April 16, 2011

The Abuse of H-2 Visas and Their Use for Labor Trafficking Purposes

Maryam Tabatabai
THE ABUSE OF H-2 VISAS AND THEIR USE FOR LABOR TRAFFICKING PURPOSES

By: Maryam Tabatabai
THE ABUSE OF H-2 VISAS AND THEIR USE FOR LABOR TRAFFICKING PURPOSES

Maryam Tabatabai

I. Introduction ........................................................................................................................................3

II. General Background and History of the H-2 Visa ........................................................................6
   A. The H-2A Visa for Temporary Agricultural Workers .................................................................7
   B. The H2-B Visa for Temporary Non-agricultural Workers .........................................................9

III. The Exploitation of H-2 Guest Workers ....................................................................................12
   A. Incidents of H-2A Abuse .............................................................................................................14
      1. Global Horizons ......................................................................................................................14
      2. Antonio-Morales v. Bimbo’s Best Produce .........................................................................16
   B. Incidents of H-2B Abuse .............................................................................................................17
      1. Aguilar v. Imperial Nurseries ..............................................................................................17
      2. David v. Signal International LLC .....................................................................................20

IV. Gaps in Guest Worker Protection and Available Remedies ........................................................22
   A. The Fair Labor Standards Act ....................................................................................................22
   B. The Department of Labor’s Poor Enforcement of H-2 Violations .........................................25
   C. The Exclusion of Guest Workers from U.S. Labor Laws .......................................................28
   D. The Trafficking Victims Protection Act ..................................................................................30
   E. The Racketeer Influenced and Corrupt Organization Act ....................................................34
   F. Common Law Tort Claims .........................................................................................................37

V. Recommendations to Mitigate Employer Abuse and Better Protect H-2 Workers ..................38

VI. Conclusion ......................................................................................................................................42
THE ABUSE OF H-2 VISAS AND THEIR USE FOR LABOR TRAFFICKING PURPOSES

“I thought I would find freedom and jobs here... I thought the United States was a civilized nation, the highest in the world. I never imagined this kind of thing could happen here.”

-Lee, Thai national

I. Introduction

In September 2010, a federal grand jury in Honolulu indicted Mordechai Orian, president of Global Horizons Manpower Inc. (Global), for what federal authorities call the largest labor-trafficking case in U.S. history. Orian and five of his associates were indicted for the coercive labor of approximately 400 Thai farmworkers. Global brought the farmworkers on H-2A guest worker visas, promising 3-years of employment and a monthly paycheck for $1,900. Under those premises, the workers paid an $18,000 recruitment fee, left behind their families and jobs, and traveled thousands of miles. Once they arrived, the workers were paid substandard wages, had their passports confiscated, received inadequate food and housing, and were threatened with physical violence and deportation for challenging the intolerable conditions. Global exploited the workers and they succumbed to the abuse for fear of losing their legal status.

1 Teresa Watanabe, Thai Workers Describe Being Lured into Slavery in U.S., LA TIMES, Sept. 9 2010, available at http://articles.latimes.com/2010/sep/09/local/la-me-0909-slave-labor-20100909. The farmworker took the pseudonym Lee to protect his identity. He was recruited by Global Horizons and placed in Seattle for work. He freed himself of the oppressive conditions by escaping through the pineapple fields in the dark. Id.
2 Id.
3 Id.
5 Watanabe, supra note 1.
6 Id.
Under the current H-2 regulations, the victims of Global Horizon’s labor trafficking do not have a private right of action. Therefore, the victims will likely rely on the Trafficking Victims Protection Act (TVPA), the Fair Labor Standards Act (FLSA), the Racketeering Influenced and Corrupt Organizations Act (RICO), or common law for relief. Each of these claims comes with limitations and barriers, which may impede a guest worker from obtaining full redress for his damages.

The abuses described below look starkly similar to those that occurred under the Bracero program, which brought Mexican laborers to the United States on temporary work visas during 1947-1964. The Bracero program was viewed largely as a failure and eventually ended after intense protests from unions and Latino advocacy groups. As more cases of H-2 guest worker exploitation surface, history seems to be repeating itself. Several critical steps need to be taken to ensure the H-2 visa does not develop into another Bracero Program. This article will discuss recent cases of guest worker exploitation, ineffective enforcement of H-2 regulations, inadequate protection of guest workers, causes of action currently available to victims, and possible solutions to mitigate abuse.

---


8 Carr, supra note 7, at 415.


10 Ragini Tripathi, The H-2B Visa: Is this How we Treat a Guest?, 11 SCHOLAR 519, 523-25 (2009) (detailing the dire treatment of Mexican workers in the Bracero Program, including inadequate compensation, filthy living conditions, and worker’s inability to recover for medical injuries incurred on the job). The federal government failed to properly enforce the program’s requirements and violators frequently went unpunished. Id.

11 Merev Lichtenstein, Note, An Examination of Guest Worker Immigration Reform Policies in the United States, 5 CARDozo PUB. L. Pol’y & ETHICS J. 689, 692 (2007) (describing the Bracero program as a large disappointment, which ended after repetitive abuse and heavy criticism from advocacy groups).
II. General Background and History of the H-2 Visa

Every year, about 121,000 guest workers arrive in the United States with H-2 temporary worker visas.12 The H-2 visa is comprised of two categories: (1) the H-2A visa for agricultural workers, and (2) the H-2 B visa for non-agricultural workers.13 A worker’s temporary employment should be completed in under one year for H-2A visas and under 10 months for H-2B visas.14 Before the U.S. Citizenship and Immigration Services (USCIS) approves an employer’s petition to hire H-2 workers, the employer must submit an application to the Department of Labor (DOL) demonstrating a shortage of available U.S. workers.15 In addition to showing the temporary workers will not displace U.S. workers, the employer must establish that there will not be any harmful impact on U.S. wages.16 The H-2 program binds guest workers to an individual employer for the full duration of temporary employment.17 Premature dismissal will dissolve the worker’s authorization status and force the worker to return to his home country.18 The

---

15 Id.
17 Id.
DOL and the Department of Homeland Security (DHS) are charged with overseeing the program and enforcing the regulatory guidelines.\textsuperscript{19}

\textbf{A. The H-2A Visa for Temporary Agricultural Workers}

Congress promulgated a new nonimmigrant status for temporary agricultural workers in section 301 of the Immigration Reform and Control Act of 1986.\textsuperscript{20} This new visa status, known as the H-2A, permitted employers to apply for certification of temporary workers based on an absence of sufficient U.S. employees.\textsuperscript{21} Unlike the H-2B visa, which is capped at 66,000, there is no limit on the number of H-2A visas issued.\textsuperscript{22}

