



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 11 | Number 3

Article 5

4-1-2009

The H-2B Visa: Is This How We Treat a Guest.

Ragini Tripathi

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Law Commons](#)

Recommended Citation

Ragini Tripathi, *The H-2B Visa: Is This How We Treat a Guest.*, 11 THE SCHOLAR (2009).

Available at: <https://commons.stmarytx.edu/thescholar/vol11/iss3/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

THE H-2B VISA: IS THIS HOW WE TREAT A GUEST?

RAGINI TRIPATHI*

I. Introduction.....	519
II. Legal Background.....	523
A. History of the Guest Worker in the United States....	523
B. Evolution of the Guest Worker Program.....	526
C. The H-2B Guest Worker.....	529
III. Legal Analysis I.....	533
A. Modern Slavery.....	533
B. Specific Gains for Guest Workers.....	536
C. Defining Human Trafficking.....	538
D. Protecting Trafficked Guest Workers.....	542
IV. Legal Analysis II.....	550
A. Barriers to Legal Remedies.....	551
V. Conclusion.....	555

I. INTRODUCTION

On March 9, 2008, the very company that brought them to the United States as guest workers held a group of Indian ship welders hostage off the coast of Mississippi.¹ Six men were kept in a room by armed guards working for Signal International, a subcontractor for Northrop Grum-

* St. Mary's University School of Law, Candidate for Juris Doctorate, May 2010, University of Texas at Austin, B.A. Government and Asian Studies, May 1998. I would like to thank my parents for their unwavering support and guidance, and for the risks they have taken to give me everything. They inspire in their ability to go through life with integrity, senses of humor, and wisdom at every turn. I would also like to thank my sisters and brother-in-law for their constant love, laughter, and their ability to keep me grounded. Without them, I would be lost. I am grateful for the women in my life, which I am fortunate enough to call my friends. They have paved the way, making my journey one I take with ease. All of you continue to motivate me, and I am grateful to be able to walk in your footsteps. Finally, my gratitude goes to all of the members of *The Scholar* Editorial Board and staff writers, for their hard work and editorial suggestions on my Comment.

1. Lindsay Beyerstein & Larisa Alexandrovna, *Human Trafficking of Indian Guest Workers Alleged in Mississippi Shipyard; Contractor Defends 290-Man Camp*, RAW STORY, Apr. 13, 2007, http://rawstory.com/news/2007/Human_trafficking_of_Indian_guest_workers_0412.html (introducing the story of Indian guest workers alleging mistreatment at the hands of their employer after six workers were detained in a room by armed security guards following a pre-dawn immigration raid).

man.² Days earlier, the workers protested their poor living conditions and threatened to stop work if the situation did not improve.³ The workers viewed the kidnapping of group members as retaliation for the unrest of the past few days.⁴

The Indian workers were complaining because they felt Signal breached the contracts it signed.⁵ These workers had each paid upwards of \$20,000 to come to the United States and work for the company.⁶ They understood the high-priced contract to include the potential to work towards permanent legal status in the United States, good living conditions, as well as a decent wage for their work.⁷ What the workers found upon their arrival in the United States was far from what was promised.⁸

2. *Id.* (describing the allegations made by the approximately 200 other guest workers who were left standing outside the room where several Signal employees were forcibly detained by security guards).

3. Vijay Prashad, *A Glimmer of Hope from the Gulf Coast*, COUNTERPUNCH, Mar. 24, 2008, <http://www.counterpunch.org/prashad03252008.html> (“On March 6, a hundred workers from a Pascagoula shipyard walked off the job. These skilled workers came to the U.S. from India (mainly Kerala) to work for Signal International, an oil services firm that overhauls and repairs oil rigs.”).

4. *Id.* (“They claim that Signal houses them poorly and treats them as illegal laborers. Dewan promised them that would be on the road to the green card (or permanent residency); this has not come to pass.”).

5. Lindsay Beyerstein & Larisa Alexandrovna, *Human Trafficking of Indian Guest Workers Alleged in Mississippi Shipyard; Contractor Defends 290-Man Camp*, RAW STORY, Apr. 13, 2007, <http://rawstory.com/news/2007/HumantraffickingofIndianguestworkers0412.html> (detailing a meeting held by the New Orleans Workers’ Center for Racial Justice, in which Signal employees complained they were deceived by recruiters who lured them to take guest worker jobs in the United States with false promises of permanent residency, good wages, and attractive living conditions). Workers at the Signal shipyard claimed Signal was unresponsive to their complaints about lower than promised wages and squalid living conditions. *Id.*

6. Vijay Prashad, *A Glimmer of Hope from the Gulf Coast*, COUNTERPUNCH, Mar. 24, 2008, <http://www.counterpunch.org/prashad03252008.html> (“In other words, their right to express their opinions is circumscribed by a system that virtually indentures them to the company.”).

7. Lindsay Beyerstein & Larisa Alexandrovna, *Human Trafficking of Indian Guest Workers Alleged in Mississippi Shipyard; Contractor Defends 290-Man Camp*, RAW STORY, Apr. 13, 2007, <http://rawstory.com/news/2007/HumantraffickingofIndianguestworkers0412.html> (listing the promises made by American and Indian recruiters operating in India in order to lure Indians to the United States as guest workers). Employees claim these promises were unfulfilled by Signal; Signal says it was tricked by recruiters’ and was unaware that such promises had been made and for a hefty fee. *Id.*

8. *Id.* (describing the conditions the Indian guest workers actually met upon arrival). Employees claimed Signal tried to force about thirty workers to agree to salary cuts or risk deportation. *Id.* One employee, a veteran foreign laborer, said the living conditions for workers at Signal were the worst he had seen in his long career, with twenty-four workers confined to a single windowless bunker with minimal facilities. *Id.* Though the exact nature of the workers’ living conditions was disputed by various newspaper and magazine

Signal paid the workers approximately five dollars less per hour than originally promised and threatened to deport the workers if they did not agree to this new salary.⁹ The Indian workers were forced to live in company bunkers, up to twenty-five workers in each bunker, and to pay over \$1000 per month, each, for those quarters.¹⁰

To call these workers “guest workers” sullies the actual meaning of the word “guest” and insults the often difficult work that many of these laborers engage in upon their legal arrival to the United States. Historically, immigrant workers have been welcomed into industries where companies have a hard time filling positions with American workers.¹¹ During the World Wars, immigration trends showed many Mexican workers were allowed into the United States through programs such as the Bracero Program (known as the Emergency Farm Labor Program) in order to fill vacant positions and address worker shortages.¹² The Bracero Program was intended to be a temporary program, terminating once World War II ended, but the program continued well into the 1960s.¹³ Over time, many of the migrant workers found harsh working conditions, low pay, and poor housing for the few months they were in the United States, similar to what the Indian workers in Mississippi faced upon their arrival.¹⁴

reporters who toured the camp, the workers and Signal agree that employees who could afford to move off-site were not permitted to do so. *Id.*

9. *Id.* (discussing claims by workers that Signal attempted to cut the wages of some employees from the promised \$18.50/hour to only \$13.50/hour or less). According to Signal, the attempted wage cuts were initiated because some workers did not have the first class welder skills required to net the higher salary. *Id.*

10. Posting of Lotus to H2B Press Watch, <http://h2bpresswatch.wordpress.com/2008/04/13/blog-david-v-signals-dickensian-tale/> (Apr. 13, 2008, 5:41 EST) (detailing the living conditions faced by the Indian guest workers).

11. See Bryce Ashby, Note, *Indentured Guests? How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 898 (2008) (describing the history behind guest workers in the United States). The guest worker programs in the United States have mostly revolved around agriculture. *Id.* When the Great Depression hit the United States, thousands of Mexican workers were forcibly removed. *Id.*

12. See *id.* at 899 (focusing on the largest immigration program to fill vacant agricultural positions). The workers were brought from Mexico for seasonal agricultural jobs, and afterwards, the workers returned. *Id.* The program was a bilateral agreement between the United States and Mexico, but it was considered a disaster in many aspects. *Id.*

13. See *id.* (describing the end of the Bracero Program). The program continued until 1964 through multiple bilateral treaties between the United States and Mexico, which were initially created out of fear of a labor shortage of agricultural jobs. *Id.*

14. See Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 535 (2007) (listing the problems that

Through legal action and diligence on the part of several dedicated advocates of migrant agricultural workers, Congress was forced to deal with many of these abuses and designed an effective system to prevent further abuses from occurring.¹⁵ It is interesting to note that even though the temporary agricultural guest worker visa program, known as the H-2A visa,¹⁶ has gone through rigorous policing and has had numerous laws in place to enforce migrant workers' rights, the temporary non-agricultural guest worker visa program, the H-2B visa,¹⁷ is severely lacking in safeguards for the worker.¹⁸ Under the current framework of the H-2B, there are limited ways to force employers to "stick" to their end of the bargain. The result is that many temporary workers put up with their sub-par conditions for fear of being deported and because of their own perception that they have no avenue to address their issues.¹⁹ Once they

workers faced in the past due to lack of regulation). "The workplace rights of guest workers do not satisfy the equality interest because they are easily violated and are difficult, and sometimes impossible, to enforce, and contain substantial legislative and regulatory gaps." *Id.*; see also Vanessa Vogl, *Congress Giveth, and Congress Taketh Away: How the Arbitration and Mediation Clauses Jeopardize the Rights Granted to Immigrant Farmworkers by AgJOBS*, 29 *HAMLIN J. PUB. L. & POL'Y* 463, 473 (2008) (specifying the hardships faced by undocumented workers in agricultural labor).

