholars have argued in favor of guest worker programs, their support rests on the assumption that such programs can be reformed of their most exploitative characteristics. For instance, Howard Chang champions guest worker programs as a “second-best policy” to open borders from a cosmopolitan perspective. He argues that the alternative of excluding unskilled and often impoverished aliens from the nation (in the name of protecting them from exploitation), actually leaves the aliens worse off than would a guest worker program.\textsuperscript{65} His proposed guest worker program, however, would resolve the exploitation problem by allowing guest workers “full mobility” between economic sectors and full workplace rights.\textsuperscript{66} So, too, Andrew Elmore has written in support of guest worker programs as a key ingredient of immigration reform on the ground that ending them while continuing the status quo of exclusion would likely increase unauthorized migration at the expense of liberty, equality and sovereignty.\textsuperscript{67} He also doubts that expanding labor-based permanent admissions would be a realistic

\textsuperscript{63} \textit{Id.} Motomura notes that such policies would correspond with a trend in U.S. immigration policy of admitting fewer aliens as lawful immigrants who are treated as “Americans in waiting” from the outset. As a result, the allure of citizenship has waned, with many lawful immigrants eligible for naturalization (on average, 40%), opting not to. \textit{Id.} at 141-144. (Lawful permanent residents may remain in the U.S. indefinitely). \textit{Id.} at 139-40.
\textsuperscript{64} \textit{Id.} at 166-67.
\textsuperscript{65} Chang, \textit{supra} note 23 at 9.
\textsuperscript{66} Chang, \textit{supra} note 23 at 8.
\textsuperscript{67} Andrew J. Elmore, \textit{Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination approach to the Labor-Based Admission of Nonprofessional Foreign Nationals}, 21 GEORGETOWN IMMIGR. L.J. 521, 557-61 (2007).
solution, and would likely come at the expense of the interest of family reunification.\textsuperscript{68}

The guest worker program he proposes, however, would be significantly reformed along the lines of what he refers to as a “non-subordination” approach. Its key features would be a thorough de-coupling of guest worker immigration status from a particular employer, full workplace rights, and effective, accessible enforcement mechanisms along with paths for unauthorized migrants and guest workers to adjust to permanent immigration status so they can follow more circular paths of migration.\textsuperscript{69}

The evidence from the CNMI suggests that reforms such as those envisioned by Chang and Elmore are not realistic. The type of guest worker programs likely to be included in any reform package will inevitably contain provisions that invite exploitation, namely, ones that limit guest workers’ mobility, and tie their immigration status to employment. This is because characteristics such as these are what make guest worker programs economically desirable. With such provisions in place, the only way to guard against widespread abuses would be to implement a vast array of enforcement mechanisms that would require a tremendous, and politically unfeasible, allocation of resources.

III. Federal Unskilled Guest Worker Programs Past, Present and Future

A. Generally

Included under the Immigration and Nationality Act (INA), are numerous “temporary worker” (or guest worker) programs. These admit foreign nationals into the

\textsuperscript{68} Id. at 559.

\textsuperscript{69} Id. at 561-67.
country for a limited period of time to perform work of a specific type.\(^{70}\) Visas are available for various categories of workers, including nurses, professional specialty workers, internationally recognized entertainers, agricultural workers and unskilled nonagricultural workers.\(^{71}\) In 2007, 1.9 million temporary worker visas were issued.\(^{72}\) The stated aim of these programs is to fill gaps in the domestic labor market without adding settlers to the population.\(^{73}\) All contain some type of a labor market test to guard against the displacement of domestic workers.\(^{74}\)

In this section, the article will focus on unskilled federal guest worker programs because that is the type of program that is likely to be included in a comprehensive reform package.\(^{75}\) In addition, while there have been numerous reports of skilled temporary workers encountering workplace abuses, the uniqueness of their skills, and the likelihood that they do not come from the impoverished background as unskilled workers, leaves skilled temporary workers less vulnerable to employer exploitation and abuse than unskilled workers.\(^{76}\)


\(^{71}\) Id. at 3.

\(^{72}\) Id. at 11.


\(^{75}\) Nonimmigrant visas are commonly referred to by the subsection letter and number that designates their category under section 101(a)(15) of the INA.

\(^{76}\) U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-720, H-1B Visa Program: Labor Could Improve Its Oversight and Increase Information Sharing With Homeland Security 3 (2006) (noting that the Dept. of Labor ordered employers to pay a total of $1.2 million in back wages to 226 H-1B workers in fiscal year 2000; by 2005, that number had increased to $5.2 million in back wages to 604 workers); see also Moira Herbst, It's True: There's Fraud in the H1-B Visa Program, Bloomberg Businessweek,
Before I turn to the evidence, let me create a frame through which to consider these programs. There is a consensus that the principal characteristics that lead to guest worker exploitation include the practice of tying guest workers’ immigration status to a single employer, the absence of a path to citizenship, the lack of government oversight, and, relatedly, the lack of accessible and meaningful avenues to enforce guest worker rights.  

I will pay particular attention to these aspects of guest worker programs, although high recruitment fees are also cited as one of the factors that lead to exploitation because that generally means that the worker arrives in the United States deeply in debt. Historically, all unskilled guest worker programs in the United States have shared these characteristics, and all have been characterized by widespread exploitation of the guest workers. They have also been accompanied by a depression of wages in the industries most populated by guest workers. Finally, all guest worker programs have been found


78 SPLC Report at 9-14.


80 See Gerald Mayer, CONG. RESEARCH SERV., RL33772, The Comprehensive Immigration Reform Act of 2006 (S. 2611): Potential Labor Market Effects of the Guest Worker Program, 16 (Dec. 18, 2006) (concluding that the introduction of 200,000 new unskilled guest workers “could be expected to lower the relative wages of competing
to lead directly and indirectly to unauthorized immigration.  

B. The Bracero Program

The Bracero program represents the United States’ largest guest worker program to date, importing as many as 400,000 Mexican farm workers per year during its height.  

The program was commenced during WWII with the stated aim of alleviating the alleged shortage of resident workers due to the war. However, the program did not end with the war, but continued until 1964. During the life of the program, approximately 4.5 million jobs were filled by braceros.  

On paper, the law governing the program contained many provisions designed to protect the braceros from exploitation, as well as provisions to protect domestic workers

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81 See Martin, supra note 71 at 293-94; MARTIN, MANAGING LABOR MIGRATION, supra n. 14 at 95 (noting that it is well established that guest worker programs are “the best way to begin a flow of immigrants,” not a means of quelling that flow and referring to the legacy of the Bracero program as the best evidence).


83 2010 CRS Guestworker Report 1. The Bracero program’s official name was the “Mexican Labor Program,” which was created by Congress in 1942 as part of an omnibus appropriations bill known as Pub. L. No. 77-45. It was extended by subsequent enactments until 1947, then continued informally until 1951 when it was officially extended by Pub.L. No. 82-78; See Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future: Hearing before the Subcomm.on Immigration and Border Security of the Judiciary Committee of the U.S. Senate, 108th Cong. 100 (Feb. 12, 2004)(hereinafter “Briggs’ testimony”), available at: http://www.access.gpo.gov/congress/senate/pdf/108hrg/94556.pdf.

84 SPLC Report at 4. The actual number of guest workers who entered the country under the program may have only been one to two million because many were repeat participants in the program. See Philip L. Martin, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS 46-47 (ILR Press 2003); Linda Levine, CONG. RESEARCH SERV., 7-5700, Farm Labor Shortages and Immigration Policy (Dec. 20, 1999).
from displacement and wage depression. Specifically, growers using the program had to (1) have individual contracts with workers under the supervision of the government; (2) provide housing that complied with minimum standards; (3) pay the higher of either the minimum or the prevailing wage; (4) offer at least 30 days of work; and (5) pay part of the transportation costs (the remainder of which was to be shared between the worker and the U.S. government). In addition, the federal government was required to support workers if a grower failed to pay.85

In practice, however, braceros, who were tied to a single employer, were subject to terrible working conditions, with low wages, minimal work, and squalid living conditions.86 Indeed, the U.S. Department of Labor (DOL) officer in charge of the program, Lee G. Williams, described the program as a system of “legalized slavery.”87

These poor conditions have been attributed in part to the paucity of resources allocated to the DOL to enforce the regulations governing the program.88 Another contributing factor was the braceros’ reluctance to lodge complaints because it was widely understood that a bracero who complained would be blacklisted by the growers and immediately sent home.89 Because most braceros arrived in the United States deeply in debt – in part on account of the bribes and fees it was necessary to pay Mexican

85 SPLC Report at 4 (confirm with CRS report).
86 Id. citing ERNESTO Galarza, STRANGERS IN OUR FIELDS (1956); Michael Holley, Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights, 18 HOFSTRA LAB. & EMP. L.J. 575, 584 (2001).
88 For instance, the DOL did not have sufficient qualified personnel to calculate a prevailing wage, as required by the law, so it just accepted growers’ representations. Holley, supra note 85 at 585 citing Galarza.
89 Holley, supra note 85 at 585 citing ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 197-98 (1964).
officials to secure a job through the program -- few were willing to risk the retaliation that would likely follow any complaint.\textsuperscript{90}

The program also caused a depression in agricultural wages and the displacement of a significant number of domestic agricultural workers.\textsuperscript{91} This outcome was due largely to the DOL’s failure to correctly determine the prevailing wage, and the relative vulnerability of braceros as compared to domestic workers, due to their indebtedness.\textsuperscript{92} Given a choice, growers preferred braceros over domestic workers because they were more “dependable.”\textsuperscript{93}

Finally, while one of the stated aims of the Bracero program was to reduce the number of unauthorized Mexican workers, their numbers actually increased during the program years.\textsuperscript{94} What is more, most scholars agree that the principal enduring legacy of the Bracero program is the significant population of undocumented Mexican immigrants

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\textsuperscript{90} Id. \\
\textsuperscript{91} Holley, supra note 85 at 584 citing Ernesto Galarza, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 199-200, 203; see also, Philip L. Martin, “Guest Workers: Past and Present,” in 3 Migration Between Mexico and the United States: Binational Study 877, 882 (1998), available at http://www.utexas.edu/lbj/uscir/binpapers/v3a-3martin.pdf; Linda Levine,CONG. RESEARCH SERV., 95-712 E, Immigration: The Labor Market Effects of a Guest Worker Program for U.S. Farmers (Jan. 2009) (citing a study by Morgan and Gardner of seven states that employed 90% of braceros, that concluded that the Bracero program decreased domestic farm employment, lowered farm wages by about 6 to 7 %, yet expanded total farm employment (by about 120,000)); Briggs’ testimony, at 101 (testifying that the wide availability of Mexican workers significantly depressed wages in some regions, particularly the Southwest where agricultural employment was “virtually removed from competition with the nonagricultural sector”).
\textsuperscript{92} Holley, supra note 85 at 584-85 citing Ernesto Galarza, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 237 (1964).
\textsuperscript{93} Id.
\textsuperscript{94} Philip Martin, Guest Workers: Past and Present, 881 in U.S. Commission on Immigration Reform: Binational Research Papers (attributing the increase in unauthorized workers to the realization of these workers that they could avoid paying bribes to Mexican officials by entering the U.S. on their own, and to employers’ preference for unauthorized workers because they did not need to cut through any “red tape” or be subjected to government inspections or other oversight).
\end{flushleft}
in the country today due to patterns of migration and dependence that were established
during this period. The Bracero program was ended on December 31, 1964 after a
documentary about the program, “Harvest of Shame,” was aired on CBS, purportedly
convincing President Kennedy that the program was adversely affecting wages and
working conditions for U.S. workers.