As a result of extensive employee abuse under the Bracero program, the H-2A visa contains numerous safeguards.\textsuperscript{23} These safeguards occur on two levels: first regulations preclude certain employers from obtaining certification for guest workers.\textsuperscript{24} An employer will be denied certification if: (1) a strike or lock-out surrounding a labor dispute takes place that disqualifies an employer under the regulations; (2) upon employing H-2A workers for 2-years, there is a legal determination that the employer violated a material term or condition of labor certification; (3) the employer fails to guarantee health coverage for injuries or diseases surfacing from the course of work; (4) or it is determined that the employer made inadequate recruitment attempts throughout the region.\textsuperscript{25} In theory, the H-2A’s statutory protections address many of the

\textsuperscript{19} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id. See also} S. Poverty Law Center, supra note 12, at 5 (the 66,000 cap was modified to exempt returning workers entering the U.S., which is why the number of non-agricultural workers in 2005 exceeded the 66,000 cap. The 89,000 temporary non-agricultural workers included H-2B and H-2R (returning worker) visas). \textit{Id.}
\textsuperscript{23} Tripathi, supra note 9, at 542.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.}
shortcomings of the Bracero program, but disheartening cases of persistent abuse indicate petitions are readily granted with minimal review and the safeguards are rarely enforced.\textsuperscript{26}

The second and most valuable form of protection for guest workers comes in the form of legal entitlements. \textsuperscript{27} The H-2A regulations entitle guest workers to the prevailing wage for a specific crop, based on a determination by the DOL or the state or federal minimum wage;\textsuperscript{28} actual employment for at least three-fourths of the time guaranteed in their contract; free housing in reasonable conditions for the duration of the contract;\textsuperscript{29} workers’ compensation benefits for injuries arising out of the job and lost work time; reimbursement for travel expenses to the job site upon completion of 50 percent of the contract, and paid return expenses upon full completion of the contract period; and eligibility for federally funded legal services.\textsuperscript{30} Despite all of these safeguards, egregious cases of abuse like Global Horizons are still taking place.

B. The H2-B Visa for Temporary Non-agricultural Workers

The H-2B visa is a temporary visa issued to seasonal workers in non-agricultural fields such as construction, healthcare, landscaping, and hospitality.\textsuperscript{31} There is a significant disparity between regulations and safeguards for the H-2A and H-2B visas.\textsuperscript{32} The substandard protections for the H-2B visa may be rooted in its formation. The

\textsuperscript{26} See Lisa Guerra, Modern-Day Servitude: A Look at the H-2A Program’s Purposes, Regulations, and Realities, 29 VT. L. REV. 185, 196 (2004) (suggesting with all the protections H-2A workers are granted on paper, they should cost more than their domestic counterparts).
\textsuperscript{27} 45 C.F.R. §1626.11.
\textsuperscript{28} 20 C.F.R. §655.102(b)(9).
\textsuperscript{29} 45 C.F.R. §1626.11. Housing must meet the DOL or Occupational Safety and Health Administration standards. Id.
\textsuperscript{30} Id.
\textsuperscript{31} Tripathi, supra note 9, at 529 (explaining the H-2B visa is a catchall visa for workers in non-agricultural sectors).
\textsuperscript{32} S. Poverty Law Center, supra note 12, at 8-9.
certification process for employers under the H-2B visa was created through internal DOL memoranda rather than formal regulation. Consequently, the certification process never underwent the formal rulemaking and comment procedures that federal regulations are subjected to. Employers seeking certification of H-2B visas from the USCIS therefore have a much lower burden for approval. Employers must guarantee that workers’ wages will be comparable to the prevailing wages of that sector and provide a description of the wage, working conditions, and type of employment. Because the H-2B wage requirement is designated by council directive rather than formal regulation, the DOL claims it does not have the authority to implement the H-2B prevailing wage.

In addition to the relaxed certification requirements of the H-2B visa, the DOL never enacted many of the substantive regulatory protections in place for H-2A visa, such as free housing, workmans’ compensation for injuries, guaranteed employment for three-fourths of the contractual amount promised, payment for transportation expenses, and access to free legal resources. Furthermore, congress eased numerical limitations on H-2B visas by creating an exemption for returning workers. The initial guidelines for

33 S. Poverty Law Center, supra note 12, at 8 (citing General Administrative Letter (GAL) 1-95)
34 Id.
35 Id.
36 GAL No. 1-95(IV)(D)(H-2B); see Dep’t of Labor ETA Form 750.
37 S. Poverty Law Center, supra note 12, at 8.
38 American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), New Orleans Workers’ Center for Racial Justice (NOWCRJ), Centro de los Derechos del Migrante (CDM) & Solidarity Center, Joint Response to U.S. Dep’t of State’s Public Notice 6921, Request for Information for the 2010 Trafficking in Persons Report, 2010, http://www.ituc-csi.org/afl-cio-submits-comments-to-the.html. See Carr, supra note 7, at 401; see also S. Poverty Law Center, supra note 12, at 8; see generally Tripathi, supra note 9, at 529-30.
39 Save Our Small and Seasonal Businesses Act of 2005 created an exemption for returning non-agricultural temporary seasonal workers. Congress proposed extending the H-2B Returning Worker Exemption through 2012 in the Save Our Small and Seasonal Businesses Act of 2007 (H.R.1843 and S.988). The bill was expected to quadruple the number of non-immigrants entering the country under H-2B visas. The bill expired in 2008 and is currently being revisited by the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.
the H-2B visa specified a 66,000 annual cap, but in 2005, congress passed the Save our Small Businesses Act, which exempted returning workers and resulted in a dramatic increase to the number of H-2B visas issued.

Because the H-2B visa includes fewer protections, there is an increased likelihood workers will be exploited. The blatant inconsistencies between the H-2A and H-2B visa are irrational and have brought the H-2B visa under heavy criticism.

**III. Exploitation of H-2 Guest Workers**

“This guest worker program’s the closest thing I’ve ever seen to slavery.”

-Charles Rangel, House Ways and Means Committee Chairman.