15. See Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 *GEO. IMMIGR. L.J.* 521, 548 (2007) (showing the various protections under a list of different types of visas available). "The primary wage protections for guest workers apart from visa-based contractual rights are FLSA and the Agricultural Migrant and Seasonal Worker Protection Act ('AWPA')." *Id.* Guest workers were given legal remedies if they suffered from poor conditions during their stay in the United States. *Id.* "Covered workers may sue farm labor contractors, agricultural employers, agricultural associations, or any 'other person' in federal court to enforce all AWPA guarantees." *Id.*

16. See Immigration and Nationality Act § 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006).

17. See *id.* § 1101(a)(15)(H)(ii)(b).

18. See Bryce Ashby, Note, *Indentured Guests? How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers' Transportation, Visa, and Recruitment Costs Is the Solution*, 38 *U. MEM. L. REV.* 893, 905 (2008) (describing the visa programs from the perspective of the guest workers). Workers are brought from Central America, Mexico and other countries such as Indonesia and Thailand. *Id.* The recruiters used to find the workers and bring them to the United States make many promises such as high wages and green cards, but many of these promises are never fulfilled. *Id.* Many times the workers have also paid the recruiter fees, which are requested in addition to the pay recruiters get from the employers. *Id.*

19. Lindsay Beyerstein & Larisa Alexandrovna, *Human Trafficking of Indian Guest Workers Alleged in Mississippi Shipyard; Contractor Defends 290-Man Camp*, *RAW STORY*, Apr. 13, 2007, http://rawstory.com/news/2007/Human_trafficking_of_Indian_guest_workers_0412.html. One particular worker, only thirty-nine years old, sold everything he owned to come to America and could not bear to return empty-handed to his wife and two young

are off American soil and back in their home country, they have even more limited resources to fight for their rights and the breach of contract. Unfortunately, many of the abuses faced by Bracero Program participants continue with guest workers even today.

This comment will focus on the incident in Mississippi noted above and try to decipher why the legal routes for H2-B visa holders are so limited. With the H2-A enforcement mechanisms and legal options as a guideline, it seems that the rules and regulations for proper implementation of H-2B are in place. Part II of this comment focuses on the history of guest workers in the United States, and how the law has grown to include guest workers. Part III examines how modern slavery and trafficking are all connected to the plight of many of the guest workers brought to the United States. Part IV looks at the unique outlets for guest workers to learn of their rights and obtain some legal help, but will also show that this is not an avenue available to all guest workers. Finally, Part V considers two ways to fix immigration laws so that widespread violations cease to occur.

II. LEGAL BACKGROUND

A. *History of the Guest Worker in the United States*

Most guest worker programs around the world were implemented due to internal labor shortages.²⁰ In the United States, many original guest worker programs were brought to existence through bilateral treaties, specific to agricultural industries, and were not originally jobs left for Congress to create and monitor, as they do with other immigration programs.²¹

As previously mentioned, one of the largest programs ever undertaken was the Bracero Program, created through a treaty between the United States and Mexico.²² This joint agreement allowed the employment of

children in India. *Id.* Several other workers told investigators that they too had spent their life savings to make the passage to the United States and considered the threat of deportation a very strong deterrent to speaking out about the poor working and living conditions they discovered upon arrival. *Id.*

20. See Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 692 (2007) ("Guest worker programs have been instituted in the past to cope with worker shortages in times of war.").

21. See *id.* ("Through an agreement with Mexico, the United States permitted American farmers to hire Mexican workers to meet their temporary employment needs by working in the United States for up nine months each year.").

22. See *id.* ("From 1942 to 1964, more than four million Mexican immigrants worked in the United States as part of the Bracero program."). The initiative was considered shortsighted and immoral to many activists who cited unfair working conditions. *Id.* at 693.

Mexican workers in the United States for up to nine months each year, and was specifically for jobs related to agriculture.²³ At the time of the program's inception, Mexico was still reeling from the lingering effects of the Great Depression, and the United States was still feeling the effects of World War II.²⁴ The more obvious benefits of this program were that Mexican workers were given ample opportunity to work for improved wages compared to the wages they would have received for the same work in Mexico, and American farmers had ample access to a large work force for the growing season.²⁵ Approximately four million Mexican laborers came to the United States as a result of this program.²⁶

In the end, the Bracero Program was largely viewed as a failure.²⁷ Essentially, the goal of the program was to bind the Mexican workers to their employer, and the American government was to regulate wages, as well as any conditions related to the workers' employment and living arrangements.²⁸ In actuality, however, the federal government was unable to enforce its end of the deal.²⁹ Many of the Mexican participants ended

"Many immigration activists look back on the Bracero program not only as an immigration policy failure but also as an example of how an unsuccessfully implemented and insufficiently enforced guest worker program could offend conventional civil and human rights." *Id.*

23. *See id.*

24. *See* Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 273–74 (2007) (discussing the reasons behind the implementation of the Bracero Program).

In 1942, the United States and Mexico engaged in a series of treaties that enabled employers to recruit Mexican agricultural workers. This agreement, which came to be known as the Bracero Program, was allegedly implemented to address labor shortages in the agricultural industry during World War II. Still recovering from the effects of the Depression, Mexican authorities were attracted to the idea of putting their men to work in American jobs to support the Mexican economy. *Id.*

25. *See* Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 693 (2007) ("Mexican workers became reliant upon the available jobs and reliable wages, while American employers grew dependent on the availability of additional assistance.").

26. *See id.* at 692.

27. *See* Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 275 (2007) (detailing the ways in which the Bracero Program failed on both sides of the U.S.-Mexico border). Workers under the program suffered severe injustices, widespread abuse and were powerless to enforce their legal rights. *Id.* The United States failed to monitor employers and ensure that employers did not violate the workers' rights. *Id.*

28. *See* Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 692 (2007).

29. *See id.* ("The Bracero program was a large disappointment to both Americans and immigrants and came to an end after intense lobbying from organized labor and Latino organizations."). "Highly criticized for failing to keep its promises, the American govern-

up living in horrid conditions, and their wages were nowhere near adequate.³⁰ Even worse, Mexican workers had no way to recover for medical injuries, and in general, were too scared to go to authorities with complaints of any sort for fear of losing their job, and consequently their ability to remain in the United States.³¹

Some regard the Bracero Program as the moment when American employers became forever entwined with the idea of cheap foreign labor.³² At the inception of the Bracero Program, it was widely believed that if the United States took action against undocumented workers, there would be labor shortages in many industries.³³ Congress was under pressure by these same industries to allow for a way to bring in a large number of Mexican workers and not disturb the current population of their undocumented workforce.³⁴ It was widely accepted that the Immigration Service ignored Mexican workers who may have entered the United States without the required documentation to work, benefiting employers in sectors with a demand for inexpensive labor.³⁵

ment was faulted for insufficiently protecting workers and for ignoring the substandard working conditions that occurred throughout the country.” *Id.*

30. See Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 274–75 (2007) (describing the various improper conditions that most Bracero participants had to withstand throughout the program’s existence). Workers who participated in the program were treated like animals, lived in filthy conditions, given low wages, unable to seek legal redress for injuries, and lived in fear of the constant threat of deportation. *Id.*

31. *See id.*

Braceros endured . . . the constant threat of deportation looming over their heads. Despite the legal protections that were supposed to be part of the program, the workers were unable to secure legal redress for their injuries because they . . . were too afraid to complain. . . . Records show that despite the widespread abuses that were part of the program, only one in every 4300 Braceros ever filed a grievance. *Id.*

32. *See id.* at 275 (linking the neverending supply and demand related to the needs of the American job market and the foreign work supply needed to fill those jobs). “The Bracero program is largely credited with beginning the mass movement of workers across the southern border. Employers became accustomed to having a cheap source of labor readily available and Mexican workers came to rely on the marginally more lucrative economic opportunities available to them in the United States.” *Id.*

33. *See id.* at 277 (“Agricultural growers argued that without creating some means of authorizing work for temporary foreign workers, ‘crops would rot in the field.’”).