C. H-2A and H-2B Programs

There are two federal programs in existence for unskilled guest workers: the H-
2A program, for temporary agricultural guest workers, and the H-2B program, for
nonagricultural temporary unskilled guest workers. The programs are administered
jointly by the Employment and Training Administration (ETA) of DOL and the United
States Citizenship and Immigration Services (USCIS) of DHS, with all enforcement
responsibilities related to employer violations of worker rights handled by the DOL’s
Wage and Hour Division (WHD). While the exact numbers vary each year, more than

95 Martin, supra note 73 at 295 (noting that most researchers point to the Bracero
program as the genesis of undocumented Mexican migration and citing to many who
have reached this conclusion).
96 Philip Martin, The Bracero Program: Was It a Failure?, H.N.N July 3, 2006 available
at http://hnn.us/articles/27336.html.
workers are referred to as “nonimmigrant aliens” under the INA. See 8 U.S.C.A.
1101(a)(15). The three most common H-2B occupations by industry in 2005-2006 were:
laborer/landscaper (62,208); cleaner/housekeeper (14,283) and construction workers I
and II (15,524). UNITED STATES DEP’T OF LABOR, FOREIGN LABOR CERTIFICATION:
INTERNATIONAL TALENT HELPING MEET EMPLOYER DEMAND, PERFORMANCE REPORT
(Sept. 2007). Not all guest workers who gain admission to work under the H-2B program
are unskilled. For instance, professional athletes and entertainers are also admitted under
this non-immigrant category. See 20 C.F.R. § 655.3(b).
98 See 2010 CRS Guest Worker Report at 2; 29 C.F.R. § 501.1(c) (H-2A workers); while
there is not specific delegation in the case of H-2B workers, most would fall within the
WHD’s jurisdiction as the agency charged with enforcing the wage and other provisions
of the Fair Labor Standards Act (FLSA); see generally, 29 U.S.C. § 211 (creating the
WHD); “Wage and Hour Division: Major Laws Administered / Enforced” available at:
100,000 H-2A workers are admitted into the United States annually (although there exists no statutory cap), and approximately 66,000 H-2B workers (which, in most years, represents the statutorily-mandated cap). H-2 workers are authorized to enter the country to work solely for the petitioning employer, generally for a period of less than a year, although visas may be extended for up to three years. An H-2 visa provides no path to permanent residence.

For an employer to obtain a visa an H-2 worker, the DOL must “certify” that capable United States workers are not available, and that employing guest workers will not adversely affect wages and working conditions. H-2B employers need only attest to their efforts to recruit United States workers at the prevailing wage to gain certification. H-2A employers must submit documentation demonstrating that they undertook local recruiting efforts and met all other program requirements. In particular, they must demonstrate that they are offering wages that meet (or exceed) the

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*http://www.dol.gov/whd/regs/statutes/summary.htm*(setting forth the major laws administered by the WHD).


100 2010 CRS Guest Worker Report at 2.

101 Ruth Ellen Wasem, CONG. RESEARCH SERV., RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, 17 (Mar. 2010). New H-2B (and H-2A) regulations were enacted in 2009 in the final days of the Bush Administration. One significant change in both was the creation of an “attestation-based” certification process, rather than a more cumbersome process that required submission of various forms of proof that the employer had made a diligent search for qualified domestic workers before it could gain certification. The Bush H-2A regulations were recently replaced in March 2010 with new regulations that reinstate the certification process previously in effect.

102 20 CFR §§ 655.121 and 655.122.
highest of a number of different wage rates, including the Adverse Effect Wage Rate (AEWR) or an agreed upon collective bargaining rate.\textsuperscript{103}

The H-2 programs are widely disfavored by worker advocates. They have been criticized as being exploitative and abusive of the guest workers, notwithstanding the existence of significant employee protections and benefits on paper for H-2A workers.\textsuperscript{104} Specifically, H-2A workers are entitled to: (1) housing; (2) meals; (3) transportation from housing to work; (4) reimbursement for travel from the country of residence after having completed 50\% of the contract; (5) workers’ compensation for injuries and illness incurred in the course of employment; and (6) a return ticket to the worker’s residence upon completion of the contract.\textsuperscript{105} In addition, they are guaranteed to be paid for 3/4’s of the workdays of work promised in the contract (referred to as the “3/4 guarantee”) unless a domestic worker is found within the first fifty percent of the contract period (in which case the employer must hire the domestic employee, may terminate the H-2A

\textsuperscript{103} 2010 CRS Guest Worker Report at 5-6. Notably, in the final days of the Bush Administration, the DOL enacted new regulations governing the H-2A program that advocates charged significantly reduced the wage rate for H-2A workers. See North Carolina Growers’ Association, Inc. v. Solis, 2009 WL 1905067, *4 (M.D.N.C. Jun. 29, 2009)(denying the Obama Administration’s effort to suspend the new regulations on the grounds that the complaining North Carolina growers would be irreparably harmed were the rules allowed to be suspended because the new rules effectively lowered the wages the growers would have to pay from $9.34 under the old rule, to between $7.25 and $8.51 under the Bush regulations). In March, 2010, the DOL issued new regulations, reinstating many aspects of the old regulations related to wage calculations and employer certification, and making some new changes. See 75 FR 10403, March 5, 2010.

\textsuperscript{104} See discussion, infra, Section III.C.3.

\textsuperscript{105} 20 CFR § 655.122; see also Notices, Department of Labor, Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 FR 13261-01 (March 26, 2009) (withdrawing interpretation contained in the preamble of the H-2A and H-2B regulations promulgated in late 2008 (73 FR 77148-52 (H-2A program) and 73 FR 78039-41 (H-2B program)), which interpreted the FLSA to not require employers to reimburse H-2A and H-2B workers earning the minimum wage for relocation expenses as an employment related cost, notwithstanding and 11\th Circuit and other federal court decisions to the contrary).
worker, and is not bound by the 3/4 guarantee). Remarkably, the only benefits or safeguards afforded H-2B workers is the right to workers’ compensation. H-2 workers have been credited with driving down wages in the industries with the greatest number of guest workers, notwithstanding the wage rate requirements.

The programs are also unpopular with employers who find them cumbersome and inefficient, and their many obligations overly burdensome. These criticisms prompted the Bush Administration to promulgate new regulations governing both H-2 programs in the final days of the administration that were aimed at streamlining the application and certification process. (The Obama DOL has since promulgated new H-2A regulations reversing most of the changes).

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106 See 20 C.F.R. 655.102.
107 See Mary Bauer, Director, Immigrant Justice Project of the Southern Poverty Law Center, Testimony before the House Subcomm. on Domestic Policy, 4 (April 23, 2009) available at http://www.splcenter.org/get-informed/news/splc-to-congress-protect-h-2b-guestworkers-enforce-labor-laws-aggressively/testimo (hereinafter “Bauer testimony”). And this one “benefit” is often effectively unavailable to H-2 workers because the rules of many states bar or limit non-resident family members from receiving death benefits, or require that an injured worker see a doctor in the state – an impossible requirement to meet if an H-2 worker is no longer authorized to be in the country. See SPLC report at 26 (internal citation omitted).
108 See generally, CRS 2010 Guest Worker Report (describing the two current methods employed to “certify” that there is a resident worker shortage in a particular industry / region).
109 See Arin Greenwood, Issue Analysis: The Case for Reforming U.S. Guest Worker Programs, Competitive Enterprise Institute (Dec. 2008) at p. 4 (noting that the U.S. DOL itself has described the H-2A application process as “slow, burdensome and duplicative”); see, e.g., Temporary Employment of H-2A Aliens in the United States; Final Rule, 73 Fed. Reg. 76891-01 (Dec. 18, 2008) (2008 rule governing H-2A workers (since replaced) referring to many employer comments criticizing various program requirements, like the obligation to provide employee housing, as “serious impediments” to program use).
1. Portability

With a few limited exceptions, H-2 workers cannot change jobs without losing their visa status. Nor can H-2 workers quit work—even if their employers have violated work agreements, failed to pay wages or overtime, or worse—without risking deportation because H-2 workers’ immigration status rests solely on their employment with their petitioning employer. One rare instance in which the law allows H-2A workers to transfer employers is when the petitioning employer cannot fulfill the contract. But even then, workers can only transfer to employers who are certified to employ H-2A workers; if such employers cannot be found, the workers must depart the country. In the case of H-2B workers, they have even fewer opportunities to change employers because, since 2004, the H-2B cap has always been reached, and generally very quickly. Accordingly, it is nearly impossible for H-2B workers to find new employers certified to hire H-2B workers, even under the rare conditions that might allow a worker to change employers. And, for all H-2 workers, no employment with a certified employer means that the workers must return to the sending country or face deportation.

(Dec. 19, 2008) (Regulations governing H-2B workers). These regulations were fiercely opposed by advocates of guest workers who believe the streamlining and other elements would leave H-2 workers even more vulnerable to abuse. See, Bauer testimony (describing the regulations as having “eviscerated the few protections that existed for guest workers”).

111 See 75 FR 10403, Mar. 5, 2010.
112 8 C.F.R. § 274a.12(b)(9) (Stating that “[a]n alien in [H-2] status may be employed only by the petitioner through whom the status was obtained” except in the case of a professional athlete, who may change employer after being “traded” under certain circumstances).
113 See 20 C.F.R. § 655.122.
2. Government oversight and accessible avenues for complaint

The DOL’s Wage and Hour Division (WHD) has enforcement authority over employment-related complaints by H-2 workers.\textsuperscript{115} It also possesses the authority to bar employers from future hiring of H-2 workers based on past violations of worker rights, and to conduct workplace investigations.\textsuperscript{116} In addition, guest workers may pursue private actions against employers in court.\textsuperscript{117}

In practice, the WHD has largely failed to protect workers through its affirmative enforcement mechanisms, and it is nearly impossible for H-2 workers on their own initiative to vindicate their rights through WHD channels or private litigation. First, the WHD has seldom taken effective steps to prevent worker abuses by consistently monitoring employer worksites or barring employers with a record of violating worker rights. Specifically, as of 1997, the WHD had never denied an application to employ H-2A workers because of previous violations of worker rights.\textsuperscript{118} In 2004, the DOL investigated a total of 89 H-2A employer worksites.\textsuperscript{119} (There is no available data on the number of H-2B sites that have been investigated in recent years). This lack of enforcement has also meant that the many paper rights afforded H-2A workers are often not realized by the workers.

