



# VISAS, INC.

CORPORATE CONTROL AND POLICY INCOHERENCE  
IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM

**GLOBAL WORKERS JUSTICE ALLIANCE**

BY ASHWINI SUKTHANKAR

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# About Global Workers Justice Alliance

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Global Workers Justice Alliance (Global Workers) combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. Global Workers believes that portable justice, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is a key, under addressed element to achieving justice for today's global migrants.

Global Workers' core work involves training and supporting a Defender Network, comprised of human rights advocates in the migrant-sending countries. The Network educates workers on their rights before they migrate, partners with advocates in the countries of employment on specific cases of labor exploitation, and advocates for systemic changes. Global Workers' U.S. legal staff trains U.S. advocates on representing clients abroad, and provides advice and referral, for case support work, outside of the Defender Network area. Increasingly, Global Workers is engaging in policy work, both nationally and internationally, drawing from its unique advocacy insight into both countries of employment and sending countries, to improve conditions for migrants. We currently operate programs in the United States, Canada, Mexico, and Central America.

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## About the Author

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Extensive support with research and writing:

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# Preface

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Visas, Inc. goes behind the scenes of the ad hoc set of visas that are sometimes referred to collectively as the “guestworker program.” It has become a lucrative business for employers, but with high costs for U.S. society as well as foreign and American workers. Employers are driving a system that lacks coherence and has serious long-term consequences for the United States.

Without thoughtful consideration of the future of U.S. labor needs as they were likely to evolve throughout the economy, Congress has responded over the years to industry-specific demands and created visas that addressed particular issues at particular moments in time. As the formal “work” visas became more regulated, employers learned they could skirt the tougher rules altogether by using other visas that were never intended to serve primarily as “work” visas. The result has been unsatisfactory to almost all the parties involved, especially the workers.

Global Workers Justice Alliance was founded in 2005 to combat worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. As we built a network of human rights advocates in the migrant home countries to partner with us to assist migrant workers exploited, even trafficked, while in the U.S., we started realizing that the temporary worker visa system was deeply flawed and one-sided.

When we decided to look further into the system what we found was confounding and, ultimately, the reason for this report. We discovered a complicated, fragmented system that few understand well. It was also a place that has little room for the interests of foreign workers.

Now is the time to take a step back and reflect on the broad effects of this ad hoc system.

We hope that this report can help advocates already deeply engaged in the hard policy work on individual visas and abuses to see how problems for many different kinds of workers and communities are all connected in this chaotic system. We also hope it encourages new voices in the U.S. and overseas to join this conversation and work together to find solutions that will eliminate abuses and work better for everyone involved.

Sincerely,  
Cathleen Caron  
Founder and Executive Director  
Global Workers Justice Alliance



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# Executive Summary

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According to the best guess of the U.S. government, somewhere between 700,000 and 900,000 foreign citizens enter the United States every year on temporary visas.<sup>1</sup> They work in every field, from low-skilled, low-wage jobs in agriculture, to specialty occupations in health care or information technology. They may be in the public sector, employed as teachers in an under-served school district, or in the most private sphere of the private sector, as domestic workers living in their employer's home.

The temporary foreign labor system that brings in these workers consists of dozens of visa categories and sub-categories, for apparently distinct purposes – cultural and educational exchange, employee relocation by multinational enterprises, U.S. based training programs and more. But the problems become apparent when we examine the structure as a whole – and in particular, its vulnerability to extreme misuse by employers eager to use foreign labor in ways that undermine established wages and working conditions in the U.S. As far as many of these employers are concerned, the entire framework is one undifferentiated avenue to source cheaper and more easily controlled labor:

- U.S. employers have substantial economic incentives, built into the visa framework, to hire foreign workers in place of a potential or existing U.S. workforce. These incentives may be embodied in regulations that exempt employers of certain visa workers from payroll taxes, for example – or a lack of regulation, enabling employers to pay foreign workers far lower wages than established for U.S. workers.
- Foreign workers are wholly dependent on their employer for their fragile status in the U.S. As a general matter, if they are fired, they must leave the country quickly, or face deportation. Combined with other tools of control, this creates a culture of fear that effectively prevents workers from reporting any abuse or exploitation.

**The size and reach of the temporary worker visa system is evidence that U.S. immigration policy has moved away from its roots in permanent labor migration. This has happened largely without public debate or political acknowledgment.**

The temporary worker visa system is utterly chaotic, constantly metastasizing to develop more visa categories or carve-outs, in response to employer demands. While there is extensive evidence of self-interested employer lobbying to expand the system, or employer misuse of the existing system, the ultimate responsibility lies with the U.S. government. The United States made a deliberate choice to shape a foreign temporary labor system that is heavily privatized, with a minimal role for public regulation and oversight. The U.S. government's delegation of control over the temporary foreign labor scheme to employers – in spite of the many critical public interests at stake – has had dire consequences.

The U.S. government has long been aware of the enormity of the situation: for nearly every relevant visa category, internal governmental reviews document exploitation of foreign workers, and displacement of U.S. workers. Unfortunately, regulatory reforms have typically been meager, in proportion to the problems. For example, while the U.S. State Department has acknowledged that many foreign domestic workers entering the U.S. in the employ of diplomats have been exploited, and even enslaved, it has failed to address the core vulnerability of these workers through provisions for better enforcement and monitoring. Today, the State

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<sup>1</sup> Estimates drawn from conversations with U.S. government agencies and secondary research. As detailed in the report, we have to rely on such crude estimates because essential data is not collected or shared by the U.S. government. See Footnote 5 for a list of sources.



Department merely requires that domestic workers have a written contract with the employer before they can be granted a visa to enter the U.S.

Governmental oversight is further hobbled by diffusion of responsibility. Regulation and enforcement is distributed among multiple agencies – the State Department, the Department of Homeland Security, and the Department of Labor – in seemingly haphazard ways that are not consistent across visa categories, and do not provide for coordination among the agencies. In the case of the majority of these visas, the one agency mandated to protect U.S. and foreign workers – the Department of Labor – has been excluded or pushed to the margins. The absence of clear data further undermines both coordination and public accountability. Under the current framework, no one within the U.S. government – let alone the U.S. public – is in a position to grasp the dimensions of the temporary foreign labor system, or to analyze its impact.

The fragmentation of oversight is linked intrinsically to the fragmentation of the framework. Rather than developing a coherent, unitary system, the U.S. government, responding piecemeal to employer demands, created a patchwork of visas subject to distinct rules. Although it is clear that employers have learned to exploit the interconnections between these visas, the government continues to treat them as entirely distinct of each other. This refusal to regulate the temporary foreign labor system in an integrated way is perhaps the most substantial obstacle to meaningful reform and oversight. In the absence of comprehensive attention, employers treat these visas interchangeably, substituting reliance on one for another as circumstances – such as increased oversight here, or additional fees there – dictate. Analysis and reform must therefore happen holistically, if abuse and misuse are to be reined in, with the recognition that these individual visas constitute a *de facto* temporary foreign labor system.

The abuse and misuse associated with temporary foreign labor are closely linked to the larger crisis of decent work in the U.S. The shift away from full-time, living wage jobs as the standard for American workers, to ever more precarious employment, is only accelerating. The use of temporary foreign labor is not responsible for the crisis, but it is both a contributing factor and an alibi. Allowing foreign workers in the U.S. is premised on the absence of willing, qualified and available U.S. workers. In reality, however, U.S. workers are actively edged out, as this report documents, in several ways:

- Individual U.S. workers are not hired, or are fired on a pretext. A foreign worker is then hired instead.
- Employers exploit visas that were intended for other purposes, and thus do not require a prior effort to hire U.S. workers. As a result, in many cases, U.S. workers may not even be aware of their exclusion.
- U.S. workers are pushed out of entire industries and regions by the systematic erosion of wages and underlying work conditions. This is followed by the recruitment of foreign workers.

Foreign workers, in turn, are vulnerable to abuse throughout their involvement with temporary work in the U.S. The problems begin prior to departure, and extend beyond their return to their home countries:

- Prior to departure, workers are in the power of recruiters, who promise them employment opportunities in the U.S. in exchange for a substantial fee. In the absence of U.S. government regulation of recruiters (through provisions holding U.S. employers liable for any abuses by their recruiters, for example), there is total impunity. Many workers have been defrauded by recruiters who take their fees and then disappear. Other problems include gross discrimination: women workers accounted for only 3.7% of visas issued for agricultural labor in 2010,<sup>2</sup> though advocate interviews suggested that women could represent up to 40% of the pool of job-seekers.
- On arrival, workers face economic exploitation at the hands of employers who know that individuals on temporary work visas have no recourse against either abuse or retaliation. Illegal deductions and wage theft are extremely common.
- While working, occupational health and safety violations are frequent, especially among “unskilled” workers. The problems arise, in part, from the very fact that the U.S. government allows risky work to be categorized as “unskilled.”<sup>3</sup>

<sup>2</sup> Website of Global Workers Justice Alliance, data on U.S. migration, available at [http://www.globalworkers.org/migrationdata\\_US\\_more.html#DOS](http://www.globalworkers.org/migrationdata_US_more.html#DOS).

<sup>3</sup> Interview with Bridgette Carr, director of the Human Trafficking Clinic at the University of Michigan Law School.

- The impact of exploitation and abuse in the U.S. can be life long. For example, injured workers find it nearly impossible to access workers' compensation benefits once they return to their home countries. The U.S. insistence on treating the temporary foreign labor framework as a series of private employment arrangements, rather than a governmental program, means that there are no agreements in place with foreign governments to enable social protection schemes, even though workers may have a legal entitlement.

There are several measures that the U.S. government should take to fix the system:

- There are short-term steps that could translate into immediate improvements in oversight and governance. The Department of Labor must be integrated into regulation and enforcement of all visa categories that enable temporary work in the U.S. It must have the resources and powers to assess the potential displacement of U.S. workers, as well as to enforce appropriate wages and working conditions for foreign workers. In order to promote greater accountability to the public, the U.S. must release consolidated and consistent data in a timely manner about the use of these visas, including the names of employers currently recruiting foreign workers.
- In the medium term, the U.S. government should undertake a systematic and sustained review of the temporary foreign labor visas to bring them in line with broader U.S. labor market policy. A helpful model would be the "permanent, independent Commission on Foreign Workers," proposed by former Secretary of Labor Ray Marshall and the Economic Policy Institute,<sup>4</sup> to collect data on labor shortages, the use of temporary work visas, and the economic impact of temporary foreign workers in the U.S.
- The long-term goal of reform should be a single visa system with uniform oversight, to replace the current patchwork of visas, each subject to separate regulations. Consistent public administration, rather than the delegation of essential responsibilities to private entities, is critical. The U.S. should engage systematically with foreign governments whose citizens work here, and should conclude agreements that (1) provide for cooperation on preventing abuse, and (2) enable access to social security benefits and workers' compensation schemes.

The size and reach of the temporary worker visa system is evidence that U.S. immigration policy has moved away from its roots in permanent labor migration. This has happened largely without public debate or political acknowledgment. At a minimum, it is time to renew the national conversations related to broad issues of immigration and labor in the U.S.

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<sup>4</sup> Ray Marshall, *Value Added Immigration: Lessons for the United States from Canada, Australia and the United Kingdom*, Economic Policy Institute, 2011.

# Introduction

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Every year, between 700,000 and 900,000 foreign citizens come to work in the United States, on visas that are structured around the expectation that these workers will eventually return to their home countries.<sup>5</sup> These individuals are not “immigrants,” arriving with the expectation that they will eventually be able to make their home here, as permanent residents or citizens. Nor are they “undocumented,” “unauthorized,” or “illegal” workers, who may have a tourist visa, an expired visa, or have entered the country with no visa at all.<sup>6</sup> Rather, “guestworkers,” or “temporary foreign workers,”<sup>7</sup> are in the U.S. on visas that are explicitly designed to come to an end. As a phenomenon, temporary foreign workers are present across almost every conceivable category of the U.S. labor market. They work in low-skilled, low-wage jobs such as agricultural labor, as well as in specialty occupations such as computer programming. They may be in the public sector, employed as teachers in an under-served school district, or in the most private sphere of the private sector, as domestic workers living in their employer’s home. Their jobs may be extremely short-term, lasting for no more than a few months, or they may span several years at a stretch.

Conversations about the system of temporary worker visas often touch a nerve, for different reasons. For some, the mere existence of the temporary worker system may come as a shock, as a marker of the demise of our ideal of the U.S. as a nation of immigrants. “A nation of temporary labor migrants?” mused a professor of U.S. history, expressing surprise at the sheer number of workers present on these visas. “It doesn’t quite roll off the tongue.” The connotations of a government program that enables employers to “import” workers without then allowing those workers a road to full citizenship troubles others, who recall a more grim history of the U.S. For them, the system may have echoes of the U.S. government’s equivocal relationship to the trans-Atlantic slave trade, or later, to Chinese workers on contracts of indenture for the benefit of employers in plantations, railroads or mines, and then denied naturalization under the Chinese Exclusion Act of 1882. Yet others, including scholars of international development, worry about the impact of the modern phenomenon of temporary labor migration on workers’ home countries, and wonder how the costs – divided households, and the flight of human capital – can be weighed against the benefit of money and skills that workers bring home.

These critical debates about temporary foreign workers in the United States have not yet entered the mainstream, due to a number of factors, including a lack of comprehensive data, and the fragmentation of interest among different constituencies. Historically, for example, those concerned about migrant farmworkers would have had few reasons to focus on professional and technical workers temporarily in the U.S. This report seeks to

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- 5 Estimates drawn from conversations with U.S. government agencies and secondary research. In the case of approximately 350,000 individuals who entered the U.S. in 2010, their visa status indicates clearly that they came for the purposes of work (H-2A, H-2B, H-1B, L-1, A-3, G-5, R-1 among others), see U.S. State Department, “Non Immigrant Visa Statistics, Detail Table by Visa Class and Nationality for FY2010,” available at <http://www.travel.state.gov/pdf/FY10NIVDetailTable.pdf>. In addition, at least 300,000 of the J-1 “cultural and educational exchange” visa holders who entered the U.S. are engaged in the U.S. labor market (see Daniel Costa, Economic Policy Institute Briefing Paper #317, *Guestworker Diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market*, 14 July 2011, p.1). Estimates of F-1 students working, through “practical training” programs, are well over 60,000 a year (see Institute of International Education, *Open Doors Report on International Educational Exchange, International Students: By Academic Level, 1979-2010*, available at <http://www.iie.org/Research-and-Publications/Open-Doors/Data/International-Students/By-Academic-Level/1979-2010>) Government officials indicated that up to 20,000 of the B-1 visas issued in 2010 enabled visa holders to engage in paid work. Finally, it should be emphasized that these estimates only address annual entries into the U.S. The majority of these visas allow for multi-year work, meaning that the number of temporary workers actually in the U.S. at any given point in time is far higher.
- 6 Following the position outlined by Beth Lyon, this report uses the term “unauthorized worker” to describe “anyone whom immigration laws forbid to work for pay.” By contrast, “undocumented immigrants” are those who “presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government.” As she describes, “immigrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally,” and for a range of policy reasons laid out in greater detail in her article, it would be a mistake to conflate the two categories. See Beth Lyon, “When More ‘Security’ Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers,” *University of Pennsylvania Journal of Labor & Employment Law*, Spring 2004, p.583 and more generally.
- 7 Researchers, advocates and policy makers on migration issues tend to use “guestworker” or “temporary worker,” some interchangeably, to describe programs where, as Philip Martin says, “migrants are expected to work one or more years abroad and then return to their countries of origin.” (See Philip Martin, *Managing Labor Migration: Temporary Worker Programmes for the 21st Century*, International Institute for Labour Studies, September 2003, p.2.) Many find the term “guestworker” an unacceptable euphemism for programs that, in practice, have been abusive of workers. Those who oppose all such programs as fundamentally unprincipled labor and immigration policy may object to either term. This report tries to use “temporary foreign worker,” and “temporary worker” as relatively neutral categories.

respond to the lack of comprehensive information and analysis, and contribute toward efforts to catalyze a new national conversation about these visas, in the context of broader immigration and labor policy in the U.S.

Many of the specific problems identified in this report will not come as a surprise to informed observers. For example, a report on “temporary foreign worker” programs around the world has noted of the U.S. visa system that

“Temporary and seasonal worker programmes in the United States have mostly resulted in wins only for employers: who keep workers captive, pay them lower wages than native workers, and deprive the latter of jobs by making some permanent jobs into temporary ones with poorer working conditions.”<sup>8</sup>

But that report is speaking *only* of the problems with those visas formally acknowledged by the U.S. to be for temporary or seasonal work, which arguably have some provisions to protect foreign workers, as well as U.S. workers at risk of being displaced. These relatively regulated visas – known collectively as the “H” visas – are just the tip of an iceberg, however, as documented in this report. The “H” visas alone account for the entry of more than 200,000 workers every year. However, there are more than a dozen other visa categories, many with no meaningful oversight, which bring in at least half a million more workers.

A handful of lawyers, journalists, academic researchers, trade unions and government officials within the U.S. as well as workers’ home countries have litigated, organized, written, and lobbied for change. However, the analysis and the advocacy has not, thus far, been able to encompass the sheer magnitude of the problem, with good reason: the work by its very nature has focused on workers from particular countries, or in particular industries, or on particular visas – especially the “H” visas.

This report draws on in-depth interviews with these advocates and experts, as well as independent analysis, to piece together a fuller picture of the visa framework, the abuses under it, and the broader implications. Bringing these perspectives together, we are able to see a whole that is even more dysfunctional than the sum of its parts.

While the combined insights of advocates, speaking from multiple perspectives and multiple countries, do come together in a powerful condemnation of the current system, they go beyond critique to frame different elements of the transformations necessary to make it better. The main recommendations that emerge can be summarized as follows:

- *We need a clearer rationale for these visas.* While the general public may be aware that some number of workers come to the U.S. on a temporary basis to meet fluctuating labor shortages, they may not realize how poorly defined a “labor shortage” actually is, in existing policies and regulations. There is still less awareness that employers are able to side-step the requirement of demonstrating a labor shortage, through an array of visas that were intended for purposes such as cultural exchange or training, but are functionally supplementing access to foreign workers.
- *We need a more coherent and better supervised visa system.* As matters stand, the temporary visa “system” in the U.S. consists of dozens of visa categories and sub-categories, framed to meet different and often conflicting goals. This incoherence only serves the interest of unscrupulous employers, who are largely free to shop among these visas for the least onerous regulations. A constellation of different special interests – individual industries, or individual companies – have even lobbied successfully in Washington D.C. for new visa categories and sub-categories, further exacerbating the lack of a uniform vision.
- *We need to address loopholes that hurt U.S. and foreign workers.* There are profound gaps in U.S. government oversight of these visas. Poorly-framed regulations have created unfair competition between U.S. workers and foreign workers, who are made structurally cheaper and easier to exploit. There are a range of unintended economic incentives for employers to hire foreign workers, including, for example, exemptions from payroll taxes under many temporary work visa categories, or provisions that allow basic employment-related costs to be shifted from employers to workers. In addition, there are legal and practical barriers inhibiting temporary foreign workers from complaining about violations, such as wage theft, or organizing in defense of their rights. At the most fundamental level, there is the fear of being fired in retaliation, and

then promptly deported: in almost all cases, a temporary workers' immigration status is dependent on a continuing relationship with the employer.

- *We need systems of cooperation between the U.S. government and workers' home country governments.* The U.S. treats the arrangement between employers and temporary foreign workers as a purely private one, and restricts its own role in the process to the granting or denial of the work visa. Thus, there are no negotiated structures to facilitate foreign government efforts to protect their citizens working in the U.S. For example, the U.S. State Department does not even share information with workers' home countries on the numbers of people granted visas, or the location of their employer in the U.S.; it does not check to determine whether employers have violated laws in the home country related to the recruitment of migrant workers, prior to granting a visa. Effectively, foreign governments are forced to participate in a race to the bottom, competing with each other to lure employers. They are all too aware that, under the current system, employers in the U.S. are free to look elsewhere for workers to import, if a country is too vocal in defense of its citizens abroad.

On these issues and many others, there is substantial agreement. At the same time, it cannot be denied that there are a number of competing interests within the U.S., as well as between U.S. and workers' home country advocates, with respect to temporary foreign workers. Such debates are documented in this report, to the extent that they inform its primary focus: U.S. law and policy related to the temporary worker visa system. Ultimately, the report highlights the imperative of coordination, both within the U.S. and across borders, if the system is to be changed in ways that are truly responsive to the scale of the problem before us.

# Methodology

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This report is the product of research conducted between March 2011 and March 2012 by Ashwini Sukthankar, a consultant for the Global Workers Justice Alliance, partnering with Philip J. Simon, a lawyer and researcher on employment rights and international migration, based in Geneva. This report references extensive regulatory analyses conducted by Philip Simon, looking closely at the history and workings of individual visa categories. Since this report is written for a broad audience, this detailed analysis of the visa categories is a separate resource, available online on the Global Workers website.<sup>9</sup>

The report draws on over 100 interviews conducted with advocates, researchers and government officials in the U.S., and in the course of travel to China, Guatemala, India, Jamaica, Mexico and the Philippines. The research conducted in workers' home countries was particularly important in framing a nuanced picture, since advocates and government agencies there have access to a broad range of workers' perspectives on return, a richer understanding of the socio-political context for workers' decisions to seek employment in the U.S., and a different perspective on the potential constraints on taking action to protect workers or seek remedies for abuse.