34. *See id.* (discussing the hurdles that Congress faced when it first undertook the creation of a temporary guest worker visa category). In response to employer concerns that the Immigration Reform and Control Act of 1986 would cause a shortage of labor, Congress divided the H-2 category into H-2A for temporary agricultural workers and H-2B for temporary workers in all other fields. *Id.*

35. See Vanessa Vogl, *Congress Giveth, and Congress Taketh Away: How the Arbitration and Mediation Clauses Jeopardize the Rights Granted to Immigrant Farmworkers by AgJOBS*, 29 HAMLINE J. PUB. L. & POL’Y 463, 470 (2008) (describing the evolution of the

B. *Evolution of the Guest Worker Program*

From the ashes of the Bracero Program came the creation of the H-2A visa category, for temporary agricultural guest workers, and the H-2B visa category, applicable to all other temporary guest workers.³⁶ The H-2 program was formed to be a temporary remedy to America's needs for a workforce.³⁷ Because both the Bracero Program and the creation of the H-2 visa program happened somewhat simultaneously, there were no provisions put into the relevant statutes that allowed for any sort of oversight of this entire visa category.³⁸ Thus began the struggle for guest worker rights. "Many immigration activists look back on the Bracero Program not only as an immigration policy failure, but also as an example

guest worker programs). "[T]he Immigration Service at that time turned a fairly blind eye to Mexican workers who entered the U.S. without proper documentation in response to growers." *Id.* Growers' dependence on Mexican workers precipitated a lax attitude towards imposing penalties for undocumented workers. *Id.* "Despite U.S. hostility towards and unfriendly treatment of Mexican farmworkers, the truth of the matter was that growers came to rely on these Mexican workers as a source of cheap labor." *Id.*

36. See Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 277 (2007) (documenting the evolution of the H-2 visa category).

H-2A visas last for up to one year and can be renewed as long as the worker's total stay in the United States does not exceed three consecutive years. . . . To qualify for the H-2A program, employers undergo a two-step process. First, they must obtain certification from the Department of Labor that there exists a need for a foreign worker. . . . Second, upon receipt of the labor certification, the employer must petition the United States Citizen and Immigration Service (USCIS) for a visa so that the worker may enter the country. *Id.*

37. See Vanessa Vogl, *Congress Giveth, and Congress Taketh Away: How the Arbitration and Mediation Clauses Jeopardize the Rights Granted to Immigrant Farmworkers by AgJOBS*, 29 HAMLIN J. PUB. L. & POL'Y 463, 473 (2008) (maintaining that the creation of any temporary guest worker program was meant to be temporary itself). "The H2 visa program was developed as another temporary solution to labor shortage, and was implemented around the same time as the [B]racero program." *Id.* at 473-74. The Bracero program was also a temporary admittance of migrant workers into the United States to work in agriculture. *Id.* at 470. "The program was meant to be temporary, and the plan involved the migrant workers, once again, returning to Mexico after their contracts and visas expired." *Id.*

38. See *id.* at 479 (showing that the H-2A visa program was lacking a process for enforcing the rights for the guest worker by comparing it to AgJOBS, which implement procedures for enforcing rights). The creation of AgJOBS made changes in response to the H-2A visa program's ability to ensure better treatment of guest workers. *Id.* "These rights include free housing or a housing allowance, transportation, proper receipt of wages, the benefits and material terms and conditions of employment as represented in the job description, the guarantee of employment as provided by the statute, fulfillment of safety requirements, and the prohibition of discrimination." *Id.*

of how an unsuccessfully implemented and insufficiently enforced guest worker program could offend conventional civil and human rights.”³⁹

As the Bracero Program was laid to rest by the Kennedy Administration, and as the H-2 program began to grow, it became evident that what had resulted from its failure and the seeming lack of cooperation and participation of employers in the H-2 visa program was a huge influx of undocumented workers from the U.S.-Mexico border.⁴⁰ After a growing movement against undocumented workers, built up throughout the 1970s and early 1980s, Congress was forced to act and implemented the Immigration Reform and Control Act (IRCA) of 1986.⁴¹ One of the key pieces of IRCA was the introduction of employer sanctions targeted at those employers that were lax in establishing the work authorization status of their employees, which was intended to ultimately prevent the hiring of undocumented workers.⁴² IRCA’s employer sanctions focused on establishing strict guidelines forcing employers to check “verification of work eligibility” and “establish penalties” for those employers that turned a blind eye to the employment status of their workers.⁴³ Many see the employer sanctions as empty promises, since historically, there was little actual enforcement of these statutes against employers.⁴⁴

39. Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 689, 693 (2007) (indicating that the Bracero program was nowhere near the success once thought).

40. *See id.* (summarizing the actual statistics of illegal migration from Mexico in the United States up through the 1960s).

41. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1324a (2006)). *See* BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 396 (1994) (“As political pressures mounted to limit illegal immigration, [c]ongressional proposals were introduced to make illegal the hiring of unauthorized workers.”).

42. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1324a (2006)) (describing the regulation of immigration laws through employers); *see also* BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS 396–97 (1994) (discussing the the approach Congress took to dealing with the abundance of undocumented workers). “The reason advanced for the imposition of these employer sanctions was to ‘close the back door’ on illegal immigration by removing the ‘magnet’ of employment which attracts aliens here illegally.” *Id.* at 397.

43. *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986) (establishing procedures for employers to follow to verify the work eligibility of their employees and also the potential punishments for failing to comply).

44. *See* Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 151, 164 (2005) (laying out the reasons that many of these employer sanctions are rarely enforced, or even investigated). “To avoid the employer sanctions, which were never fully funded or adequately enforced, a cottage industry of producing fake or fraudulent documents arose in the wake of IRCA’s passage.” *Id.* Thus arose a

As mentioned above, one of the largest gaps unearthed by the Bracero Program was that workers, whether documented or not, rarely felt comfortable filing complaints against their employers when it came to injuries they suffered on the job, their living or work conditions, or concerns with their wages.⁴⁵ In fact, approximately one in every four thousand Bracero participants actually lodged any sort of complaint as to their plight.⁴⁶

As the Bracero Program's failure became more evident, large groups began forming to protest the conditions and lack of enforcement or protection on behalf of the agricultural workers.⁴⁷ What resulted from these efforts became the foundation of actual federal protections for the workers, not just for that generation, but also for future generations of agricultural guest workers. Many laws were created or utilized to provide protections to migrant farm workers. For example, temporary employment and seasonal labor standards became tied in many ways to the Fair Labor Standard Act.⁴⁸ During the 1960s and 1970s, Congress again expanded the rights of agricultural guest workers with the passage of the Farm Labor Contractor Registration Act.⁴⁹ Within another decade, Congress further surrounded these guest workers with the security of the Migrant and Seasonal Agricultural Workers' Protection Act.⁵⁰ Despite the fact that Congress was constantly reviewing and re-analyzing legal protections for agricultural workers who had been wronged, Congress did not

black market for unauthorized workers in which employers viewed obtaining cheap labor as more important than the risk of being sanctioned. *Id.*

45. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 585 (2001) (discussing the glaring issues faced by the Bracero participants).

46. *Id.* (showing the lack of legal recourse available to the millions of Bracero participants).

47. See *id.* (discussing the creation of the United Farmworkers and Texas Farmworkers Unions).

48. See *id.* at 586 (listing the many ways that advocates for agriculture guest workers changed the laws of the United States to benefit a larger, more inclusive group of workers).

49. See Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, 78 Stat. 920, 920 (1965) (repealed 1983); see also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 586 (2001) (discussing the historical lineage of government actions taken to improve farmworker conditions).