Exploitation and abuse of guest workers begins with the recruitment process and often includes deportation threats, wage and hour violations, contract-term violations, denial of workers’ compensation or aid for injuries, worker blacklisting in the agricultural community, systematic discrimination, and decrepit housing conditions. In the United States, the DOL’s failure to scrutinize H-2 petitions has allowed employers to overstate their labor needs and apply for far too many workers than they actually have need for. Consequently, workers incur recruitment, visa, housing, and travel costs only to wait months before they are actually given the full-time employment they were promised. Idle workers are not legally permitted to seek work elsewhere in order to support

---

41 *Id.* (after the exemption was created, the number of non-agricultural temporary workers increased to 89,000).
42 *Id.*
46 Carr, *supra* note 7 at 401.
47 *Id.*
themselves or relieve themselves of the significant debt they have acquired from travelling to the United States.\(^{48}\)

Once the DOL approves the employer’s H-2 petition, the employer generally contracts out to foreign recruiters to help hire guest workers. These foreign recruiters are often the greatest abusers of the H-2 system.\(^{49}\) The H-2A and H-2B programs prohibit employers from knowingly charging recruitment fees, but most employers escape liability by having the recruiter recover fees from the guest worker.\(^{50}\) Recruiters often charge exorbitant recruitment fees and make deceitful assurances that guest workers rely on.\(^{51}\) Employers relieve themselves of liability for the recruiter’s fraudulent actions and prevent revocation of their guest worker petition by simply claiming they were unaware of the recruiter’s unlawful conduct.\(^{52}\) Employers are not required to reimburse workers for fees charged by a recruiter and the DOL has stated it only has a limited ability to enforce H-2 regulations when monetary exchanges took place abroad.\(^{53}\)

After entering the United States, the guest workers is tied to a specific employer and cannot leave intolerable work conditions to seek employment elsewhere.\(^{54}\) When a guest worker decides to leave an abusive employer, the worker’s legal status is terminated and he must leave the United States.\(^{55}\) This makes the decision to report

\(^{48}\) Id.

\(^{49}\) Carr, supra note 7, at 410-11.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id. at 411; Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the Labor Certification Process and enforcement, 73 Fed. Reg. at 77,159.


\(^{55}\) Id. at 3.
exploitative behavior by an employer an extremely difficult one. Moreover, the workers are usually linguistically, geographically, and culturally isolated in their placements, making them vulnerable targets. The following cases exemplify the exploitation of H-2 visa holders in the United States and how the statutory safeguards were inadequate in protecting them.

A. Incidents of H-2A Abuse

1. Global Horizons

The allegations against Global Horizons (Global) include countless stories of abuse similar to Nikhom Intajak’s. Intajak came from Thailand with a contract to work for $7-10 an hour in the United States. He paid $11,700 in recruitment fees for this opportunity. After three months Intajak was sent to Hawaii, where he was in fact paid $9.50 an hour, but was only given sporadic work and forced to live in decrepit housing. Global agents monitored his production, circling him and the other laborers with a knife, gun, or baseball bat. In addition to those intimidation tactics, the agents physically beat defiant employees and threatened them with deportation. Intajak slept in a one-room barrack with 17 other people and often spent his nights waiting in the parking lot to

56 Id.
57 Human Rights Watch, supra note 18, at 209 (describing flaws in the H-2A program).
58 Bowe, supra note 45 (Intajak’s hourly wage depended on what the minimum wage was for the state that he was employed in).
59 Id.
60 Id. (stating that most workers paid between $11,000-21,000 in recruiting fees). This money was generally borrowed from relatives or banks, with communal property put up as collateral. Id. See Watanabe, supra note 1 (Thai worker describes paying $18,000 in recruitment fees). See also S. Poverty Law Center, supra note 12, at 19 (stating that overwhelming debt stemming from recruitment expenses is a chronic problem for guest workers).
61 Bowe, supra note 45 (describing unsteady work hours from absolutely no available work to 8 hour days).
62 Id. See Carr, supra note 7, at 408. See also S. Poverty Law Center, supra note 12 at 38-39 (citing Asanok v. Million Express Manpower Inc., filed Feb 12, 2007 in the U.S. Dist. Ct for the E.D.N.C., where Thai workers had passports and return tickets confiscated and were constantly threatened with deportation). On numerous occasions, the labor broker and his son threatened the workers with guns. Id. In another case, New Orleans H-2A workers were guarded by a man with a gun. Id.
ensure he was selected for work at 4:30 am. Intajak eventually escaped the squalid conditions and came to the Thai Community Development Center, which had been investigating Global’s exploitation of Thai guest workers since 2003. The Center’s investigation revealed hundreds of accounts of abuse similar to Intajak’s, which ultimately led to the indictment of Global’s president for labor trafficking.

2. Antonio-Morales v. Bimbo’s Best Produce

In 2005, a group of about 50 Mexicans came to Almite, Louisiana, on H-2A visas to work at Bimbo’s Best Produce strawberry plantation. Bimbo’s owner Charles Relan, confiscated the guest workers’ passports and threatened the workers with physical abuse, unlawful arrest, eviction, and deportation. In addition to being harassed by Relan, the workers were paid less than minimum wage. Most of the workers lacked English language skills and were unfamiliar with the region. They continued to work in the oppressive conditions for fear of their physical safety. The workers alleged Relan would fire a shotgun into the air while they were working and would spray slower workers with pesticides. In 2008, nineteen of the workers escaped the harsh conditions and brought an action against Bimbo in the Eastern District of Louisiana alleging claims

---

63 Bowe, supra note 45. See S. Poverty Law Center, supra note 12, at 37-39 (describing the filthy and cramped living conditions guest workers frequently endure, which often lacked electricity or hot water).
64 Bowe, supra note 41.
65 Bowe, supra note 45; Watanabe, supra note 4; Thai Community Development Center: Victory for Human rights, http://thaicdchome.org/cms/victory-for-human-rights/.
67 Id. at 2.
68 Id.
69 Id. at 6.
70 Id.
71 Id. In their complaint, the guest workers allege Relan shot a dog in the field that frequently visited the workers. The workers interpreted the killing of the dog as a threatening gesture. Id. at 7-8.
under the TVPA, the FLSA, and Louisiana tort and contract law.\textsuperscript{72} In 2009, the court granted plaintiffs’ motion for equitable tolling, delaying the statute of limitations to permit opt-in plaintiffs to join the action under FLSA 18 U.S.C. §1595(b).\textsuperscript{73} The court reasoned equitable tolling was especially appropriate under the circumstances of this case.\textsuperscript{74}

\textbf{B. Incidents of H-2B Abuse}

\textit{1. Aguilar v. Imperial Nurseries}

In Spring 2006, an agent of Pro Tree Forestry Services LLC (Pro Tree) recruited twelve Guatemalan men.\textsuperscript{75} The recruiter assured the workers they would be planting trees at a wage of approximately $7.50 an hour.\textsuperscript{76} The workers incurred significant expenses and debts to travel to the United States on an H-2B visa and work for Pro Tree.\textsuperscript{77} Upon their arrival to the site, the workers’ passports were confiscated, they were forced to sign contracts in English (a language none of the men understand), and they were informed their payment would be based on the group’s collective production rather than an hourly wage, as they were originally promised.\textsuperscript{78}

In addition, the following abuses proceeded to take place on a daily basis: the workers were threatened with deportation, withheld payment, denied medical care when ill, forced to live in filthy housing, told they were prohibited from travelling, and verbally

\textsuperscript{72} Antonio-Morales v. Bimbo’s Best Produce, No. 2:08-cv-05105, 2009 WL 4060936 (E.D.L.A. 2009) (extending the tolling to plaintiffs who initially file consents under 29 U.S.C. § 216(b) and those who subsequently join the lawsuit as named plaintiffs).