The "home" countries selected for this research – China, Guatemala, India, Jamaica, Mexico and the Philippines – have different histories of migration to the U.S., different visa categories that their migrants rely on today, and different understandings of what changes need to take place in order for the U.S. to move closer to a system that works. For each, the U.S. is just one of the countries with which it has a relationship of migrant labor, and the ways in which these other migrations take place – documented or undocumented, temporary or permanent, whether there are also migrants coming in, and not just going out – are also part of the context within which the U.S. system is compared and judged. The decision to focus on these particular countries reflects the following:

- Mexico – sends the vast majority of H-2 workers.<sup>10</sup> There has also been extensive research and advocacy around Mexican participants in U.S. temporary work schemes, producing insights that we hoped to draw on for this report.
- China – sends a large number of J-1 visa holders on "cultural and educational exchange" programs, as well as H-1B "specialty occupation" workers, and F-1 students.
- India – sends substantial numbers of L-1 "intracompany transferees," H-1B "specialty occupation" workers, and F-1 students who work in the U.S. on "practical training" programs.
- Jamaica – the one country that still has a bilaterally-negotiated migrant worker "program" with the U.S., where the Jamaican government plays an extensive role in the management, from recruitment to welfare schemes. For that reason, it serves as an interesting point of comparison to the visa schemes that minimize government involvement.
- Philippines – sends many teachers and nurses. In addition, there are many different government agencies in the Philippines attempting to address different aspects of the problem of regulating circular migration, with respect to their own workers abroad, with "labor welfare officers" stationed around the world, including the U.S.
- Guatemala – offers a critical opportunity to understand Central American perspectives on the H-2 visas; these perspectives are at risk of being obscured in the attention that is given to the Mexico-U.S. relationship.

<sup>9</sup> Website of the Global Workers Justice Alliance, [www.globalworkers.org](http://www.globalworkers.org).

<sup>10</sup> Website of Global Workers Justice Alliance, [http://www.globalworkers.org/migrationdata\\_US.html](http://www.globalworkers.org/migrationdata_US.html).

While there were issues raised by home country advocates that lie beyond the scope of this report, for the most part, these interviews contained many insights that serve to enrich our conversations on temporary foreign workers, and strategies to promote the rights of all those who work in the U.S.

With some exceptions, interviews with U.S. consular officials and meetings with agencies in the U.S. were granted on the condition that the information was not for citation or attribution, but background only. A small number of advocates and officials from workers' home countries also requested that their comments be used without attribution.

The research did not include outreach to employers, business associations or recruitment agencies. Certainly, it would be worth hearing the voices of the many employers intent on doing business in ways that are fair to U.S. and foreign workers, who are concerned about competition with enterprises manipulating the temporary worker visa system. There are other employers with legitimate complaints that the temporary work visa system fails to meet their needs, who are raising concerns about bureaucratic delays and inefficiencies. However, an effort to include these perspectives, while maintaining the report's core focus on workers' rights, would ultimately have done justice to neither.

# The ABCs of “Temporary Worker” Visas

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It is important to understand the many visa categories and sub-categories that constitute the temporary foreign worker system, individually and not just in the aggregate. When seen together, the visas represent an *ad hoc* approach to developing a temporary foreign worker system, with little data gathered by the government beforehand in order to determine labor market needs, and even less gathered after foreign workers arrive, to assess the impact on labor markets. In addition, however, the individual visas have very particular weaknesses, and leave U.S. and foreign workers vulnerable in particular ways that require attention.

If we were merely to glance at the descriptions of the visas below, they would seem to address genuine needs of particular constituencies in the U.S. The visas appear to respond to local businesses facing a temporary labor shortage, universities enrolling foreign students, organizations trying to promote intercultural exchange and understanding, and religious institutions seeking clergy for worship and pastoral care.

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Even before scrutinizing the details of how U.S. and foreign workers have fared in practice, a closer look at the history and stated intent of these visas, the framing of the regulations, and the government’s own data, raises serious concerns about whose interests are actually being served, and at what cost. It is not illegitimate to shape visas that are responsive to the genuine absence of U.S. workers. But it is telling that, in the case of most of these visas, attentiveness to employers’ demands is not accompanied by any calibrated determinations of labor

shortages, or protections for foreign workers’ rights. The visas generally provide the maximum possible flexibility for employers, with a minimum of oversight.

Another common feature of these visas further highlights the entire system’s focus on employer interests: *the visas are tied to the employer*. That is to say, for almost all foreign workers, their immigration status essentially belongs to their employer, and there is limited or no ability to change jobs. Workers are extremely vulnerable to exploitation, since they cannot easily leave and seek fairer treatment elsewhere. There could be an alternative, if the U.S. chose to see temporary foreign worker arrangements as something other than private contracts between employers and employees: the visa framework could allow foreign workers to leave their employment for other opportunities in the same sector, or the same region, through channels supervised by the Department of Labor if necessary.

As noted above, there are many subtle differences among the separate visa categories that create very specific problems, and the larger dimension should not blind us to particular flaws within individual visas, or groups of visas. Especially of note are the visas outside Department of Labor supervision. Under these visas, workers who enter are *structurally* cheaper than U.S. workers, because employers are legally exempted from certain payroll taxes, legally able to pay wages lower than fair market wages, and/or legally empowered to pass on many basic costs associated with employment – such as transportation, visa fees, housing and more – to the workers. And, since employers are legally able to hire foreign workers without advertising domesti-



cally first, the terrain shifts from one of unfair competition, for U.S. workers, to one where they are simply excluded from the competition altogether.

The following section describes the primary visa categories that are used to bring foreign workers to the U.S., focusing on the legal framing, and current regulations. The discussion of how workers actually experience these visas is deferred until later in this report.

## Formal “work” visas

The modern “guestworker” system in the U.S. has its roots in temporary labor programs designed to supply employers with agricultural workers: the so-called “bracero” program, which brought in workers from Mexico, from 1941 to 1964, and the British West Indies Labor Program, initiated in 1943, which continues to bring in Jamaican agricultural workers today.<sup>11</sup> Following the establishment of these agricultural worker programs, the proliferation of other visa categories quickly followed, as employers in other sectors sought their own avenues to cheap and transient labor.<sup>12</sup> They also vigorously resisted any regulations that might have allowed these visas to serve the interests of foreign and U.S. workers, and not just their own, as documented below.

Most visible to the general public are the “H” visas, which constitute the formal temporary labor system. These are designed to bring in “unskilled” workers, as well as workers with special skills, for short periods of time that correspond in theory to the fluctuating needs of the labor market – defined as the availability of willing, qualified and available U.S. workers. In addition to framing a role for the Department of Labor in determining whether such labor shortages exist, the “H” visa regulations give the agency responsibility for trying to ensure that foreign workers are not exploited, by overseeing wage levels, hours of work, and conditions of work.

### H-2A: Agricultural Workers

*In 2010, almost 56,000 H-2A visas were issued. These visas bring in agricultural workers for every conceivable crop in every state of the United States, from apples to oranges, onions to tobacco. More than 90% of these workers come from Mexico.*

Hard-won protections for U.S. and foreign agricultural workers, overseen by the Department of Labor, include provisions to promote the recruitment of U.S. workers, and measures to ensure that H-2A workers do not receive lower wages and poorer working conditions than U.S. workers in comparable jobs. In recognition of how low the wages are in the sector, the regulations require that employers cover visa costs and transportation fees, and exempt workers from the payment of social security and income tax. However, H-2A workers are not covered under the Agricultural Workers Protection Act, which grants other workers in this sector a set of critical workplace protections, including the right to sue farm labor contractors or employers in federal court to enforce the provisions of the Act.<sup>13</sup>

### H-2B: Non-Agricultural Workers

*The H-2B visa, created in 1987, allows employers to fill low-wage non-agricultural jobs with foreign workers, to meet temporary or seasonal needs. More than 70% of the 66,000 workers who are permitted to enter under this visa come from Mexico. (In some years, the number of H-2B workers has been almost twice as high, under a controversial exemption that allowed workers who had used the visa before to enter again without being subject to the cap) H-2B workers serve a host of different industries, although landscapers, amusement park operators, forestry and the hospitality sector are the major employers by far.*

As initially framed, the regulations did not require the employer to meet the expenses of housing, travel, visa fees or any of the other costs associated with bringing in foreign workers. The Obama administration’s Depart-

<sup>11</sup> Cindy Hahamovitch, *No Man’s Land: Jamaican Guestworkers in America and the Global History of Deportable Labor*, Princeton University Press, 2011.

<sup>12</sup> See e.g. Vernon Briggs, “Guestworker Programs: Lessons from the Past and Warnings for the Future,” March 2004, available at <http://www.cis.org/articles/2004/back304.html>.

<sup>13</sup> United States Code, 29 U.S.C. § 1854(a): “Maintenance of civil action in district court by aggrieved person: Any person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.”

ment of Labor has moved to bring protections for H-2B workers in line with those available under the H-2A, particularly with respect to these fees, and in terms of prevailing wage guarantees. It did so, both to protect foreign workers who should not have to bear expenses that are fundamentally for the employer's benefit, and to protect U.S. workers from competition with foreign workers who are made artificially cheaper when they are forced to absorb these costs. However, employers have fought back against these reforms through aggressive lobbying and litigation.

### H-1B: Specialty Occupations

*The inception of the H-1B visa in 1990, for workers with special skills, reflected the demands of the high-tech industry at the height of the boom, and more than 45% of the workers entering the U.S. annually under this visa hold jobs in systems analysis, programming or other computer-related work. H-1B workers born in India, China, Canada and the Philippines account for almost two-thirds of all visas issued. Congress set a cap of 85,000 new workers per year for this visa, but has allowed up to 195,000 in certain years.*

While this visa, as framed, is for specialty occupations requiring "theoretical and practical application of a body of highly specialized knowledge,"<sup>14</sup> the Department of Labor's H-1B database shows hundreds of entry-level positions, at entry-level hourly rates, including cooks (\$11), pharmacist interns (\$11), and market research analysts (\$11.33).<sup>15</sup> This visa also brings in public school teachers and nurses, who may well meet a critical need, but do not fit easily in the stated purpose of the visa. H-1B workers would seem to be less vulnerable than "unskilled" workers – and indeed, they have somewhat more flexibility to change jobs without fear of losing their visa status, and having to leave the country. However, the Department of Labor provides that "the employer may contract with the worker to receive liquidated damages in the event of a premature termination on the part of the worker,"<sup>16</sup> giving its blessing to heavy fees for breach of contract. These breach of contract provisions serve as an equally effective means of keeping the worker bound to the employer.

## ...other work visas

The formal temporary labor visas are heavily supplemented by a lesser-known set of temporary work visas. As inventoried by the Department of Homeland Security's Citizenship and Immigration Services,<sup>17</sup> these visas appear somewhat erratic in terms of motivation, creating discrete categories for:

- *Workers from specific countries:* E-3 visas for skilled workers from Australia, TN visas for skilled workers from Canada and Mexico.
- *Employers in specific regions of the U.S. and its territories:* CW-1 visas for workers employed in the Northern Mariana Islands.
- *Specific occupations:* I visas for foreign media, O visas for individuals with "extraordinary ability or achievement," P visas for athletes, entertainers and performers, R visas for religious workers.
- *Specific business interests:* E-1 and E-2 visas for the foreign employees of traders and investors in the U.S.,

### Why Department of Labor oversight matters

The Department of Labor's role, with respect to temporary work visas, is to protect the interests of both U.S. workers and foreign workers. Protecting U.S. workers entails ensuring that they have the opportunity to be hired for a job before the employer is entitled to seek foreign workers. A critical element of limiting unfair competition from foreign workers in this process involves verifying that the employer is paying "prevailing wages" for the job. By determining what U.S. workers in a particular industry and in a particular region are paid for their work, and requiring that employers seeking temporary foreign workers pay the same rate, the Department of Labor attempts to prevent employers from driving down wages, and forcing U.S. workers to compete with an artificially cheaper foreign workforce. It should be acknowledged that the agency has not been very successful in this regard: it is under-resourced for the magnitude of the task it faces, and lacks the tools necessary for meaningful enforcement. But, in terms of the necessity for democratically accountable and transparent oversight of workers' rights under the temporary visa system, it is the only option available.

<sup>14</sup> Website of the U.S. Department of Labor, Office of Foreign Labor Certification, "Frequently Asked Questions and Answers," available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h1b1>.

<sup>15</sup> See H-1B data regularly posted by the U.S. Department of Labor's Employment and Training Administration, Office of Foreign Labor Certification, available at <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm>. See also Sharon Machlis, "H-1B visa data: Visual and interactive tools," in *Computerworld*, 17 November 2010. See also Ron Hira, Testimony before the Subcommittee on Immigration Policy and Enforcement Committee on the Judiciary U.S. House of Representatives, "H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers," 31 March 2011, available at <http://judiciary.house.gov/hearings/pdf/Hira03312011.pdf>.

<sup>16</sup> U.S. Department of Labor, Office of Foreign Labor Certification, "Frequently Asked Questions and Answers."

<sup>17</sup> See "Temporary (Nonimmigrant) Workers," on the website of U.S. Citizenship and Immigration Services, at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=13ad2f8b69583210vgnVCM100000082ca60aRCRD&vgnnextchannel=13ad2f8b69583210vgnVCM100000082ca60aRCRD>.

L visas for employees transferred by a multinational company from its operation abroad to its operation in the U.S.

Although U.S. Citizenship and Immigration Services recognizes that these visas are for the purposes of “temporary work” in the United States, there is little or no oversight by the Department of Labor.

No clear organizing principle, or animating logic, unites this group of “other” temporary work visas. For the purposes of this section, which is designed to indicate regulatory gaps and lapses in particular visa categories, we explore just one – the L-1 – since it serves to illustrate the typical opportunities for abuse and fraud in work visas that exclude the Department of Labor. The accompanying text box, on the Q visa, exemplifies another important dimension of these visas: their very existence is an indicator that the framework is captive to narrow business interests.

**L-1: Intracompany Transferees**

*The L-1 visa was created in 1970 for the ostensible purpose of allowing companies to bring top-level international executives and managers to work in the U.S. for short-term postings.<sup>22</sup> Since then it has morphed into a much broader program, adding categories for skilled workers and L-1 spouses.<sup>23</sup> At its peak, this category resulted in the issuance of 84,532 visas; the numbers have diminished slightly in the wake of the recession. Eight of the top ten requesting companies are multinational “business process outsourcing” companies, headquartered abroad.<sup>24</sup>*

**Distinctively Disney: The creation of the Q Visa**

The Q visa is surely the quintessential “special interest” visa created for the benefit of employers – or rather, for a specific employer – enabling them to bring in workers while avoiding many workplace regulations. This visa, framed for the purposes of advancing “cultural exchange,” (like the J-1, discussed below) was the product of extensive lobbying by Disney, which sought to bring in cultural ambassadors to staff its Epcot Center, beginning in the late 1980s. The visa category was inserted into the Immigration Act of 1990, despite extensive government scrutiny of J-1 misuse by amusement park operators. The General Accounting Office (now known as the Government Accountability Office) had noted that “Authorizing J visas for participants and activities that are not clearly for educational and cultural purposes as specified in the act dilutes the integrity of the J visa and obscures the distinction between the J visa and other visas granted for work purposes.”<sup>18</sup> The Q visa has served Disney very well indeed. In 2007, it received 54% of the 2412 Q visas issued.<sup>19</sup> The two “controlling considerations” for approval of the visa are “public accessibility” and the “cultural exchange value” provided by the sponsoring organizing – both of which neatly describe Disney’s Epcot Center.<sup>20</sup> It is not clear how much money Disney saves by using foreign workers, but one credible estimate puts the figure at \$17 million every year.<sup>21</sup>

**The functioning of L-1 “body shops”**



18 Kit Johnson, “The Wonderful World of Disney Visas,” *Florida Law Review*, Vol. 63, p.915 (2011) at p.922 (quoting U.S. Government Accountability Office GAO/NSIAD-90-61, “U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas” (1990)).

19 Kit Johnson, “The Wonderful World of Disney Visas,” pp.935-36.

20 Kit Johnson, “The Wonderful World of Disney Visas,” p.935.

21 Kit Johnson, “The Wonderful World of Disney Visas,” pp.930-1.

22 U.S. State Department, *Foreign Affairs Manual*, Volume 9: Visas, revised 9 March 2012, at 9 FAM 41.54 N1.

23 Ruth Wassem, Congressional Research Service, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, 15 May 2006, p.2.

24 U.S. Department of Homeland Security, Office of the Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, 24 January 2006, p.3, available at [http://www.dhs.gov/xoig/assets/katovrsght/OIG\\_06-22\\_Jan06.pdf](http://www.dhs.gov/xoig/assets/katovrsght/OIG_06-22_Jan06.pdf).

Employers readily acknowledge that the L-1 visa is an easier and cheaper alternative to bring workers into the U.S. than the more demanding H-1B visa process.<sup>25</sup> The Department of Labor has no authority to monitor whether employers are refusing to hire U.S. workers, or actively replacing them, or to ensure that foreign workers receive the prevailing wage for the industry. There is also no cap on the number of visas issued under this category. Some employers are even entitled to submit “blanket petitions” for multiple workers, who can then be brought in on short notice.<sup>26</sup> This essentially means that, under the L-1, employers can replace U.S. workers *en masse* with foreign workers who can be – and often are – paid home country wages.<sup>27</sup> In one case, the transferees received one-sixth of the pay of the U.S. workers they replaced.<sup>28</sup> Employers are even free to use L-1 visa holders to replace workers on strike. The incoming foreign workers are then captive to the employer, since they do not have the right to change jobs without losing their visa. The agencies overseeing these visas – the State Department and the Department of Homeland Security – have been paying attention in recent years to the issue of fraud, which is known to be rife, with companies functioning as “multinational temp agencies,” or “body shops.” Such companies will bring in thousands of workers, claiming that it is for their own corporate purpose, and will then deploy them to other businesses, with the “temp agency” taking a substantial “placement fee” from each corporate client, every time a worker is re-deployed.

## “Definitely not for work” visas

Even further in the shadows are visas framed without any acknowledgment that they are for the purposes of work at all. These include J-1 visas for “educational and cultural exchange,” A-3, B-1 and G-5 visas for the “personal servants” accompanying individuals temporarily in the U.S., and F-1 visas for students.

For these visas, work is treated as subsidiary to their larger goal: diplomatic relations (A-3, G-5), cultural exchange (J-1), the facilitation of commerce (B-1) or studying in the U.S. (F-1). Like the other work visas, they do not carve out a role for the Department of Labor. The first four are overseen primarily by the State Department, and the last by the Department of Homeland Security, through U.S. Citizenship and Immigration Services.

Unfortunately, not only is there no Department of Labor oversight of these visas, but the “larger goal” has functioned to deflect any efforts to focus scrutiny on violations of workers’ rights in the operation of these visas. Needless to say, the failure to regulate or even properly acknowledge the work performed under these visas not only creates fertile terrain for abuse, but also erodes the credibility of the professed purpose that the visa program was intended to serve.

### **B-1: Business Visitors**

*The B-1 visa was created to allow foreign nationals to enter the U.S. for business purposes. It is often issued in combination with a B-2 visa (intended primarily for tourists) so that the two are generally referred to together, as a B-1/B-2 “business and pleasure” visa. Although the B-1 in theory bars visitors from engaging in day-to-day work in a U.S. job, the State Department has created a set of B-1 exceptions that allow paid work in the U.S. These exceptions threaten to eclipse the whole, if not in number, then certainly in terms of clarity of purpose. With respect to numbers, there is no way of assessing the scale of the B-1 exceptions, since the State Department does not count (let alone disclose) how many of the 40,000 B-1 visas issued annually allow paid work.*

There are two types of B-1 exceptions that permit paid work in the U.S. One type allows the primary B-1/B-2 visa holder, temporarily in the U.S. for business or pleasure, to be accompanied by a B-1 “personal servant.” The lack of a protective framework for so-called personal servants has, in many documented cases, enabled actual enslavement. The other type of B-1 exception is issued “in lieu of” H-category work visas. These “in lieu of” visas essentially allow employers to bring in “H” workers without having any restrictions imposed on them by the Department of Labor. There are two such visas:

<sup>25</sup> See, e.g., Hiawatha Bray, “Firms find skilled-worker visas too hard to get,” *The Boston Globe*, 24 March 2008.

<sup>26</sup> Code of Federal Regulations related to “Intracompany transferees (executives, managers, and specialists),” revised 4 January 2011, 22 C.F.R. § 41.54.

<sup>27</sup> Daniel Costa, Economic Policy Institute Briefing Paper #275, *Abuses in the L-1 Visa Program: Undermining the U.S. Labor Market*, 13 August 2010, p.4.

<sup>28</sup> Daniel Costa, *Abuses in the L-1 Visa Program*, p.9.