50. See Migrant and Seasonal Agricultural Workers' Protection Act, Pub. L. No. 97-470, 96 Stat. 2583, 2583 (1983) (codified as amended at 29 U.S.C. §§ 1801-1872 (2006)); see also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 586 (2001) (explaining how the various actions taken by the government as protection for farmworkers evolved over the decades following the end of the Bracero program).

recognize the need for temporary farm workers having their own whistleblower protection until 1983.⁵¹

The result of these periodic overhauls of laws related to guest workers, specifically those that work in agricultural industries (H-2A visa holders), is a larger mechanism to ensure legal protections for these workers and their employers. While millions of foreign workers throughout the latter half of the last century suffered horribly for their right to work in the United States, agricultural workers in this century are able to take advantage of laws and protection by agencies that are there to guarantee that such atrocities are not repeated.⁵²

C. *The H-2B Guest Worker*

The other side of the H-2 visa coin is the non-agricultural H-2B visa. This subcategory of visas is a catchall for industries that are not related to agriculture.⁵³ It includes “seafood, landscaping, housekeeping, construction, and tree planting.”⁵⁴ An endemic problem within the H-2B visa category is that employers search far and wide for workers to fill the gaps in their work force, and in order to entice these workers from across the globe, many outrageous and exaggerated promises are made on the part

51. See 29 U.S.C. § 1855(a) (2006) (proscribing any type of retaliatory action against migrant or seasonal agricultural workers for attempting to file complaints or grievances); see also Laura C. Oliveira, Comment, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 169 (2002) (“In 1983, Congress recognized that migrant farm workers needed ‘whistle blowing’ protection. Consequently, AWPA [Migrant and Seasonal Agricultural Worker Protection Act] was enacted. The Act afforded migrant farm workers protection when they were retaliated against for complaining about substandard conditions.”).

52. See Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1454 (2008) (beginning a discussion of employment-based visa programs). “In recent years, the United States has admitted well more than one million workers annually on temporary employment visas, through an alphabet soup of programs enacted over many years and often on an ad hoc basis.” *Id.*

In these early years of the twenty-first century, the nation’s immigration laws play a significant role in regulating domestic labor markets. They also define and limit labor rights for millions of low-wage immigrant workers, often distorting the labor and employment schemes through which Congress intended to supply basic workplace protections for all workers. *Id.* at 1461.

53. See Bryce Ashby, Note, *Indentured Guests? How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 903 (2008) (discussing the differences between the H-2 visa categories).

54. Analiz Deleon-Vargas, Comment, *The Plight of the Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 252 (2008) (including various employment-based visas in her discussion regarding immigration law and its effects on day laborers).

of the employers.⁵⁵ For example, many potential workers are promised “high wages, overtime, and green cards.”⁵⁶ It is not hard to guess that these promises are rarely, if ever, kept. Despite the protections in place, there are still abuses of guest workers in agricultural industries, and there seems to be a very limited path for legal recourse regarding *non*-agricultural guest workers that enter with an H-2B visa. One analyst suggests strongly that “regulations for H-2B workers . . . readily demonstrates the degree to which the H-2B program lacks fundamental legal protections that are at least theoretically available to H-2A workers.”⁵⁷

In his analysis of labor issues that plague the H-2 visa category, Bryce W. Ashby studied *Arriaga v. Florida Pacific Farms*,⁵⁸ is an H-2 case regarding reimbursement by the employer to the guest employee for expenses incurred during the time the employee is applying for his visa in his home country, and the time he actually arrives and begins work in the United States.⁵⁹ In *Arriaga*, the court found expenses employees incurred regarding transportation and other initial costs that were mainly for the benefit of the employer needed to be paid back to the employee.⁶⁰ Like *Arriaga* and the many cases that were actually filed in the H-2A visa category, the reimbursement should cross over to the H-2B candidates as

55. See Bryce Ashby, Note, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 904–05 (2008) (explaining the H-2 visa program from the perspective of the workers).

56. *Id.* at 905 (relaying the various egregious promises made by American-based employers to lure foreign guest workers). Many times there are multiple fees paid to the recruiters in exchange for these promises, both from the workers being recruited and from the employers seeking workers. *Id.*

57. Arthur Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 433 (2007) (discussing the theoretical differences between the H-2A program and the H-2B program).

58. 305 F.3d 1228 (11th Cir. 2002).

59. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1242, 1244 (11th Cir. 2002) (holding that transportation costs, visa costs, and immigration fees for employing H-2A visa workers were to be reimbursed by the employer). See Bryce Ashby, Note, *Indentured Guests? How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 914–16 (2008) (highlighting the differences in reimbursement techniques). The transportation, visas, and recruitment fees are the notable H-2A fees. *Id.* at 914. Courts initially determined that only the transportation and visa fees needed to be reimbursed to the worker by the employer, since those were primarily for the benefit of the employer. *Id.* at 914. Eventually, courts determined that recruitment fees also had to be reimbursed. *Id.* at 915.

60. *Arriaga*, 305 F.3d at 1237 (“If an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose.”).

well.⁶¹ What results from this with respect to reimbursement claims is that H-2B applicants are left out in the cold because unlike H-2A applicants, they are “not eligible for legal services representation” and so they are unlikely to even file a claim.⁶²

In more recent developments, the Department of Labor (DOL) has stated any transportation, and other costs incurred by the employees in their first week on the job (typically those related to the employees relocation) were not intended to be thought of as primarily benefitting the employer.⁶³ This means that the workers are not entitled to those relocation costs because the DOL views those costs as either mostly benefitting the worker or benefitting the worker and employer at some equal value.⁶⁴ What the DOL’s reasoning does not address is that in many cases these guest workers are promised repayment of relocation costs in their initial negotiations. If the workers pay those costs on their own, with the misguided understanding that they will eventually be reimbursed, it seems they will have no recourse to recover their losses. Unfortunately, the DOL’s clarification of their regulations leaves *Arriaga* and the line of cases that followed, completely moot. “*Arriaga* and the district courts that followed its reasoning in the H-2B context misconstrued the Department’s regulations and are wrongly decided.”⁶⁵

Still, there is the ongoing issue of what wages are actually promised, and what wages actually end up being paid to the guest workers. In effect, there are different routes an H-2A and an H-2B visa applicant or holder must go through in order to right that wrong. Although wages for H-2B workers are traditionally higher than the wages required for H-2A

61. Bryce Ashby, Note, *Indentured Guests? How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 915 (2008) (“Although *Arriaga* concerned H-2A workers and the H-2A program, the rule for reimbursement of transportation, visa costs, and recruitment fees should also logically extend to those workers engaged in the H-2B program.”).

62. *Id.* at 916 (discussing the differences in services available to the H-2 subcategories). Because the H-2B workers are ineligible, they are also “less likely to bring claims.” *Id.* This results in guest workers rarely getting paid correctly, and there is no manner of enforcement or “arbitrary enforcement” at best. *Id.*

63. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78040 (Dec. 19, 2008) (to be codified at 20 C.F.R. pt. 655) (providing the reasons that certain costs related to relocation of guest workers were not intended to be paid back by employers).

64. *Id.* (attempting to differentiate among costs that primarily benefit the employer, the guest worker, or those that benefit the two parties equally).

65. *Id.* (maintaining that many courts misunderstood the Department of Labor’s true intent regarding portions of the regulations behind compensation between employers and guest workers).

workers, H-2B employers rarely pay what they agree to in the beginning of their relationship with the guest worker.⁶⁶ Though the argument may seem circular, once the worker realizes his or her wages are not what they were originally agreed to, the worker may not want to remain at his or her job. The H-2B visa prevents these people from looking for other work, since their visa ties them to their employer, and thus their work becomes akin to indentured servitude. They are forced to continue working for the remainder of their contract or face returning home.⁶⁷ In fact, one can go so far as to say that these labor programs violate the Thirteenth Amendment⁶⁸ “because they replicate the same harms to workers’ rights, citizenship rights, human rights and civil rights that chattel slavery did.”⁶⁹ This can certainly be true of the Indian guest workers contracted to Signal.

Guest worker programs as a whole are problematic specifically since they thwart workers’ abilities to integrate into the greater society in the United States because they “erect undesirable and otherwise avoidable obstacles to the integration process by constraining the two key mechanisms of immigration integration: mobility and reciprocity.”⁷⁰ Also, the “right to remain” is a right which is lacking for most of these guest work-

66. See Arthur Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 433 (2007) (discussing more differences between the H-2 subcategories).

67. See Maria Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 926 (2007) (“[T]he ability to stay in the United States during the visa period is contingent upon continued employment with the specific employer that sponsored the visa initially.”). Therefore, if the employee quits or is fired, then he or she will face deportation. *Id.* Because quitting will lead to deportation, this arrangement forces workers to “work in a state of involuntary servitude.” *Id.* at 927.

68. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

69. Maria Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 930 (2007) (“The undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”). Therefore, the use of non-citizen immigrant labor violates the essence of the Thirteenth Amendment when they work in abusive conditions and are excluded from citizenship. *Id.*

70. Christina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 222 (2007) (discussing guest worker programs and the myriad of problems that come with them). The author describes mobility as “the ability to move freely among society’s various sectors as well as in and out of ethnic communities.” *Id.* She also describes the lack of reciprocity as the unwillingness “to adapt to the presence of immigrant communities.” *Id.* at 223.

ers.⁷¹ In fact, it is seen as one of the most important features lacking in current employment-based laws.⁷² For the Indian workers hired to work at Signal, it was exactly “the right to remain,” namely the promise of a green card that allured so many of them.⁷³

So then, what remedies *do* these Indian workers have? What follows below is an analysis of the Fair Labor Standards Act, the Trafficking Victim’s Protection Act, and methods used in similar cases to bring relief to these guest workers.

III. LEGAL ANALYSIS I

A. Modern Slavery

The plight of guest workers has been referred to as a form of contract slavery.⁷⁴ Contract slavery is one of the most prevalent forms of modern slavery.⁷⁵ Describing modern slavery as an overarching category existing

71. *Id.* at 222–23 (arguing that the right to remain, something that guest worker programs do not provide, is essential for mobility).

72. See Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1455 (2008) (bringing attention to the various shortcomings of current employment-based visas).

From a labor rights perspective, the two most important elements of any temporary or provisional worker program are “portability” – that is, freedom to carry one’s visa to a new employer – and a path to permanent legal status.

....

Second, in any new program, labor rights advocates have a stake in ensuring that temporary workers be given some opportunity to apply to adjust their status to lawful permanent residence, and eventually to naturalize. Many foreign workers who enter on temporary employment visas will likely establish community and family ties in the United States. Some of these workers will not return to their country of origin upon the expiration of their visas.

....

... [A] temporary worker program with both portability and a path to permanence should allow future workers to exercise the full range of labor and employment rights enjoyed by U.S. workers, including, critically, the right to exit abusive work environments. *Id.* at 1455–58.

73. Posting of Lisa Swanson to Unitarian Universalist Social Justice Blog, <http://uuasocialjustice.blogspot.com/2008/05/gulf-coast-guest-workers-launch-hunger.html> (May 15, 2008, 16:35 EST) (relaying that the Indian guest workers were promised a chance at obtaining green cards for permanent status in the United States).

74. See Amy Kathryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 743 (2008) (listing the various ways in which modern slavery still exists, and the ways in which it differs from more traditional forms of slavery). Contract slavery falls into one of the three general categories of modern slavery. *Id.* at 742.

75. See *id.* (noting the ways in which contract slavery has become an acceptable way to do business). The contract is often used as a tool to make the labor agreement seem legitimate, despite subsequent cruelty toward workers. *Id.*

in recent times allows one to see the many similarities with the more traditional form of slavery known around the world.⁷⁶ Included in the definition of modern slavery are the following ideas: 1) legal ownership is avoided; 2) there are very low purchase costs; 3) there are very high profits; 4) a massive supply of potential slaves exists; 5) there is only a need for a short-term relationship; 6) these slaves are disposable; 7) and contrary to traditional slavery, there need not be an ethnic difference between employer and employee.⁷⁷ Contract slavery becomes difficult to enforce under traditional contract law because so much of the control on the person signing the contract happens after the contract is signed.⁷⁸ This last point was certainly true for the Indian workers in Mississippi.⁷⁹

This concept is key to many issues faced by guest workers. Many times, the contract itself is tied to the workers' legal ability to remain in the United States, since it was the employer's contract that allowed for the procurement of the visa itself (such as the H-2B).⁸⁰ One way that employers seem to wiggle out of traditional contract enforcement is through

76. *See id.* at 742 (giving additional information on modern slavery). Old forms of slavery and new forms of slavery provide a similar experience to those that are subject to bondage. *Id.* All forms prevent the person in slavery from having a "meaningful personal existence" and cause his existence to be defined through a "relationship with his master." *Id.*

77. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 15 (2d ed. 2004) (listing the differences between traditional and modern slavery).

78. *See* Amy Katheryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 *RUTGERS L. REV.* 737, 743 (2008) (showing the many ways in which contract slavery becomes difficult to enforce).

79. Patrick Springer, *Workers Are Victims, Pastor Says*, *FORUM*, Nov. 4, 2008, available at <http://nolaworkerscenter.wordpress.com/2008/11/04/the-forum-newspaper-workers-are-victims-pastor-says/> (describing the helplessness that the Indian guest workers faced upon their arrival and learning of the actual work conditions they faced).

80. *See* Michael J. Wishnie, *Labor Law After Legalization*, 92 *MINN. L. REV.* 1446, 1455 (2008) (highlighting the importance of employment visas and how they tie workers to their employers).

Under current law, it is extremely difficult for many employment-based visa-holders to change jobs, because immigration status is frequently conditioned on continued employment by the sponsoring employer. Even where available, the legal process for switching employers is cumbersome. As a result, many temporary workers in existing visa programs endure extreme exploitation and abuse by their employers rather than forfeiting their immigration status.

Yet labor scholars well understand the necessity of a genuine "right of exit" from an employment relationship, if individual liberty is to be preserved. This is the promise of the Thirteenth Amendment, which itself secures a principle far older than the Civil War.

Although temporary workers may have the formal option to leave exploitative and dangerous jobs, the reality is often that one cannot risk the termination of visa status and loss of costly investments in travel, visa fees, and other expenses, when work authorization is not portable.

the use of subcontractors. Because many of these subcontractors usually work outside of the United States, they are seemingly able to stay out of the reach of American courts.⁸¹ Traditionally, the U.S. State Department and other government entities have relied on the host country (in this case, the country of the subcontractor's operations) to prosecute issues related to human trafficking.⁸² American companies then rely on the fact that they were unaware of the contractual obligations that any subcontractor may have promised these guest workers.⁸³

Although this theory focuses on the human rights and contractual violations of American companies against third-country nationals hired to work in Iraq, many of these ideas are very relevant to the discussion of guest workers that actually do come to the United States.⁸⁴ There is no difference in the discussion of third-country nationals working in Iraq and guest workers working in the United States. This conclusion is stark, and suggests that with the growth of the global economy, modern slavery will continue to grow, as well.⁸⁵

More recently, Congress has certainly noticed the prevalence of these derelict third party subcontractors, and begun to regulate their involvement in the process of tying needy American employers to willing guest

. . . Denying portability to temporary workers thus confers on employers a dramatic coercive power. Preserving a genuine right of exit, by contrast, will be indispensable in allowing future temporary workers to exercise their rights to organize, to their certified wages, to a safe workplace, to be free from unlawful discrimination, and to other legal rights. *Id.* at 1455–57 (footnotes omitted).

81. See Amy Kathryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 745 (2008) (citing the main reason that contract slavery cases become so difficult to bring to justice in the U.S. court system). Use of subcontractors lengthens the chain of contractual relationships and allows companies to rely on the defense of ignorance to any contract violations. *Id.*

82. See *id.* at 755 (showing that the problem lies in the way the U.S. system relies on host countries to police the root of the trafficking problems in their own countries). The Trafficking Victims Protection Act, enacted by Congress in 2000, puts the responsibility of investigation and prosecution for crimes involving human trafficking in the hands of the government in the country where the crimes take place. *Id.*

83. See *id.* at 745 (discussing the many ways in which American contractors find a way out of the contractual obligations, in that they rely on subcontractors to find the workers, and thus cannot be tied to any guarantees made by the subcontractor to the workers). If a multinational corporation is found to have benefited from a host government's human rights violations, they can be held criminally liable. *Id.*

84. See generally *id.* at 766 (detailing issues faced by guest workers in Iraq). Current legal remedies and guidelines concerning human rights violations leading to modern types of slavery are not sufficient in the United States or abroad. *Id.*

85. See *id.* (focusing on the myriad of reasons that modern slavery will be much more difficult to eradicate than more traditional forms of slavery). Modern slavery is a reality that is making an appearance in many countries due to the rise of the international labor force. *Id.*

workers. With the implementation of two new regulations, one each within the Department's of Labor and Homeland Security, these subcontractors are under heightened scrutiny by the American government.⁸⁶ In fact, these regulations go as far as to prohibit these subcontractors from receiving any payment from guest workers.⁸⁷ While the presence of these regulations is certainly a positive sign, there remain some issues. These newly implemented rules will not help the Indian guest workers in Mississippi, or elsewhere, because these rules are not applied retroactively.⁸⁸ Also, it seems that because these subcontracting companies are all overseas, being able to show proof that they have violated these new provisions seems virtually impossible. Still, the presence of these new rules certainly shows recognition that a problem does exist, and that something is being done to begin oversight on a national level.