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} \textit{Id}. The outcome of the case is still pending.

\textsuperscript{75} Memorandum of Law in Support of Plaintiff’s Motion for Rule 55(b) Default Judgment at 4, Aguilar v. Imperial Nurseries, No. 3:07-cv-00193, 2008 WL 2572250 (D. Conn. Feb. 4, 2008).

\textsuperscript{76} \textit{Id}. at 4.

\textsuperscript{77} \textit{Id}. at 6-7.

\textsuperscript{78} \textit{Id}. at 4-7.
taunted verbally regarding their debt. When a group of the workers escaped, several fled back to Guatemala and others obtained T-visas, a visa granted to individuals whom the Department of Homeland Security and Department of Justice certify as victims of a severe form of human trafficking. T-visa holders are allowed to remain in the United States to assist in the investigation and prosecution of trafficking claims.

With their T-visas, the workers were able to stay in the United States and file suit in federal court. The workers brought the following claims: (1) forced labor in violation of federal law under the TVPA, 18 U.S.C. § 1589; (2) human trafficking in violation of federal law under the TVPA, 18 U.S.C. § 1590; (3) involuntary servitude and forced labor in violation of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350; (4) human trafficking in violation of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350; (5) violations by enterprise Pro Tree under the RICO, 18 U.S.C. § 1962; (6) fraud under common law tort; (7) intentional infliction of emotional distress under common law tort; (8) negligent infliction of emotional distress under common law tort; and (9) violation of the Guatemalan Labor code. In 2008, the court ordered default

---

79 Id. See United States v. Kozinski, 487 U.S. 931, 949 (1988) (“[I]t is possible that threatening... an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.”).
81 In 2007, 279 victims of human trafficking were granted T-Visas. Christal Morehouse, COMBATING HUMAN TRAFFICKING: POLICY GAPS AND HIDDEN AGENDAS IN THE USA, at 117 (2009) (citing US Dep’t of Justice, Report to Congress and Assessment of the U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2007 (May 2008), 20). In 2006, 182 T-visas were granted. Id. The number of T-visas granted is significantly below the number of applications received and is far below the allotted statutory limit. Id.
82 Aguilar, supra note 75, at 4.
83 Id.
judgment against Pro Tree, and its owners William Forero and Hernando Aranda jointly and severally for approximately $7.7 million dollars.\textsuperscript{84}


After guest workers organized a series of protests concerning labor and living conditions, Signal International LLC (Signal) retaliated by hiring armed guards to hold three protest-leaders hostage.\textsuperscript{85} Signal, a ship construction company in Mississippi, hired the workers in response to a shortage of U.S. workers following Hurricane Katrina.\textsuperscript{86} Signal hired a recruitment company in India to sign up welders, pipefitters, shipfitters, and other specific laborers.\textsuperscript{87} The workers were recruited in Mumbai under false pretenses of long-term employment, permanent U.S. residency, and green card opportunities.\textsuperscript{88} Relying on those assurances, the workers spent upwards of $20,000 in recruitment fees and travel expenses to come to the United States on the H-2B visa.\textsuperscript{89} Upon arriving in the United States, the workers discovered they would be fenced in, isolated, and forced to pay $1,050 to live in a crowded trailer with 24 other men.\textsuperscript{90}

---

\textsuperscript{84} Aguilar v. Imperial Nurseries, 2008 WL 2572250 (D. Conn. 2008) (Not reported).


\textsuperscript{86} Rajghatta, \textit{supra} note 85; Bauer et al., \textit{supra} note 85.

\textsuperscript{87} David v. Signal Int., LLC, 257 F.R.D. 114, 117 (ED. La. 2009) (holding plaintiffs are entitled to protection from inquiry into their current immigration status, current addresses and employment history post-termination from Signal); Rajghatta, \textit{supra} note 85; Bauer et al., \textit{supra} note 85.

\textsuperscript{88} Signal, \textit{supra} note 87, at 11; 7ACLU, \textit{supra} note 85.

\textsuperscript{89} Rajghatta, \textit{supra} note 85; Bauer et al., \textit{supra} note 85; ACLU, \textit{supra} note 85.

\textsuperscript{90} Bauer et al., \textit{supra} note 85.
2008, a class action suit was filed in the Eastern District of Louisiana for violations of the TVPA and RICO.\textsuperscript{91}

The above cases illustrate abusive employer practices and the causes of action guest workers commonly brought. The ongoing manipulation of guest workers suggests that the current precautions are deficient and the available remedies are not as accessible and expansive as they should be.

\textbf{IV. Gaps in Guest Worker Protection and Available Remedies}

The majority of enforcement actions for violations of H-2 regulations are brought under the FLSA, the RICO, the TVPA, and common law.\textsuperscript{92} There are various inadequacies that come with each means of relief. The exclusion of H-2A workers from the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and the absence of a private right to action to enforce the H-2 regulations further limit exploited guest workers. This section will address the limitations of the FLSA, the poor administrative enforcement of the H-2 regulations, the exclusion of guest workers from U.S. labor laws, and the shortcomings of the remedies available under the RICO, the TVPA, and common law tort.

\textbf{A. The Fair Labor Standards Act (FLSA)}

The FLSA provides various safeguards for guest workers, ranging from hour and wage protection to medical coverage for injuries incurred while at work.\textsuperscript{93} The FLSA allows the DOL to bring actions for wage and overtime violations and gives employees a...

\textsuperscript{91} Signal, \textit{supra} note 87, at 114; ACLU, \textit{supra} note 85 (In addition to the federal court litigation, in partnership with the ACLU, the workers have testified before the UN Special Reporter on the Human Rights of Migrants, the UN Special Reporter on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, and senior staff at the UN Office of the High Commissioner for Human Rights.). The outcome of the case is still pending.

\textsuperscript{92} Carr, \textit{supra} note 7, at 415.