- B-1 “in lieu of” the H-1B, which permits holders to perform specialized work, without H-1B caps on numbers or prevailing wage guarantees.
- B-1 “in lieu of” H-3, which allows for job-related training in the U.S. The vague definition of what might constitute “training,” or what a “trainee” should be paid, has allowed conditions of virtual enslavement.<sup>29</sup>

Even the State Department, which oversees these visas, admits that these exceptions open the door to confusion. Its Foreign Affairs Manual, designed to provide guidance for staff, notes that “[i]t can be difficult to distinguish between appropriate B-1 business activities,” that are permissible under this visa, and activities that “constitute skilled or unskilled labor” in the U.S., which are barred.<sup>30</sup>

### A-3/ G-5/ B-1: Domestic Workers

*The U.S. allows people into the country for domestic work – household cleaning, child care, elder care etc. – only as dependents and household members of a primary visa holder. The A-3 visa allows entry for the “attendants, servants, personal employees”<sup>31</sup> of a diplomat or foreign government official; a G-5 visa for the domestic workers of employees of international organizations; and a B-1 – mentioned above – for domestic workers accompanying visitors to the U.S. The problem, as the State Department has noted, is that the U.S. does not treat domestic work as work: it does not “offer protection to domestic workers under prevailing labor laws, [instead] perceiving their work as something other than regular employment.”<sup>32</sup>*

In the wake of scandals related to extreme underpayment, physical abuse and even trafficking of domestic workers, the State Department has issued guidelines for consular officials, noting that they must ensure that A-3 and G-5 domestic workers have a signed contract with their employer.<sup>33</sup> There is no enforcement mechanism in place, however, to ensure that domestic workers are actually able to enjoy their contractual rights once in the U.S. As noted by one State Department official, who spoke on condition of anonymity, “There is no way any of them are being paid prevailing U.S. wage – but since they don’t get a Social Security number, we can’t even check via Social Security deductions.” In any case, it is critical to note, as part of the legal background, that many of the diplomats and high-ranking employees of international organizations who employ migrant domestic workers in the U.S. have broad immunity from civil and criminal prosecutions<sup>34</sup> – serving as another obstacle to workers’ efforts to claim their rights.

### J-1: Educational and Cultural Exchange Visitors

*The J-1 Exchange Visitor Program was established in 1961 with high-minded goals, including “to promote international cooperation for educational and cultural advancement,” and “to assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world.”<sup>35</sup> However, a breakdown of the number of J-1 visas issued annually shows that most of the participants come to the United States with a promised job – mostly precarious, low-wage work – or in search of one.<sup>36</sup> Typically, more than 300,000 people participate in the J-1 every year; in 2008, there were as many as 359,447.<sup>37</sup>*

The J-1 visa has 15 sub-categories, with little in common: there are programs for camp counselors, *au pairs*, students working during summer breaks and even doctors and high school teachers. From the perspective of the program’s original purpose, it appears to have lost its way, having become a jumble of responses to different interest groups. But from the perspective of employers, this translates into a very appealing flexibility. Two of the sub-categories illustrate this well:

29 See e.g. Michael A. Scaperlanda et al., “Human Trafficking in the Heartland: Greed, Visa Fraud, and the Saga of 53 Indian Nationals ‘Enslaved’ by a Tulsa Company,” in *Loyola University Chicago International Law Review* Spring/Summer 2005, p.219.

30 U.S. State Department, *Foreign Affairs Manual*, 9 FAM 41.31 N7(b).

31 United States Code, 8 U.S.C. § 1101(a)(15)(A)(iii).

32 U.S. State Department, *2010 Trafficking in Persons Report*, p.32.

33 U.S. State Department, *Foreign Affairs Manual*, 9 FAM 41.21 N6.2(a).

34 U.S. State Department, “Immunities and Liabilities Of Foreign Representatives and Officials of International Organizations In The United States,” *Foreign Affairs Manual*, 2 FAM 230.

35 Mutual Educational and Cultural Exchange Act of 1961, § 2451, Pub. L. No. 87-256, 75 Stat. 527 (codified at 22 U.S.C. 33).

36 Interagency Working Group FY 2010 Annual Report at 24-27, available at [http://www.iawg.gov/rawmedia\\_repository/44c4ac01\\_4486\\_4a6c\\_8f03\\_f6bcb696eda5](http://www.iawg.gov/rawmedia_repository/44c4ac01_4486_4a6c_8f03_f6bcb696eda5); Ruth Wassem, Congressional Research Service, *U.S. Immigration Policy on Temporary Admissions*, 28 February 2011, p.7. Even J-1 post-secondary students (DOS issued 38,861 of these visas in 2010, the second largest J-1 category after summer work students) may work up to twenty hours per week as long as certain minimal requirements are met. 22 CFR § 62.23(g).

37 U.S. State Department, “Non-Immigrant Visas issued FYs 1987-2010,” available at <http://www.travel.state.gov/xls/NIVIssuedFYs1987-2010-Detailed.xls>.

- An analysis of the *au pair*<sup>38</sup> program indicates the power of certain employer lobbies in the J-1 context. The program was initiated in 1985, at the instigation of the American Institute of Foreign Study, a leading provider of *au pairs* to American households. The organization has steadily resisted efforts at regulation of working conditions under this program, including calls to reduce working time to 30 hours per week, or to limit wage deductions for room and board, noting in a letter to Congress that regulation would be improper, since “*au pairs* are not laborers; they are members of their host family.” As matters currently stand, *au pairs*, who are also supposed to be studying while in the U.S., may be required by their employer to work up to 45 hours a week. They are entitled to minimum wage, but up to 40% can be deducted for room and board.<sup>39</sup>
- The J-1 intern program and trainee program, which places college students and recent graduates with employers in the U.S., is also marked by a degree of minimalist regulation that invites abuse of foreign workers, and displacement of U.S. workers. As with J-1 summer work students, there are no payroll taxes to be paid by the employer. In fact, the program regulations for interns and trainees do not even require that they be paid a wage. While the regulations attempt to draw a distinction between “work-based learning” which is permitted under the program, and “unskilled labor,”<sup>40</sup> which is not, this determination is left to the discretion of the sponsor.

The J-1 is administered in its entirety by the State Department Bureau of Educational and Cultural Affairs. The agency does little by way of enforcement; it has largely relied on self-regulating and self-reporting by the dozens of companies and non-profits that serve as “sponsors” for the participants in the programs. So, to the extent that the regulations may include lukewarm protections for foreign and U.S. workers – forbidding, for example, displacing American workers<sup>41</sup> – interpretation of this requirement is left up to the sponsor. Furthermore, since the program explicitly relies on these “sponsors” to serve as a primary interface with J-1s, employers are insulated from significant liabilities.

There are substantial savings associated with hiring J-1 workers, as alluded to in the context of J-1 interns and trainees. Not only are employers exempted from Medicare, Social Security and unemployment taxes, in the case of most J-1 sub-categories, but it is typically participants – rather than employers – who pay application fees, travel, housing, and health insurance.<sup>42</sup>

## F-1: Students

*It may seem inappropriate to include F-1 students in a catalog of temporary foreign workers. However, this visa has come to be widely recognized by all key participants in the visa process – students, schools and even the federal government – as another path for foreign nationals to work legally in the U.S. at jobs ranging from low-wage retail clerks to skilled information technology positions. These students may work while studying, through curricular practical training (CPT) programs, or after graduation, in an optional practical training (OPT) program. Neither the Department of Homeland Security nor the State Department will release information about the number of F-1 visa holders who work. But a non-governmental organization, the Institute of International Education, annually estimates the number of participants in OPT programs, and that number alone has tripled in the span of a decade, from 22,745 participants in 2002 to 67,804 in 2010.<sup>43</sup>*

F-1 students are the one category of temporary worker whose visa is not tied to the employer. In theory they are, therefore, free to switch employers. However, their visa status is bound to the university where they are enrolled, which has resulted in numerous abuses. An abundance of schools, even unaccredited schools, has been authorized by the State Department and the Department of Homeland Security to enroll foreign students – and many act as third-party brokers charging students a high fee for the opportunity to work in the U.S., and then offering them to employers for a further fee.<sup>44</sup> Such universities are understandably reluctant to relinquish control over the students enrolled with them. In the absence of guidance from the Department

38 *Au pair* refers to “exchange visitor programs under which foreign nationals are afforded the opportunity to live with an American host family and participate directly in the home life of the host family. All *au pair* participants provide child care services to the host family and attend a U.S. post-secondary educational institution.” 22 C.F.R. § 62.31.

39 Janie A. Chuang, “Exploitation Diplomacy? *Au Pairs* in America” (draft; copy on file).

40 Code of Federal Regulations, 22 C.F.R. § 62.22 (b)(1)(ii).

41 J-1 Trainees and Interns, Code of Federal Regulations, Part 62: Exchange Visitors, 22 CFR § 62.22 (b)(1)(ii).

42 See generally Code of Foreign Relations 22 C.F.R. § 62.

43 Institute of International Education, *Open Doors Report on International Educational Exchange, International Students: Enrollment Trends, International Students: By Academic Level and Place of Origin* (2010).

44 T. Bartlett, K. Fischer, and J. Keller, “Little Known Colleges Exploit Visa Loopholes to Make Millions off Foreign Students,” *Chronicle of Higher Education*, 20 March 2011. See also Lisa Kreiger, “Universities or Visa Mills?” *MercuryNews.com*, 16 July 2011, available at [http://www.mercurynews.com/top-stories/ci\\_18492754?nlick\\_check=1](http://www.mercurynews.com/top-stories/ci_18492754?nlick_check=1).

of Labor regarding appropriate wages and working conditions, the limits imposed by the Department of Homeland Security are weak at best. For example, Homeland Security maintains that there is “no restriction on the number of hours a student can work per week while in CPT,”<sup>45</sup> and specifically states that “there is no restriction on compensation during CPT,”<sup>46</sup> which has meant that F-1 visa holders can work legally for less than minimum wage.

As this brief overview suggests, there is no coherence to the system of visas enabling temporary work in the U.S. This overall disarray may be unintentional but it does represent the U.S. government’s conscious refusal to develop a real “temporary foreign labor” program – with the coherence, planning and coordination that this would require.

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45 U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Module 4: Employment and Practical Training*, available at <http://www.ice.gov/exec/sevp/Module4.htm>.

46 U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Module 4*.

Visas Commonly Used for Temporary Foreign Labor			
Visas	H-2A	H-2B	H-1B
<b>Employers/ Job Positions</b>	Agricultural work, including tobacco farms, onion and sweet potato farms, and fruit picking	Amusement parks; forestry industry; seafood industry; landscaping; housekeeping and cleaning; groundskeeping (industrial, commercial); construction; restaurants	Computer programming and information technology services; accounting; engineering; physicians and nurses; teachers; architectural drafters; cooks; law clerks; market research analysis; office administration; social work
<b>Intended Category of Nonimmigrants/ Purpose of Visa</b>	"[A]n alien . . . who is coming temporarily to the United States <b>to perform agricultural labor or services . . . and the pressing of apples for cider on a farm, of a temporary or seasonal nature . . . .</b> " (INA § 101(a)(15)(H)(ii)(a))	"[A]n alien . . . who is coming temporarily to the United States <b>to perform other temporary service or labor</b> if unemployed persons capable of performing such service or labor cannot be found in this country . . ." (INA § 101(a)(15)(H)(ii)(b))	"[A]n alien . . . who is coming temporarily to the United States <b>to perform services</b> [other than H-2A labor or services, among other exceptions] . . . <b>in a specialty occupation . . .</b> or who is coming temporarily to the United States <b>to perform services as a registered nurse . . . .</b> " (INA § 101(a)(15)(H)(i)(b))
<b># of Visas Issued in 2010 by State Department<sup>47</sup></b>	55,921	47,403	117,409
<b>Top Ten Sending Countries in 2010<sup>48</sup></b>	Mexico, South Africa, Peru, Guatemala, Romania, Nicaragua, New Zealand, Costa Rica, El Salvador, Uruguay	Mexico, Jamaica, Guatemala, Philippines, South Africa, U.K., El Salvador, Indonesia, Honduras, Costa Rica	India, China, South Korea, U.K., Philippines, Mexico, Japan, Taiwan, France, Germany
<b>Government Agencies Enforcing Regulations</b>	Department of Labor; Department of Homeland Security	Department of Labor; Department of Homeland Security	Department of Labor; Department of Homeland Security

47 U.S. State Department, Non Immigrant Visa Statistics, Detail Table by Individual Class of Admission for FY2006-2010, available at <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2006-2010.pdf>.

48 U.S. State Department, Non Immigrant Visa Statistics, Detail Table by Visa Class and Nationality for FY2010, available at <http://www.travel.state.gov/pdf/FY10NIVDetailTable.pdf>.



L-1	B-1
<p>Multinational corporations, including high-tech, computer, and information technology services-related firms (not only executives and managers but also lower level positions)</p>	<p>Multinational corporations, including high-tech, computer, and information technology services-related firms (ex. Infosys); domestic work</p>
<p>“[A]n alien who . . . has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to <b>render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge . . .</b>” (INA § 101(a)(15)(L))</p>	<p>“[A]ny alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) . . . who is <b>visiting the United States temporarily for business . . .</b>” (INA § 101(a)(15)(B))</p>
<p>74,719</p>	<p>B-1 visas: 44,197 (Note: “B-1 in lieu of H-1B” visas, “B-1 in lieu of H-3” visas, and B-1 visas for domestic workers not disaggregated by State Department) Combination B-1/B-2 visas: 3,278,782 Combination B-1/B-2 visa Border Crossing Cards to Mexican nationals: 971,886</p>
<p>India, U.K., Japan, Mexico, France, China, Germany, South Korea, Brazil, Australia</p>	<p>B-1 visas (State Department): Mexico, Philippines, Venezuela, Colombia, Brazil, Peru, U.K., India, Dominican Republic, El Salvador Combination B-1/B-2 visas issued by State Department: China, India, Brazil, Venezuela, Colombia, Argentina, Taiwan, Russia, Israel, Philippines</p>
<p>Department of Homeland Security</p>	<p>State Department</p>

Visas Commonly Used for Temporary Foreign Labor		
Visas	A-3	G-5
<b>Employers/ Job Positions</b>	Domestic work	Domestic work
<b>Intended Category of Nonimmigrants/ Purpose of Visa</b>	“[A]ttendants, servants, <b>personal employees</b> , and members of their immediate families, <b>of [foreign government] officials and employees,</b> ” including ambassadors, public ministers, and career diplomatic or consular officers, with A-1 or A-2 visas. (INA § 101(a)(15)(A)(iii))	“[A]ttendants, servants, and <b>personal employees of any . . . representative, officer, or employee [of international organizations]</b> with G-1, G-2, G-3, or G-4 visas], and the members of [their] immediate families . . . .” (INA § 101(a)(15)(G)(iv))
<b># of Visas Issued in 2010 by State Department<sup>48</sup></b>	916	747
<b>Top Ten Sending Countries in 2010<sup>4</sup></b>	Philippines, Indonesia, India, Sudan, Saudi Arabia, Brazil, Mexico, Morocco, Sri Lanka, Nigeria	Philippines, Peru, Brazil, Colombia, India, Sri Lanka, Ecuador, Paraguay, Mexico, Kenya
<b>Government Agencies Enforcing Regulations</b>	State Department	State Department

F-1	J-1
<p>On-campus jobs; retail store clerks; high-skilled positions, including information-technology jobs</p>	<p><b>Summer Work Travel:</b> Hotels; restaurants; amusement parks; beach resorts; ski resorts; seafood processing plants; factories and warehouses</p> <p><b>Trainees and Interns:</b> Hotels; restaurants; airlines; corporations; architectural firms; development organizations; investment and financial services; manufacturing companies; dairy farms</p> <p><b>Positions/employers for other J-1 categories:</b> camp counselors; au pairs; schools and educational institutions (for teachers, professors, scholars, students); hospitals and private practices (for physicians)</p>
<p>“[A]n alien . . . who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States <b>temporarily and solely for the purpose of pursuing such a course of study</b> . . . at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program . . . approved by the Attorney General . . .” (INA § 101(a)(15)(F)(i))</p>	<p>“[A]n alien . . . who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill . . . who is coming temporarily to the United States <b>as a participant in [an exchange visitors] program designated by the [Department of State]</b>, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training . . .” (INA § 101(a)(15)(J))</p>
<p>385,210</p>	<p>320,805</p>
<p>China, South Korea, India, Saudi Arabia, Canada, Japan, Taiwan, Vietnam, Mexico, Brazil</p>	<p>China, Russia, Germany, U.K., France, Brazil, Ukraine, Turkey, South Korea, Thailand Israel, Philippines</p>
<p>Department of Homeland Security</p>	<p>State Department</p>

# U.S. Government Reforms

Each one of the visa categories and sub-categories that constitute the temporary foreign worker system has generated significant debate within the U.S. government, at many different levels. Concerns about the abuse of foreign workers, the displacement of U.S. workers, and the potential for fraud date back virtually to the inception of each visa category, as documented by Congressional hearings, reports by the Government Accountability Office (a federal watchdog agency), and reviews of visa regulations by the governmental agencies responsible for oversight.

## Regulatory “quick fixes”

As currently framed, the visas are marked by many well-meaning, if sometimes haphazard, efforts to revise and reform them. A few examples are given below.

- **A-3/ G-5 Domestic Workers:** The State Department expressed concern in 1996 about diplomat employers in the U.S. withholding wages, confiscating passports, imprisoning workers, and worse.<sup>49</sup> In 2008, the Government Accountability Office detailed further abuses.<sup>50</sup> The State Department’s 2010 report on human trafficking even acknowledged that the problems are essentially embedded in the skewed power dynamics between diplomatic employers and domestic workers, and that “the lack of legal protections – combined with the social isolation and a lack of personal autonomy inherent in live-in domestic service – provides an enabling environment for slavery.”<sup>51</sup> The State Department’s reforms have been focused primarily on the visa approval process. Consular officials are now required to interview all applicants for domestic worker visas, outside of the presence of the employer.<sup>52</sup> Officials are also required to review the terms of the employment contract.<sup>53</sup> No provisions have been made, however, to enable domestic workers to file complaints about living and working conditions once they are in the U.S.
- **J-1 Summer Work Travel Program:** Recent scandals related to misuse of the Summer Work Travel Program of the J-1 cultural and educational exchange visa (described later in this report) have led the State Department to develop a number of changes to the regulations. These changes, as set forth in an Interim Final Rule published on 11 May 2012, include important protections for foreign student-workers (including bans on job placements in manufacturing and other potentially hazardous industries;<sup>54</sup>) as well as for U.S. workers at risk of being displaced (including a prohibition on J-1 placements in the wake of layoffs or labor disputes)<sup>55</sup> At the same time, the State Department has delegated still more responsibility for enforcement and interpretation to private intermediaries – the J-1 sponsors – and has further reduced its direct regulation of employers.<sup>56</sup> Notably, these changes arrive more than two decades after the U.S. Government Accountability Office concluded in a 1990 report that the U.S. government’s “management oversight of the J-1 visa program has not been adequate to ensure the integrity of the program.”<sup>57</sup> Furthermore, the

49 U.S. State Department, Circular Diplomatic Note, May 20, 1996, at 5, available at <http://www.state.gov/documents/organization/32298.pdf>.

50 U.S. Government Accountability Office, *U.S. Government’s Efforts To Address Alleged Abuse Of Household Workers By Foreign Diplomats with Immunity Could Be Strengthened*, 29 July 2008, p.17.

51 U.S. State Department, 2010 Trafficking in Persons Report, p.32.

52 U.S. State Department, *Foreign Affairs Manual*, 9 FAM 41.21 N6.5-2(b).

53 U.S. State Department, *Foreign Affairs Manual*, 9 FAM 41.22 N4.2 and N4.4.

54 Federal Register, 77 FR 27610, referencing CFR §62.32(h)(16).

55 Federal Register, 77 FR 27611, referencing (n)(3)(iii).

56 “Acknowledging the Department does not have jurisdiction over host employers, the ‘host employer obligation’ section is renamed ‘host employer cooperation’ and refocused to urge sponsors to work only with host employers willing to make good faith efforts to comply with the requirements therein.” Federal Register, 77 FR 27594.

57 U.S. Government Accountability Office, *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas*, 1990, p.3.

reforms will only affect one program of the larger J-1 visa scheme, leaving other programs with extremely similar weaknesses unaltered.

- *L-1 Intracompany Transferees*: A report issued in 2000 by the Government Accountability Office pointed to substantial evidence of fraud in the use of these visas, and quoted managers from the agency then known as Immigration and Naturalization Services, referring to the L-1 as “the new wave in alien smuggling.”<sup>58</sup> In particular, the problem of multinational employers serving as “body shops” (mentioned above), which contract out their L-1 employees to U.S. companies in “labor for hire” deals, caused so much concern that Congress passed the L-1 Visa Reform Act in 2004 to try to end the practice.<sup>59</sup> The efforts to end “body shops” have not been very successful, given numerous loopholes that continue to allow offsite work for L-1 visa holders, and payment by third parties. The Office of the Inspector General at the Department of Homeland Security issued a report in 2006 identifying continuing problems with the L-1 visa,<sup>60</sup> but, as a 2011 letter by Senator Charles Grassley pointed out, the recommendations in that report have still not been adequately addressed.<sup>61</sup>

Other examples include the R-1 “religious worker” visa program, where an internal review by U.S. Citizenship and Immigration Services in 2007 determined that as many as one in three R-1 visas issued to “religious workers” were fraudulent. It is also worth noting the recent efforts of the Department of Labor to address abuses of low-wage H-2 workers, only to have their efforts blocked or diluted through litigation and lobbying by employers’ associations.

There are many more instances of problems identified by a range of governmental actors with different visa categories and the subsequent efforts made to analyze and amend the underlying regulations. Meaningful change has typically been elusive, as the examples suggest, either because the reform efforts are stymied by employers’ organizations, or because employers are able to shift without great difficulty to reliance on a different visa category. The point would appear to be clear: the weaknesses are not simply contained within individual visa categories, but cut across the entire temporary worker visa framework. Review and revision of the temporary foreign work system in the U.S. will have to be comprehensive, if it is to be significant.

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## Uncoordinated and inefficient oversight

The descriptions above indicate how responsibility for oversight of the temporary worker visas is scattered among multiple government agencies. The H-2 visa, which is arguably the most carefully regulated, is a compelling example of the confusion that can result from diffused responsibility compounded by imperfect coordination. As detailed below, even the most basic data is never reconciled or consolidated.