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\textsuperscript{115} See 29 C.F.R. 501.1(c) (H-2A workers); 20 CFR 655.50 (H-2B workers).
\textsuperscript{116} See 8 U.S.C. 1188(b)(2); 20 C.F.R. 655.110(a).
\textsuperscript{117} See e.g., Laura Parker, Guest Workers Sue Companies Over Pay, USA TODAY, Nov. 15, 2006.
\end{flushright}
In addition, local WHD offices are not accessible or equipped to effectively resolve complaints lodged by guest workers, even though the H-2A regulations theoretically give these workers a right to pursue administrative complaints with the WHD.\footnote{See Bauer testimony at 5; Holley, supra note 85 at 11 (describing how there is no set procedure for filing H-2A complaints, no guarantee that they will be pursued by the DOL, and no time line for investigations).} Guest workers generally don’t know where DOL offices are located, most offices are only open during business hours when guest workers are working, and most are not set up to help workers who do not speak English.\footnote{See Bauer testimony at 5.} What is more, the majority of guest workers work in remote locations, with scant access to transportation (other than what is provided by the employer).\footnote{Id. at 4.} In the rare instances in which H-2 workers find their way to a DOL office, file a complaint, and the WHD successfully carries out an investigation, the fines and other remedies are generally so little they are ineffective as a means of deterring future violations.\footnote{Id.} By way of example, the DOL website reports that it is has temporarily barred a total of 6 employers from employing H-2A workers, out of a total of approximately 7,383 H-2A employers in 2009.\footnote{U.S. DEP’T OF LABOR, EMPLOYMENT & TRAINING ADMIN.: OFFICE OF FOREIGN LABOR CERTIFICATION PROGRAM, LABOR CERTIFICATION DEBARMENTS (2009) available at: http://www.foreignlaborcert.doleta.gov/pdf/Debarment_List_Revisions.pdf; H-2A Disclosure Data: 2009, available at http://www.flcdatacenter.com/CaseH2A.aspx.} There does not appear to be a list of barred H-2B employers.

Indeed, in a 2009 report, the General Accounting Office essentially concluded that the WHD was failing in its duty to protect the workplace rights of low wage workers due to botched investigations, long delays and toothless fines. Remarkably, the principle violation the report found the WHD was failing to prevent is the most fundamental:

wage theft. The report also describes a case in which a GAO investigator posed as a complainant reporting possible child employment at a factory with dangerous machinery, no investigation was undertaken for four months. Ultimately, only one of a total of ten fictitious cases that were presented to the WHD was handled properly, and even that one was marked by significant delays.

Certainly, one reason for the failings of the WHD is that there are desperately few investigators. According to a 2005 study by the Brennan Center for Justice, over the period 1975-2004, enforcement activities and resources allocated to the DOL “either stagnated or declined” at the same time that the workforce steadily increased. Specifically, during this period, the number of workers covered by the wage and hour laws of the Fair Labor Standards Act grew by 55% (from 56,648,000 in 1975 to 87,691,695 in 2004), while the number of WHD investigators declined by 14% (from 921 in 1975 to 788 in 2004). While in 2010, the DOL has hired 250 new WHD investigators -- bringing the number of WHD investigators up to 949 -- this still translates into approximately one investigator for every 91,600 covered workers – a ratio that cannot possibly ensure adequate enforcement of any of the many laws under the WHD’s jurisdiction, let alone close monitoring of the H-2 programs. What is more, the cases

126 Id. at ii.
that involve serious abuses of the kinds to which guest workers are particularly
vulnerable – like forced labor and debt peonage – require the investment of even more
scarce resources than other cases.\footnote{129}

Given the WHD’s shortcomings, the only viable avenue for relief open to most
H-2 workers is private litigation. This avenue is also full of nearly insurmountable
obstacles. First, it is very difficult for H-2 workers to find legal representation because of
geographic isolation and lack of transportation.\footnote{130} In addition, many fear a lawsuit would
be met with retaliation from recruiters in the workers’ sending countries or result in their
being “blacklisted” and unable to secure employment in the future.\footnote{131} Second, H-2B
workers have been deemed ineligible for Legal Services assistance because of their
nonimmigrant status.\footnote{132} Of course, most H-2 workers, particularly those whose rights
have been violated by their employer, do not have funds to pay private attorneys.\footnote{133}

\footnote{\texttt{due_help_to_wage-theft_victims} (reporting that the DOL has recently hired 250
investigators, bringing the number up to pre-2001 levels). I arrived at the ratio based on
an estimate of 87 million covered workers. This percentage was estimated by the DOL in
a report entitled, \textsc{U.S. Dep’t of Labor, Employment Standards Administration,
Wage and Hour Division: Minimum Wage and Overtime Hours Under the Fair
Labor Standards Act} (1998). The worker numbers were obtained from the \textsc{Bureau of
\url{http://www.bls.gov/web/empsit/ceshighlights.pdf} (reporting that 130 million
workers were employed in seasonally adjusted non-farm labor in June 2010); \textsc{Bureau of
\url{http://www.bls.gov/oco/ocos349.htm} (reporting that approximately 821,700 workers
were engaged in agricultural work in 2008).
\footnote{129} \textsc{Free the Slaves and Human Rights Center, U. Cal., Berkely, Hidden Slaves:
Forced Labor in the United States} (Sept. 2004) 16-17 (citing an anonymous DOL
WHD official who discussed the difficulties in handling forced labor cases that often
arise in the agricultural sector where most workers are immigrants, and very vulnerable to
abuse).
\footnote{130} \textsc{SPLC Report at 31}.
\footnote{131} \textsc{SPLC report at 16-17}.
\footnote{132} \textsc{See Bauer Testimony at 3}.
\footnote{133} \textsc{See Bauer Testimony at 5}.
Finally, there is no certain or established procedure available to H-2 workers who have stopped working for their petitioning employer to secure the right to remain in the country.\textsuperscript{134} The only avenue available to them is to seek deferred action status from the United States Citizenship and Immigration Services (USCIS).\textsuperscript{135} By the CIS Ombudsman’s own account, the process for obtaining deferred action is shrouded in mystery and never a certainty. To begin, it is granted solely at the discretion of USCIS, has no statutory basis, and only passing reference is made to it in the federal regulations.\textsuperscript{136} In addition, there are no posted procedures for filing for deferred action, no mechanism for ensuring that uniform standards are being applied across the country, no formal statistics kept on requests, grants and denials, and no way to appeal a decision related to a deferred action request.\textsuperscript{137} Accordingly, there is no guarantee an H-2 worker pursuing legal action against an employer will be granted such status. Nor is there any

\textsuperscript{134} 8 C.F.R. § 274a.12(b)(9).
\textsuperscript{135} See 8 C.F.R. 274a.12(c)(14) (referring to “deferred action” as “an act of administrative convenience to the government which gives some cases lower priority”); cf. Leticia M. Saucedo, A New “U”: Organizing Victims and Protecting Immigrant Workers, 42 U. Richmond L. Rev. 891, 892-905 (2008) (proposing that the “U” visa, which grants nonimmigrant status to victims of crime who have “suffered substantial physical or mental abuse as a result” of the crime, and who are cooperating with law enforcement pursuant to 8 U.S.C. § 1101(a)(15)(U)(2000), become one of the tools used by labor advocates to address workplace abuses of unauthorized immigrants).
\textsuperscript{136} DEP’T OF HOMELAND SECURITY, OFFICE OF THE CITIZEN AND IMMIGRATION OMBUDSMAN, RECOMMENDATION OF THE CIS OMBUDSMAN available at http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf. (While the Ombudsman in this memo made several recommendations, including that USCIS “post general information about deferred action on its website,” it does not appear that this recommendation has been implemented).
\textsuperscript{137} Id.
guarantee that a worker who has left the country can gain readmission to participate in litigation because that also lies within the discretion of USCIS.\textsuperscript{138}

3. Abuses of H-2 workers are commonplace, along with depressed wages

By many accounts, exploitation and abuse of H-2 workers is commonplace.\textsuperscript{139} H-2 workers are routinely cheated of wages.\textsuperscript{140} It is also common for them to have to pay kickbacks and up-front fees to labor contractors and recruiters.\textsuperscript{141} In one recent case, H-2B guest workers paid between $3500 to $5000 to work for hotels in New Orleans after Hurricane Katrina for a nine-month period. Under the contract terms, each guest worker would have had to work full time for three to four months just to pay off the recruitment fee debt. As it turned out, the employer did not even provide the workers with full time

\textsuperscript{138} Bauer Testimony at 7 (recounting a case in which a named plaintiff in a class action handled by SPLC was not granted a visa to testify at a deposition).


\textsuperscript{140} See, e.g., Janine Zeitlin, Ignored and Cheated, Farm workers earn nada in America’s green bean capital, MIAMI NEW TIMES, Mar. 14, 2008, available at http://www.smfws.com/articles2008/march2008/art03142008d.htm (quoting a Dade County community organizer describing wage theft in the industry as “massive and ubiquitous” and noting that “[i]t's rare to find an immigrant worker in South Dade who hasn't been ripped off at some point”).

\textsuperscript{141} Laura Wides-Munoz, Migrants See Abuse in Guest Worker Jobs, WASH. POST, Jun. 2, 2007, http://www.washingtonpost.com/wpdyn/content/article/2007/06/02/AR2007060200049.html. Since November 2009, the law has prohibited the collection of recruitment or other placement fees by employers, or others, and required that petitions be denied or revoked if it is established that such fees were sought or collected. In such cases the worker will have thirty days to return to his country of residence (at the employer’s expense), or to find another employer. See 8 C.F.R. 214.2(h)(5) and (6). It is too early to tell whether this prohibition can (or will) be effectively enforced.
work. H-2 employers often seize workers’ travel documents upon arrival. It is also widely understood that these workers are particularly vulnerable to human trafficking. Indeed, in an effort to curb this abuse, the State Department recently published a pamphlet aimed at preventing trafficking of H-2A and B workers. Finally, in industries and in geographic areas where H-2 guest workers are employed in substantial numbers, wage rates have declined.


143 See SPLC Report at 2 (noting how common is the practice of taking travel documents based on interviews with thousands of guest workers and “scores of legal cases”).

144 See Free the Slaves and Human Rights Ctr. (Cal. Berkeley), Hidden Slaves: Forced Labor in the United States (2004) 3, 52 (recommending, among other actions, that the U.S. government eliminate all visa requirements that tie an employee to a single employer as step towards combating forced labor).