\textsuperscript{93} Tripathi, \textit{supra} note 9, at 551.
private right of action to seek redress for these violations.\textsuperscript{94} The FLSA offers workers compensatory and liquidated damages for willful wage and hour abuses by an employer.\textsuperscript{95} However, there are numerous challenges associated with bringing actions under the FLSA. Of the challenges, “procedural barriers” probably present the greatest obstacle for guest workers seeking to impose the protections of the FLSA.\textsuperscript{96} Workers filing a complaint with the DOL have several aspects of the administrative process working against them.\textsuperscript{97} For example, a worker is unable to bring a complaint at the termination of his employment, because he must return to his home country immediately after being dismissed from his position.\textsuperscript{98} The complainant’s absence makes administrative, discovery, and litigation proceedings impossible in many instances.\textsuperscript{99} Additionally, most free legal services offered to guest workers are limited in resources and are unable to continue a case when the plaintiff has gone abroad.\textsuperscript{100}

The FLSA’s coverage is often insufficient to fully compensate H-2 workers for their losses, especially for their recruitment fees.\textsuperscript{101} Several courts have hesitated to extend the FLSA to cover recruitment fees obtained abroad, unless the employer had express knowledge of the fee collection action or implied knowledge based on an

\textsuperscript{94} Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 216(c). See Bailey v. Gulf Coast Trans., Inc., 280 F.3d 1333, (11th Cir. 2002) (holding FLSA provided employees with a private right of action to pursue preliminary injunctive relief for violations of the FLSA’s antiretaliation provision) The secretary of Labor does not have an exclusive right to seek injunctive relief under the FLSA. \textit{Id}.


\textsuperscript{96} Tripathi, \textit{supra} note 9, at 551 (citing Victoria Gavito, \textit{The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrant Rights}, 14 HUM. RTS. BRIEF 5, 6 (2007) (suggesting procedure is the greatest impediment for a worker attempting to exercise the FLSA protections)).

\textsuperscript{97} Tripathi, \textit{supra} note 9, at 551-552

\textsuperscript{98} \textit{Id}.

\textsuperscript{99} \textit{Id}.

\textsuperscript{100} \textit{Id}.

\textsuperscript{101} Carr, \textit{supra} note 7, at 411-13.
established agency relationship with the recruiter. Consequently, an employer that intentionally turns a blind eye to a foreign recruiter’s deceitful assurances is likely to be absolved of liability. Under the H-2 regulations and the FLSA, employers are only reprimanded if they were cognizant of the recruiter’s abuses. Finally, the DOL’s poor enforcement of the FLSA often leaves H-2B workers, who do not have statutory access to free legal services, without any method of recourse. The FLSA’s private right of action is in effect futile for indigent H-2B workers who cannot afford legal services. The DOL’s poor enforcement is especially troublesome given the vulnerability of guest workers. Guest workers are less likely to initiate proceedings against their employer, because he is the worker’s sole source of income and legitimacy in the United States. The shoddy enforcement of the FLSA and the limitations of its extraterritorial reach require guest workers to find other viable legal remedies.

**B. The Department of Labor’s Poor Enforcement of H-2 Violations**

The DOL and Department of Homeland Security (DHS) are statutorily charged with supervision and enforcement responsibility of the H-2 visa. However, based on a study of DOL trends in wage and hour enforcement by the Brennan Justice Center, the

---


103 *Carr, supra* note 7, at 414-15.

104 *Id.*

105 *See* S. Poverty Law Center, *supra* note 12, at 42-46.

106 *See Id.*

107 *See Id.*


U.S. government is investigating and enforcing fewer labor violations.\textsuperscript{110} Between the years of 1974-2004, the number of U.S. workers covered by the FLSA increased from 56.6 million to 87.7 million.\textsuperscript{111} However, the number of wage and hour inspectors decreased by 14 percent and the number of successful compliance actions declined by 36 percent.\textsuperscript{112} The following chart illustrates the decline in enforcement actions brought by the DOL.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Trends in enforcement by the U.S. Department of Labor, Wage & Hour Division, compared to growth in U.S. workers and establishments, 1975-2004}
\end{figure}

\textsuperscript{111} Bernhardt et al., supra note 110.
\textsuperscript{112} Id.
\textsuperscript{113} Id. (citing U.S. Department of Labor, Bureau of Labor Statistics. Quarterly Census of Employment and Wages. \url{http://www.bls.gov/cew/home.htm} (accessed 21 August 2005). For number of workers covered, the estimate of covered workers for 1975 was 56,648,000, taken from WILLIS J. NORDLUND, \textit{THE QUEST FOR A LIVING WAGE}, Greenwood Press, 1997. The estimate of covered workers for 2004 was 87,691,695, which was calculated drawing on a report by the U.S. Department of Labor, Employment Standards
As evident from the data, even though H-2 visas come with various safeguards, the enforcement of these provisions is often limited and non-existent.\footnote{Lindsay M. Pickral, Close to Crucial: The H-2B Visa Program Must Evolve, But Must Endure, 42 U. RICH. L REV. 1011 (2008).} In 2004, the DOL commenced 89 investigations of H-2A employers and at the time there were approximately 6,700 total employers certified to retain H-2A workers.\footnote{Id. at 1021} Additionally, the DOL rarely denies employers’ H-2 petitions on the basis of past violations.\footnote{Id. at 1021. See S. Poverty Law Center, supra note 12, at 28.} In 1997, the Government Accountability Office found the DOL had never revoked an employer’s application for H-2A workers based on a determination that the employer violated guest worker’s legal rights.\footnote{Guerra, supra note 26, at 196.}

Furthermore, the DOL’s administrative system for handling H-2 workers’ complaints has been criticized as “obscure” and “biased.”\footnote{Id. at 196-197.} Because the H-2 system does not prescribe a precise method for the agency to handle complaints, the DOL may take a course of action that is clearly unfair.\footnote{Id. In 1998, the North Carolina Growers Association (NCGA) had several complaints of employee abuse filed against it. The DOL permitted the NCGA to conduct its own investigation of the exploitation allegations. The NCGA found no violations in its program and stated the accusations were groundless. Id.} Complainants are also generally not updated on the status of their complaints, leaving many distressed workers in the dark.\footnote{Id.} The vulnerability of guest workers should

\footnote{Id.}
encourage the DOL to clarify the muddled administrative process for handling complaints and stringently enforce the H-2 regulations.122