The **Department of Labor** plays two distinct roles in the H-2 visa:

- In the first place, its Office of Foreign Labor Certification receives petitions from employers seeking to hire H-2 workers. The Office decides whether to approve them, based on an assessment of whether there is a risk of displacing U.S. workers. *According to data released by the Department of Labor, in 2010 it certified petitions for 94,218 H-2A and 86,596 H-2B positions.*

58 Government Accountability Office, *Alien Smuggling: Management and Operational Improvements Needed to Address Growing Problem*, May 2000, p.12.

59 United States Code, 8 U.S.C. § 1184(c)(2)(F).

60 U.S. Department of Homeland Security, Office of the Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, 24 January 2006.

61 Office of U.S. Senator Charles Grassley, press release, *Grassley Concerned about Fraud and Abuse in L-1 Visa Program*, Mar. 30, 2011, available at [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=33437](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=33437).

- Subsequently, the Wage and Hour Division is responsible for enforcing employer compliance with regulations protecting U.S. and foreign workers. It may issue orders for the payment of back wages, repayment of illegal deductions, reinstatement of wrongfully terminated workers, and compensation for any U.S. worker who was improperly rejected or laid off from a job.

The **State Department's** main role is to approve or deny individual visa applications. It does this through U.S. Embassies and Consulates around the world. *The State Department reported that it issued 55,921 H-2A visas, and 47,403 H-2B visas in 2010.*

The **Department of Homeland Security** has several responsibilities:

- It must give final approval to employer petitions, through U.S. Citizenship and Immigration Services, before employers can seek workers abroad.
- Additionally, the agency processes requests with respect to H-2 workers already in the U.S., for extensions of the period of their visa or, in extremely rare cases, for transfer to a different employer.
- Customs and Border Protection is responsible for gathering and releasing data on the number of entries under each visa category. *In 2010, the Department of Homeland Security reported 139,406 H-2A entries, and 69,499 H-2B entries.*

H2 Statistics for Fiscal Year 2010			
Class of Visa	Dept of Labor	State Department	Dept of Homeland Security
H-2A	94,218	55,921	139,406
H-2B	86,596	47,403	69,499

The significance of the widely varying data released by the three agencies should not be underestimated. The lack of any consolidated numbers highlights the broader lack of cooperation among agencies with respect to the temporary worker system. No one claims to know exactly how many H-2 workers are currently in the U.S.

Beyond the "H" visas, the gaps in information-sharing, and the confusion over jurisdiction, are even more profound. While there are many problems regarding coordination where the "H" visas are concerned, at

least the Department of Labor has an established supervisory role, to address potential abuses of foreign and U.S. workers. The Department of Labor is formally subordinated, in the other temporary worker visas.

In fact, in a number of instances involving J-1 workers complaining of mistreatment, the State Department has actually warned the Department of Labor not to get involved. For F J-1 visa holders, the only official recourse for problems related to conditions of work is an office within the State Department, known as Exchange Coordination and Compliance. It was set up to monitor the functioning of all educational and cultural exchange programs under J-1 visas, and to analyze data, but has little capacity to handle individual complaints, let alone complex queries related to wages or working conditions.

**...until 1940, all immigration issues were handled solely by the Department of Labor, and labor aspects were much more integrated at every level...**

that today's Department of Labor should return to bearing sole responsibility for managing any temporary foreign labor system, he urged that it be re-integrated into all visa categories. As further noted by Yale-Loehr, even if there are multiple agencies involved in oversight, there should be a system in place for clear, consistent cooperation among them.

Stephen Yale-Loehr, who teaches immigration at Cornell Law School and has also written on legal history of temporary foreign labor in the U.S., points out that until 1940, all immigration issues were handled solely by the Department of Labor. "Labor aspects were much more integrated at every level," he emphasized. Without proposing

The cooperation should also extend to include U.S. engagement with worker's home country governments, through mechanisms such as negotiated bilateral agreements on worker protection and the sharing of information. For the U.S., its H-2A program with Jamaica (described in greater detail below) is the one remaining

vestige of its bilateral arrangements on labor migration); it has not entered into others in over half a century. The U.S. position is far from the norm, in this respect. Each of the countries sending workers to the U.S. also sends workers to a number of other countries, frequently under bilateral agreements. Through interviews conducted for this report, it became apparent that advocates and government officials in workers' home countries routinely understand the U.S. approach in the context of their experiences with other "host" countries. They describe the frustration of dealing with the U.S. system, which is truly anomalous in its blanket refusal to share information or strategy with workers' home countries, and experience the U.S. as callous and unaccountable, even when confronted with evidence of gross abuses of foreign citizens on its soil.

The general lack of coordination, transparency and accountability in U.S. procedures for oversight and enforcement in the temporary foreign labor system is troubling. It is even more so in combination with the U.S. government's problematic understanding of the relationship between employers and foreign workers as a purely private one, even though there are clear issues of public interest at stake – including the livelihoods of U.S. workers.

# U.S Advocacy: An Uphill Battle

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Civil society organizations in the U.S. have tried to highlight or challenge egregious elements of certain visas, and in many cases have appeared to make significant gains through their advocacy. Some of these efforts are outlined below. However, extensive interviews with advocates indicate the fragility of even the most impressive victories. As noted above, it is not hard for employers to switch from reliance on one visa where regulations and protections appear to be getting onerous, to another – or to switch from sourcing from one particular country to another.

## Snapshots of advocacy campaigns

Advocate efforts have focused heavily on the H-2 visas, and in response to this pressure, those regulations have improved in many important ways. But, while the advocacy stories below are inspiring – with critical organizing victories and litigation successes among them – in their larger context, they also serve to emphasize the ease with which the gains can and have been taken away. In some cases, advocates themselves describe the changes wrought as having been insufficient to reduce the problems to any significant degree.

- *In 2007, the Southern Poverty Law Center issued *Close to Slavery*, a report documenting violations in the H-2A and H-2B programs, through the lens of litigation undertaken by legal organizations supporting migrant workers. The report detailed litigation that exposed and challenged abuses such as the use of threats and retaliation to control H-2 workers, gross violations of wage and hour laws, and systematic discrimination in recruitment and pay. Through such litigation, workers have received substantial awards for unpaid wages, and important precedents have been set, determining that routine deductions from workers' wages are actually illegal.*

In an interview with Mary Bauer, author of *Close to Slavery*, she emphasized how little has changed in the H-2 visa context, since the publication of the report. The precedent-setting litigation has not served as a meaningful disincentive for employers to exploit H-2 workers, and even political change that has improved the Department of Labor has not checked the abuse. (During the George W. Bush administration, H-2 regulations were eroded, and enforcement was dramatically scaled back; under the current administration, many regulatory protections for H-2 workers have been restored and strengthened, and there is new commitment to enforcing workers' rights). "We're heartened by the fact that the Department of Labor is doing a much better job than they used to, but it's not clear that things are different for H-2 workers in the real world," Bauer observed. "We continue to see the same issues playing out." The power dynamics have become so engrained in the operation of the H-2 visas that, she reflected, "It is hard to imagine what a good temporary worker program could look like, and how it is not, in practice, abusive."

- *In 1999, the Farm Labor Organizing Committee called for a boycott against the Mt. Olive Pickle Company, focusing attention to the ways in which "name brands" at the top of the supply chain were the ones to benefit most from the exploitation of migrant farmworkers. The organization emphasized that brands such as Mt. Olive demanded impossibly low prices for the produce they sourced from farmers, who in turn were forced to squeeze their workers to work harder and harder for lower wages in order to make any profit at all. In 2004, the Farm Labor Organizing Committee ended the boycott, having succeeded in securing a commitment from Mt. Olive to pay higher prices to growers for its cucumbers. In addition, the organization signed a collective bargaining agreement with the North Carolina Growers' Association, to represent H-2A*



*workers who travel from Mexico to work on farms in North Carolina. The North Carolina Growers' Association, on behalf of its members, brings in more than 8000 H-2A workers every year.*

As Baldemar Velásquez, co-founder and President of the Farm Labor Organizing Committee, noted in an interview, the campaign helped focus public attention on the large, wealthy companies who may never directly employ temporary workers, but benefit directly from their labor, and help create the conditions that ensure their exploitation. The collective bargaining agreement secured, for these H-2A workers, a set of rights that few other temporary workers enjoy, such as the right to some job security, through provisions that allow workers to return for subsequent seasons, based on their seniority rather than favoritism on the part of the employer, and the right to complain about working conditions, without fearing retaliation, firing, and deportation. But, according to the North Carolina Growers' Association, half of its 1,000 farmers almost immediately stopped using the organization's services to bring in H-2A workers, turning to other suppliers of temporary foreign labor who do not have to provide the same guarantees to their workers.<sup>62</sup> The membership of the North Carolina Growers' Association remains steady today, with the help of consistent campaigning by the Farm Labor Organizing Committee. However, it is a potent reminder of the fragility of any effort to address basic gaps in public regulation through private contract. The government makes no effort to check employers in their search for workers who are ever cheaper, and easier to exploit.

- *In 2006, a company in Mississippi, Signal International, brought in 500 welders and pipe fitters from India, on H-2B visas, to repair oil rigs damaged by Hurricane Katrina. The workers had paid up to \$20,000 each to recruiters who had promised them "green cards" which would allow them to settle in the U.S. with their families as permanent residents and work wherever they chose, but instead found themselves on short-term visas for low-wage work, trapped with one abusive employer. When workers protested the fraud as well as employer mistreatment, Signal International approached Immigration and Customs Enforcement, part of the Department of Homeland Security, for advice on how to fire them and send them back to India. However, with the support of the New Orleans Workers' Center for Racial Justice, the workers were able to organize to escape from the labor camp where they were being kept by Signal International, expose the complicity of Immigration and Customs Enforcement, and demand protection as victims of a sophisticated cross-border trafficking scheme.*

The Signal International workers' campaign for justice helped transform debates on temporary worker programs, both in India and the U.S. As noted by Jennifer Rosenbaum, legal director of the National Guestworker Alliance, the Signal campaign highlighted the imperative of organizing partnerships between the U.S. and workers' home countries to end worker abuse and visa misuse, and catalyzed a support network of labor and community organizers, trade unions and progressive lawyers from India as well as the U.S. However, in the wake of the scandal, and without any apparent consultation, the Department of Homeland Security moved to develop a list of countries eligible to participate in the H2 program – "and India was not on that list," said Rosenbaum. The action taken by the Department of Homeland Security not only punished other Indian workers, by denying them job opportunities in the U.S., but it also undermined a cross-border organizing network that could have ensured that H-2 workers along this particular migration path were actually *less* vulnerable.

- *In 2010, the International Human Rights Clinic at American University Washington College of Law and the Centro de los Derechos del Migrante released Picked Apart, a report on H-2B women workers employed by Maryland's crab industry. The findings strongly supported arguments that the U.S. Department of Labor should strengthen protections for H-2B workers. The report found, for example, that even though Mexican and U.S. law prohibit recruiters from charging fees to workers seeking a job, "100% of women who reported working with a recruiter paid that recruiter a fee," and most women took on loans to pay these fees.<sup>63</sup> The work environment was very stressful, since workers were paid for every pound of crabmeat they were able to pick, and earnings in general were low, with additional deductions for such things as protective equipment and tools.<sup>64</sup>*

At the current moment, the H-2B regulatory reforms that were ultimately developed by the Department of Labor and scheduled to go into effect in April 2012 have been stalled by legal challenges from employers, as well as concerted opposition from members of Congress, including some acting explicitly in defense of the Maryland crab industry. Even elected leaders whose voting records reflect consistent support for U.S. workers

62 *Rural Migration News*, Vol. 12 Number 2, April 2006, available at [http://migration.ucdavis.edu/rmn/more.php?id=1107\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1107_0_3_0).

63 American University Washington College of Law (International Human Rights Law Clinic) and Centro de los Derechos del Migrante, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* (2010) p.14.

64 *Picked Apart*, p.26.

have spoken out against the new H-2B regulations, insisting that higher wages and enhanced enforcement will be too much of a burden on employers. “Temporary workers can’t vote, they are isolated and don’t tend to have a substantial community that will vote in their name, and so they have no voice in the political process,” was how one government staff person, who chose not to be identified, described the dynamic at work. Jayesh Rathod, a professor at the Washington College of Law who was involved in *Picked Apart*, emphasized in an interview that elected leaders kept pressing certain sets of arguments when the advocates associated with the report met with them to discuss its implications. “Even in face-to-face meetings, they defend the program as it stands, talking about the risks of foreign competition, the cost to small businesses of any change, and the unreliability of the U.S. workforce,” he described. “There is lots of sympathy for mistreated workers, but there is reluctance to change the basic architecture of the program.”

These textured advocacy efforts have exposed many of the weaknesses in the H-2 visas, but the dynamics of exploitation have proven to be deeply embedded. The obstacles to meaningful, enduring change in the H-2 context are certainly mirrored in the other visas. But the peculiar composite structure of the system presents yet another problem, as discussed below. Advocates seeking to draw attention to abuses under one particular visa category have found that employers will temporarily shift to using a different visa to bring in workers, until the scandal – and heightened scrutiny – have passed.

## Shifting among visas, but the abuses remain constant

The shortcomings of the H-2 program have been in the public eye, to some extent, and the Department of Labor’s involvement has allowed for some avenues of complaint. The flaws in other temporary work visas – which, as previously noted, bring in over 500,000 workers – remain relatively unreported, even though the abuses workers face are similar or worse. As Jennifer Rosenbaum described it, “Practically speaking, the reality for H-2, H-1B and J-1 workers is essentially the same. Employers try to pass on as many of the costs as possible to these workers – visa fees, transportation, housing. When they protest, they are forced to attend captive audience meetings where they are threatened with termination and deportation.” In the case of each of these temporary worker visas, as Rosenbaum added, employers and recruiters also routinely threaten temporary foreign workers with long-term immigration consequences, suggesting that they will face not only deportation, but permanent exclusion from the U.S., if they complain about abusive treatment.

One of the reasons that there has been little net improvement in the U.S. temporary foreign labor system, in spite of advocacy efforts, is that the visas are essentially interchangeable, and employers are able to shift easily from reliance on one category to another.

In some cases, employers will do so because visas of a particular category are no longer available. As mentioned in the summary above, the H-2B and the H-1B visas both have

“caps,” imposing an upper limit on how many people can come in to the U.S. every year to perform particular types of work. However, from the perspective of advocates interviewed, this has simply meant that employers have moved to other visa categories to meet their needs:

- As Mary Bauer of the Southern Poverty Law Center described in an interview, “whenever the hospitality industry in the Gulf Coast hits the H-2B cap, the number of J-1 workers balloons.”
- The Department of Education in New York City has turned to the J-1 program to bring in foreign teachers, when there were no more H-1B visas available in a particular year.<sup>65</sup>
- Rachel Micah-Jones of the Centro de los Derechos del Migrante, which has been researching worker abuses in the carnival and fair industry, mentioned that employers have been using visas as obscure as the O-1 (intended for foreigners of “extraordinary ability” or “extraordinary achievement”) and the P-3 (for

**One of the reasons that there has been little net improvement in the U.S. temporary foreign labor system, in spite of advocacy efforts, is that the visas are essentially interchangeable, and employers are able to shift easily from reliance on one category to another.**

artists and entertainers involved in a “culturally unique program”) to skirt the H-2B visas, and fill low-wage jobs setting up tents and operating rides.

If the anecdotal evidence is borne out, this would suggest that the policy of capping visas, premised on addressing a defined labor shortage in a particular industry, is largely meaningless.

Advocates have also alleged that employers have switched the visa categories they relied on, either because they found the regulations in the “H” visa process too onerous or expensive, or because they sought a temporary respite from litigation or public controversy:

- In one example, emerging from a case filed by a U.S. employee of the multinational Infosys, the giant corporation was not only using B-1 “in lieu of” H-3 visas (rather than H-1B visas) to bring in large numbers of skilled workers, but was paying them a “stipend” of \$15,000 a year, rather than the prevailing wage of \$65,000 that would have been required under H-1B rules.<sup>66</sup>
- Greg Schell of Florida Legal Services noted in an interview that many hotels in Florida had shifted from reliance on H-2B to using J-1 “intern” visas, when confronted with litigation demanding that they pay the transportation costs of H-2B workers, to and from the U.S. “So now there are Filipino hotel management degree candidates making beds in Palm Beach at minimum wage,” said Schell.

Such stories amount, in the aggregate, to a condemnation of the system as it stands, and a call for comprehensive legislative and regulatory overhaul. There is a clear imperative to look beyond the individual visa categories and the apparent distinctness of their purpose, to understand the core employer interests and the disempowerment of workers that connect them all.

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<sup>66</sup> *Palmer v. Infosys Technologies Ltd.*, Complaint, No. CV-2011-900228, 23 February 2011.

# U.S. Workers Need Not Apply

Those with a passing familiarity with the U.S. temporary foreign labor system would be likely to assume that these workers fill significant gaps in the labor market, where there are no “qualified, willing and available” U.S. workers. This assumption deserves to be interrogated, for two different reasons. First, for the visas that *do* require some determination of a shortage of U.S. workers, the enforcement mechanisms are relatively narrow and weak, as indicated below, and easy to evade. Second, for other visas, employers do not even have to pretend to seek U.S. workers first.

## Bypassing U.S. workers

Given the procedures and delays associated with seeking foreign workers, it would seem inexplicable that U.S. employers look beyond the U.S. unless absolutely necessary. However, there are many incentives for employers to recruit overseas. Most importantly, temporary foreign workers are substantially cheaper than U.S. workers as a general matter. Furthermore, since it is difficult to apply U.S. anti-discrimination law to recruitment actions overseas, employers can pick out the “perfect worker” – in many circumstances, young, male, and with no family obligations – without fearing a lawsuit. Finally, given the mechanisms of employer control enabled by these visas, foreign workers are structurally easier to exploit than most U.S. workers. In light of these inducements, it is necessary to look more closely at claims that temporary foreign workers are brought in only in the context of labor shortages.

The story is perhaps most surprising in certain agricultural labor contexts. As journalist Dan Rather has described it, “Even among those skeptical of the general concept of ‘jobs Americans won’t do,’ when it comes to farm work, foreign labor [has] long been the historical reality and the conventional wisdom.” The article goes on to describe a visit to Colquitt County, Georgia, where Rather “found plenty of out-of-work Americans – literally hundreds – vying for jobs in the fields.”<sup>67</sup> Legal Services lawyers describe in detail the various means by which employers are able to discriminate against these American workers, even though the regulations are framed to protect them from being displaced or replaced.

### Unauthorized Workers: comparing structures of exploitation

In many surprising respects, temporary foreign workers are even more vulnerable than unauthorized workers since, as some advocates have noted, they are actually under greater employer control: Unauthorized workers work and live under extremely difficult conditions, but they do have the ability to quit their jobs without the lawful requirement that the employer immediately report them to the Department of Homeland Security. In fact, there are real disincentives for employers of unauthorized workers to expose their own noncompliance with the law by doing so.

Another problem relates to Department of Labor oversight. There is substantial clarity, among governmental agencies, that the Department of Labor can and will step in to address claims related to unpaid wages or mistreatment raised by unauthorized workers, or by workers coming in under the “H” visas. However, as noted above, Department of Labor jurisdiction over abuses related to visas supervised entirely by the State Department, and/or the Department of Homeland Security, is either highly contested or absent. Half a dozen U.S. advocates described instances where Department of Labor officials had been told by officials of other agencies to be “hands off” on certain cases of clear abuse, involving J-1 students, A-3 domestic workers, and “B-1 in lieu of H-3” trainees.

There are also numerous credible accounts that workers on temporary visas earn even *less* than similarly-situated unauthorized workers. Julián Adem Díaz de León, director of the protection of Mexican citizens abroad at Mexico’s Ministry of Foreign Affairs, agreed that this was broadly true, based on his own experience with Mexicans involved in low-wage work in the U.S. This was echoed by advocates who had compared the earnings of unauthorized workers and foreign workers on visas, in agriculture in the Napa Valley, construction work in New York State, and housekeeping work in resorts in South Carolina.

67 Dan Rather, “Help Not Wanted?” *Huffington Post*, 13 October 2010, available at [http://www.huffingtonpost.com/dan-rather/help-not-wanted\\_b\\_761132.html](http://www.huffingtonpost.com/dan-rather/help-not-wanted_b_761132.html).

"There is an absolute displacement of U.S. workers in southern California, around the border," said Cynthia Rice, an attorney at California Rural Legal Assistance, in an interview. "There is up to 24% unemployment in the Imperial Valley, and yet employers are bringing in 400 to 500 broccoli harvesters." One of the many strategies employed has been to shift the purported job location from Calexico, California – where it has always been, and where many unemployed American farmworkers live – to Yuma, Arizona, more than 60 miles away. "We are trying to challenge this right now," said Rice, "but the Department of Labor will only look at the issue narrowly, to see whether there are U.S. workers who have been refused work, rather than seeing the structural discrimination." She also described how employers manipulate the requirement that jobs be advertised to American farmworkers first: "They will send in a job description to the unemployment office – but that's just not how farmworkers are hired! The practice has always been to post vacancies at the work site. So if the unemployment office is the pool of who you're looking to for willing and available farmworkers, then there's a problem."