146 See SPLC Report at 21, (discussing the decrease in real terms of the wage rates for tree planters in Alabama, and attributing the decline to a recent modification by the DOL in its methodology for determining the prevailing wage, and to the fact that a substantial number guest workers are employed in tree planting in Alabama, and they have no ability to bargain for better wages and working conditions); see also, Linda Levine,Cong. Research Serv., 95-712 E, Immigration: The Labor Market Effects of a Guest Worker Program for U.S. Farmers (Jan. 2009) (noting that while the H-2A program has likely not driven down farm wages nationwide because of low utilization of the program, it might have a more substantial effect on wages in certain local labor market that rely heavily on guest workers, and positing that an expansion of the H-2A program could be expected to have similar effects as Bracero program (and thus, could be expected to drive down wages)); see also Jennifer Gordon, Transnational Labor Citizenship, 80 S. Cal. L. Rev. 503 (noting that the Adverse Effect Wage Rate that governs H-2A guest worker wage rates, while set above the minimum wage, acts as a ceiling to farmworker wages because the moment that wages move beyond this mark, an employer may declare all such applicants “unavailable,” under the H-2 regime, and apply to bring in workers from abroad).
D. McCain-Kennedy Style Bills

In May 2005, the McCain Kennedy comprehensive immigration reform bill was introduced in the Senate, representing the first of numerous immigration reform packages that were introduced during the years 2005 to 2007 – the last time that comprehensive immigration reform legislation was introduced. One component of each of the comprehensive proposals (which all featured a plan to adjust the immigration status of the millions of unauthorized workers), was a large-scale unskilled guest worker program designed to control future migrant flow. The guest worker programs were essentially the same in each bill, with key worker safeguards, namely, portability, stronger enforcement mechanisms, and a path to earned adjustment. It is likely that the guest worker component of any comprehensive immigration reform bill that will be proposed in the near future, will resemble these programs. While none of the bills became law, the

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146 S. 1033 (2005). Others included CIRA 2006, S. 2611, 109th Congress (2006); CIRA 2007, S. 1348 (2007); the Security Through Regularized Immigration and a Vibrant Economy or STRIVE Act, H.R. 1645 110th Congress (2007); but see, the Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007, S. 1639, 110th Congress (2007) (proposing three categories of guest worker, each with shorter visa terms than three years, and no path to citizenship; however, the visas would have been portable, and more protections would have been granted workers).

147 S. 1033 (2005). Others included CIRA 2006, S. 2611, 109th Congress (2006); CIRA 2007, S. 1348 (2007); the Security Through Regularized Immigration and a Vibrant Economy or STRIVE Act, H.R. 1645 110th Congress (2007); but see, the Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007, S. 1639, 110th Congress (2007) (proposing three categories of guest worker, each with shorter visa terms than three years, and no path to citizenship; however, the visas would have been portable, and more protections would have been granted workers).

148 S. 1033, 109th Congress, 1st Session (2005). Notably, the H-2C program would not have been available to unauthorized immigrants as a means of adjusting their status. See CIRA 2006, S. 2611, 109th Cong., § 403(b)(f) (2006). Similarly, from the information thus far released about the framework for comprehensive immigration reform now under consideration it does not seem that the guest worker program will be designed to provide status to current unauthorized immigrants, but rather, will be directed toward addressing the future flow of immigrants.
Comprehensive Immigration Reform Act of 2006 progressed the furthest in the legislative process in that it was passed by the Senate.\textsuperscript{149} For this reason, this discussion will center on CIRA 2006’s proposed H-2C guest worker program.

The H-2C program would admit guest workers to perform non-agricultural jobs of a temporary or seasonal nature upon a showing by a petitioning employer that no qualified United States worker was available at the time of need, and an employer attestation that the hire would not “adversely affect the wages and working conditions” of similarly employed domestic workers.\textsuperscript{150} While CIRA 2006 would wait on a job study to determine the number of guest workers to be admitted, McCain-Kennedy proposed the admission of 400,000 in the first year, with increases of 10 to 20\% permitted in later years.\textsuperscript{151} Under the H-2C program, the initial visa would be effective for a period of three years, and could be extended for another three years.\textsuperscript{152}

H-2C employers would be required to pay the greater of the customary wage rate for similarly-situated employees of the employer, or the prevailing wage level in the area of employment. Guest workers would also be entitled to receive the same benefits as similarly-situated employees and the equivalent of workers’ compensation insurance, if not covered by the state.\textsuperscript{153} Foreign labor contractors and recruiters would be prohibited from collecting any fees from guest workers.\textsuperscript{154}

\textsuperscript{149} CIRA 2006, S 2611, 109\textsuperscript{th} Congress (2006).
\textsuperscript{151} CIRA 2005, S.1033, 108th Cong., § 305 (2005) (The STRIVE Act also proposed an initial 400,000 cap, which could be raised to 600,000, depending on demand).
\textsuperscript{152} CIRA 2006, S. 2611, 109th Cong., § 403(b)(f) (2006).
\textsuperscript{153} Id. at § 404.
\textsuperscript{154} Id. at § 404(h).
1. Portability

To qualify for an H-2C visa, and to gain admission to the U.S., an H-2C worker would need to find an employer willing to hire them, and petition for a visa. Once in the U.S., an H-2C guest worker would be able to change jobs if the subsequent employer was certified as being unable to find qualified domestic workers and the guest worker could demonstrate that he or she had never worked without authorization. A guest worker’s H-2C status would terminate if the worker was unemployed for 60 or more consecutive days, unless the period of unemployment was due to medical problems, authorized leave, or “any other period of temporary unemployment caused by circumstances beyond the control of the [guest worker].”

2. Government oversight and avenues for complaint

In the way of enforcement, CIRA 2006 directed the Secretary of Labor to hire an additional 2000 compliance investigators annually to be dedicated to administering the guest worker program, “subject to the availability of appropriations for such purpose.” The H-2C program would have featured a comprehensive administrative complaint system, while also retaining the guest worker’s right to seek vindication of contractual or statutory rights in other forums, like the courts. Under the system, upon receipt of a complaint, the Secretary of Labor would either initiate a hearing, or notify the aggrieved party that the DOL would not be proceeding. The guest worker would then have a right to pursue an administrative hearing on his or her own initiative. CIRA 2006 did not

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155 Id. at § 403(j).
156 Id. at § 403(f)(3).
157 Id. at § 412.
158 Id. at § 404(i).
159 Id. at § 404 (i)(4)((B).
provide for a means by which workers could remain in the U.S. during the pendency of a labor case.

3. Opportunity to adjust from temporary nonimmigrant status to permanent resident status

The H-2C program would have provided two avenues for guest workers to adjust their status to Lawful Permanent Residents. First, a guest worker could be sponsored for an employment-based immigrant visa by his or her employer. Second, a guest worker could self-sponsor upon a showing that (1) the guest worker had been employed as an H-2C worker for at least four years, (2) an employer attestation that it would employ the guest worker and (3) an attestation by the Secretary of Labor that there were insufficient available domestic workers.\(^\text{160}\)

IV. The Commonwealth of the Northern Mariana Islands' Guest Worker Program

The CNMI’s guest worker program employed many of the worker safeguards that have been proposed in recent legislation – namely, visa portability and a comprehensive, accessible administrative complaint system – with little success. As such, it offers useful evidence when considering including a large-scale guest worker program as an element of immigration reform. It also stands as a cautionary tale.

A. A Brief History of the CNMI

The CNMI is comprised of 14 small islands in Micronesia, three of which are inhabited by little more than a few people.\(^\text{161}\) The Commonwealth is located about 3300

\(^\text{160}\) Id. at § 408(h).

\(^\text{161}\) The largest island, Saipan, is approximately 12 miles long and 5 miles across. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, OFFICE OF INSULAR AFFAIRS, INSULAR AREA SUMMARY FOR THE NORTHERN MARIANA ISLANDS available at http://www.doi.gov/oia/Islandpages/cnmipage.htm (last visited July 8, 2009).
miles from Honolulu and 1270 miles from Tokyo. It is home to about 48,000 people, of whom approximately 20,000 are guest workers. Saipan, the largest and most populated island, is best known as the site of a decisive battle in WWII in 1944. Neighboring Tinian was the launching site for the Enola Gay and the atomic bomb dropped on Hiroshima.

After the war, the Northern Mariana Islands were administered by the U.S. as part of the Trust Territory of the Pacific Islands, a United Nations Trusteeship. In the mid-seventies, the Northern Marianas opted to become a Commonwealth of the United States and entered into a Covenant with the United States that governs the relationship. Under the Covenant, the CNMI was allowed to govern itself, but agreed to be subject to most provisions of the U.S. Constitution, and most federal laws, with a few notable exceptions. In particular, until November 29, 2009, the CNMI was not subject to U.S. Immigration and Customs Laws. In addition, until June 2007, the CNMI was not

162 Id.
covered by the minimum wage provisions of the FLSA.\footnote{Id.} Under the Covenant, those born in the CNMI are U.S. citizens.\footnote{48 U.S.C. 1801 § 301.}

\textbf{B. Guest Workers}

The CNMI began using guest workers during the trust territory period because it was deemed necessary in order to support economic development given the small size of the population. (In 1980, the population totaled 16,780).\footnote{Howard P. Willens & Deanne C. Siemer, \textit{An Honorable Accord: The Covenant Between the Northern Mariana Islands and the United States} (University of Hawai’i Press 2002).} In 1983, the newly-formed Commonwealth enacted the Nonresident Workers’ Act, which remained in effect until January 1, 2008. This is the law that will be discussed below.\footnote{The Nonresident Workers Act was replaced, effective January 1, 2008, by the Commonwealth Employment Act of 2007, available at \url{http://www.marianaslabor.net/law/empreg.pdf}, which was essentially replaced on November 29, 2009, by The Act Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, which was part of the Consolidated Natural Resources Act of 2008. \textit{See} P.L. 110-229, Title VII, codified at 48 U.S.C. § 1806 et seq. The law was scheduled to go into effect on June 1, 2009, although the effective date was later delayed 180 days until November 29, 2009.}

The number of guest workers in the CNMI surged in the 1980s when garment manufacturers from Hong Kong and Korea discovered that by incorporating and setting up their businesses in the CNMI, they could avoid the U.S. quota system, which limited the number of garments foreign countries could sell in the U.S.. Also, the CNMI’s low minimum wage and its guest worker program allowed manufacturers to import workers from China and the Philippines, among other countries, and pay them very low wages.\footnote{John Bowe, \textit{Nobodies: Modern American Slave Labor and the Dark Side of the Global Economy} 173-77 (Random House Publishing, 2007).}
At the height of the boom – in the year 2000 – more than 34,000 guest workers were working in the CNMI (out of a total population of about 69,200 at the time).\footnote{175}  

C. The Nonresident Workers’ Act  

The Nonresident Workers’ Act (NWA) allowed a basically unlimited number of guest workers to enter the CNMI for employment purposes.\footnote{176} The policy driving the NWA was the legislative finding that guest workers were “essential to a balanced and stable economy in the Commonwealth,” and necessary “at the present state of economic development.”\footnote{177} The law allowed guest workers to perform almost any job – skilled and unskilled – with a few specific categories excluded.\footnote{178} To be permitted to hire a guest worker, the employer had to establish that no resident worker was available, and that employment of a guest worker would not drive down wages of resident workers.\footnote{179} Employment visas could be issued for a period of not more than one year, but could be renewed indefinitely.\footnote{180} The law provided guest workers with no path to permanent resident status or citizenship.