C. The Exclusion of Guest workers from U.S. Labor Laws

Fulfilling the standing requirements has proven to be a reoccurring impediment for H-2 visa holders seeking to bring a cause of action in federal court.123 Because the H-2 guidelines do not contain an explicit private right of action, most federal courts have ruled guest workers do not have standing to bring a suit to implement H-2 regulations.124 In Nieto-Santos v. Fletcher Farms, the Ninth Circuit conducted an analysis to determine whether a private remedy is implicit in the H-2 regulations.125 The court found there was no implied private right of action because the H-2 regulations were not intended to protect guest workers and the purpose of the regulations “is to protect the jobs of the United State’s citizens.”126

In addition to not having a statutory private right of action, migrant workers are specifically excluded from the AWPA, which serves as a protection tool for seasonal and migrant agricultural laborers.127 Section 1802 of the AWPA expressly bars H-2 workers from the scope of the Act.128 The AWPA provides various safeguards for workers that are unavailable in the H-2 framework.129 For example, the AWPA requires an employer to post provisions of the Act and terms and conditions of housing in a language

122 Id. at 196; Carr, supra note 7, at 409.
123 Guerra, supra note 26, at 197-98. See Christopher Ryon, Comment, H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Agricultural Protection Act, 2 Margins 137, 138 (2002).
124 Guerra, supra note 26, at 198.
126 Guerra, supra note 26, at 198; Nieto-Santos, supra note 125, at 641.
129 Guerra, supra note 26, at 199; § 1801 et seq.
accessible to the workers.\textsuperscript{130} The AWPA also mandates stringent record keeping by employers and section 1854 of the AWPA grants workers with a private right of action and federal question jurisdiction.\textsuperscript{131} For H-2 workers relying on ineffective DOL enforcement, the AWPA could prove to be beneficial.\textsuperscript{132} Extending AWPA coverage to guest workers would give guest workers standing in federal court to enforce H-2 regulations and would increase protections from exploitation.\textsuperscript{133}

D. The Trafficking Victims Protection Act (TVPA)

Guest workers laboring under severely oppressive work conditions may consider bringing claims under section 1589 (forced labor), section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), or section 1351 (fraud in foreign labor contracting) of the Trafficking Victims Protection Act (TVPA).\textsuperscript{134} Under the TVPA, plaintiffs may recover damages either through a government instituted action or a private right of action.\textsuperscript{135} In cases where the government brings a criminal case under the TVPA, the court awards the plaintiff mandatory restitution.\textsuperscript{136} A private right of action for TVPA claims did not exist until 2003, when congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA), which enabled private parties to bring a suit to recover compensatory and punitive damages for § 1589, § 1590, and § 1591 claims.\textsuperscript{137}

\textsuperscript{130} Guerra, supra note 26, at 199; § 1821(b)-(c).
\textsuperscript{131} Guerra, supra note 26, at 199; § 1821 (d)(1)(A)-(F); 29 U.S.C. § 1854 (c)(1).
\textsuperscript{132} Guerra, supra note 26, at 199; 8 U.S.C. § 1324a(2006)(statutorily charging the DOL with enforcement of H-2 regulations); Bernhardt et al., supra note 110 (showing the statistical decline in DOL enforcement despite the significant increase in the number of workers).
\textsuperscript{133} Guerra, supra note 26, at 196-99.
\textsuperscript{134} TVPA, 18 U.S.C. §§ 1589, 1590, 1351.
\textsuperscript{135} 18 U.S.C. §§ 1593 (mandatory restitution), 1595 (civil remedy).
\textsuperscript{136} 18 U.S.C. § 1593.
Guest workers may also find the TVPA’s extraterritorial jurisdiction provision beneficial.\textsuperscript{138} Section 1596 gives federal courts extraterritorial jurisdiction over an alleged offender that is a U.S. national, permanent resident, or present in the United States, irrespective of nationality.\textsuperscript{139} The TVPA’s expansive extraterritorial reach distinguishes it from the FLSA and the RICO, which are more limited in their extraterritorial application.\textsuperscript{140} Despite the TVPA’s favorable provisions, it is often an unsuccessful tool for guest workers, because courts generally limit the Act’s application to extremely coercive labor conditions.\textsuperscript{141} The following analysis looks at the scope of and limitations of the most relevant portions of the TVPA in the guest worker context.

Section 1589(a) defines forced labor as employment obtained using (1) force or threat of force, (2) serious harm or threat of serious harm, (3) abuse of the legal process or threatened abuse of the legal process, or (4) a scheme, plan or pattern to convince a person a serious threat exists.\textsuperscript{142} A finding of forced labor hinges on whether the employer’s threats were serious enough such that a reasonable person of the same background in a similar situation would feel compelled to continue providing labor.\textsuperscript{143} Courts conduct a fact-intensive inquiry when considering whether the coercion amounts to forced labor.\textsuperscript{144} Additionally, the standard for recovery is high and damages are

\textsuperscript{138} 18 U.S.C. § 1596.
\textsuperscript{139} Id.
\textsuperscript{140} See S. Poverty Law Center, supra note 95, at 52 & 57.
\textsuperscript{141} Carr, supra note 7, at 428-430.
\textsuperscript{142} 18 U.S.C. § 1589(a).
\textsuperscript{143} Carr, supra note 7, at 430.
\textsuperscript{144} Id. at 433.
generally only recoverable in the most extreme cases. Section 1589 forced labor claims are typically filed in conjunction with section 1590 trafficking claims.

Section 1590 implicates anyone who “knowingly recruits, harbors, transports, provides, or obtains” a person for labor or services under circumstances that violate the TVPA. The statute’s broad scope and use of “obtains” suggests employers may be liable for holding a trafficking victim. Section 1590 would cover foreign recruiters who knowingly participated in the trafficking of guest workers, however because most recruiters are found outside of the United States, they are not within the ambit of section 1596’s extraterritorial jurisdiction reach.

Finally, guest workers may consider a cause of action under section 1351, which was recently added to the TVPA. Section 1351 implicates “[w]hoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment.” This statute specifically targets the reoccurring behavior of manipulative foreign recruiters in H-2 cases and gives courts extraterritorial jurisdiction over defendants anywhere in the world, as long as they meet the statutory criteria. This extension of the TVPA’s jurisdictional reach goes beyond section 1596, which is limited to defendants physically present in the United States. Because the litigation arising under 1351 will probably involve two

145 Id.
146 S. Poverty Law Center, supra note 95, at 29-33.
148 Carr, supra note 7, at 433-34.
152 See Id.
foreign parties and an incident occurring abroad, challenges of forum non-conveniens, venue, and enforcement of judgments may surface. Courts have not yet issued any rulings on section 1351 claims in the guest worker context, so the outcome of this argument is still uncertain.

Although the TVPA provides guest workers with an alternative approach for seeking redress, it is generally limited to instances of egregious employer conduct. Furthermore, it remains unclear as to how a § 1351 claim will span out in court. For these reasons, guest workers are often forced to consider other avenues for a remedy.