Rebecca Miller, staff attorney at the Farmworker Rights Division of Georgia Legal Services (which handled the Colquitt County case described by Dan Rather) described how employers manage to get rid of existing U.S. workers, in order to replace them with temporary foreign workers. "The employers start a campaign of wearing the U.S. workers down, by making the job more burdensome and offering them less hours, to encourage people to quit." The organization recently won a determination from the Equal Employment Opportunities Commission (the governmental agency tasked with enforcing federal anti-discrimination laws) regarding exactly such a campaign of discrimination against American workers. The agency noted that Hamilton Growers "engages in a pattern or practice of regularly denying work hours and assigning less favorable assignments to U.S. workers, in favor of H-2A guestworkers," and "discharging U.S. workers and replacing them with H-2A guestworkers."<sup>68</sup>

Similar discrimination is rife where employers are seeking low-wage workers outside the agricultural context, through the H-2B visa, which also requires that the jobs be offered to American workers first. In comments submitted to the Department of Labor in support of efforts to strengthen H-2B regulations, the National Employment Law Project chronicled systematic "bogus advertisements in media designed to avoid U.S. workers, through unreasonable job qualifications, or through simple lack of follow up with qualified U.S. workers." The organization went on to describe:

"One media investigation reported that an East Coast visa fraud conspiracy simply scheduled interviews with U.S. applicants for inconvenient times, such as 6 p.m. on Christmas Eve. The few Americans who actually appeared reported later that the interviewers were 'intimidating' and made the jobs sound 'as bad as possible.'"<sup>69</sup>

In an interview, Christopher Willett of the Equal Justice Center cited several instances where "employers advertise a job in terms that ensure no U.S. worker will want it – and then when the foreign workers show up, you find out that it's a higher quality job, at a better wage." A U.S. government official detailed several cases, including of foreign landscaping supervisors on H-2B visas being paid \$18 an hour for jobs advertised to Americans as entry-level jobs, at an hourly rate of \$8. "The actual hourly wage, in a fair market, would have been \$25. Everyone loses... except the employer," the official concluded.

As this comment implies, the impact of such discrimination goes well beyond the individual American workers denied jobs. Economists and trade unions, among others, have sounded the alarm about eroded working conditions and depressed wages in low-wage and professional sectors where U.S. employers have brought in large numbers of workers on "H" visas.<sup>70</sup>

## Total exclusion of U.S. workers

Beyond the "H" system, there is no obligation imposed on employers to look for U.S. workers at all, creating still greater scope for discrimination. Furthermore, the economic incentives for employers to look beyond the U.S. are even greater. First, as noted, there is no requirement to pay foreign workers the prevailing wages. Second,

68 Jeremy Redmon, "Feds: South Georgia farm favors foreign laborers over U.S. workers," *The Atlanta Journal-Constitution*, 5 August 2011.

69 National Employment Law Project, "Comments on RIN 1205-AB58, Temporary Non-Agricultural Employment of H-2B Aliens in the United States" 17 May 2011, available at <http://www.nelp.org/page/-/Justice/2011/CommentsonProposedRulesTemporaryEmployment.pdf?nocdn=1>.

70 See e.g. Ray Marshall, *Immigration for Shared Prosperity: A Framework for Comprehensive Reform*, Economic Policy Institute, 2009.

there are numerous exemptions from employment taxes under many visa categories, leading to savings of up to 11.5% of payroll, according to one U.S.- based recruitment agency that asked not to be identified. The examples of displacement and replacement of U.S. workers, as documented by trade unions, journalists and lawyers, cut across the spectrum of visa categories:

- Stories abound of large multinational corporations – including Pfizer, Siemens, Nielsen, Wachovia, and Bank of America – replacing U.S. workers with foreign workers, relying on the L-1 “intra-company transfer” visa to bring in employees from their operations abroad. U.S. employees have even been required to train the foreign employees who were brought to the U.S. to take over their jobs.<sup>71</sup>
- In an interview for this report, Ana Avendaño, Associate General Counsel and Director of the Immigrant Worker Program at the AFL-CIO, pointed to misuse of the E-2 visa, which allows foreign investors to bring workers with “special skills” from their home countries. She described one investor in Florida who brought in his own sheet metal workers – in spite of the fact that there were many highly skilled Americans, represented by unions in the metal trades, out of work. In this case, a number of U.S. workers showed up at the work site to protest and demand the jobs.
- Employers have even been able to use these other visa categories to bring foreign workers into sectors where they are currently not permitted, under Department of Labor regulations intended to protect American workers’ interests. For example, the dairy industry is currently excluded from the H-2A program but, as Christopher Willett from the Equal Justice Center noted, employers have already found a way around this restriction. An organization named Global Cow offers to send American dairy farmers foreign “interns” and “trainees,” on J-1 visas. According to the organization’s own website, the foreign workers’ wages are as low as \$6.55 per hour; they can be required to work for up to 55 hours per week, with no overtime compensation. Global Cow deducts \$380 to \$580 per month from workers’ wages, including for an enforced “savings” program; the worker forfeits these “savings” if he or she tries to leave the program early.<sup>72</sup>

The purported justification for the J-1 and Q visas – cultural exchange – has rendered them peculiarly immune to challenges from U.S. workers on the grounds of national origin discrimination. As documented in an extensive analysis of the Q visa by Kit Johnson, a law professor at the University of North Dakota, an American employee of Disney had tried to challenge the practice of staffing much of the resort with only foreign workers, but failed at the level of the District Court as well as the 11th Circuit. The courts accepted the idea that Disney was entitled to prioritize hiring foreign workers, to promote an environment of “cultural authenticity.”<sup>73</sup>

## Challenging discrimination against U.S. workers

The system is designed to pit U.S. workers and temporary foreign workers against each other. With no expert, independent assessment of genuine labor shortages, it is easy for U.S. workers to succumb to a generic fear that foreign workers are “stealing” their jobs, and for foreign workers to believe that U.S. workers are trying to protect jobs that they themselves are unwilling to perform. Under the circumstances, it is difficult to forge solidarity among U.S. and foreign workers on the many workplace issues they may hold in common – wage theft, occupational safety, retaliation against those who try to organize.

Many advocates – especially farmworker lawyers – have urged that the issue of unfair competition between H-2A workers and U.S. farmworkers has to be confronted directly. Even though it is sometimes a difficult balancing act for organizations working with both U.S. and H-2A workers, advocates pointed out that most foreign workers understood that failure to challenge unfair competition ultimately only served employers. Strategies of doing so varied, with Cynthia Rice describing her organization, California Rural Legal Assistance, taking a particularly proactive approach, consistently reviewing all “job orders” approving growers’ requests for H-2A workers, and distributing leaflets to local communities to inform them of the availability of these jobs, to ensure that American workers have a fair opportunity to apply. California Rural Legal Assistance also represents U.S. workers who have gone through the process of applying for a job and have been rejected, as well as U.S. workers claiming wrongful discharge.

71 Ron Hira, *The H-1B and L-1 Visa Programs: Out of Control*, p.5; Steven Greenhouse, *The Big Squeeze: Tough Times for the American Worker*, Alfred A. Knopf 2008, pp.207-08; Michael Kruse and Theresa Blackwell, “How Oldsmar got Global Influence,” *St. Petersburg Times*, 21 September 2008; and Lee Howard, “Pfizer to Ax IT Contractors?” *The Day*, 3 November 2008.

72 Website of The Global Cow, Ltd., <http://www.globalcow.com/images/pdfs/global-cow-monetary-information.pdf>.

73 Kit Johnson, “The Wonderful World of Disney Visas,” (citing *Gupta v. Walt Disney World Co.*, 256 F. App’x 279, 280 (11th Cir. 2007)).

As Jayesh Rathod of the Washington College of Law noted, from the perspective of his work on the *Picked Apart* report, the standard for allowing temporary foreign workers in a given industry, in a given location – requiring that employers demonstrate the absence of qualified, willing and available U.S. workers – is clearly a legitimate one, worth defending and applying fairly. The economic displacement of U.S. workers in the Maryland crab industry took place more than two decades ago, and is now far too entrenched to reverse easily. However, as he noted, it remains critically important to be able to convey to policymakers that the genuine labor shortage of today was carefully crafted. It reflects a conscious choice on the part of crab industry employers to abandon a permanent, unionized workforce of Americans, rather than a natural shift within labor markets.

It is imperative that examples such as this be at the forefront of advocacy, emphasizing the need for effective regulations that can guide and limit what employers are allowed to do, in terms of reshaping work in the U.S. Employers should not be entitled to erode wages and conditions for their U.S. workers until they leave, in order to create a “labor shortage” that can then be filled by a foreign workforce.

# The Abuse and Exploitation of Foreign Workers

It is difficult to disaggregate the complex narratives of temporary foreign workers in the U.S. into discrete moments of violations and problems. The fraud, underpayment, harassment and control documented below are of course embedded within larger tales of life choices in home countries, and migrants' expectations of the U.S., which can not be easily reduced to purely economic or rational desires. So, while this section focuses on U.S. advocates' perspectives, and a framework of U.S. law and policy, it places these accounts in dialog with advocates from workers' home countries, whose viewpoints may offer additional nuance and context on how we think about the violations, as well as potential remedies.

In reading the points made below, it would be worth bearing in mind the sheer scale and ubiquity of this workforce: at least 700,000 workers at any given time, traveling to every state in the U.S. They are here as agricultural workers, hotel workers, domestic workers, teachers, nurses, and more. Their exploitation cannot be considered accidental, or anecdotal, or exceptional – in many ways, it is structural. Given the economic incentives in play, and the fact that even well-intentioned employers are forced to participate in this “race to the bottom,” it is hard to escape the reality: foreign workers who can legally be paid less than U.S. workers *will* be paid less. If employers are free to discriminate, they will seek out young male farmworkers, and avoid hiring older women. If foreign workers are denied access to meaningful avenues of redress, the atmosphere of general impunity will mean routine exploitation of these workers.

## Abuses by recruiters and other intermediaries

With respect to temporary work visas, the basic responsibility of employers for the treatment of employees is complicated and diffused by the increasing presence of a range of “middlemen.” These include recruiters outside the U.S., as well as possible labor contractors, sub-contractors and outsourcing facilities within the U.S. – each benefiting, in particular ways, from the very lucrative and largely unregulated business of foreign labor.

It has often proved difficult to hold employers accountable for mistreatment of workers, in a number of cases, across visa categories – intermediaries have

### A “perfect storm” of structural factors make workers easy to exploit:

- *Bound to their employer.* Temporary workers' visa status is tied to the employer who sponsored them, creating an artificial marketplace for their labor. These workers cannot respond to mistreatment by leaving and looking elsewhere for fair conditions.
- *Social isolation.* Temporary foreign workers tend to be isolated – usually far from their families and support systems, living in housing provided by the employer and thus at the employer's disposal.
- *Minimal access to justice in the U.S.* It is not easy to raise claims even while workers are still in the U.S. – quite besides workers' fear of retaliation if they complain. The vast majority of temporary foreign workers have no access to federally-funded legal services; enforcement by the Department of Labor is either absent or inadequate; and often workers do not have the right to bring their employer to court to enforce themselves the minimum protections laid out in the visa regulations.
- *No “portable justice.”* Workers who return to their home countries have few clear avenues to pursue claims against U.S. employers. For employers, sending workers back to their home countries is an easy way to silence them.



contributed to the abuses in contexts ranging from giant corporations requiring large numbers of high-tech workers, to foreign diplomats seeking a single domestic worker.

With respect to the J-1 Exchange Visitor visas, the regulations *require* employers and workers to work through an intermediary. The J-1 “sponsor” is technically an organization with a mission of promoting cross-cultural engagement and international educational opportunities. But, as a report by the Economic Policy Institute notes, many of these organizations are for-profit corporations, with some sponsors generating more than \$7 million a year in fees from workers and employers.<sup>74</sup> Another organization has estimated that the sponsor industry in the Summer Work Travel category, the largest category in the broader J-1 program, is worth \$100 million.<sup>75</sup> In addition, as mentioned in a recent report by the American Federation of Teachers, the visas of some J-1 teachers have been tied to the sponsor agency – meaning that the agency has as much power to fire the teacher and terminate his or her visa status as does the actual employer.<sup>76</sup>

In interviews conducted in China with students who had traveled to the U.S. on J-1 “summer work travel” visas, they all described a thick web of intermediaries. They had signed two contracts (one in China, and another with substantially poorer terms of employment once in the U.S.), they had two visa sponsors, and some, at various times, took orders from up to three different companies at the same time. A major complaint, for those who were most unhappy with their experience in the U.S., was that that it was hard to know who to blame for oppressive working conditions, high levels of surveillance and control, and heavy deductions for housing costs.

As the brief description of the F-1 student visa indicates, universities and colleges can also play a complex mediating role in facilitating – and even financially benefiting from – student work. At the most basic level, as noted in the *Chronicle of Higher Education*, even unaccredited institutions “generate millions of dollars in profits because they have the power, bestowed by the U.S. government, to help students get visas.”<sup>77</sup> One such unaccredited university based in California, Tri-Valley, charged tuition fees, did not require class attendance, and placed its F-1 “students” in low-wage retail jobs scattered around the country.<sup>78</sup> Just 53 of the school’s 1,555 students lived within commuting distance of the university. Following investigations and legal action by the Department of Justice and the Department of Homeland Security in 2011, about 1,000 F-1 students at Tri-Valley had to leave the country, scramble to transfer schools or face the prospect of deportation.<sup>79</sup>

Other universities may benefit from F-1 students in an even more extreme but legal manner. Immanuel Ness, a political scientist at Brooklyn College who has researched and written extensively on temporary workers, spoke about a hospitality management professor he interviewed, who described his F-1 and J-1 students from Jamaica as a “windfall.” Under the terms of the visa, the hospitality management school was permitted to send them out on practical training “internships” at a range of nearby resorts as well as at training facilities directly operated by the school, where they would clean and care for the facilities, with a substantial cut of the money they earned going back to the school.

## Recruiters

It is hard to come up with a single, precise definition of a “recruiter,” because so many different entities can play the role of helping workers secure access to a job in the U.S. Recruiters might be large, registered firms, or a single individual, such as the favored employee of a U.S. landscaping firm who is asked to “bring some friends” when he returns the following season. In Mexico, even municipalities typically charge fees for facilitating work opportunities in the U.S. There are some outposts of U.S. staffing agencies based in workers’ home countries, engaging in recruitment as well. Even where U.S. employers have been deeply involved in recruitment, and in abuses related to recruitment, it has been hard to hold them responsible, as described in greater detail below.

- *Discrimination in recruitment.* A wide range of federal laws in the U.S. prohibit discrimination in hiring on a number of important grounds, including race, color, religion, sex, and age. Advocates note, however,

74 Daniel Costa, *Guestworker Diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market*, p.37.

75 Jerry Kammer, “Cheap Labor as Cultural Exchange,” Center for Immigration Studies, December 2011.

76 American Federation of Teachers, *Importing Educators: Causes and Consequences of International Teacher Recruitment*, 2009. p.18.

77 Beth McMurtrie, “Foreign students pour back into the U.S.,” *Chronicle of Higher Education*, 21 November 2008.

78 U.S. Department of Homeland Security, Immigration and Customs Enforcement, “Student and Exchange Visitor Program Notice of Intent to Withdraw,” 19 January 2011, available at <http://www.laborimmigration.com/wp-content/uploads/2011/02/Tri-Valley-University-Notice-of-Intent.pdf>

79 U.S. Department of Homeland Security, Immigration and Customs Enforcement, “Attention Former Tri-Valley University Students,” 8 February 2011, available at <http://www.ice.gov/sevis/tri-valley-110118.htm>.

that discrimination on the basis of age and gender is pervasive in the context of the temporary worker visas, particularly the H-2, where employers strongly prefer young, male workers, in the majority of cases. The discrimination endures, in spite of the U.S. government's stated commitments to equality in employment. Advocates have found it difficult to hold U.S. employers responsible in the U.S., even where they were able to present evidence that the discrimination represented the employer's preferences, and not just the recruiter's.

- Analysis of State Department data on visa issuances, conducted by the Global Workers Justice Alliance and available on the organization's website, reveals that women accounted for a mere 3.7% of H-2A visas issued in 2010.<sup>80</sup> While it is impossible to know how many women in general were seeking H-2A jobs, it is worth noting that women represent 40% of the pool of job-seekers represented by the Centro Independiente de Trabajadores Agrícolas, a nonprofit organization involved in recruitment from Mexico. However, as the executive director, Janine Duron, noted in an interview, more than 90% of those selected from this pool by employers are men.
- A State Department official who chose not to be identified said flatly that recruiters will choose women for H-2 work only for a narrow set of jobs: picking fruit under an H-2A visa, or crab-picking under the H-2B visa.
- Cynthia Rice of California Rural Legal Assistance pointed to signs of rampant age discrimination in recruitment – "If you look at Imperial County, there is no one brought in over 30" – but added that, in spite of the clear indications of discrimination, a complaint to the Equal Employment Opportunity Commission had proven useless.
- Baldemar Velásquez of the Farm Labor Organizing Committee recalled that the organization had filed a case in the early 2000s on age discrimination in H-2A recruitment for growers in North Carolina. However, the 4th Circuit had determined that it was not actionable under applicable U.S. law since the discrimination against older workers took place outside the U.S.<sup>81</sup>
- *Recruiter fraud and misrepresentation.* As Cathleen Caron of Global Workers Justice Alliance pointed out in a recent paper, current visa regulations do not enable potential workers in their home countries to determine whether a recruiter is actually representing an employer with a genuine H-2 job available. This means that they are taking a substantial risk in this process: that they will not be paid what the recruiter promised, that the job is substantially different from what was promised, or that there is no job at all. "If they gamble incorrectly, the result can be financial ruin or even worse, human trafficking," Caron emphasized.<sup>82</sup> In the absence of requirements in U.S. visa regulations that employers disclose the recruiters with whom they are working, and take responsibility for any abuses by these recruiters, there can be no accountability. Cases described by other advocates confirm this analysis, across multiple categories of temporary work visas.
  - "We see constant misrepresentations to workers at the time of recruitment, about the hours of work available, or the wages and working conditions," said Cynthia Rice of California Rural Legal Assistance. "Recruiters will tell workers they can make \$600-700 a week – but then they end up with just 30 hours of work a week, at \$10 an hour, so right away there is a violation of their expectations." There is nothing that workers can do to force employers to make good on these promises, however, because it is the employer's promise to the U.S. government – rather than to the foreign workers – which is considered the benchmark.
  - Rebecca Miller of Georgia Legal Services described the frequency with which they encounter complaints from workers that recruiters promise nonexistent jobs, and take a substantial fee. "It happens all the time," she commented, "But there is not much we can do about it, since it happened in another country, and there was no real job order or a real employer to try to hold responsible."
  - Fraud over the *type* of job is also common. Bridgette Carr, who directs the Human Trafficking Clinic at the University of Michigan Law School, described one particularly extreme case, where J-1 "summer work travel" students from the Ukraine were forced to work in a strip club in metropolitan Detroit; the J-1 sponsor agency had told them that they would be waiting tables at a restaurant in Virginia Beach. In another case, Filipino workers on H-2B visas were promised work in hotels in Missouri, but were put to work on farms in Louisiana. According to Carmelita Dimzon, head of the Overseas Workers Welfare

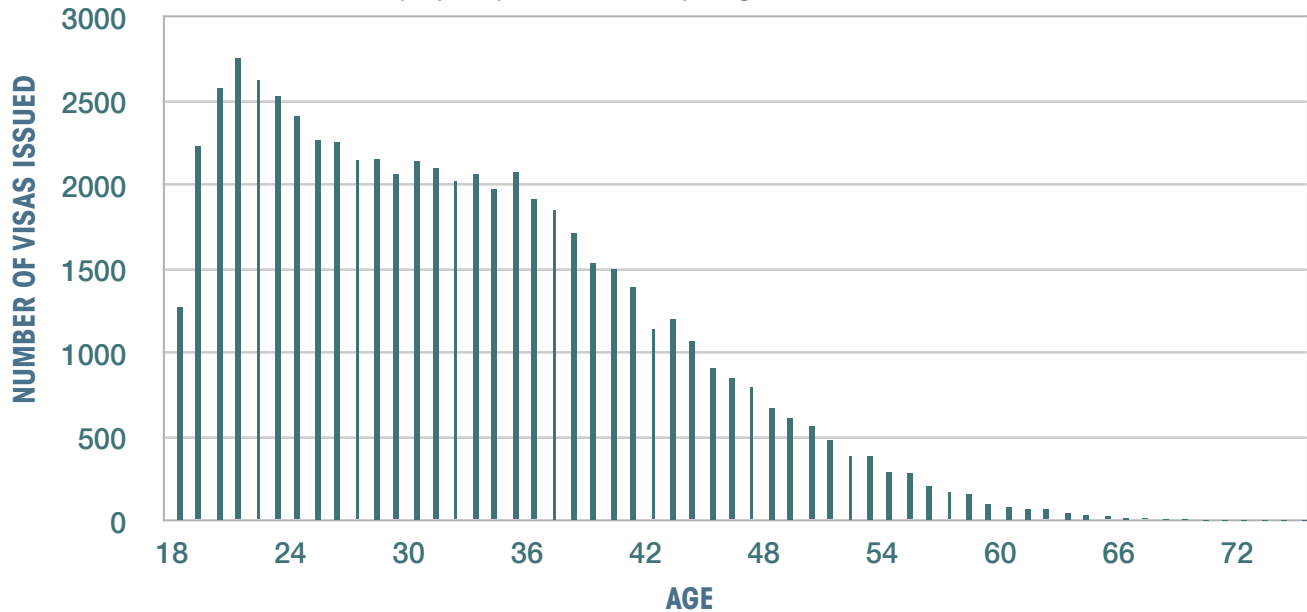
80 Website of Global Workers Justice Alliance, Data on U.S. Migration, available at [http://www.globalworkers.org/migrationdata\\_US\\_more.html#DOS](http://www.globalworkers.org/migrationdata_US_more.html#DOS).