\footnote{175}{“CNMI Census Reports,” 2003 Commonwealth Survey, American Factfinder, 2000.}  
\footnote{176}{In 1996 a hiring moratorium was put in place setting limits on hiring for some companies and industries. The many exemptions and exceptions, along with the high numerical limits set, did little to limit or reduce the numbers. 3 N. Mar. I. Code § 4601. Indeed, the number of guest workers expanded until the year 2000 when it peaked at more than 34,000. CNMI Census Reports,” 2003 Commonwealth Survey, American Factfinder, 2000.}  
\footnote{177}{3 N. Mar. I. Code § 4411 (2004).}  
\footnote{178}{3 N. Mar. I. Code § 4434(e)(i) (Among the jobs for which guest workers could not be hired were most positions in the government and taxi cab driver, secretary, bus driver, among others).}  
\footnote{179}{3 CMC §§ 4411, 4413, 4436-4440.}  
\footnote{180}{CNMI Alien Labor Rules and Regulations (hereinafter, “CNMI ALRR”) § II(C)(4) (2004). The NWA contains a four-year cap on renewal, but it was never enforced. See 3 N. Mar. I. Code § 4411(b).}
The employment of guest workers was highly regulated by the CNMI government. To secure a visa, guest workers had to be hired by a particular employer pursuant to a contract approved by the CNMI Department of Labor. To be approved, the employment contract had to specify the hours and location of work, wages to be paid for straight time and overtime work, and an itemized list of any deductions to be made; any substantive changes to the contract had to be approved by the Director of Labor.\textsuperscript{181} The NWA also required employers to pay guest workers the minimum wage for the occupational category, provide them with at least 40 hours of work per week, cover all medical expenses (not just work-related expenses), all expenses associated with work visas, and the costs of transportation to the CNMI and back to the employee’s point of origin.\textsuperscript{182} Employers were also prohibited from terminating guest workers’ employment without cause.\textsuperscript{183} The law also required employers to purchase a bond ensuring the payment of back wages, medical bills and repatriation costs in the event of insolvency.\textsuperscript{184}

1. Portability

The NWA provided guest workers with three ways to “transfer” to a new employer. First, a guest worker was afforded 45 days to find a new employer at the end of the contract.\textsuperscript{185} Second, a guest worker could transfer mid-contract upon the consent of both the original contracting employer and the new employer.\textsuperscript{186} Finally, a guest worker could gain the right to transfer by administrative order upon a finding by an administrative law judge that the employer had committed a violation of the NWA, or

\textsuperscript{181} 3 N. Mar. I. Code §§ 4433, 4434.
\textsuperscript{182} 3 N. Mar. I. Code §§ 4424(a)(5), 4436, 4437.
\textsuperscript{183} CNMI ALRR § III(F).
\textsuperscript{184} 3 N. Mar. I. Code §§ 4433, 4435.
\textsuperscript{185} 3 N. Mar. I. Code § 4602; CNMI ALRR § IV(A).
\textsuperscript{186} 3 N. Mar. I. Code § 4602; CNMI ALRR § IV(B).
had closed the business, terminated the worker without cause, or upon other specified grounds.\textsuperscript{187}

2. Government oversight and accessible avenues for complaint

The CNMI’s Department of Labor had broad authority to monitor employers of guest workers and to enforce the provisions of the NWA, the Commonwealth Minimum Wage and Hour Law, and the terms of guest workers’ nonresident worker contracts.\textsuperscript{188} Specifically, DOL was authorized to inspect worksites and employer-provided housing, and to review payroll records and records related to worker illness and injuries.\textsuperscript{189} During the years 2001 through 2006, the DOL Health and Safety Unit conducted more than 1000 worksite inspections each year, and a few hundred inspections of employee housing.\textsuperscript{190} During this same period, however, unannounced regulatory inspections were very rare, in part due to a February 2000 U.S. District Court case which invalidated some provisions of the NWA related to regulatory inspections. Corrective legislation was never enacted.\textsuperscript{191}

The NWA also created an accessible administrative complaint system which allowed guest workers (and employers) to file complaints with the CNMI DOL for any

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\textsuperscript{187} 3 N. Mar. I. Code § 4602; CNMI ALRR § IV(C).
\textsuperscript{188} 3 N. Mar. I. Code § 4421, 4437; Commonwealth Minimum Wage and Hour Act, 4 N. Mar. I. Code § 9231.
\textsuperscript{189} 3 N. Mar. I. Code § 4437.
\textsuperscript{190} \textit{Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 96 (Feb. 8 2007).} (U.S. GPO 2007; 35-819 pdf) at 96.
\end{flushright}
contract or wage and hour violation. A complaint could be initiated either by the
local DOL, or by a worker or employer. The filing costs for a worker-initiated
complaint were $20. The complaint could take the form of a one-page handwritten
statement of the problem. While attorneys were not required in the administrative
proceedings, the NWA provided for attorneys’ fees for guest workers who prevailed in
their complaints. The federal ombudsman’s office would provide translators for guest
workers if they needed one. Under the NWA, workers could also seek administrative
review of the hearing officer’s decision and subsequent judicial review. Finally, a
worker unable to collect on an administrative or court order awarding back wages who
was ready to return to his place of origin could assign his or her right to collect the wages
to the DOL, and the DOL would then grant the worker up to three months of back wages
and a plane ticket to the worker’s point of hire.

192 3 N. Mar. I. Code § 4447; CNMI ALRR § VII.
193 See JIM BENEDETTO, FEDERAL OMBUDSMAN’S REPORT ON THE STATUS OF
NONRESIDENT WORKERS IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS:
CURRENT CONDITIONS, ISSUES AND TRENDS IN THE CNMI(2006) available at
LEXIS 17677 ( 9th Cir. July 10, 1996) (affirming award of compensation for then non-
working hours that plaintiff hostesses were confined to the employer’s barracks).
194 See CNMI ALRR §§ VII and IX(B)-(D).
195 CNMI ALRR § XIV(G).
196 CNMI ALRR § VII.
197 3 N. Mar. I. Code § 4447(d).
199 See Commonwealth Nonresident Worker Relief Act of 1999, CNMI P.L. 11-66,
During the period 2000-2006, there were generally 11 DOL investigators on staff, and a labor force of approximately 50,000, which translates into approximately one investigator for every 4500 workers.\textsuperscript{200} In addition, there were three hearing officers permanently assigned to the CNMI DOL to handle labor matters.\textsuperscript{201} Generally there was also an Assistant Attorney General assigned to the DOL. The hearing officers and Secretary of Labor had broad authority to award back pay, liquidated damages and to bar serious offenders from further hiring of guest workers.\textsuperscript{202} Currently, the CNMI has approximately 190 employers on its barred list, many of whom are permanently barred from employing guest workers.\textsuperscript{203}

A tremendous number of labor complaints were filed by guest workers and some by employers. In addition, some were initiated by the CNMI DOL. During the years 2000 to 2006, an average of 300 complaints regarding working conditions were filed each year, and another 400 complaints objecting to denials of requests for labor permits or transfers.\textsuperscript{204} Some of these cases involved numerous complainants – and required time-

\textsuperscript{200} Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 104 (Feb. 8, 2007) (U.S. GPO 2007; 35-819 pdf) (The 50,000 number represents the entire labor force, not just employees under the CNMI DOL’s jurisdiction, which would be a lesser number).

\textsuperscript{201} Id.

\textsuperscript{202} 3 N. Mar. I. Code § 4444.

\textsuperscript{203} CNMI Dep’t of Labor, Barred Employers, available at https://marianaslabor.net/barred.asp. (It remains to be seen whether the U.S. DOL will honor this list as it takes over administration of the guest worker program applying federal law).

\textsuperscript{204} See Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 96 (2007); Ferdie de la Torre, Labor Cases Piling Up Anew, SAIPAN TRIBUNE, Oct. 19, 2007 available at: http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=73442 (reporting that in 2006, 358 labor cases were filed and 441 denial case applications. As of October 2007, 280 labor cases had been filed and 400 denial case applications).
intensive investigations. As a result of the high volume of cases, and an inadequate number of trained, experienced investigators, the administrative system was overwhelmed with a backlog of cases. In 2007, more than 3000 cases from the period of 1996-2004 were pending.

In the early 1990s, the CNMI Supreme Court issued a number of decisions establishing that guest workers alleging any infringement on their right to life, liberty or property, including a claim of unpaid wages, had a due process right to remain in the Commonwealth until afforded a hearing. In response to these decisions, the CNMI DOL began holding mediation sessions within a month of a worker filing the complaint, and if the complaint was deemed nonfrivolous and one that arguably warranted that the

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205 See Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 96-97 (2007) (discussing “compliance agency cases,” which were initiated by the CNMI DOL, generally were more complex, and involved multiple workers).


208 Commonwealth v. Deala, 3 N.M.I. 110 (1992) (holding that “[i]n an administrative proceeding where a person’s life, liberty, or property is at stake, Article I, §5 of the Commonwealth Constitution requires, at a minimum, that the person be accorded meaningful notice and a meaningful opportunity to a hearing, appropriate to the nature of the case.”); Commonwealth v. Rivera, 3 N.M.I. 436, 445 (1993) (holding that “an order of deportation, while a valid wage claim is pending, must be stayed until, at the very least, the worker is provided a meaningful opportunity to a hearing. . . . Furthermore, the opportunity for a hearing cannot be meaningful when a worker is required to leave the island and then return for a hearing and it is undisputed that the worker has no financial means to return.”).
employee cease working for the contract employer, the DOL would grant the employee a temporary work permit to seek work elsewhere during the pendency of the case.\textsuperscript{209}

This due process right, combined with the tremendous backlog of cases, meant that many workers were authorized to remain in the CNMI, sometimes for years, without formal employment while awaiting a labor hearing.\textsuperscript{210} This created a large pool of available workers, at times exceeding 1000 workers (out of a guest worker pool of between 25,000 to 35,000), who were unemployed, but authorized to seek temporary work. These workers often ended up working off the books, and for even lower wages than guest workers under contract.\textsuperscript{211} There also emerged a population of unauthorized workers who were neither under contract with an employer, or authorized to be seeking temporary work, estimated at approximately 500 in 2007.\textsuperscript{212}

3. Abuses of CNMI guest workers were commonplace, along with depressed wages

The CNMI’s guest worker program gained world-wide notoriety in the 1990s when reports of horrid sweatshop conditions and wide-spread abuse of the guest workers began to surface.\textsuperscript{213} Its notoriety was renewed during the Jack Abramoff scandal because

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\textsuperscript{209} CNMI ALRR § IX(E).
\textsuperscript{211} Id.
Abramoff had been the principal lobbyist for the Northern Marianas, hired to head off efforts by the federal government to take control of the CNMI’s immigration to curb the abuses. Some of the worst abuses of the 1990s were resolved by three landmark class action lawsuits filed against some of the biggest names in the apparel industry, including The Gap, Calvin Klein, Liz Claiborne, Sears and Nordstrom. Ultimately, the defendants agreed to a settlement that required them to pay the workers more than $20 million, and agree to submit to ongoing monitoring. Also during this period, the U.S. DOL imposed its largest fine ever ($9 million in wage restitution) on garment magnate Willie Tan for unpaid wages due garment workers in his Saipan factories. Notwithstanding these large settlements and the introduction of independent monitoring at the large garment factories, the number of labor abuses continued to be significant.