E. The Racketeer Influenced and Corrupt Organization Act (RICO)

In light of the difficulties in obtaining remedies under the TVPA, guest workers have alternatively sought relief under the RICO’s civil liability statutes, which give individuals harmed by an enterprise a private right of action. Section 1962(c) is the most common avenue guest workers utilize under the RICO to recover recruitment fees and lost wages from their employers. Section 1962(c) covers business activities of the enterprise that directly or indirectly amount to a pattern of racketeering and have an effect on interstate commerce. Section 1961 includes a list of predicate acts fulfilling the definition of racketeering. When the TVPRA passed in 2003, peonage, slavery, and

---

153 Carr, supra note 7, at 435-36.
154 Id.
155 Id.
157 Carr, supra note 7, at 415-16.
158 18 U.S.C. § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.”)
159 18 U.S.C § 1961(1).
trafficking in persons became predicate acts for racketeering purposes.\textsuperscript{160} Therefore, RICO claims on behalf of guest workers are relatively new and only a limited number of courts have actually addressed the issue.\textsuperscript{161} The RICO also has the advantage of treble damages, but recovery is limited to quantifiable property loss and litigation fees.\textsuperscript{162} The RICO does not provide relief for physical or mental injuries and in some instances courts have ruled the RICO may be preempted by the FLSA.\textsuperscript{163}

Using the RICO to recover recruitment fees from an employer can be difficult because U.S. employers generally contract out with a foreign agency to hire guest workers.\textsuperscript{164} These foreign recruitment agencies are treated as external contractors, rather than an agent of the U.S. employer.\textsuperscript{165} Unless there is a clear showing of encouragement on the part of the U.S. employer, or that the “contractor” relationship was in fact a sham, the employer will likely not be liable for the recruiter’s false assurances and exorbitant fees.\textsuperscript{166} Finally, the RICO will only extend its reach to international recruiters, “if conduct material to the completion of the racketeering occurs in the United States, or significant effects of the racketeering are felt here.”\textsuperscript{167} Determining whether guest workers fulfill the statutory requirements will involve a fact-intensive analysis and will

\textsuperscript{160} 18 U.S.C § 1961(1)(B); TVPRA, supra note 137, at 108-93; S. Poverty Law, supra note 95, at 29.
\textsuperscript{161} S. Poverty Law Center, supra note 12, at 19-20 (stating 12 lawsuits have been brought against 10 seafood companies in Virginia and North Carolina since 1998 and virtually all of them have ended in settlements); Carr, supra note 7, at 417.
\textsuperscript{162} 18 U.S.C. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee…”).
\textsuperscript{163} Sedima, S.P.R.L. v Imrex Co., 473 U.S. 479, 496 (1985) (indicating plaintiff in a RICO suit may only recover for injuries to business or property); Carr, supra note 7, at FN 107 (citing Choimbol v. Fairfield Resorts, Inc., No. 2:05cv463, 2006 WL 2631791, at *6 (E.E. Va. Sept. 11, 2006) (concluding FLSA minimum wage and hour claims precluded plaintiff’s civil claims under RICO)).
\textsuperscript{164} S. Poverty Law Center, supra note 12, at 9-10.
\textsuperscript{165} Carr, supra note 7, at 418-19.
\textsuperscript{166} Id.
\textsuperscript{167} Grunenthal GmbH v. Hotz, 712 F.2d 421, 424 (9th Cir.1983) (explaining the “conduct” and “effect” tests for extraterritorial RICO application).
depend on the court’s broad or narrow interpretation of “conduct” and “effect.”\textsuperscript{168} The RICO’s agency requirements, limited extraterritorial reach, and exclusion of physical and mental damages make it difficult for guest workers to seek full redress for their grievances.\textsuperscript{169}

F. Common Law Tort Claims

Guest workers commonly bring tort law actions in addition to their FLSA, TVPA, and RICO claims.\textsuperscript{170} Tort law allows plaintiffs to seek compensatory and punitive damages for a wide spectrum of claims.\textsuperscript{171} The following causes of action may be applicable to a guest worker in an oppressive work environment: intentional infliction of emotional distress, false imprisonment, assault, battery, fraudulent misrepresentation, negligence, and negligent infliction of emotional distress.\textsuperscript{172} Furthermore, the burden of proof in a civil tort action is beyond a preponderance of evidence, which is lower than the burden of proof for criminal cases.\textsuperscript{173}

The flexibility of tort claims makes them attractive to guest workers, but tort law comes with several challenges. First of all, most tort claims are subject to a one-year statute of limitations.\textsuperscript{174} Additionally, tort law varies tremendously from jurisdiction to jurisdiction, producing different outcomes for similarly situated workers.\textsuperscript{175} Finally,

\textsuperscript{168} Carr \textit{supra} note 7, at 420.  
\textsuperscript{169} \textit{Id.} at 415-423.  
\textsuperscript{170} \textit{Id.}  
\textsuperscript{171} \textit{Id.} at 424.  
\textsuperscript{172} S. Poverty Law Center, \textit{supra} note 95, at 67-70.  
\textsuperscript{173} \textit{Id.} at 67. The burden of proof for criminal cases is beyond a reasonable doubt. \textit{Id.}  
\textsuperscript{174} \textit{Id.}  
\textsuperscript{175} \textit{See Id.}
common law tort claims may be precluded by the FLSA in certain situations.\textsuperscript{176} Although the FLSA does not expressly address preemption, most courts find a FLSA claim precludes common law when the issue is specifically addressed in the FLSA.\textsuperscript{177}

**V. Recommendations to Mitigate Employer Abuse and Better Protect H-2 Workers**

Employer abuses of the H-2 program are unacceptable and as the case law above illustrates, they are not rare. Theoretically, the H-2 program contains a variety of critical safeguards, but these protections lack adequate enforcement mechanisms.\textsuperscript{178} There are several different approaches to improving the current system to ensure guest workers are treated properly when employed in the United States. The following are recommendations that could enhance the current H-2 program and better protect workers.