81 *Reyes-Gaona v. NCGA*, 250 F.3d 861 (4th Cir. 2001), cited in Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*, 2007, p.34.

82 Cathleen Caron, "Why Transparency in the Recruiter Supply Chain is Important in the Effort to Reduce Exploitation of H-2 Workers: A Global Workers Justice Alliance Position Paper," September 2011, p.1.

## Statistics from the U.S. State Department showing the age distribution of H-2A visa holders in 2010.

Employers' preferences for younger workers are evident.



Administration of the Philippines government, the workers were paid "one or two dollars an hour," clearing brush.

- *Recruiter fees.* As many advocates said, recruiters' demands that workers pay a fee in exchange for a job opportunity in the U.S. are virtually universal. The means by which recruiters extract the fee, the amount, or the degree to which it placed workers in situations of debt bondage do vary to some extent.

**...recruiters' demands that workers pay a fee in exchange for a job opportunity in the U.S. are virtually universal.**

- As Erik Nicholson of the United Farm Workers recounted in an interview, recruiter fees have skyrocketed in recent years. "In the early '90s, no one had heard of fees of more than \$50," he said. "Now we routinely hear of amounts like \$4000, or \$20,000. Sending countries are refusing to regulate, so workers arrive with massive debts."
- Recruiters continue to demand fees, in spite of the fact that under recent changes to H-2A regulations, they are no longer permitted to do so. According to a State Department report, "recruiters adjusted their practices by charging fees after the workers had obtained their visas and levying charges under the guise of 'service fees.'"<sup>83</sup>
- With few exceptions, it remains difficult to recover these fees from the employer. According to Jim Knoepp of the Southern Poverty Law Center, employers will insist that the recruiters had been instructed not to charge a fee, and were therefore acting outside the scope of their agency. A legal aid lawyer interviewed agreed that it was difficult to hold the main employer responsible. "We've had mixed results in terms of the responsiveness of courts, as to whether the employer should have known what the recruiter was doing."
- Consular officials believed that fees were charged across all categories of visas, including those for professional workers. In fact, they noted, those fees tended to be higher, reflecting the higher earning potential of B-1, H-1B and L-1 visa holders.

## Contractors

Temporary foreign workers may frequently be employed through a third party, who is not the direct beneficiary of their labor. These entities tend to have different names in different industries – “farm labor contractors” in the H-2A agricultural work context, “staffing agencies” where H-2B workers are concerned, and “job shops” or “body shops” when talking about high-tech professionals brought in through B-1, H-1B and L-1 visas.

- Leaked State Department cables indicate a long awareness of problems related to H-2B staffing agencies. A 2009 cable from the consulate in Monterrey, Mexico cited examples of staffing agencies “petitioning [for] increasing numbers of H-2B temporary worker visas for needs that are neither temporary nor seasonal, but year-round,” and found that such fraud “dilutes the benefits of the H-2B program for both H-2B employers and their beneficiaries and [...] disadvantages U.S. workers who might want to compete for these jobs.”<sup>84</sup>
- Third-party companies obtain L-1 visas for purported intra-company transferees (generally, information technology professionals, accountants, or other skilled workers). On arrival in the U.S., these workers are then sent off-site to fill temporary vacancies inside the operations of U.S. employers. The L-1 “multinational enterprise” essentially functions as a temp agency staffed by foreign workers. Some of these companies continue to employ hundreds or even thousands of L-1 workers, even in the wake of efforts at legislative reform intended to rein in “multinational temp agencies” or “body shops,” since they have found ways around the restrictions.<sup>85</sup>
- Cynthia Rice of California Rural Legal Assistance pointed to the massive increase in farm labor contractors – “inching up to about 50% for farms” – and detailed how their presence creates a greater challenge in enforcing rights. “Anyone who is in between the worker and the person who benefits financially is an impediment to recovery,” she said, “And these contractors often have no land or equipment assets that you can make a claim on – so you have to establish employer liability. There is still no presumption of joint employer liability under the current regulations.” Rebecca Miller of Georgia Legal Services described the ways in which farm employers will deliberately set up contracting arrangements to avoid liability – “they will even help their crew leaders incorporate.”

### Advocate Recommendations:

Some U.S. advocates have called for the registration and disclosure of all intermediaries, in order to limit the abuses, though they acknowledge that greater transparency cannot compensate for the many other factors that disempower workers in the recruitment process.<sup>86</sup> Other advocates insist that employers be required to accept responsibility for all recruiter and contractor abuses, as a condition of using any temporary worker visa.<sup>87</sup>

One of the most consistent messages from advocates in workers’ home countries was that the issue of recruitment is a complicated one, and that tackling it appropriately will require creativity. As Mariano Yarza, of Catholic Relief Services in Mexico noted, the current U.S. visa system treats the hiring process as a private matter. In

**“In the absence of government involvement, workers are effectively required to rely on recruiters, since they have no way of making direct contact with U.S. employers.”**

the absence of government involvement, workers are effectively required to rely on recruiters, since they have no way of making direct contact with U.S. employers. Yarza believed that U.S. advocates should press the U.S. government to change this dynamic, and create alternative hiring structures with government supervision. Elisabel Enriquez, from Mesa Nacional para las Migraciones en Guatemala, suggested one possible alternative: that consulates create databases of jobs available, and thus replace the recruiters. One consular official acknowledged hearing this demand constantly from workers: “It is a problem that we won’t provide an answer to the question, ‘How do I get an H-2 job?’ – but we also say, ‘Don’t pay a recruiter.’ How does that make sense?”

84 U.S. State Department, Consulate in Monterrey, Mexico, “Misrepresentations By Staffing Agencies Under The H-2B Temporary Worker Program,” 28 May 2009, available at <http://www.cablegatesearch.net/cable.php?id=09MONTERREY201>.

85 Ron Hira, *The H-1B and L-1 Visa Programs: Out of Control* p.5.

86 See e.g. Cathleen Caron, “Why Transparency in the Recruiter Supply Chain is Important in the Effort to Reduce Exploitation of H-2 Workers.”

87 Interviews with Rachel Micah-Jones, Jennifer Rosenbaum and Greg Schell.

In terms of the framing of the problem, several advocates from workers' home countries pointed out that the fraud and misrepresentation may predate what is usually thought of as the moment of recruitment and urged that U.S. advocates adopt a correspondingly more expansive campaign to challenge it. For example, Tatcee Macabuag of Migrant Forum in Asia pointed to the proliferation of training programs in Philippines for those seeking nursing and care-giving programs abroad, taking in ten times as many students as there are jobs in "host" countries. She proposed that the U.S. government could play a role in limiting these types of abuses, by requiring the registration of these training programs with consulates and embassies, or simply by being more transparent about its actual labor market needs, at the current moment and as they are likely to evolve over time.

## Economic exploitation: wage theft and beyond

The analysis below of the economic exploitation of temporary foreign workers is concerned with violations of legal provisions related to the payment of wages and overtime, and illegal deductions from workers' paychecks. The issue of lawful but potentially unjust cost-shifting, where workers are made to cover expenses that are demonstrably for the benefit of the employer, is referenced but not dealt with at length, since it is a very distinct problem. Examples of such cost-shifting are explored in the case-study of the J-1 "summer work travel" visa, later in this report. Both types of economic exploitation testify to intractably deep imbalances of power between temporary workers and their employers, in the current system.

- *Failure to cover the costs of transportation.* Case law has developed in support of the principle that employers should cover the costs of H-2A and H-2B workers getting to the job. The principle has its foundations both in the logic that this helps ensure that U.S. workers do not face unfair competition, and that foreign workers should not be subsidizing their employer by taking on expenses that are for the employer's benefit. Nevertheless, attempts to enforce have faced vigorous resistance from employers. For example, although the court's decision in the *Arriaga* case in 2002 affirmed that employers should reimburse H-2A workers for visa and travel expenses to the place of work during the first week of work,<sup>88</sup> employers mounted coordinated resistance, which included securing an alternative interpretation on the issue from the Department of Labor in the George W. Bush administration. Even though current Department of Labor regulations are very clear that visa and transportation costs should be covered by the employer, as Cynthia Rice of California Rural Legal Assistance described, many employers are still not complying. A 2011 report by Farmworker Justice documents one common way of avoiding the payment of transportation costs: since full travel reimbursement is guaranteed only for those employees who have completed the season, employers will sometimes force them to quit early.<sup>89</sup> These descriptions emphasize how little has changed, since a 1994 congressional investigation found that nearly 40% of North Carolina's H-2A workers left early in the season, denying them reimbursement for the journey home.<sup>90</sup> In other visa categories, where regulations do not explicitly require that employers pay for transportation costs, there is no meaningful employer practice of doing so. Advocates describe J-1 teachers and nurses, A-3 and G-5 domestic workers, and B-1 trainees, all taking on debt in order to pay their own way to the job.
- *Deductions.* Deductions from workers' paychecks are another way of passing on to workers different categories of expenses that are the legal responsibility of employers. Silas Shawver of the Centro de los Derechos del Migrante gave some of the most common examples, which, he commented, are typically described on pay slips as "miscellaneous." H-2B workers in the carnival and fair industry have reported that they are charged for all bathroom breaks – these are not treated as routine, necessary and negligible time off that should be compensated, but even worse, as a form of misconduct, since the deduction is out of proportion to the time taken off. Other advocates described H-2 workers being unlawfully forced to buy their own protective gear.
- *Failure to pay appropriate wages.* Advocates for temporary workers point out that, across the board, employers have found ways to avoid paying workers the full quantum of what they are owed for their labor. H-2 workers are often paid a piece rate – based on the amount of fruit they pick or the number of hotel rooms they clean – and employers will frequently adjust the hours they worked downward, when

88 See *Arriaga v. Florida Pacific Farms*, 305 F.3d 1228 (11th Circuit, 2002).

89 Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, 2011, p.16.

90 Oxfam America, *Like Machines in the Fields: Workers without rights in American agriculture*, 2004, p.49.

preparing paychecks, to make it appear that the workers were paid the proper hourly rate.<sup>91</sup> In other industries, workers may be forced to accept a day rate: in one case, Indonesian H-2B oil rig workers were forced to work up to 90 hours a week, at a fixed rate of \$100 per day.<sup>92</sup> In each case, workers were well aware that their rights were being violated – but the threat in each case was explicitly the same: If you don't like it, we'll send you back.

### **Advocate Recommendations:**

A number of U.S. advocates insisted that the regulations of all temporary work visas must reflect the principle that expenses incurred for the employer's benefit should be borne by the employer.

Among sending country advocates, a different category of economic exploitation, and a different set of economic vulnerabilities, were typically at the fore. Several emphasized that most temporary workers in the U.S. will return to their home countries with no expectation of any form of retirement security, such as a pension. Even the temporary workers who pay social security contributions – H-2B, H-1B, L-1, R-1 and others – will never be able to collect the benefits. "Exploitation by the U.S. government is not discussed," complained an advocate from India who had also worked in the U.S. on an H-1B visa. "The U.S. could do so many things differently. They could enter into agreements with sending countries so that, for a worker from India, for example, the money would be credited to his or her Provident Fund account." Advocates in Mexico pointed to the Canadian model as an example of such an international agreement on social security. Canadian pension benefits are successfully routed through the Mexican government, and paid to returned workers on a monthly basis, in their home countries.

### **The J-1 Summer Work Travel Program**

In the summer of 2011, nearly 400 foreign students arrived at a Hershey's chocolate company distribution plant in Palmyra, Pennsylvania from countries as diverse as China, Ghana, Ukraine, and Turkey.<sup>93</sup> The students were participants in the U.S. Summer Work Travel program, the largest J-1 visa category with 132,342 participants in 2010 alone.<sup>94</sup> While Summer Work Travel students typically work at resorts, hotels, restaurants, and amusement parks, employers have also included seafood processing plants, farms, factories, and warehouses, such as the Hershey's distribution plant.

The State Department's official website on J-1 visas maintains that "[t]he Summer Work Travel program provides foreign students with an opportunity to live and work in the United States during their summer vacation from college or university to experience and to be exposed to the people and way of life in the United States."<sup>95</sup> In lieu of a cultural program or the chance the travel, however, the students at the Hershey's plant found themselves laboring under isolated and exploitative conditions, lifting boxes weighing 60 pounds every few seconds, often through the night. After being forced to share one-bedroom apartments with four to eight other participants,<sup>96</sup> the students earned approximately \$1 to \$3.50 per hour due to deductions for rent and other exorbitant fees.<sup>97</sup>

With the support of the National Guestworkers Alliance, the student workers' protests garnered widespread media coverage and national attention in August 2011. Nevertheless, the events at the Hershey's plant are not an anomaly within the Summer Work Travel program. While the Summer Work Travel program has had a long history of abuse and exploitation, many cases fail to attract public attention because students are silenced by threats of termination and deportation by sponsors and employers. For instance, the Equal Justice Center recently worked on a case involving six Russian students who were fired from their positions as lifeguards at condominium swimming pools after they complained about illegal wage deductions, including excessive housing fees.<sup>98</sup>

In 2010, the Associated Press interviewed nearly 70 Summer Work Travel participants in ten different states, most of whom expressed frustration with the program. The investigative team uncovered cases of students who took shifts sleeping in crowded apartments and turned to homeless shelters or churches for free meals, with the Ocean City Baptist Church in Maryland serving more than 1,700 J-1 students at the time of the investigation. One student was left without work upon arriving in South Carolina and had to resort to begging in Myrtle Beach until she could return to Romania. Another student from Ukraine testified before Congress in 2007 that – instead of waitressing and taking English

91 Interview with Silas Shawver.

92 Interview with Christopher Willett.

93 Colleen P. Breslin, Stephanie Luce, Beth Lyon & Sarah Paoletti, "Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania," 2011, available at <http://www.guestworkeralliance.org/wp-content/uploads/2011/09/Human-Rights-Delegation-Report-on-Hersheys-J-1-Workers.pdf>, p.1.

94 U.S. State Department, *Facts and Figures*, J-1 Visa Exchange Visitor Program, available at <http://j1visa.state.gov/basics/facts-and-figures>; Daniel Costa, *Guestworker Diplomacy: J Visas Receive Minimal Oversight Despite Significant Implications for the U.S. Labor Market*.

95 U.S. State Department, *Summer Work Travel Program*, J-1 Visa Exchange Visitor Program, <http://j1visa.state.gov/programs/summer-work-travel>.

96 Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania, p.1, 14.

97 Jennifer Gordon, "America's Sweatshop Diplomacy," *New York Times*, 24 August 2011.

98 Interview with Christopher Willett, Equal Justice Center.

classes in Virginia as she had been promised – she was forced to work in a strip club in Detroit, Michigan after traffickers told her at Dulles International Airport that her placement had fallen through.<sup>99</sup>

Other cases may not rise to the level of human trafficking or flagrant violations of labor law, but nonetheless implicate sponsors and employers who manipulate the Summer Work Travel program and place foreign students in vulnerable situations. In 2010, the Tompkins County Workers Center came across seven J-1 students who were paying \$200 each per week to stay in a motel in Cortland, New York, with multiple students to a room, as well as additional above-market costs to travel to the Holiday Inn in Ithaca where the students were put to work as housekeepers. The Center also discovered 50 other students from China and Eastern European countries at the same motel, working for the Marietta Corporation, a company that packages shampoo and other toiletries for hotels, who were forced to pay similarly excessive costs for rent and transportation. The Department of Labor concluded that neither employer violated the law, even though the students could barely earn enough money to cover the excessive costs and fees of the program.<sup>100</sup>

Many sponsors and employers take advantage of the work component of the Summer Work Travel program, to the complete exclusion of any cultural activities. For example, a recruiter for Leader Creek Fishing, a fish processing company in Nakanak, Alaska, bluntly told prospective student workers that they must be able to work “up to 16 hours a day” and that “there’s really nothing to do in Nakanak, other than work.”<sup>101</sup> On March 16, 2012, a group of fish processing companies in Alaska sent a letter to Secretary of State Hillary Clinton, opposing a prohibition on the placement of Summer Work Travel students in seafood processing plants. The industry emphasized the central importance of J-1 students in filling labor shortages.<sup>102</sup>

The push for a thorough review of the Summer Work Travel program was largely the result of orders from high-level government officials, such as the Secretary of State, following the events at the Hershey’s distribution plant in 2011. Nonetheless, these actions have not translated to consistent reform of other J-1 visa categories that are also commonly abused by sponsors, recruiters, and employers – such as the interns and trainees program – due to the lack of a similar political impetus for change in those areas.

## Employer control

The high degree of employer control over temporary workers’ lives is both a problem in itself, and a major factor enabling other forms of exploitation – from the extreme impoverishment of workers described above, to human trafficking. This section outlines the types of control that are actually permitted under current visa regulations, rather than those that are illegal, such as retaining a worker’s passport, or confinement under lock and key.

Employer control is present across the range of temporary worker visas. The most significant factor has already been noted: workers’ immigration status is tied to the employer. This means that they cannot easily leave conditions of exploitation. It also means that workers are afraid to access even the limited avenues of redress provided by the government, under applicable regulations. Workers’ fear of being fired and deported runs so deep that an employer may never even have to take the illegal step of articulating a threat to do so.

**“Workers’ fear of being fired and deported runs so deep that an employer may never even have to take the illegal step of articulating a threat to do so.”**

Employers are not penalized for asking for more workers than they may actually require, and frequently do so, especially in the context of the H-2 visas, the B-1 “in lieu of” H-3 visa and the J-1 “summer work travel” visa. They are then free to bring them in (often at workers’ own expense) and keep them waiting until they are needed, paying them only for the hours they actually work. With few exceptions – one being the H-2A visa, where workers must be compensated for at least 30 hours of work per week – employers are not violating any regulation by doing so. This tactic, sometimes described as “over-asking,” makes workers extremely easy

<sup>99</sup> Holbrook Mohr, Mike Baker and Mitch Weiss, “US Fails to Tackle Student Visa Abuses,” *Associated Press*, 6 December 2010, available at <http://www.newsday.com/business/ap-impact-us-fails-to-tackle-student-visa-abuses-1.2520504>.

<sup>100</sup> Interview with Pete Meyers. See also Pete Blanchard, “An Exchange Program: How a Local Corporation Uses Foreign Students as a Workforce,” *Buzzsaw Magazine*, 8 December 2010.

<sup>101</sup> Daniel Costa, “Feds Correct to Ban Alaska Fish Processing Jobs from J-1 Visa Program,” *Alaska Dispatch*, 20 March 2012.

<http://www.alaskadispatch.com/article/feds-correct-ban-alaska-fish-processing-jobs-j-1-visa-program>; Jerry Kammer, “Cheap Labor as Cultural Exchange.”

<sup>102</sup> Daniel Costa, “Feds Correct to Ban Alaska Fish Processing Jobs from J-1 Visa Program;” See also “Southwest Alaska Communities Want J-1 Visa Program Kept Alive,” *Fisherman’s News Online*, 21 March 2012, available at <http://fnonlinenews.blogspot.com/2012/03/southwest-alaska-communities-want-j-1.html>.

to dispose of and to replace, with minimal inconvenience to the employer. The threat of denying work is also a potent means of amplifying control over workers, many of whom may have entered the U.S. already in debt to recruiters.

The troubling isolation of temporary workers is another factor in their vulnerability, and is typically a mix of the psychological and the geographic. H-2A farmworkers, J-1 student-workers and *au pairs*, and A-3/ G-5 domestic workers usually live in housing owned or at least controlled by the employer; in addition, farmworkers are usually in remote rural locations, with little access to a support network.

Employers have also been able to exercise ongoing control over skilled temporary foreign workers by inserting enormous penalties for breach into employment contracts. Patricia Pittman, who teaches in the Department of Health Policy at the George Washington University School of Public Health and Health Services, and directs the Alliance for Ethical International Recruitment Practices, described foreign nurses whose contracts specified penalties of up to \$45,000 for early termination by the worker. In many cases, the nurses were only presented with the contract on arrival in the U.S., when they had few options except to sign; others did not even receive copies of the contract that they were bound by.

### *Advocate Recommendations*

A number of U.S. advocates argue that a temporary foreign workers' visa should be portable, so that it is feasible to change employers in the event of mistreatment. "As a condition, it is necessary, but not sufficient," said a professor, who asked not to be identified because of previous ties to the U.S. government. "There are many other factors, massive power imbalances, keeping these workers down."

Advocates from workers' home countries largely agreed on the issue of visa portability, but more than one expressed discomfort with the suggestion that foreign workers were under a dramatically higher degree of employer control than low-wage American workers. Given that "power is everywhere, and in all interactions between all employers and all workers," as described by Apoorva Kaiwar, an advocate from India, "we have to be more specific to capture what is different about migrant workers." Home country advocates' discomfort often stems from the concern that broad condemnations of employer control and social isolation in temporary foreign labor programs are often used to support the argument that these programs are inherently exploitative, and should be ended entirely. For these reasons, they suggest that U.S. advocates begin with a highly specific account of mechanisms of employer control, with narrowly-drawn remedies.

## Human Trafficking

In recent years, the U.S. government has begun to scrutinize its own record on trafficking, documenting and analyzing the types of force and fraud that are used to create situations of modern-day slavery, within this country's borders. The government's attention has focused on the disproportionately high incidence of trafficking among populations of temporary foreign workers.

As the State Department's 2011 Trafficking in Persons report acknowledges, in its section on the U.S., the trafficking of temporary foreign workers results, at least in part, from inherent regulatory weaknesses in visa frameworks. The report notes vulnerability to trafficking across categories, "in visa programs for legally documented students and temporary workers who typically fill labor needs in the hospitality, landscaping, construction, food service, and agricultural industries. There are allegations of domestic workers, foreign nationals on A-3 and G-5 visas, subjected to forced labor by foreign diplomatic or consular personnel posted to the United States."<sup>103</sup> Indeed, visa regulations in each of these cases create a high degree of employer control, and provide for little or no oversight of the types of intermediaries (such as recruiters or sub-contractors) who are frequently implicated in cases of human trafficking.