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214 Controversial lobbyist had close contact with Bush team, USA TODAY, May 6, 2005, available at: http://www.usatoday.com/news/washington/2005-05-06-abramoff-bush_x.htm (reporting that in the first 10 months of the Bush Administration, Abramoff and his team had nearly 200 contacts with Administration officials regarding the CNMI and its interest in preventing the federal government from taking control of its immigration).
215 Cummings, supra note 213; see Doe v. Gap, Inc., No. 01 Civ. 0031, slip op. at 51-53 (D. N. Mar. I. Nov. 26, 2001) (involving allegations of involuntary servitude and interference with the right to free association and to be free from discrimination by garment workers in Saipan under the Alien Tort Crimes Act).
Specifically, instances of wage theft were common.\textsuperscript{219} Over a 10-month period in fiscal year 2005, the federal ombudsman of the Department of the Interior, Office of Insular Affairs, who was charged with assisting guest workers with labor complaints, referred 701 employee cases to federal and local agencies. Most of the complaints involved non-payment of wages, breach of contract and wrongful termination.\textsuperscript{220}

Unhygienic and inhumane working conditions in factories and barracks were also widespread.\textsuperscript{221} In one notorious case in 1999, 1200 workers were sickened by food poisoning from food served to them by a factory cafeteria.\textsuperscript{222}

Instances of discrimination were also numerous. In 2005, the regional attorney for the Equal Employment Opportunities Commission's district office that covers the Northern Marianas expressed concern about the “extraordinarily high number of charges alleging unlawful terminations based on national origin and various forms of sex discrimination, including harassment against women” in the Northern Marianas. He also


\textsuperscript{220} \textit{Feds Note Disturbing Labor Cases in CNMI}, \textit{Pacific Island News Service}, Nov. 10, 2005.

\textsuperscript{221} \textit{Investors Responsibility Research Center, Social Issues Reporter}, Oct. 2002; see also \textit{Lured by jobs in the U.S., workers denied even basic human rights; Factories of hell in paradise}, \textit{South China Morning Post}, \textit{Hong Kong} (1999).

\textsuperscript{222} In one notorious case in March 1999, nearly 1200 workers at a garment factory came down with a severe case of food poisoning. Ron Harris, \textit{OSHA: Massive Food Poisoning Outbreak at Saipan Garment Factory}, \textit{Associated Press}, April 7, 1999, available at \url{http://www.globalexchange.org/campaigns/sweatshops/saipan/harris040899.html}. 

characterized the discrimination as “blatant and clearly intentional.” In 2009, the EEOC reached a $1.7 million settlement with a group of Hong Kong based garment manufacturers resolving a series of lawsuits that involved claims of pregnancy, age and national origin discrimination, along with retaliation. Among the claims that were acknowledged to be true by the employer were that it did not allow Filipino workers to eat in the company cafeteria, and refused to provide them with certain benefits (like medical coverage) that were provided to Chinese workers. Human and sex trafficking were (and continue to be) prevalent in the CNMI. According to State Department estimates in 2007, human trafficking was reported as occurring at least 8.8 to 10.6 times more frequently in the Northern Marianas than in the United States as a whole.

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224 Press Release, United States Equal Employment Opportunity Comm., Largest Garment Manuf. in Saipan to Pay $1.7 in Landmark Discrimination Settlement with EEOC (July 28, 2009) (available at: http://www.eeoc.gov/eeoc/newsroom/release/7-28-09.cfm); see also, Press Release, United States Equal Employment Opportunity Comm., EEOC Obtains Million Dollar Judgment Against Saipan Garment Contractor Sako Corp. (Apr. 25, 2005) (available at http://www.eeoc.gov/press/4-25-05.html) (reporting that the EEOC had won a $1 million judgment against a garment factory for failing to renew the contracts of 100 long-time Filipino, Thai and Bangladeshi guest workers, allegedly for business necessity, but then replacing them with less-experienced Chinese nationals, and that the employer had only five years earlier settled two lawsuits with the EEOC, one alleging pregnancy discrimination, and another, retaliation).
225 David B. Cohen, Deputy Assistant Secretary of the U.S. Dep’t of the Interior Office of Insular Affairs, Statement before The Senate Committee On Energy and Natural Resources Regarding Labor, Immigration, Law Enforcement and Economic Conditions In The Commonwealth of the Northern Mariana Islands (Feb. 8, 2007), available at http://www.doi.gov/oia/press/2007/02082007.html. (And, according to Cohen, this was based on an “apples to oranges” comparison because State Department numbers based on estimates, CNMI numbers based on identified cases; for the period April 30, 2006 to April 30, 2007, 36 identified victims of human trafficking, out of a CNMI population of approximately 70,000. In contrast, the State Department estimates that 14,500 to 17,500 people are trafficked in the U.S., out of a population of roughly 300 million).
Finally, wages in the CNMI were markedly low and jobs sharply demarcated as “guest worker” and citizen. The minimum wage in the Northern Marianas did not exceed the $2.00 mark until 1984, and did not rise above $3.00 until 1997, when it was raised to $3.05 per hour.\textsuperscript{226} It stayed at that rate until June 2007, when it was forced to increase by federal legislation. When compared to the federal minimum wage, and with median wages paid in neighboring Guam, wages in the Northern Marianas have been woefully slow to increase both for skilled and unskilled workers alike.\textsuperscript{227} With most private sector salaries depressed, many U.S. citizens sought work in the public sector.\textsuperscript{228} In the private sector, nearly all jobs involving manual labor, domestic services, restaurant work, or garment manufacturing, were (and continue to be) held by foreign workers. In addition, many skilled jobs have also become “guest worker” jobs, including accountant positions, general managers, masons, carpenters and automotive mechanics.\textsuperscript{229}

The very safeguards designed to protect guest workers, namely, the right to transfer, the accessible complaint system, and the due process right to remain in the CNMI pending a hearing, combined with inadequate resources allocated to the CNMI DOL to administer the program, led to a second tier of abuses and scams related to the guest worker program. Namely, there emerged a spate of sham employment

\textsuperscript{226} 4 N. Mar. I. Code § 9221 and accompanying Commission Comment.  
arrangements in which unemployed guest workers, desperate to remain in the CNMI, paid local businesses and individuals to pose as their employer, knowing that they would not work for that employer.\textsuperscript{230} Then the guest worker could remain in the CNMI and continue searching for a real employer (one intending to provide the guest worker with work) and seek a consensual transfer to the new employer.\textsuperscript{231} There were also instances in which unemployed guest workers, coming to the end of the 45 days they were allowed to find a “transfer” employer, would file a frivolous complaint knowing that this would very likely buy the worker a significant amount of time – often years – to remain in the CNMI given the tremendous backlog of labor cases.\textsuperscript{232} While these arrangements allowed guest workers to remain in the CNMI, it also left them even more vulnerable to exploitation – with some becoming prostitutes to support themselves while unemployed.\textsuperscript{233}

\textsuperscript{230} Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 49-51, 62 (2007) (testimony of then Federal Ombudsman, Jim Benedetto, describing the prevalence of “illegal sponsorships” and testimony of social worker Lauri Ogumoro, describing one case in which a woman paid $2000 to a “sponsor” who then ran away with her money without sponsoring her).

\textsuperscript{231} Id. These same kinds of sponsorships have also been observed by guest worker advocates under the H-2 programs. S. Poverty Law Center, Workers Pay Up To $5,000 For Post-Katrina Hotel Jobs (Apr. 2007) available at http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/recruitment-exploitation-be-1.

\textsuperscript{232} See Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Resources, 110th Cong. 46 (2007) (prepared statement of Timothy P. Villagomez, then Lieutenant Governor of the CNMI, describing the numerous “copy cat” cases filed by guest workers in 2003 and 2004, so named because many of the complaints filed were identical).

\textsuperscript{233} See United States Dep’t of State, 2010 Trafficking in Persons Report, available at: http://www.state.gov/g/tip/rls/tiprpt/2010/142761.htm (under country narratives, U.S. Insular areas); David B. Cohen, Deputy Assistant Secretary of the U.S. Dep’t of the Interior Office of Insular Affairs, Statement before The Senate Committee On Energy and Natural Resources Regarding Labor, Immigration, Law Enforcement and Economic 57
V. The Evidence is Unequivocal

Cornell labor economist Vernon Briggs began his testimony before a 2004 Senate committee considering introducing a large-scale guest worker program to help combat unauthorized immigration by noting that this idea had been periodically raised over the last thirty years. He then summarized his view of this approach with the words: “It is a bad idea that just will not go away.” The CNMI example lends further support to this position, and provides evidence establishing that even with the safeguards of portability and an accessible administrative complaint system, such a program would likely spawn myriad abuses, drive down wages, and damage democracy. The evidence from the CNMI suggests that this would be the case even with the added ingredient of a path for adjustment to permanent immigration status of the kind envisioned in the McCain-Kennedy bill. The evidence should not be ignored.

A. Portability

The NWA provided CNMI guest workers the right to freely transfer to other employers at the end of their contract, by consensual transfer mid-contract, or at the conclusion of an administrative hearing, so long as they were not be unemployed for more than 45 days. Arguably, the relative independence provided CNMI guest


234 See Briggs Testimony (February 12, 2004); see also See Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor, Hearing Before the Committee on Education & Labor (2007) (statement of Jonathan P. Hiatt, General Counsel, Am. Federation of Labor and Congress of Industrial Organizations) (stating that the “United States has been experimenting with temporary worker programs for almost a century, without a single success.”); The U.S. Commission on Immigration Reform, IMMIGRATION AND THE CNMI 13 (1997) (noting that “[n]o liberal democracy has yet implemented a large scale guestworker program with success.”).

workers should have protected them from abuse, but most workers remained very reliant on their original employers because all transfer options ultimately rested upon the willingness of another employer to officially hire the employee within a set period of time.\(^{236}\)

An H-2C-type visa would provide guest workers with portability on similar terms. Namely, an H-2C worker, who must initially be petitioned for by a specific employer, would be free to change employers, but only if the worker could secure employment with a certified employer within 60 days of becoming unemployed. Judging from the CNMI example, portability to a limited number of employers under strict time constraints would likely not decrease guest workers’ reliance on their sponsoring employers by a significant degree because meeting these conditions would be far from a certainty, particularly if the guest workers worked in remote locations and had limited access to transportation. What is more, the potential for earned adjustment and its requirement of employer sponsorship or continuous employment for four years, would arguably make many guest workers even more motivated to either remain with their original employer, no matter the circumstances, or find a new employer, no matter the costs. As such, it is easy to imagine how the combination of portability, with limitations, and earned adjustment, with conditions, could lead to a whole new category of abuses, likely of the type experienced in the CNMI.