1. *The Department of Labor’s enforcement of H-2 regulations needs to be improved.*\textsuperscript{179}

   If the H-2 program is to continue, then there needs to be increased funding for enforcement of H-2 regulations. An increase in funding would allow the DOL to conduct more investigations of H-2 complaints and better enforce the FLSA protections.\textsuperscript{180}

   If funding allocation is impractical, then congress needs to consider amending the H-2 regulations to increase employer transparency. For example, congress could enact a provision mandating employers to regularly report to the DOL at the completion of a guest worker’s contract to demonstrate compliance with the terms of the agreement.\textsuperscript{181}

---

\textsuperscript{178} See Guerra, *supra* note 26, at 194-195.
\textsuperscript{179} See S. Poverty Law Center, *supra* note 12, at 44
\textsuperscript{180} See Pickral, *supra* note 114, at 1025.
\textsuperscript{181} See S. Poverty Law Center, *supra* note 12, at 44
The DOL may also consider promulgating clearer administrative process guidelines for addressing H-2 complaints. The lack of clarity in the current administrative process, especially in the H-2B context, leaves guest workers uninformed and reduces confidence in the system.\textsuperscript{182} If the DOL laid out a step-by-step framework for addressing complaints, employers and guest workers would have clear expectations of the administrative process when a complaint is filed by an H-2 guest worker.\textsuperscript{183}

Clarity in the administrative process may also be fostered through increased education surrounding guest worker protections. To provide temporary workers with greater access to information, employers that hire H-2 workers should be required to permit advocacy groups in the community to administer free legal materials concerning guest worker rights and the complaint process.\textsuperscript{184} Regulations requiring increased transparency and information access would encourage guest workers to enforce illegal violations of their statutory protections.

2. \textit{Penalties for violations of the H-2 regulations need to be more stringent.}

---

\textsuperscript{182} See Guerra, \textit{supra} note 26, at 195-97.

\textsuperscript{183} See \textit{Id.} (addressing the inefficiencies and obscurities within the DOL complaint system). Guerra analogizes the DOL administrative handling of H-2 worker complaints with a “black hole.” \textit{Id. See also} Michael Holley, \textit{Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights}, 18 HOFSTRA LAB. & EMP. L.J. 575 (2001).

\textsuperscript{184} See Human Rights Watch, \textit{supra} note 18, at 219 (discussing the North Carolina Growers’ Association efforts to deter guest workers from speaking to legal advocacy groups). The following paragraph was published in an NGCA handbook:

[Farmworker Legal Services] has a hidden motive when they approach you. They say that they are your friends and they are concerned about your rights and well being, but in reality their motive is to destroy the program which brings you to North Carolina legally . . .FLS discourage the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. Don’t be fooled and allow them to take away your jobs. \textit{Id.} (quoting North Carolina Growers’ Association, Inc., Understanding the Work Contract, 12-13).
In many H-2 cases, there are specific reoccurring abuses by employers seeking to manipulate guest workers, such as confiscating passports and threatening deportation. These specific tactics should be written into the H-2 guidelines as triggering serious criminal penalties for violators. Congress may also consider adding guest worker-specific provisions to the TVPA or the FLSA. Also, once an employer has violated H-2 regulations, the DOL should automatically deny the employer’s future applications. A rigid bar on petitions for guest workers would have deep implications for many employers, forcing them to think twice before violating the H-2 provisions.

In addition to developing stricter consequences, congress should consider expanding the H-2 regulations or the FLSA to create strict liability for any fees paid that push employee’s wages below the statutory minimum. A strict liability approach would encourage employers to investigate foreign recruiters’ practices and deter employers from ignoring the recruiter’s fraudulent actions.

3. Congress should extend the safeguards in place for H-2A visas to H-2B visas.

There is no reasonable rational for providing H-2B workers with fewer protections than those in place for H-2A workers. Extending the H-2A safeguards to non-agricultural workers would provide victims with increased mechanisms to combat

---

185 See Carr, supra note 7, at 442 (describing a settlement agreement between the Farm Labor Organizing Committee (FLOC) and the North Carolina Growers’ Association, whereby guest workers would apply for guest worker jobs through the union and completely skip the recruitment process). The FLOC agreement holds employers liable for all recruitment costs, regardless of the employer’s relationship with the recruiter. Id.
exploitative working conditions.\textsuperscript{186} Congress should amend the H-2B regulations immediately to remedy this blatant inconsistency in guest worker protection.\textsuperscript{187}

4. *The Migrant and Seasonal Agricultural Worker Protection Act’s coverage should be extended to include H-2 guest workers.*

The AWPA statutory definition of seasonal workers should be broadened to include H-2 temporary workers.\textsuperscript{188} This expansion would provide guest workers with increased protections and another enforcement mechanism for violations of H-2 regulations. Under the AWPA, seasonal and migrant workers are afforded a private right of action and federal question jurisdiction.\textsuperscript{189} These aspects of the AWPA could prove to be beneficial for exploited guest workers that are relying on DOL enforcement as their only hope for recourse.\textsuperscript{190}

5. *The H-2 regulations should be expanded to include a private right of action.*

The H-2 regulations do not currently provide plaintiffs with a private right of action to enforce illegal violations by employers.\textsuperscript{191} The absence of a private remedy provision has compelled plaintiffs to use an array of tactics to obtain relief or rely on the DOL’s slow and often ineffective enforcement actions. This simple solution would ease the complexity of guest worker actions to enforce the H-2 regulations.

\textsuperscript{186} See S. Poverty Law Center, *supra* note 12, at 44. See also Centeno-Bernuy v. Becker Farms, 564 F.Supp.2d 166, 180 (W.D.N.Y. 2008) (finding temporary nonimmigrant aliens who were authorized to work in US agricultural jobs were not subject to the AWPA). See generally Tripathi, *supra* note 9.


\textsuperscript{188} AWPA 29 U.S.C. § 1802(10)(B); See Guerra, *supra* note 26, at 200-201 (arguing for the expansion of the AWPA to H-2A workers).

\textsuperscript{189} 29 U.S.C. §1801 et seq. (2010)

\textsuperscript{190} See Guerra, *supra* note 26, at 200-201.

\textsuperscript{191} Id. at 196.
VI. Conclusion

In theory, the H-2 program is a reasonable means of alleviating the U.S. worker shortage in certain fields. However, the reality of the situation is evidenced by the accounts of employer manipulation and abuse. The H-2 program often engenders an environment in which guest workers “labor under the realistic fear that if they stand up for their rights, join a union, or do not work at the limits of human endurance, they will be fired and deported immediately.”

This suggests that in addition to poor execution of the existing protections, the current safeguards are inadequate and enforcement mechanisms are lacking. Change on both the administrative and the legislative level needs to take place, because a poorly regulated guest worker program rampant with abuses reflects poorly on the United States and creates negative impacts abroad. To effectuate change, congress must demand employers undergo greater scrutiny, suffer more serious penalties, and conduct hiring practices with greater transparency.

---

192 Human Rights Watch, supra note 18, at 208 (citing Farmworker Justice Fund, Inc., The H-2A Program in a Nutshell (Nov. 1999)).