<sup>103</sup> U.S. State Department, 2011 Trafficking in Persons Report, p.372.

<sup>104</sup> *Matter of Vinlaun [sic] v Doyle* (60 AD 3d 237 (13 January 2009; Eng. Opinion; Santucci, Angiolillo, Chambers, Concurring)).



## The “Sentosa 27”: Nurses Trafficked into the U.S.

In April 2006, 26 nurses and a physical therapist from the Philippines – who became popularly known in the Philippines and in the Filipino-American community as the “Sentosa 27” – tried to resign from their jobs at nursing facilities in New York State. They did this claiming “virtual enslavement,” according to Neri Colmenares, a member of Congress from the Philippines who launched an investigation into the trafficking of Filipino workers to the U.S.

The nurses were promised positions in nursing facilities, but found on their arrival in the U.S. that they had actually become “agency nurses” for SentosaCare LLC, which sent them to fill temporary staffing shortages at institutions all over New York State. In one case, a nurse was sent to a nursing facility where her daily commute was two and a half hours in each direction. The wages were much lower than had been promised, and the conditions harsher – but the sponsoring agency for the nurses, SentosaCare, had put in place an almost insurmountable barrier to any attempts to leave the job. It had inserted a penalty provision of \$25,000 (described as “liquidated damages”) into each worker’s contract, which would be collected if employment was terminated by the worker.

It should be noted here that the nurses were not on regular “temporary worker” visas, but had been brought in on EB-3 status, which granted them permanent residence in the U.S. Nevertheless, the case is an important example, in part because it demonstrates that many of the factors that make temporary foreign workers vulnerable to exploitation – substantial recruiter fees, debt bondage, third-party employment through “body shops” or other intermediaries – are present for other migrant workers as well. These are further indicators that visa portability across employers, or a visa status that allows a “pathway to citizenship,”

may reduce vulnerability but cannot erase it.

When the “Sentosa 27” submitted letters of resignation, SentosaCare retaliated, filing a \$50 million civil suit and a criminal complaint accusing the nurses of having endangered patients by their “abandonment.” A civil suit for tortious interference with employment contracts was filed against Felix Vinluan, the lawyer who sought to assist them, and he was indicted for criminal solicitation, for having advised the nurses that they had the right to resign. Other nurses who had been in the process of leaving were terrified by this, and actually bought out their contracts, taking loans to pay the \$25,000 in “liquidated damages.”

On 13 January 2009, the Appellate Division finally halted the prosecutions, concluding that they constituted “an impermissible infringement upon the Thirteenth Amendment rights of the nurses to be free from involuntary servitude, and the First Amendment rights of their attorney.”<sup>106</sup>

Colmenares commented that the exploitation of the Sentosa 27 demonstrated that a secure visa status was no protection from trafficking. He blamed lack of attention to the economic disparities that make migrants easy to exploit, and also pointed to the problematic role of staffing agencies. “The Philippines government, through the Overseas Employment Agency, and the U.S. government should allow only direct-hire arrangements,” he said. He also demanded greater oversight of migrants’ contracts in the Philippines as well as in the U.S. “They should never have been exposed to three years of mental torture while waiting for this case to be resolved. How can a contract with a \$25,000 penalty be considered enforceable?”

## Occupational health and safety

There are relatively few U.S. advocates who address issues of occupational health and safety for temporary foreign workers. This is not because the concerns are minor – they are actually among the most significant, certainly in the H-2 context. But securing help is extremely challenging, according to advocates interviewed.

“One of our cases involved an H-2B landscaping worker who suffered a debilitating knee injury on the job,” recounted Cathleen Caron of the Global Workers Justice Alliance. “After various delays, the company eventually complied with the law and provided him medical care. But when he returned to Guatemala, after his visa expired, the insurance company refused him coverage. We went through three doctors, and none of them was equipped to follow the guidelines of the American Medical Association on how to do an evaluation for workers’ compensation. The lesson is, if you don’t settle your case before you leave the U.S., you’re in trouble.”

“Workers’ compensation cases are a huge part of our work,” said Rachel Micah-Jones of the Centro de los Derechos del Migrante in an interview. The week that the interview took place, the organization was pursuing five requests for humanitarian parole visits to the U.S. in connection with workers’ compensation issues: “One is the mother of a client in a coma in the U.S., one is a workplace death, where the widow is coming to testify, three are workers who were injured.”

The rate of injuries among H-2 workers is shockingly high, according to Micah-Jones. “100% of the H-2B women workers in the crab picking industry we interviewed had been cut on the job. Among H-2B traveling fair workers, none of them have had training on how to put together rides and operate them. We’ve seen quite a few injuries and deaths of workers in that industry.”

Bridgette Carr, whose Human Trafficking Clinic at the University of Michigan Law School has handled several cases related to injured traveling fair workers, emphasized: “There are many factors at work here. The U.S. government, in allowing risky work requiring experience and training to be categorized as ‘unskilled,’ must be considered complicit.”

Occupational injuries typically spawn a host of further abuses, Micah-Jones explained. “There is usually some form of employer retaliation. Those who come forward are often those who can no longer work, and have nothing to lose. But even those who have recovered won’t be rehired, since they’re now considered disabled. We’ve even seen cases where employers will promise to pay their medical expenses in Mexico and then get them a new visa, but it’s just a scam to get the worker out.”

### *Advocate Recommendations*

U.S. and home country advocates agree that the workers’ compensation model in the U.S. is deeply flawed, from the perspective of temporary foreign workers. “Only the H-2A regulations require that all workers be covered, across the U.S.,” said Cathleen Caron. “Otherwise, workers’ compensation varies from state to state. So H-2Bs, for example, are only covered if they work in an industry that’s covered under that state’s rules.”

For many advocates, this serves as a further reminder of the importance of bilateral agreements between host and home country governments. The Jamaican H-2A program, the sole remaining vestige of the US’s bilaterally-negotiated programs, makes provisions for a wide range of occupational health and safety eventualities, including direct payment to Jamaican doctors who treat returned H-2 workers. Canada, as host country for temporary foreign workers, ensures workers’ compensation coverage for all temporary foreign workers, with a package including medical care and lost wages, accessible in Canada or on return to workers’ home country.

## When workers try to complain

It is in the interest of everyone – except abusive employers – to have a system that encourages workers to come forward to report violations of U.S. law. To borrow an argument made by Jennifer Gordon, long-term solidarity between temporary workers and U.S. workers – and the preservation of U.S. workers own interests – would require empowering temporary workers to be able to walk away from jobs violating basic workplace laws, and reporting employer violations.<sup>105</sup>

**...on paper and in practice, the current system creates obstacles and disincentives, at every level of the process: it offers inadequate avenues for redress, and fails to provide sufficient protections to workers who experience retaliation if they do try to alert authorities to abuse.**

However, on paper and in practice, the current system creates obstacles and disincentives, at every level of the process: it offers inadequate avenues for redress, and fails to provide sufficient protections to workers who experience retaliation if they do try to alert authorities to abuse.

<sup>105</sup> Jennifer Gordon, “Transnational Labor Citizenship,” *Southern California Law Review*, Vol.80 (2007) p.567.

## Before Workers Leave Their Home Countries

Consular officials all acknowledge that the visa issuance system – the only tool available to them – is a “blunt instrument” for dealing with pre-departure problems, such as illegal recruiter fees, or unconscionable terms and conditions of employment. Given the limits of U.S. jurisdiction, the officials cannot offer nuanced remedies. Their only option is to approve or deny the visa – they do not even have authority to demand that the recruiter return an illegal fee, for example. Officials are compelled to deny a visa in such instances, not only because fees are prohibited, but also because of fears that workers in an already abusive situation will be more vulnerable to trafficking. In any case, since workers are aware that acknowledging recruiter abuses will lead to a denial, they have no incentive to come forward. Moreover, as advocates have noted, refusing a visa to a worker who has already gone into debt for a job opportunity is likely to deepen an existing problem, rather than resolve it. Or, as one consular official put it – “We have only two tools – a hammer and a saw. And neither of those is ideal for surgery.”

## While in the U.S.

With the exception of H-2A agricultural workers and the subset of H-2B workers in forestry, temporary foreign workers are denied access to federally-funded legal services – free legal aid for low-income people in the U.S. This makes access to legal help very difficult, since private attorneys tend to find temporary foreign workers unattractive clients – the amounts in dispute are frequently too low to warrant the investment of time. Furthermore, the strong likelihood that the worker will leave the U.S. before the case is over complicates matters further, reducing the possibility of a successful outcome.

To the extent that there are protections for workers in the visa regulations, many temporary visas do not have a “private right of action” that would enable the visa holder to enforce those provisions. In the absence of this right, they are dependent on government agencies. If the agencies do not take action to enforce the regulations, workers have no independent authority to do so.

A private right of action would allow the workers to drive the litigation. Sometimes interventions by the Department of Labor have had severe unintended consequences, which in turn serve to further disincentivize complaints. As Jim Knoepp of the Southern Poverty Law Center commented, penalties imposed on employers by the Department of Labor under the H-1B program function in ways that can punish workers. He gave the example of 1,044 H-1B teachers employed in Prince George’s County, Maryland, who had paid fees of \$10,000 each to secure their jobs. In April 2011, the Department of Labor ruled that the county school system owed the teachers \$4.2 million, imposed an additional \$1.7 million in penalties and debarred it from participation in the H-1B program for a period of two years. As a consequence, the county was unable to renew any H-1B visas, and the workers lost their jobs.

In the case of domestic workers on A-3 and G-5 visas, which are supervised in their entirety by the State Department, the agency has declared itself “not in a position to adjudicate claims of rights violations, to determine levels of compensation, to run compensation programs, or to adjudicate civil claims or mediate allegations between diplomatic personnel and their employees.”<sup>106</sup> The State Department enforcement and monitoring role has typically been restricted to keeping a copy of the contracts that domestic workers are asked to show when requesting visas, and the agency rejected a Congressional proposal that employers deposit a bond to deal with compensation claims.<sup>107</sup>

The State Department has been even more active in resisting attempts to address the issue of diplomatic immunity, which insulates many diplomat employers of A-3 domestic workers from civil and criminal suits, including those related to worker abuse. Jayesh Rathod of the Washington College of Law described the agency’s reluctance to engage in “creative legal conversations” to identify avenues toward accountability for diplomats. Advocates had proposed, for example, conditioning diplomats’ access to A-3 and G-5 visas for their domestic workers on a waiver of diplomatic immunity in the narrow context of the employment relationship. However, the State Department rejected all such proposals.

<sup>106</sup> Janie A. Chuang, “Achieving Accountability for Migrant Domestic Worker Abuse,” *North Carolina Law Review*, Vol. 88 (2010) p.1652.

<sup>107</sup> United States Code, 8 U.S.C. §§ 1375c(d)(1) and 1375c(d)(2).

### **After they return.**

Temporary workers who return to their home countries at the conclusion of their work face many legal and practical obstacles to bringing (or pursuing) claims in the U.S. While advocates have sought to address these gaps through cross-border collaborations to promote “portable justice,”<sup>108</sup> the larger problems remain in place. The very requirement that workers leave the U.S. whenever their jobs end is a significant barrier. A very few qualify for “T” or “U” visas, designed for foreign citizens who are victims of trafficking and other forms of exploitation. These visas enable such individuals to remain in the U.S., on the condition that they cooperate in criminal investigations or prosecutions of those involved in the abuse. For all others, there is no option but to leave. Once they are back in their home countries, the claims are hard to pursue: travel is likely to be expensive, and visas either difficult or impossible to secure. Moreover, there are no guarantees that courts will allow workers to submit their testimony via telephone or video.

Retaliatory firing of workers who complain is an issue in itself, of course, in that it serves as a real disincentive to worker complaints – especially when the anecdotal evidence is that employers can terminate workers with relative impunity. In addition, it is a practical barrier to complaints, since fired workers are quickly sent back to their home countries. Christopher Willett of the Equal Justice Center described a group of landscaping workers who had been fired and immediately given bus tickets back to Mexico when they complained to the employer about working conditions. “It’s only by chance that they got in touch with us,” he noted. There are no routine efforts by the Department of Labor to check whether early departures of temporary workers may have resulted from employer retaliation.

### **Advocate Recommendations**

Some U.S. advocates, and a number of home country advocates, cautioned against locating the issue of complaints and avenues of redress in too narrow a context. As Jayesh Rathod of the Washington College of Law pointed out, workers face a real risk of being “blacklisted” from future employment in the U.S. if they complain about working conditions, as documented later in this report. Thus, the “access to justice” narrative must be understood as being in deep tension with the “access to stable employment” that workers also desperately need.

U.S. and home country advocates generally agreed that it is necessary to assert a broad demand for U.S. accountability, for its failure to ensure compliance with its own laws and policies regarding the protection of temporary foreign workers, and its failure to make adequate provisions for access to justice in the U.S. At the same time, some home country advocates suggested equal attention to laws in workers’ home countries. “Access to justice should actually be about binational justice,” proposed Alejandra Ancheita of ProDESC in Mexico. “There are provisions in Mexican labor law about the rights of workers traveling to the other countries – we should also be thinking together about better enforcement in Mexico.”

Aroldo Palacios, a lawyer in Guatemala who is part of the Global Workers Defender Network, suggested that U.S. consulates should have the responsibility to ensure that employers have complied with domestic laws, prior to granting visas. He noted that there are many protective provisions in Guatemalan law regarding migrant workers’ rights: “Foreign companies can’t sign contracts with Guatemalan workers without the permission of the Ministry of Labor. Foreign employers are required to make a deposit in a bank account as a bond, before a worker departs. Why doesn’t the U.S. Consulate make sure that these steps have been taken?”

Other home country advocates noted that the U.S. justifies broad failures to act in defense of temporary foreign workers by pointing to institutions in workers’ home countries which ostensibly fulfill that purpose. “But the U.S. won’t partner with our government; it allows its employers to side-step our laws, and so it hollows out our institutions,” complained one Filipino government official. “Whatever else we demand, we have to demand that they be accountable throughout the process, from recruitment to return.”

The central message that emerges from interviews with U.S. advocates, and home country advocates is that the problems of abuse of foreign workers are closely linked to the particular weaknesses in U.S. government regulation and oversight identified earlier in this report. The U.S. government has the ability to address these

<sup>108</sup> See Cathleen Caron, “Portable Justice, Global Workers and the United States,” *Clearinghouse Review, Journal of Poverty Law and Policy*, January–February 2007, pp. 549-57.

## Blacklisting

The fear of retaliatory termination that undergirds all of the other barriers documented above, is accompanied by the fear of being “blacklisted” – being denied any further opportunity to work in the U.S., by the recruiter or by the employer. Their joint force makes workers extremely reluctant to use even the narrow avenues of complaint that exist.

“An employer can blacklist with impunity,” stated Silas Shawver of the Centro de los Derechos del Migrante. “All they have to say to the recruiter is, ‘I don’t want that worker again,’ and it’s done.” The majority of workers who report blacklisting to the organization have not been involved in concerted or sustained action, or union organizing – often, the employer may be reacting to a one-time, individual act of protest, such as worker raising a concern about workplace safety, speaking up in support of another worker who was fired, or questioning wage deductions on a paycheck.

There have been numerous efforts to fight back against blacklisting, addressing the lack of safeguards and remedies in U.S. law through private contract, or settlement agreements following litigation:

- The Farm Labor Organizing Committee’s collective bargaining agreement with the North Carolina Growers’ Association, covering thousands of H-2A workers, has a specific provision that creates a grievance mechanism, and protections against both retaliatory termination and blacklisting. In 2010 alone, the Farm Labor Organizing Committee processed more than 700 complaints, many relating to wages and workplace safety.<sup>109</sup>
- Rebecca Miller of Georgia Legal Services emphasized the importance of being proactive, in litigation contexts, with respect to blacklisting. “When workers come and talk to us about problems at a farm, we ask them right away, ‘Is this a place you want to return to?’ We counsel them to cross their ‘T’s and dot their ‘I’s in the re-application, so that the facts are in place to identify any discrimination or blacklisting in a failure to re-hire.” She acknowledged, however, how difficult retaliation issues can be. “In 2005 we filed suit on behalf of H-2A workers regarding the employer’s failure to reimburse them for their travel, and underpayment of wages – and as part of the settlement, they promised that workers would be able to return. But each year it was a struggle, and finally the farm simply withdrew from the H-2A program – it just shows how determined employers can be to retaliate.”

flaws, and close the gaps currently exploited by recruiters and employers. Its failure to act rankles U.S. and foreign advocates. “The U.S. exercises power over us when it doesn’t regulate what’s happening in its own country,” said an Indian trade unionist. “This story is not about evil employers, because it is in human nature to see an opportunity to make money off someone else, and want to take it. The purpose of regulation is to keep us from temptation.”

There are very specific measures that should be taken. Some short-term measures would include a role for Department of Labor oversight for visas where there currently is none, and clear, secure avenues for workers challenge abuse with reduced fear of retaliation. In the longer term, the U.S. should explore ways to cooperate with workers’ home country governments to limit abuses by recruiters, and to ensure that critically-needed social protections for returned workers – such as retirement benefits and workers’ compensation – are accessible.

The visas could also be re-structured in ways that place limits on employer control. De-linking the visa status from the employment relationship would be an important step. While this would be a major change, many have proposed that the visa could be re-designed to be sector- and region-specific instead, with Department of Labor supervision of any change in employment.

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According to Alejandra Gordillo, head of the Guatemalan agency coordinating governmental efforts in support of their migrants, “an overarching aspect of the guestworker experience is living with fear.” Regulatory fixes cannot be expected to resolve everything. But they would provide a solid foundation for the social and economic transformations necessary to address the deeper imbalances of power.

<sup>109</sup> Farm Labor Organizing Committee and Oxfam America, *A State of Fear: Human Rights Abuses in North Carolina’s Tobacco Industry*, 2011, p.42.

# Perspectives from Workers' Home Countries

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This report is concerned with analyzing the temporary work visa system from the point of view of U.S. advocates and the lens of U.S. policy. But efforts to frame a more effective and responsive policy in the U.S. must draw on the realities in workers' home countries, including the perspectives of advocates and government officials.

## Foreign governments unable to protect their own citizens

The current fragmented, opaque, and highly privatized approach to temporary foreign labor in the U.S. promotes a damaging dynamic among sending country governments that contributes to the dysfunction and abuse documented previously in this report. It forces workers' home countries to compete with each other for the attention of U.S. employers in a "race to the bottom," each trying to offer them as cheap and under-regulated an environment for recruitment as possible.

At the same time, home country governments are profoundly disempowered vis a vis the government of the U.S. The unilateral structure of the temporary foreign worker system gives them no standing to discuss abuses of their citizens with the U.S. government. Since the U.S. government engages in virtually no oversight of, or restraints on, U.S. employers in their sourcing of workers, there is further disincentive for governments to speak up in defense of their citizens. If the home country government does complain, employers are free to shift from one country to another virtually overnight, abandoning whole communities that have come to rely on the jobs.

As a result, workers' home country governments describe having to cater to employer caprice. They even find themselves having to engage seriously with racist stereotypes, for example, arguing the relative desirability of a Thai worker compared to a Mexican worker. Such stereotypes could be challenged through litigation, were these hiring choices taking place inside the U.S.

Most of the U.S. commentators interviewed expressed sympathy for the dilemma confronting home country governments. The sympathy emerged out of the recognition that these countries are trapped in a larger dynamic that is hard to control. As U.S. advocates note, the dynamic plays out not only in negotiations between U.S. employers and home country governments, but even in highly localized ways at individual work sites. "In Washington State, there will be farms with 700 Mexicans and 400 Jamaicans – the employer will pit them against each other," described Erik Nicholson of the United Farmworkers. "It is an implicit or explicit threat to the government, not just to the workers. So we're not surprised when sending countries say, 'we'd love to stand up for our workers, but then another country will just step in.'"

## Beyond a unilateral and privatized approach: empowering home countries

A survey of temporary visa schemes around the world reveals a spectrum of degrees and forms of government involvement, both among workers' home countries as well as countries hosting foreign workers. The U.S. is at one extreme, treating the employment relationship between U.S. employers and foreign workers as a private arrangement, and keeping its engagement with workers' home country governments to an absolute minimum. Other "host countries" are much more involved in regulating the employment relationships, and in engaging with workers' home countries, often through negotiated bilateral agreements that cover issues such as worker protection and routine sharing of information. While the U.S. approach largely eliminates a role for home countries, other approaches produce meaningful collaborations.

**The U.S. is at one extreme, treating the employment relationship between U.S. employers and foreign workers as a private arrangement, and keeping its engagement with workers' home country governments to an absolute minimum.**

Many of the countries sending workers to the U.S. maintain and pursue negotiated agreements with other "host countries." Thus, when governments and advocates in workers' home countries comment on the

### The U.S. and Jamaica: the pitfalls and potential of bilateral arrangements

Historically, the U.S. negotiated bilateral agreements on temporary labor migration with workers' home countries. The U.S.-Jamaica agricultural program is the last relic of this history.

Under the U.S.-Jamaica H-2A program, the Jamaican Ministry of Labour undertakes multiple roles related to recruitment, hiring and worker welfare schemes. The Ministry is even a party to the employment contract between workers and U.S. employers.