\(^{236}\) 3 N. Mar. I. Code § 4602. 1) In the case of a consensual transfer, it must be requested by the new employer, and the original employer can say no, and hold it against the employee. 2) To transfer at the end of a contract, the guest worker must secure new employment within 45 days, or must depart the Commonwealth. 3) To be eligible for an administrative transfer, the employee must prevail in an administrative proceeding, and then must secure new employment within 45 days.
B. Effective Oversight and Accessible Avenues for Pursuing Worker Complaints

While the CNMI DOL did not engage in significant proactive enforcement efforts, the administrative complaint system available to guest workers under the NWA was accessible, easy to navigate, comprehensive, and generally accompanied by a right to remain and work in the CNMI for the duration of the case. The downside to the accessibility of the complaint process and the nearly automatic protection from deportation was that it led to a tremendous number of cases being filed, including a large number of frivolous cases motivated by a wish to remain in the CNMI. This, in turn, led to a monumental backlog of cases, and a large pool of under employed or unemployed guest workers available to be hired on a temporary basis (or “off the books”). Dealing with the “old” cases, and with guest workers under temporary work authorization, diverted considerable resources away from policing and preventing the many serious labor abuses.

Notably, the H-2C program would include a comprehensive administrative complaint system that resembles the CNMI system. While it is unclear how effective or accessible such a program would be, if implemented, it is notable that it was to be carried out by the U.S. DOL. Currently, H-2A and H-2B workers possess a theoretical right to file a work-related complaint with their local wage and hour division of the U.S. Department of Labor. However, as discussed supra, Section II,C, this process is largely ineffective in part because DOL offices are often far from guest workers’ place of employment,\(^\text{237}\) and because there are far too few investigators to handle what are often

\(^{237}\) SPLC Report at 16.
time-intensive cases.\textsuperscript{238} What is more, the DOL’s WHD is already failing in its duty to protect low-wage workers already in the country from wage theft. It is certainly not equipped to protect an influx of tens of thousands of vulnerable guest workers.\textsuperscript{239} To judge from the experience of the CNMI, a very high investigator-to-worker ratio is needed to effectively and justly administer a large-scale guest worker program. Just to reach the ratio of DOL investigator to worker that existed in the CNMI of 1 to 4,500, the U.S. DOL would have to hire approximately 18,588 more investigators, from its current number of 949.\textsuperscript{240} Given that this ratio proved to be woefully insufficient in the CNMI, the number would have to be far greater to prevent widespread abuses. In addition, to meet the CNMI’s ratio of approximately 3 hearing officers for 25,000 guest workers, the DOL would need to hire at least 48 hearing officers to cover a guest worker work force of 400,000.


\textsuperscript{239} \textit{See} U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-458T, \textit{TESTIMONY BEFORE THE COMM. ON EDUC. AND LABOR, WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESS LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT} (2009) (The report describes investigations that were characterized by long delays and countless missteps. In one case in which an investigator posed as a complainant reporting possible child employment at a factory with dangerous machinery, no investigation was undertaken for four months. Of ten fictitious cases that were presented to the division, only one was handled properly, and even that one was marked by significant delays).

\textsuperscript{240} Even assuming that the comparison with the CNMI is imperfect because many of the CNMI’s investigators lacked the education and training that U.S. investigators would likely receive, there can be no doubt that the U.S. DOL would still have to hire thousands of investigators to provide adequate oversight over a large-scale guest worker program.
Unlike the CNMI guest worker program, CIRA 2006 contains no mechanism which would allow complaining guest workers to remain in the United States to pursue a labor complaint during its pendency if their visa status expired – either due to unemployment, or because they had reached the end of the visa duration. It appears that H-2C workers, like H-2A and B workers, would have to roll the dice with the USCIS on a case-by-case basis, and hope that it would grant deferred action.

If a McCain-Kennedy style administrative complaint system ends up being inaccessible and under-resourced, then it is likely that a new class of guest workers would be as vulnerable to abuses as today’s H-2 workers. In addition, if it does not include a transparent and dependable process for granting deferred action, none but the most desperate are likely to complain about unlawful employer practices, particularly when the possibility of earned adjustment hangs in the balance. On the other hand, if the system is well-resourced and staffed, offices are opened close to where guest workers live and work, and complaining guest workers are allowed to remain in the U.S. to pursue their complaints, then, based on the CNMI example, the U.S. DOL should be prepared to receive an avalanche of complaints – both legitimate and illegitimate. This is because, as is well documented in the case of the H-2 programs and the CNMI program, many employers will cheat and abuse their guest workers. If there is an effective and fair administrative complaint system, guest workers will likely use it in great numbers, often with legitimate complaints. In addition, some guest workers, desperate to make money to provide for their families, to repay employment-related debts, and to gain citizenship, will game the system with frivolous complaints to try to remain in the country if they find themselves out of work with the 60-day deadline approaching.
C. Earned Adjustment

Unlike a McCain-Kennedy style program, the CNMI guest worker program offered no possibility for earned adjustment. This possibility represents a significant change from past and present federal guest worker programs and arguably, a material difference from the CNMI example. Indeed, such a possibility might resolve any potential for the program to look, in the words of philosopher Michael Walzer, like a “tyranny” insofar as the state would not be creating a cast that permanently bars a group that looks exactly like citizens from citizenship.241

However, as proposed, earned adjustment seems destined to exacerbate the power imbalance between guest workers and employers and to more sharply define guest workers as a caste separate and apart from the rest. This will be the case so long as earned adjustment is dependent at all on continued employment with some employer, because guest workers who seek to become citizens will be all the more likely to suffer uncomplaining abuse and exploitation to achieve the dream of citizenship. Guest worker proposals of earned adjustment have already been described by many as “unprecedented” in the United States, and “inimical to this country’s professed tradition of equality and citizenship without tiers.”242 As proposed, guest workers are expected and required to labor quietly and without complaint if they want to be certain to earn the right to move from the caste of laborers to that of citizen. Any bureaucratic misstep – like a failure to report a change of address, or poor turn of luck – such as a disagreement with an employer which results in unemployment lasting more than 60 days, can lead to the

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242 Gordon, supra note 146 at 561.
abrupt end to the dream of citizenship (not to mention the exclusion from the caste of laborers and the country).

D. Limitations of the Evidence

There are certainly some limits to the evidence presented by the CNMI. The most significant distinction is the high proportion of guest worker to permanent residents in CNMI (where at times nearly 50% of the population has been guest workers), and the CNMI’s resultant overwhelming reliance on a foreign labor force. In contrast, the 500,000 or so guest workers that would likely be admitted under a federal program would not even approach a percentage of the 309,807,000 residents in the U.S. However, it is almost certain that guest workers would constitute significant portions of certain labor sectors, causing certain sectors of the U.S. economy to become significantly reliant upon guest workers. For instance, it is estimated that in 2008, unauthorized workers comprised 25% of the farming sector, 19% of the building, groundskeeping and maintenance sectors, 17% of the construction sector, 12% of the food preparation and serving sector, and 10% of the production sector. If guest workers were to replace the unauthorized – and a program would certainly steer them in this direction – they would likely populate these industries to a similar extent. Accordingly, the impact guest workers could have

245 Jeffrey S. Passel and D’Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, Pew Hispanic Center (April 14, 2009).
on many of the industries in which they would work in terms of wages and working conditions, would not be that different from the CNMI experience.

Adding credence to the claim that the CNMI example is relevant is the fact that the problems that characterize the CNMI program – recruitment scams, unpaid wages, substandard working conditions, discrimination and trafficking – are the very ones that plague H-2 workers under the current federal programs.246 This strongly suggests that the lessons from the CNMI should not be discounted notwithstanding the many unique aspects of the CNMI program and society.

VI. Guest Worker Programs Cannot be Reformed, Nor Can They Help to Reform the Broken Immigration System.

With the evidence so overwhelming that unskilled guest worker programs are more of a state-run continuation of the unauthorized worker sector than an antidote, the question of why guest worker programs are held up by business interests and politicians as a critical component of immigration reform is laid bare. The answer is not veiled or unspoken. Indeed, it is openly discussed by immigration scholars and policy-makers that to be a successful program, the guest workers must rotate in and out of the country according to the host country’s employment needs, and must be prevented from establishing “roots” in the host country.247 It is also understood that one reason these programs are economically desirable is that guest workers tend to arrive in the host country in debt, and as such, “have an incentive to be good employees.”248 Indeed, one popular contractor of H-2A and B workers has a website, unsubtly named, “mexican-worker.com,” which includes employer testimonials. In one, an employer praises its

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246 See discussion, supra __.
247 MARTIN, Et Al., supra note 14 at 86, 128-29.
248 MARTIN, Et Al., supra note 14 at 113.
“loyal and hardworking Mexican workers,” and another exclaims that “the workers stick with me.” 249 Nor is it a secret that unskilled guest workers are principally admitted to fill undesirable and dangerous jobs. 250 Thus, rotation and limits on guest worker mobility and rights are necessary to ensure that they continue performing the bottom-rung jobs they were recruited to perform. 251 In effect, these constraints simply create a vulnerable, uncomplaining underclass of lawful guest workers to replace the vulnerable, uncomplaining underclass of unauthorized immigrants comprehensive immigration reform is reputedly intended to eliminate.

The McCain-Kennedy style guest worker programs lend currency to this view. That is, the very fact of “earned adjustment” leaves no doubt that the value of a guest worker program is in its ability to coerce workers into performing specific, socially undesirable jobs. If it were otherwise, these bills would simply issue 400,000 to 500,000 green cards a year to low-skilled workers. Instead, for the four-year adjustment period, the country would trade on guest workers’ economic vulnerability and, in addition, on the fierce desire of many to become United States citizens, to ensure that they work in jobs certified as guest worker jobs. The guest worker must pay his or her dues by performing the dirty, dangerous and difficult jobs that those with a choice will not do (at least not at the wage rates offered).


250 MARTIN, ET AL. supra note 15 at p. 83.

251 MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLUARLISM AND EQUALITY 56-57 (Basic Books 1983); 2010 CRS Guest Worker Report at 15 (noting that some have voice objections to a quick legalization process on the grounds that this could result in labor shortages in undesirable jobs as former guest workers seek better work opportunities).
But what about the position that guest worker programs represent a reasonable compromise in the polarized arena of immigration reform, or a second-best alternative to open borders? This would make sense if a guest worker program represented a step in the direction of the stated goals of comprehensive immigration reform. However, the evidence shows that even a McCain-Kennedy style large-scale guest worker program will not represent a step in the direction of reducing abuses of migrants – be they unauthorized or guest workers -- because it will not quell the flow of the unauthorized, nor will it end abuses of guest workers.