B. *Specific Gains for Guest Workers*

These problems are clearly not merely historical. After the labor shortages on the American Gulf Coast following the devastation of Hurricane Katrina, many foreign guest workers found themselves in dire straights because of companies that had no interest in holding true to their original promises of employment made to these workers.⁸⁹ For the Indian guest workers in Mississippi, mentioned at the beginning of this comment, the workers were able to file a case on their behalf, *David v.*

86. Labor Certification Process Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B workers), and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (to be codified at 20 C.F.R. pt. 655) ("The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees")

87. Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78,104,78,128 (Dec. 19, 2008) (to be codified at 8 C.F.R. pt. 214) ("[n]o job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H-2B employment")

88. See *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, No. 07-30942, 2009 WL 324636, at *6 (5th Cir. Feb. 11, 2009) (discussing the new regulations and how they are not able to be enforced retroactively).

89. U.N. Gen. Assembly, Hum. Rts. Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 21, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (prepared by Jorge Bustamante) (highlighting the vastness of the exploitation of guest workers in the era after Hurricane Katrina). Not only are the workers not getting paid what was promised, but they are "living and working amid substandard conditions." *Id.* To top it all off, because of the multiple tiers of subcontractors, many "workers do not even know the identity of their employer," making it impossible for them to collect the wages owed. *Id.* at 23.

*Signal International, L.L.C.*⁹⁰ Though the case is still pending, considerable success was made on behalf of the workers, because it is shedding light on the plight of these workers.

In fighting their case, the Indian guest workers in Mississippi can look to a recent decision handed down by a federal court in Oklahoma. In the *Chellen v. John Pickle Co.* cases, the workers complained they were misled when solicited for employment.⁹¹ Reports indicate that when the workers were brought from India to Oklahoma they were promised “good wages and generous overtime pay; free food, living accommodations, insurance, and medical services; an American drivers license (for those with Indian licenses); a cell phone; and a job for at least two years.”⁹² The employees alleged that they were paid less than minimum wage; kept in squalid dormitories secured by armed guards; had their food rationed, even though deductions were made from their wages to pay for meals; and had their immigration documents confiscated in an effort to prevent escape.⁹³ Ultimately the court found that the conditions were as the workers described, and even found that the company *intentionally* made them that way.⁹⁴ One of the company’s defenses was that

90. No. 08-1220, 2008 WL 4266214 (E.D. La. Sept. 11, 2008) (denying defendants’ motion to dismiss and allowing the plaintiffs’ case to proceed).

91. *Chellen v. John Pickle Co.*, 344 F. Supp. 2d 1278, 1279 (N.D. Okla. 2004).

[The workers] allege that defendants made false representations when they recruited the *Chellen* plaintiffs for JPC employment, required them to work in excess of forty hours per week, paid them below minimum wage, compelled them to eat and sleep at the JPC facility, restricted their ability to leave or travel freely to other locations, placed armed guards at the gates of the facility to discourage their travel or compel them to stay at the facility when they were not on duty or working, and held them unlawfully against their will within the confines of the JPC facility. *Id.*

Note that there are two *Chellen* cases. The court describes the split:

The Court initially planned to proceed in three phases and, after a non-jury trial in the first phase, determined that the *Chellen* plaintiffs were employees, not trainees, under the FLSA. *See Chellen*, 344 F. Supp. 2d 1278 *Chellen* I. With the agreement of the parties, the Court combined the second and third phases of the proceedings to determine liability as well as damages for all claims. *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1256 (N.D. Okla. 2006).

92. Alba Lucero Villa, *Guest Worker Litigation Gains Ground*, 42 TRIAL 70, 71–75 (2006) (discussing the false promises provided to the immigrant workers by a company utilizing the federal “guest worker” program to entice them).

93. *Chellen*, 344 F. Supp. 2d at 1286 (describing the horrendous conditions that the guest workers were forced to endure and survive while employed by the company, much different from the previously promised conditions).

94. *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1256 (N.D. Okla. 2006) (“The hostile work environment they created for the *Chellen* plaintiffs, and the disparate treatment afforded them, was intentional and discriminatory.”). *See* Alba Lucero Villa, *Guest Worker Litigation Gains Ground*, 42 TRIAL 70, 74–75 (2006) (describing the judge’s ruling, specifically regarding the living and working conditions faced by the plaintiffs).

these workers had come to the United States under a B-2 visa category, an employment visa category for trainees, and thus they were allowed to pay the workers a lower wage.⁹⁵ The court disagreed.⁹⁶ The court then found for the workers, and granted them an award of not just their back wages and punitive damages, but also \$1000 each for emotional distress.⁹⁷

In light of the *Chellen* cases, it is not a stretch to see the workers in Mississippi winning their case against Signal International. Advancement in the current interpretation of a handful of laws already in place has seen workers rights expanded. Below is a further discussion of this growth in interpretation.

C. *Defining Human Trafficking*

Human trafficking has been defined as another form of modern day slavery.⁹⁸ The roots of human trafficking lie in “a consensual and relatively benign market-based response to the existence of laws that seek artificially to constrain the marriage of surplus labor supply on one side of a border with unmet demand for certain types of labor on the other side of that border.”⁹⁹ Similarly, “the U.S. government and many other nations promote human trafficking and labor exploitation while simulta-

95. *Chellen*, 344 F. Supp. 2d at 1286.

Defendants contend that the *Chellen* plaintiffs entered the United States with visas authorizing entry into the United States for the sole purpose of receiving training at JPC. . . . Whether the *Chellen* plaintiffs were “trainees” or “employees” is significant because, if they were “employees,” they were entitled to minimum wage and overtime compensation. *Id.*

See Alba Lucero Villa, *Guest Worker Litigation Gains Ground*, 42 TRIAL 70, 75 (2006) (reporting the defense argued by the defendant’s counsel attempting to use the B-2 visa classifications as an excuse for the subpar wages paid to the workers).

96. *Chellen*, 344 F. Supp. 2d at 1286 (“[T]he Court finds that the *Chellen* plaintiffs were employees, and not trainees, under the FLSA.”).

97. *Chellen*, 446 F. Supp. 2d at 1256 (“The Court finds that compensatory damages should be awarded to the *Chellen* plaintiffs for emotional harm suffered as a result of defendants’ actions. Accordingly, the Court awards compensatory damages for emotional distress in the amount of \$1000 per *Chellen* plaintiff, against both defendants . . .”). See Alba Lucero Villa, *Guest Worker Litigation Gains Ground*, 42 TRIAL 70, 72 (2006) (detailing the increase of previously awarded damages won by the plaintiffs for the additional emotional distress caused by the defendants’ deceptions regarding the conditions of their employment and the violation of their civil rights).

98. See Nancy G. Abudu, *International Legal Developments in Review: 2007*, 42 INT’L LAW. 755, 775 (2008) (making the connection that human trafficking is a form of modern slavery). “The internationally recognized crime targets the vulnerable, exploiting women, children, and men for sex, labor, domestic work, and other services.” *Id.*

99. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 5 (2008) (defining the “push” and “pull” factors that are created between markets on a border).

neously creating the conditions of poverty . . . compelling people to migrate.”¹⁰⁰

One of the problems with classifying these claims as human trafficking is that international law and laws within the United States differ on how trafficking is defined.¹⁰¹ The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children¹⁰² allows for a broad definition of human trafficking, while the United States’ definition is much narrower.¹⁰³ In a discussion of how child sex trafficking laws are difficult to enforce because the idea of “consent” remains in the laws, one author agrees that “since policy considerations have driven definitional differences between U.S. human trafficking legislation and United Nations protocol language, our immigration laws must be revisited to more closely align with international human rights principles.”¹⁰⁴ The main idea should be that it is important to not just

100. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 327–28 (2007) (describing the ways host countries essentially perpetuate poverty in neighboring countries in order to create a migration problem). Specifically, “[t]he selective criminalization of ‘sex trafficking’ ensures that the root causes of all forms of human trafficking, and state responsibility for or complicity in these structural causes, remain unchallenged.” *Id.* at 328. However, the causes that make humans susceptible to trafficking are diverse and complicated, requiring the integration of “multiple perspectives from varied fields of human rights, women’s rights, labor rights, and health rights.” *Id.*

101. See Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309, 373–74 (2008) (discussing the lack of consolidation between international laws and the laws which govern trafficking within the United States). The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children “addresses human trafficking through an expansive definition while the U.S. human trafficking laws more narrowly craft its definition.” *Id.* (footnote omitted).

102. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Id.* at art. 3(a).

103. Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309, 373–74 (2008) (discussing that part of the problem lies in the definition of human trafficking: the United Nations, unlike the United States, addresses human trafficking through a broad spectrum).

104. *Id.* at 374–75 (showing in more detail that the international system and the system within the United States needs to be reconciled in order for trafficked victims to truly

prosecute the traffickers, but also to protect the victims that have been trafficked.¹⁰⁵

Authors Chang and Kim bring insight into why ideas regarding trafficking need to be revisited and reconceptualized.¹⁰⁶ In their view, “[s]cholars and advocates across several movements have attempted to develop approaches to human trafficking that would best serve the needs and support the rights of all migrant workers and survivors of trafficking.”¹⁰⁷ Also, they find that because American law approaches trafficking with an emphasis on sex trafficking, other forms of trafficking are overlooked, thus becoming a weaker source of protections for migrant workers needing that protection, which effectively “marginalizes trafficked persons in non-sex related industries.”¹⁰⁸ Chang and Kim seek to show the international repercussions of the American trafficking policy, due to this emphasis on the sex trade and suggest a “cross-sectoral alliance to challenge mainstream approaches to human trafficking and to create new strategies to protect the rights of trafficked persons, migrant workers, and women against the negative impact of United States policies and practices.”¹⁰⁹

be protected). “Modifying the U.S. immigration law is a measure that elevates our commitment to this subpopulation of human trafficking victims to internationally recognized standards that herald the legal and social rights of children.” *Id.* at 375.

105. *See id.* at 375 (proving that trafficking laws need to go after the traffickers, but also justice for the trafficked victims and greater access to compensation for their trauma). Human trafficking victims will be afforded greater protection with the modification of U.S. immigration laws and with international recognition of these “naive and powerless” victims. *Id.* at 374–75.

106. *See* Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 318 (2007) (discussing the problems with existing concepts behind the criminalization of trafficking). The discussion initiates with the general idea that “enforcement agencies largely neglect the broader phenomenon of trafficking into agriculture, domestic service, restaurants, hotels, manufacturing, and construction.” *Id.*

107. *Id.* (showing the ways advocates of criminalization of trafficking are moving the discussion along to include all types of trafficking victims). However, though both domestic and international groups rallying for the rights of immigrants, laborers, and sex workers realize that a collaborative approach must be taken to address trafficking issues, their efforts are often blocked by the federal government’s focus on sex trafficking above other forms of trafficking. *Id.*

108. *Id.* at 318–19 (discussing the weaknesses created when laws against trafficking become too centered on people who are trafficked into the sex industry rather than focusing on the larger themes of all human trafficking). Furthermore, the United States’ “policies and practices [centering on sex trafficking] inhibit a rights-based approach that respects the agency and choice of adults to decide how to organize their lives.” *Id.* at 319.

109. *Id.* at 319 (maintaining that human trafficking needs to be seen through a larger scope within the laws of the United States).

Expanding the concept of trafficking to include not just women trafficked into the sex trade, but men and women trafficked into other fields of labor only occurred in the last twenty years.¹¹⁰ It is only after realizing this timeline that one can see, perhaps, why legal recourse for victims of many other categories of trafficking is so severely lagging.

One theory blames “receiving” countries for unfairly written laws that impact these trafficked workers by keeping them “super-exploitable” and unable to access rights like native workers.¹¹¹ It is suggested that because of the concentration on sex trafficking and criminalizing prostitution, migrant workers are largely ignored.¹¹² By ignoring these guest workers’ rights, there is far too much room for exploitation, working against the basic idea that globalization should allow all workers access to ways of improving their lives.¹¹³ The system results in a vicious cycle keeping workers from obtaining rights, and keeping them marginalized despite the fact that they are seeking legitimate opportunities to better their lives.¹¹⁴

Organizations throughout the world report that U.S. anti-trafficking policies and practices operate with a narrow conceptual focus. As a consequence, advocates and other commentators have observed the erosion of trafficked persons’ rights and diminishing service provisions for trafficked persons in a variety of sectors. . . . The result is the conflation of human trafficking with prostitution. *Id.* at 320.

110. *See id.* at 326 (going through the historical roots of the criminalization of trafficking). “The new discourse supports a framework that views trafficking as coerced migration or exploitation of migrant workers for all forms of labor, including a broad spectrum of work often performed by migrants . . .” *Id.*

111. *See* Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 327 (2007) (showing the discrepancies between native workers and trafficked workers and their access to rights). The way countries like the United States and Canada, which are “receiving” countries, formulate immigration, labor, and welfare laws leaves migrant workers in a perpetual “temporary” state of immigration, which makes them ineligible for the common rights and protections that “receiving” country citizens are afforded. *Id.*

112. *See id.* at 334 (highlighting the weaknesses in laws against trafficking of humans). U.S. policies and practices focusing on sex trafficking marginalize the rights of workers trafficked into non-sex-related industries. The emphasis on sex trafficking and criminalization of prostitution perpetuates the widespread exploitation of migrant workers by failing to reform restrictive immigration policies that deny migrant workers the labor protections afforded to citizen workers. *Id.*

113. *See id.* at 339 (focusing on the fact that globalization does not mean exploitation of workers must exist in order for it to work). In a global market, “demand for cheap and expendable labor increases the vulnerability of migrant workers susceptible to trafficking.” *Id.* However, it is important that the global market encourage workers’ safe migration and empowerment so that migrant workers may fight for their own labor rights. *Id.*

114. *See id.* at 343–44 (emphasizing that equality among these workers is necessary for parity). At a minimum, comprehensive labor protections should be extended “to all migrant and non-migrant workers in all labor sectors including commercial sex, domestic ser-

Other authors have brought focus to this growing problem by suggesting that guest worker programs are “leading to the commodification of labor and a widening of the democracy deficit.”¹¹⁵ The commodification comes from the fact that they are part of the larger mechanism of globalization, but the workers themselves lack any “bargaining power or voice” in that well-oiled machine.¹¹⁶

D. *Protecting Trafficked Guest Workers*

Many protections exist for agricultural guest workers that came to the United States with an H-2A visa. Initially, agricultural workers did not have any protections, but activists worked over time to put some into place. Protection for the non-agricultural guest worker (holder of an H-2B visa) has come more recently, mostly through the Fair Labor Standards Act (FLSA).

An example of how the FLSA has been used to protect against trafficking abuses occurred in the *Chellen* case from Oklahoma discussed above, and many of the facts of that case are incredibly similar to the case of the Indian guest workers described from Mississippi.¹¹⁷ The *Chellen* case, tied in Title VII civil rights laws, and also 42 U.S.C. § 1981 to human trafficking and gave “the government one more weapon in the fight against exploitation and forced labor.”¹¹⁸

In *Chellen*, welders from India were recruited to the United States via a subcontractor, AL Samit, to work for a company in Oklahoma, John Pickle Company (JPC).¹¹⁹ A lawyer for the Equal Employment Opportunity Commission described what ensued as “the American dream turned into a workplace nightmare.”¹²⁰ The workers were paid less than minimum wage, and lived in horrific quarters, where their meals were

vice, agriculture, construction, restaurants, hotels, factories, and any other type of work.” *Id.* at 342.

115. Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 28 (2006) (suggesting that these workers become a commodity in an unfair balance between employers and the economic system, but as a group, they have no rights).

116. *Id.* (maintaining that these workers are virtually voiceless, and have to work against the system to have their rights enforced).

117. *See Chellen*, 344 F. Supp. 2d at 1278–80.

118. *See Judge Orders John Pickle to Pay \$1.24 Million to 52 Foreign Workers in ‘Human Trafficking’ Case*, U.S. FED. NEWS, May 26, 2006, available at 2006 WLNR 9295698 (stating the importance the precedent of this case sets). This ruling should help fight the battle against the countries expanding the human trafficking problem. *Id.*

119. *Chellen*, 344 F. Supp. 2d at 1278–80.