Andrea Miller-Stennett, Director of Overseas Employment at the Jamaican Ministry of Labour, outlined the process: "We arrange for health checks and criminal background checks for all applicants, and then put approved workers into a pool so that they can be sent on demand. Employers specify how many workers they want and for what purpose, and then the government of Jamaica supervises the selection process, puts them through trainings, and arranges for travel. The workers don't even have to go to the consulate for a visa." Until recently, she noted, the Jamaican government also provided social welfare schemes – health insurance, a compulsory savings scheme, and welfare officers based in the U.S. – funding them through small deductions from workers' paychecks. However, the U.S. Department of Labor's H-2A regulations bar recruiter fees of all forms, and the Jamaican government deductions have been interpreted as prohibited fees.

There is of course much that remains unsaid in this description, and questions have been raised by U.S. advocates about whether

the government's role – in managing the program, or the welfare schemes – ultimately serves workers' interests. Greg Schell of Florida Legal Services mentions instances where the government collaborated with employers to blacklist "troublemakers" – they were put on a "U" list (for Unavailable) and screened out. "The employers couldn't be accused of discriminating, but that's because the Jamaican government was doing it for them." He also questioned the value of the Ministry of Labour's training program, noting that it included no discussion of workers' rights – "not even minimum wage levels." The content of the trainings is oriented towards avoiding conflict between employers and workers, and advises workers to "fit in and keep your head down," according to Schell.

Nevertheless, Schell concedes that Jamaican H-2As tend to be much better off than those from other countries. "The government charges next to nothing, in comparison with private recruiters," he noted, "and with the liaison program, they had a way to send back their savings without having to pay hefty fees to Western Union." Unlike all other workers in the U.S. on temporary visas – including, for that matter, Jamaican H-2B workers – H-2A workers from Jamaica are also able to rely on a relatively seamless workers' compensation scheme, and are entitled to Social Security benefits on retirement. As Schell describes it, in the final analysis, the involvement of home country governments in the temporary foreign labor programs is "probably the better of bad choices."

strengths and weaknesses of the U.S. approach, it should be understood that they are explicitly or implicitly considering the relationship with the U.S. against the backdrop of these other relationships.

Most U.S. advocates support closer cooperation with workers' home countries, though some remain ambivalent about bilateral agreements. They have few illusions about the current capacity and political will of workers' home country governments. There is deep frustration among U.S. advocates and scholars that mechanisms implemented by these governments – apparently for the protection of workers' rights – often function as means to suppress complaints and protests. According to Cindy Hahamovitch, a professor at William and Mary who has written extensively on Jamaican temporary workers in the U.S., this is the role played by Jamaican Liaison Officers. "The Liaison Officers will help you get home if your father has died, but they won't advocate for you with your boss," she said. "Their job is tell workers how not to get in trouble, and if they try to go beyond that, the employer will tell them, 'Well, in that case we can always get Mexicans or Haitians' – so they quickly learn. So if a worker complains about unpaid wages, the Liaison Officer's response is, 'Be quiet, or you'll be sent home.'" Hahamovitch's position typifies advocate opinions of similar officials in Mexican, Indian and Filipino consulates.

In some cases, home country governments have more elaborate schemes to protect migrant workers but, as Robyn Rodriguez, a professor at Rutgers University, has pointed out, a larger number of institutions is no guarantee of effective implementation. The Philippines – with its thick web of training, welfare and employment promotion agencies for migrant workers – is frequently held up as a model for home country practice. However, as Rodriguez has argued, these agencies are no more successful since their primary purpose is to promote the country's labor export model, and they are ultimately willing to sacrifice workers' well being to that end.<sup>110</sup>

Advocates in workers' home countries – and even governments – did not disagree with these analyses. "Officials of the Philippines will always encourage workers to go back, rather than to stay and demand their rights," asserted Rina Anastacio of Migrante International in the Philippines. However, many advocates also noted that home country governments' hands are tied in important respects. Officials within the labor departments of a few countries pointed, tentatively, to ways in which U.S. government action or inaction was making their job more difficult – but most were extremely cautious about saying anything that could be construed as critical.

- Several officials noted that the U.S. government should consider placing limitations on its employers – the ones propelling the "race to the bottom" – and require them to enter into long-term sourcing relationships with workers' home countries, or else involve itself directly in the relationships. A U.S. guarantee of long-term access to certain numbers of jobs would help reduce the power of employers, who constantly threaten to shift their sourcing to other countries.
- An official at the Guatemalan Ministry of Labor expressed a wish that the U.S. would share information on the contracts that workers sign, and the work sites where they go. "It would enable me to do my job better," he hastened to add. "We don't want to intervene in the private nature of the program and the contracts, but information on worker flows would let us fulfill the obligations of Guatemala as a state to its citizens." As noted above, Guatemalan law actually requires that migrant workers' contracts be deposited by the employer with the Ministry of Labor, along with details on the nature and location of the work, to enable consular officials to ensure their welfare.
- "The U.S. does not treat its visa system as a 'program' with a role for sending country governments," said Elisabel Enriquez, from Mesa Nacional para las Migraciones en Guatemala. "So if our Ministry of Labor wants to be involved in monitoring conditions in an ongoing way, they are treated by the U.S. as though they are interfering in another country's affairs." Julián Adem Díaz de León, of Mexico's Ministry of Foreign Affairs, pointed out that workers themselves think of the U.S. visa system as a program, developed in partnership with Mexico. "So

**“The U.S. does not treat its visa system as a ‘program’ with a role for sending country governments, ...so if our Ministry of Labor wants to be involved in monitoring conditions in an ongoing way, they are treated by the U.S. as though they are interfering in another country’s affairs.”**



they think that any recruiter's table in the plaza has the blessing of the authorities," he explained. "If there were a program in place, it would be easier for the Mexican government to support workers."

- The extremely asymmetrical relationship between home country governments and the U.S. – both employers and the government – is clear in a comment made by one foreign government official based here. "When we receive complaints from one of our workers, we usually go to a non-profit organization and ask them to take it up without mentioning us," the official said. "We don't want the employer to know, and we don't want the State Department to find out. There are some people in the U.S. Department of Labor that we trust, but otherwise we don't advocate directly."

## Cross-border Advocacy Partnerships: challenges and opportunities

U.S. advocates widely recognize the importance of shaping long-term relationships with advocates in workers' home countries, in order to develop a textured understanding for any intervention, from litigation to organizing.

At the level of rhetoric, there are clear stumbling-blocks, however. U.S. advocates often charge foreign advocates with a willingness to "trade rights for access," prioritizing continued employment in the U.S. over a workers' rights agenda. Equally frequently, foreign advocates allege that U.S. advocacy agendas boil down to protectionism (simply wishing to keep foreign workers out) and paternalism (focusing on rights in a way that substitutes U.S. advocates' judgment and morality for that of foreign workers themselves).

At a practical level, experience indicates that U.S. advocacy priorities are unlikely to be advanced through collaboration with traditional partners, such as unions, through traditional means, such as joint organizing. This is because several non-negotiable issues for U.S. unions are not a high priority for home country unions. "Over the last five years, we have done a lot of work in sending countries, a lot of engagement with policy with foreign governments, and have had a lot of conversations with foreign country advocates," said Erik Nicholson of the United Farm Workers, "and it's clear that the right to organize, or the right to change employers, is part of our agenda, not theirs. Unions in sending countries don't really think too much about the people going abroad, or else they look down on them as selling out."

With a few exceptions, home country unions agreed with this assessment. "From our perspective, Jamaican migrants in the U.S. are not there to form a union,"

### Canada-Mexico Seasonal Agricultural Workers Program

In Mexico, critiques of the U.S. government's handling of its temporary visa system inevitably involve comparisons to the Canada-Mexico Seasonal Agricultural Workers Program, which involves 18,000 workers traveling from Mexico every year. "The National Employment Service processes the visa – they don't even have to go to the Canadian consulate," described a Mexican Department of Labor official. "They are guided until they get on the airplane – and once they arrive in Canada, the Ministry of Foreign Affairs takes over. They have an actual mandate to visit farms and inquire into workers' welfare. On the other hand, up to 60,000 Mexicans travel to the U.S. every year on H-2As and we don't even have the right to know where they are."

Advocates in Mexico, Canada as well as in the U.S. have cautioned against treating the Canadian program as the "gold standard," as Ana Avendaño of the AFL-CIO puts it. She pointed to problems that include routine discrimination – not favoring young, single men, as in the U.S. context, but rather married men with children, on the assumption that they are less likely to overstay their visas.<sup>113</sup>

Nevertheless, there is general agreement that the Canadian program has crucial provisions to promote Mexican workers' welfare, in ways lacking in the U.S. visa system. "At least the Canada-Mexico program is integrated into state policy and practice on both sides, so there are better protections against recruiter abuses here, or blacklisting," commented Mariano Yarza of Catholic Relief Services in Mexico. "The Mexican government can do nothing – or worse than nothing – unless the U.S. government is willing to let it intervene in conversations related to migration policy."

The Canada-Mexico program also provides for access to the Canadian health care system, disability insurance, and a pension. "The social safety nets are very important," said Yarza. "For Mexican workers in the U.S., they aren't protected here and they aren't protected there."

explained a leader of the Bustamante Industrial Trade Union. “They are there to make as much money as possible, and then come back. Many of them are our members before they leave, and we will try to keep their jobs for them until they return. When they are in the U.S., their problems are somebody else’s problem.”

It is worth giving some nuance to the position articulated by unions in workers’ home countries. First, it is not a rejection of partnerships with U.S. unions, but rather, a call to refine a common agenda, so that joint trade union advocacy on temporary foreign labor focuses on issues that have a demonstrable short-term impact felt in both countries. Recruitment abuses, blacklisting, wage theft and occupational health and safety were commonly cited.

Second, it is not a rejection of joint union organizing of temporary migrants. But, as unions in the Philippines and Jamaica emphasized, it is important for transnational trade union solidarity around temporary work programs to begin with solidarity *among workers’ home countries*, to create bulwarks against the “race to the bottom.” Padre Mauro Verzeletti of the Pastoral de Movilidad Humana described this regional dilemma: “Our work will have to be shaped across civil society in Central America. If Guatemala tries to stand up alone, they will just look to El Salvador and Honduras for workers. So the first priority is to come to an agreement with and among organizations in these countries.”

**“If Guatemala tries to stand up alone, they will just look to El Salvador and Honduras for workers.”**

However, as emphasized by Jayesh Rathod of the Washington College of Law, U.S. advocates need partnerships with home country advocates, since effective interventions in the U.S. are dependent on a principled understanding of the larger contexts. As Rathod described, the economies of workers’ home towns, the structures of family relationships, the social positioning of recruiters, are all relevant to understanding workers’ vulnerability, and the choices they make. This has meant, then, different types of long-term partnerships. U.S. advocates may not necessarily be able to find exact counterparts, equally focused on issues of temporary migration or worker organizing, but increasingly, are engaging with home country organizations working more broadly on human rights, economic justice, national development, or rural poverty.

# Conclusion

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The problems across the U.S. temporary worker visa system run very deep. They will require immediate attention to several urgent priorities, as well as sustained policy review over time.

The long-term vision must be of a unitary visa system with uniform oversight, rather than a multiplicity of visas, regulated differently. While there are many legitimate interests represented by the numerous categories that constitute the current framework, it should be possible to address the “temporary labor” dimensions in an integrated manner, while still facilitating genuine “cultural exchange,” “foreign student enrollment,” and “travel for business and pleasure.” An important facet of such a system would be consistent public administration, rather than the delegation of essential responsibilities to private entities, such as employers and recruiters, whose own interests inevitably inhibit their ability to prioritize public policy goals.

**“The long-term vision must be of a unitary visa system with uniform oversight, rather than a multiplicity of visas, regulated differently.”**

Such a system must be based on a sophisticated understanding of “labor shortages,” recognizing and challenging the ways in which they can be artificially constructed through the erosion of wages and working conditions for U.S. workers. This is a necessity, if a temporary foreign labor program is to adequately protect U.S. and foreign workers. Under the current system, there is little effort to understand the barriers and disincentives that amount to the displacement or replacement of U.S. workers. Even under the best of circumstances, the U.S. government’s approach to investigating discrimination against U.S. workers is limited to determining whether an eligible U.S. applicant was refused work, or terminated from a job.

Meaningful public administration, which addresses the current gaps in protections for foreign workers, also requires that the U.S. return to systematic cooperation with home country governments, potentially through the negotiation of bilateral agreements. This would reduce pre-departure abuses, such as recruiter fraud, and would also help returned workers, ensuring that they have access to social security benefits accrued during their time in the U.S., or to workers’ compensation in the event of workplace accidents or illnesses.

While working toward this goal, there are a number of intermediate measures possible, requiring the U.S. to play a stronger role in regulation of the visas and to take control away from private employers and recruiters. Some commonsense steps could include posting information on available jobs directly, through individual U.S. consulates, or through partnerships with ministries of labor in workers’ home countries. Greater transparency would also promote public accountability: information on which U.S. employers are seeking foreign workers through these visas and for what types of jobs would help check misuse of these programs, for example.

If the U.S. were indeed to expand its understanding of temporary foreign worker arrangements beyond the private contract between employers and employees, it could also take the step of issuing visas that are linked, not to an individual employer, but rather to a economic sector or region experiencing a demonstrated labor shortage. Such a visa could, with appropriate Department of Labor supervision, allow for workers to change employers, thus reducing the employer control that is such a key element of worker vulnerability.

In order to situate temporary foreign labor programs within broader U.S. labor market policy, and to promote transparency and accountability to the public, it would be helpful to put in place a “permanent, independent Commission on Foreign Workers,” such as that proposed by former Secretary of Labor Ray Marshall and the

Economic Policy Institute.<sup>112</sup> As currently imagined, such a Commission would be able to collect data on labor shortages, temporary work visas, and the economic impact of temporary foreign workers in the U.S. It could then analyze this data to inform the U.S. public and policymakers about the costs and benefits of the choices available.

Such a Commission would also serve the interests of foreign workers, and inform the labor market policy choices made by foreign governments whose citizens work in the U.S. At a minimum, a more predictable system, offering accurate public information about labor market trends in the U.S., and projected needs, would help “inoculate” workers against intermediaries who make their money fraudulently training or recruiting workers for non-existent jobs.

Another important medium-term goal involves better protections for workers who face employer retaliation when they come forward with complaints about exploitation, or organize in defense of their rights. A model that has already been developed is the POWER Act, legislation first introduced in 2010. The draft bill provides for temporary immigration status and the right to work legally anywhere in the U.S. to workers who come forward to report workplace violations; the provisions would apply to temporary workers across all visa categories, as well as to unauthorized workers.

In terms of immediate measures, there are several that are highlighted here:

- The Department of Labor must be integrated into the oversight of all visa categories that enable temporary work in the U.S. It should be empowered to assess the potential displacement of U.S. workers, as well as to establish and enforce appropriate wages and working conditions for foreign workers.
- The U.S. must release consolidated and consistent data about the use of these visas, including the names of employers currently recruiting foreign workers. Given pressing concerns about discrimination in recruitment, statistics on workers, particularly those related to age and gender, should also be disclosed. Employers should be required to disclose all arrangements with recruiters and labor contractors, and to accept full responsibility for fraud, discrimination, or economic exploitation by intermediaries.
- Some steps of cooperation with foreign governments should be initiated immediately, to address the ways in which workers can fall into the cracks between U.S. law and the laws that could protect them in their home countries. For example, U.S. consular officials could take the relatively minor step of verifying basic elements of compliance with home countries’ labor protections for migrant workers, in the process of granting workers a visa.

Underlying all of these conclusions, however, there is another inescapable one. The sheer size and reach of the temporary visa system, whatever else it may mean, reveals the extent to which immigration policy has grown very distant from its deep roots in permanent labor migration. The national conversations that are periodically initiated on broad questions of immigration and labor policy in the U.S. – most recently in the context of discussions related to the Comprehensive Immigration Reform Act in 2007 – have stalled or been silenced. These conversations must begin again.

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112 Ray Marshall, *Value Added Immigration: Lessons for the United States from Canada, Australia and the United Kingdom*, Economic Policy Institute, 2011.





# Appendix A: Organizations Consulted for this Report

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## **AFL-CIO (American Federation of Labor and Congress of Industrial Organizations)**

Umbrella federation for U.S. trade unions, representing over 12 million working people.

## **Alliance for Ethical International Recruitment Practices**

Multi-stakeholder initiative to promote better practices in the recruitment of foreign-educated health professionals to the U.S.

## **Alliance of Progressive Labor**

Labor center in the Philippines bringing together trade unions and other labor organizations in support of workers' rights.

## **American Federation of Teachers**

Union in the U.S. whose membership includes teachers, college and university faculty, government employees, and nurses.

## **Asia Pacific Mission for Migrants**

Regional center based in Hong Kong, dedicated to supporting strong migrant workers' movements through advocacy, networking and education.

## **Beijing Legal Aid Office for Migrant Workers**

Organization providing free legal advice and services to Chinese migrant workers (internal and cross-border), through 21 offices across China.

## **Bustamante Industrial Trade Union**

Trade union in Jamaica, with a substantial membership in agricultural and food processing industries. .

## **California Rural Legal Assistance, Inc.**

Nonprofit legal services program with 21 offices throughout California.

### **Catholic Relief Services**

The official international humanitarian agency of the Catholic community that carries out the commitment of the Bishops of the United States to assist the poor and vulnerable overseas.

### **Centro de los Derechos del Migrante**

Organization that supports Mexico-based migrant workers to defend and protect their rights as they move between their home communities in Mexico and their workplaces in the United States.

### **Centro Independiente de Trabajadores Agrícolas**

Non-profit organization operating in the U.S. and Mexico to help employers in the agriculture industry recruit foreign workers, and to improve working and living conditions for farmworkers.

### **China Labour Bulletin**

Non-governmental organization based in Hong Kong, involved in research and advocacy on workers' rights in China.

### **Coalition of Immokalee Workers**

Membership-based organization of low-wage immigrant and migrant workers in Immokalee, Florida, with a majority of its members in farm work.

### **Economic Policy Institute**

Think tank focused on policy related to low- and middle-income workers.

### **Equal Justice Center**

Public interest law firm based in Texas, focused on basic employment rights for low-wage workers.

### **Farm Labor Organizing Committee**

Labor union representing migrant farm workers in the Midwestern United States and North Carolina.

### **Farmworker Justice**

Non-profit organization in the U.S. supporting farmworkers through litigation, public education, coalition-building, and advocacy.

### **Florida Legal Services, Migrant Farmworker Justice Project**

Organization providing legal advocacy to farmworkers across the state of Florida.

### **Friends of Farmworkers**

Organization assisting migrant and immigrant workers across Pennsylvania with employment-related claims.

### **Georgia Legal Services Program - Farmworker Rights Division**

Civil litigation organization focused on the employment rights of farmworkers in Georgia.



**Global Workers Defender Network**

Project of Global Workers Justice Alliance; support network of human rights organizations and individual advocates in workers' home countries.

**Human Trafficking Clinic at the University of Michigan Law School**

Clinical legal education program representing and advocating for U.S. and foreign victims of trafficking.

**International Human Rights Clinic at American University Washington College of Law**

Clinical legal education program representing clients in cases involving established and emerging human rights norms.

**Kilusang Mayo Uno**

Trade union federation in the Philippines, recently challenging extrajudicial killings of labor leaders.

**Mesa Nacional para las Migraciones en Guatemala**

Coalition of civil society in Guatemala, focused on the protection of migrants and their families.

**Migrant Forum in Asia**

Regional network of migrants' rights organizations and individual advocates supporting migrants; the secretariat office is in the Philippines.

**Migrante International**

Organization supporting Overseas Filipino Workers in partnership with more than 90 organizations in 22 "host" countries.

**Migration Policy Institute**

Think tank in Washington D.C. analyzing and evaluating policy related to migrants and refugees.

**National Employment Law Project**

Advocacy organization promoting policies and programs in support of workers' rights and unemployed workers.

**National Guestworkers Alliance**

Membership organization of guestworkers across the United States; a project of the New Orleans Workers' Center for Racial Justice.

**New Orleans Workers' Center for Racial Justice**

Brings together projects organizing day laborers, guestworkers, and homeless residents in New Orleans.

**New Trade Union Initiative**

National federation in India, bringing together trade unions independent of affiliations to political parties.

### **Partido ng Manggagawa**

Political party and network of trade unions in the Philippines, focused on working class mobilization in government.

### **Pastoral de La Movilidad Humana**

Episcopal organization supporting migrants, refugees and trafficked persons across Central and North America, and the Caribbean.

### **ProDESC (Proyecto de Derechos Económicos, Sociales y Culturales)**

Non governmental organization based in Mexico, focused on the advancement of economic, social and cultural rights.

### **PSLINK**

Union of public sector workers in the Philippines; networks internationally on behalf of members in education, health care, and elder care who are involved in temporary migrant labor.

### **Service Employees International Union**

Union of more than 2 million workers in the U.S. and Canada, with members in health care, property services and public services.

### **Southern Poverty Law Center**

Civil rights organization promoting racial and social justice through litigation, education, and advocacy.

### **Tompkins County Workers Center**

Membership-based organization in upstate New York, addressing workplace justice and other social and economic issues.

### **United Farmworkers**

Union organizing across major agricultural industries in 10 states of the U.S.

### **United Food and Commercial Workers, Canada**

Private sector trade union in Canada, with a substantial membership of foreign workers in Canada on temporary visas.

### **University and Allied Workers Union**

Trade union in Jamaica with a large proportion of members from sugarcane and allied industries, including many returned workers from the U.S.



**Global Workers Justice Alliance**  
**789 Washington Avenue**  
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**Global Workers Require Global Justice**