This position also seems palatable only if it is believed that the exploitation that has accompanied all guest worker programs is simply a matter of degree, not a characteristic inherent to state-controlled guest worker programs. The evidence strongly supports the latter characterization. That is, the very attributes that make guest worker programs economically efficient, and therefore desired by the state – namely, the ability of the state to limit guest worker mobility to undesirable sectors, and to keep a constant flow of uncomplaining replacements coming – are what leave guest workers so vulnerable to abuse. By the same token, this is why many business interests have made their support of comprehensive immigration reform legislation contingent upon the inclusion of a guest worker program. Without a supply of guest workers to fill the positions abandoned by the unauthorized workers who are permitted to adjust to lawful

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252 Chang, supra n. 23 at 8.
253 I am limiting my critique to state-controlled guest worker programs, leaving open the possibility that programs run by workers themselves, or other enlightened non-governmental bodies, such as the program envisioned by Jennifer Gordon in her article on transnational labor citizenship, might defy this characterization. Gordon, supra n. 146 at 564-570.
status or deported from the country, they could suddenly find themselves without workers willing to perform their undesirable jobs at a bargain rate.

Thus, the introduction of a large-scale guest worker program would simply replace the current underground system of exploitation of unauthorized immigrants with a state-run system of exploitation of authorized immigrants. As such, it would represent a sharp departure from longstanding efforts to combat human exploitation in the workplace and beyond. 254 Historically, federal labor and employment laws have been enacted to protect employees from exploitative employers. 255 The National Labor Relations Act was designed to protect the rights of employees to organize into unions to equalize their bargaining power with employers, and prevent worker exploitation; 256 the employment

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254 As discussed, supra, Section III, the state is already involved in enforcing exploitative employment conditions in the context of the H-2A and H-2B programs. 255 This is not to suggest that the laws, in practice, have been effective in rooting out exploitation, but this has been their stated aim. Indeed, lax enforcement, and employer-oriented court decisions, have long countered these aims, particularly where immigrant workers have been involved. See e.g., Jennifer M. Chacon, Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking, 74 FORDHAM L. REV. 2977, 3040 (2006) (asserting that “[t]he failure to protect workers who are victims of abusive labor practices has been a feature of the U.S. legal landscape throughout history, and it has worsened in recent years”); Hoffman Plastic Compounds, Inc. v. Nat’l Labor Relations Board, 535 U.S. 137, 151-52 (2002) (holding that an unauthorized immigrant worker who was terminated for efforts to organize the workplace was entitled to back pay only for periods during which the worker was legally authorized to work); Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, ____ (1983) (noting that in the 1970s and early ‘80s an average of one in twenty workers was fired for attempting to organize a union in violation of the National Labor Relations Act). 256 See N.L.R.B. v. Apollo Tire, Inc., 604 F.2d. 1180, 1184 (9th Cir. 1979) (Now Justice Kennedy stating in concurrence, “[i]f the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case.”). In the eyes of many, the U.S. Supreme Court in Hoffman Plastics Inc. v. NLRB, 535 U.S. 137 (2002), severely curtailed the NLRA’s effectiveness when it held that IRCA prohibited the NLRB from awarding an unauthorized employee who was found to have been discharged due to his organizing efforts from being awarded back pay.
provisions of the civil rights laws were enacted to protect women and minorities who were recognized as occupying particularly weak bargaining positions, from unfair employer exploitation.\textsuperscript{257} and the Migrant Seasonal Agricultural Worker Protection Act’s identified purpose is “to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers.”\textsuperscript{258} In 2000, the federal government arguably took its most aggressive legislative step yet to end worker exploitation in enacting the Trafficking Victims Protection Act (TVPA).\textsuperscript{259} In the view of Dina Francesca Haynes, the TVPA represented nothing less than “an attempt to counter . . . the practice of using human beings as commodities.”\textsuperscript{260}

Yet, it is widely understood by labor and anti-trafficking advocates, and the government itself, that guest worker programs are breeding grounds for trafficking.\textsuperscript{261}

Indeed, in the 2008 Reauthorization of the TVPA, Congress explicitly acknowledged the

\textsuperscript{258} 29 C.F.R. § 500.20(h)(5). See also, SPLC Report at 31 (noting that AWPA’s “powerful protections are not available to H-2A workers).
\textsuperscript{259} 22 U.S.C. § 7101.
\textsuperscript{261} See FREE THE SLAVES AND HUMAN RIGHTS CENTER, U. CAL., BERKELY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 13, 54 (Sept. 2004) (recommending, among other steps, that immigration policies that tie workers to one employer be ended as a means to combat forced labor)
unique vulnerability of guest workers to trafficking, and required that consular offices of
the Department of State create and distribute pamphlets for all such workers that set forth
their rights.\textsuperscript{262} The State Department has specifically recognized that migrant laborers
are particularly vulnerable to trafficking schemes that involve debt bondage and
involuntary servitude.\textsuperscript{263} Haynes makes a powerful argument that an abused migrant
laborer and a trafficked person are arguably the same when the migrant laborer’s choice
to migrate and consent to the conditions of a given job are considered in the context of
the migrant’s desperate economic situation along with the extent of the migrant’s
invisibility in the market and society.\textsuperscript{264}

A large-scale unskilled guest worker program would represent a large step
backward in the campaign of discouraging worker exploitation and the human trade in
labor. Guest worker programs, including those with McCain-Kennedy-style reforms, are
exploitative in that they are deliberately designed to take advantage of the material and

\textsuperscript{262} William Wilberforce Trafficking Victims Protection Reauthorization Act 2008, Pub.
L. No. 110-457, 112 Stat. 5044. Notably, one provision of the pamphlet advises of “the
illegality of . . . worker exploitation in the United States” (along with “slavery, peonage,
trafficking in persons, sexual assault, extortion, [and] blackmail”). Id. at § 202.
\textsuperscript{263} U.S. Dep’t of State, 2008 Trafficking in Persons Report, Chapter 1: “Major Forms of
Trafficking in Persons, available at:
http://www.state.gov/g/tip/rls/tiprpt/2008/. The State Department has identified three
factors as contributing to migrant’s susceptibility to trafficking:

\begin{itemize}
\item Abuse of contracts;
\item Inadequate local laws governing the recruitment
and employment of migrant laborers; and
\item The intentional imposition of
exploitative and often illegal costs and debts on these laborers in the
source country or state, often with the complicity and/or support of labor
agencies and employers in the destination country or state.
\end{itemize}

Id. Notably, it was careful to clarify that high recruitment fees alone do not constitute
debt bondage or involuntary servitude, but only “place laborers in a situation highly
vulnerable to debt bondage.” According to the State Department, the magic ingredient
that transforms high recruitment fees into debt bondage is “exploitation by unscrupulous
labor agents or employers in the destination country” of “excessive” costs or debts. Id.
\textsuperscript{264} Haynes, \textit{supra} note 261 at 17-18, 22.
psychological vulnerabilities of most unskilled guest workers, including their poverty, cultural and linguistic isolation, and strong desire to become citizens, to meet the nation’s employment needs at a cheap rate. In short: a state-run program that, by design, treats migrants as commodities.\textsuperscript{265} Even more, a McCain-Kennedy-like program with its period of “earned adjustment” would harness the state’s apparatus, most directly, its deportation capabilities in combination with its offer of citizenship, to coercively maximize the economic output of a disenfranchised laboring class of guest workers – a profoundly undemocratic proposition.

So, too, a guest worker program with an earned adjustment component would also represent a significant step away from the nation’s revered self-image as a nation of immigrants.\textsuperscript{266} To be true to that tradition, immigrants should be welcomed at the outset as “Americans in waiting,” and integration promoted from the point of arrival. A program of earned adjustment that delays integration for many years while the immigrants toil in dangerous and undesirable jobs, largely surrounded by many of their same ethnicity and class, “earning” the right to become citizens, certainly does not foment integration. This is particularly the case if these potential Americans, while guest workers, are subject to the exploitation and abuse that the evidence establishes so commonly occurs.

VII. Conclusion

Legislators considering comprehensive immigration reform should heed the evidence. The experience of the CNMI guest worker program powerfully demonstrates that even programs that contain key worker safeguards of the kind that have been

\textsuperscript{265} Haynes, \textit{supra} n. 261 at 44.
\textsuperscript{266} See MOTOMURA, \textit{supra} n. 61 at 140.
included in all comprehensive reform proposals in recent years -- like portability, considerable government oversight and an accessible, comprehensive administrative complaint system -- will be characterized by worker exploitation and abuse. And the possibility of earned adjustment to permanent residence and eventual citizenship is no solution because it will only strengthen employers’ hands, and further stifle workers’ voices, so long as adjustment is contingent upon continued employment. In addition, even if such a program features a highly-functioning complaint process that is well-resourced and staffed, and includes a mechanism to allow complaining guest workers to remain in the U.S. to pursue their complaints, the CNMI program teaches that this will lead to a deluge of legitimate and illegitimate complaints. In short, any guest worker program that has been contemplated, or that can be crafted in the current political climate, will not sufficiently disengage guest workers from their dependence on employers, nor contain sufficient oversight, protections, or administrative safeguards to ensure that it does not result in widespread exploitation of guest workers. As such, it will essentially replace and largely function like the unauthorized workforce that immigration reform is reputedly designed to dismantle.

So, too, a large-scale guest worker program that doubles as a path for immigrants to “earn” the right through hard labor to become Americans counters a central, and cherished narrative about America: that this is a nation that welcomes immigrants as equals, and that has thrived because of immigrants’ contributions to every sector of society. As President Obama reflected in a recent speech on comprehensive immigration reform:

[W]e’ve always defined ourselves as a nation of immigrants -- a nation that welcomes those willing to embrace America’s precepts. Indeed, it is
this constant flow of immigrants that helped to make America what it is. The scientific breakthroughs of Albert Einstein, the inventions of Nikola Tesla, the great ventures of Andrew Carnegie’s U.S. Steel and Sergey Brin’s Google, Inc. – all this was possible because of immigrants.

And then there are the countless names and the quiet acts that never made the history books but were no less consequential in building this country -- the generations who braved hardship and great risk to reach our shores in search of a better life for themselves and their families; the millions of people, ancestors to most of us, who believed that there was a place where they could be, at long last, free to work and worship and live their lives in peace.

So this steady stream of hardworking and talented people has made America the engine of the global economy and a beacon of hope around the world. . . .

Introducing potential new Americans to this nation as guest workers, likely to endure exploitation and abuse along the way, threatens this storied history by discouraging reciprocal commitment and loyalty to the nation, and will likely cause these “Americans in waiting” to turn instead to “more parochial . . . less democratic” affiliations, like race or ethnicity. In short, a guest worker program will not help to fix our broken immigration system, and would represent a step away from the nation’s proud tradition as a nation of immigrants that reveres equality, and eschews castes.

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