120. *See Judge Orders John Pickle to Pay \$1.24 Million to 52 Foreign Workers in ‘Human Trafficking’ Case*, U.S. FED. NEWS, May 26, 2006, available at 2006 WLNR 9295698.

rationed.¹²¹ The Indian workers came from varying religious backgrounds; some were Hindu, others Catholic, and still others were Muslim.¹²² No provisions were made to incorporate their varying dietary restrictions as a result of their differing religious beliefs, nor were any attempts made at incorporating their various needs for worship.¹²³

Also, because of the nature of their jobs as welders, these workers were given competency tests before they left India, and again upon their arrival in Oklahoma.¹²⁴ Their passage rate was impressively high, even though non-Indian workers applying for the same job with this company did not have to achieve the same high marks on the same tests.¹²⁵ Once they began, the Indians found themselves forced to work on a septic tank and other jobs that were not related to their positions as welders.¹²⁶

When JPC began to answer for its treatment of the Indians, it argued that the workers were in fact employed by AL Samit International, an Indian company that hires people to train in order to work for a JPC affiliate in Kuwait.¹²⁷ Because JPC argued these workers had come to the United States as “trainees” and not “employees,” the court first had to decide whether these workers were categorized as trainees or employees; if the workers were found to be employees, “they were entitled to

121. *Chellen*, 344 F. Supp. 2d at 1285–87 (listing some of the complaints of the Indian workers against the defendant: minimal managerial supervision, “Cram-a-lot-Inn” living quarters, inattentive medical attention, and preventing workers from leaving).

122. *Chellen*, 446 F. Supp. 2d at 1262 (showing the differences among the various Indian workers to further show the lack of common decency shown on the part of the defendant). The court stated that defendant’s “restrictions on movement of the *Chellen* plaintiffs affected [their] ability to worship freely.” *Id.*

123. *Id.* (providing further details on the lack of provisions made on the part of the defendant). Not only did the defendants not make any attempts to accommodate the workers’ religious practices, but they encumbered them. *Id.*

124. *Chellen*, 344 F. Supp. 2d at 1283–84 (“JPC required each welder in the *Chellen* group to be tested on welding procedures under the ASME code specifications, first in India and again in Tulsa. The *Chellen* plaintiffs were given the same test JPC gave to applicants for a full-time job at the Tulsa facility.”).

125. *Id.* (explaining how non-Indian workers achieving lower test results obtained more prominent job positions than higher achieving Indian workers). “There was no predictable or consistent hiring practice with regard to the testing of fitters for employment at JPC.” *Id.* at 1284.

126. *Id.* at 1286 (asserting that *Chellen* plaintiffs were required to do any job required by their training as well as those tasks specifically requested by JPC Management “without hesitation or reservation”).

127. *Id.* at 1279–80 (“Defendants den[ied] most of the allegations and allege[d], in defense, that the *Chellen* plaintiffs were employed by an Indian company, AL Samit International, to be trained in the United States by JPC for work at a JPC-affiliated company in Kuwait.”).

minimum wage and overtime compensation.”¹²⁸ As trainees, they were not entitled to those benefits and it was only after the “trainee/employee” distinction was made, that liability could be assessed and damages awarded.¹²⁹

In a two-part decision, the court found that because of fraud on the part of JPC, the workers were in fact employees.¹³⁰ Based on an earlier decision, *Patel v. Quality Inn South*,¹³¹ which allowed *undocumented* workers to be considered employees in order to gain protections under the FLSA, the *Chellen* court extended that concept to include workers that were in the United States with *valid* non-immigrant visas.¹³²

What is key in *Chellen* is that JPC was able to quickly procure B1 or B2 visas for the workers (visas for people visiting for business purposes, not for guest workers).¹³³ The appropriate visa would have been the H-2B visa.¹³⁴ According to the court, these visas are easier to obtain, and generally have a “less scrutinized process than an H-2B visa for temporary work or an H3 visa for training.”¹³⁵ If JPC’s argument that these workers were hired to be trainees was accepted by the court, the workers would not be eligible for protection under the FLSA, and thus would not qualify for minimum wage.¹³⁶ The court did not accept this argument, and instead condemned JPC for misleading the workers and for “knowing that

128. *Id.* at 1280 (relying on the definitional difference within the statute of “employee” and “trainee”).

129. *Chellen*, 344 F. Supp. 2d at 1292 (explaining that the distinction of whether the *Chellen* plaintiffs were “trainees” or “employees” is important to the case’s outcome because “if they were ‘employees’, they were entitled to minimum wage and overtime compensation”).

130. *Id.* at 1292 (deciding that these workers were in fact employees and not trainees for purposes of the law). The court found the *Chellen* plaintiffs were “employees” based on the FLSA and the *Reich* Test. *Id.*

131. 846 F.2d 700, 706 (11th Cir. 1988) (holding that regardless of immigration status, employees are covered by FLSA protections).

132. *Chellen*, 344 F. Supp. 2d at 1291 (citing *Patel* as support for its finding that statutory definitions “include all individuals employed by covered employers and impose no limitation based on nationality or immigration status”). The *Patel* court found that undocumented East Indian workers were “employees” in regards to FLSA coverage. *Id.*

133. *Id.* at 1282 (finding that the defendant purposely obtained the easiest visas available, rather than going through the rigorous process to get the appropriate visas). The B1 and B2 visas are obtained easier than an H-2B visas for temporary workers or an H3 visa for training because they are less scrutinized by the government. *Id.*

134. *Id.* (noting that H-2B visas are for temporary workers, which was the most appropriate classification for the *Chellen* plaintiffs).

135. *Id.* (insinuating that the defendant used B1 or B2 business visitor visas in order to avoid the scrutiny of the more appropriate H-2B visas for temporary workers).

136. *Chellen*, 446 F. Supp. 2d at 1276–77 (detailing the plaintiffs’ arguments that defendant intentionally procured improper visas and made misrepresentations to U.S. officials regarding the supposed “training” of plaintiff workers).

they could not be legally employed in the U.S., given the types of visa obtained for the *Chellen* plaintiffs by the defendants.”¹³⁷ The plaintiffs in this case were later awarded damages after JPC was found liable for a number of FLSA violations.¹³⁸

Later, another case, *Castellanos-Contreras v. Decatur Hotels*,¹³⁹ decided that the “employee” definition was extended to include H-2B visa holders, thus extending FLSA protections to them as well.¹⁴⁰ In *Castellanos-Contreras*, similar to what the Indian workers in Mississippi faced, Latin American workers (specifically from Bolivia, Peru, and the Dominican Republic) were brought to the American Gulf Coast, also in the aftermath of Hurricane Katrina, to work in luxury hotels in the New Orleans area.¹⁴¹ Again, a third party contractor was involved in recruiting these workers, though the American company, Decatur Hotels, was involved in procuring the DOL certification needed to get these workers

137. *Id.* at 1277–78 (focusing again on defendant’s conscious decision to apply for the wrong visas for the Indian workers who relied solely on defendant for the proper work authorization). The court stated that the FLSA provides protection for undocumented workers “as an award against a ‘knowing employer.’” *Id.* at 1278.

138. *Id.* at 1294 (detailing the various liabilities attached to defendant and the damages awarded to the plaintiff). During the time that the *Chellen* workers were working for the JPC, people who were determined “employees” under the FLSA were entitled to \$5.15 an hour, and time and a half for overtime. *Id.* at 1276. JPC did not pay their workers at these statutory rates. *Id.* Therefore, “the award for work performed should equal the difference between what JPC actually paid them and what they would have earned if they had been paid minimum wage for the hours they worked, including overtime.” *Id.* at 1277. Under Title VII, “the measure of damages is the rate of pay that each *Chellen* plaintiff should have earned, given his skills and qualifications, compared to that of similarly-situated non-Indian JPC workers, less any applicable offsets.” *Id.* at 1286–87. Furthermore, compensatory damages were awarded for mental and emotional distress. *Id.* at 1288. Lastly, punitive damages were awarded for the defendant’s engagement “in a discriminatory practice . . . with malice or reckless indifference to the federally protected rights of the aggrieved individual.” *Id.*

139. 488 F. Supp. 2d 565 (E.D. La. 2007).

140. *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F. Supp. 2d 565, 566 (E.D. La. 2007), *rev’d*, No. 07-30942, 2009 WL 324636 (5th Cir. Feb. 11, 2009); see Rachel K. Alexander, *Undocumented Workers Can Sue Under Federal Employment Laws*, NEB. LAW., Nov./Dec. 2007, at 22, <http://www.nebar.com/pdfs/nelawyer/2007/NOVDEC07/1107.pdf> (stating that this ruling was not surprising, given that “the federal courts had already determined that temporary agricultural workers with H-2A visas were ‘employees’ for purposes of the FLSA”). “What may be surprising is that citizens and legal immigrants aren’t the only employees who can properly sue under federal employment laws; undocumented workers can too.” *Id.*

141. *Castellanos-Contreras*, 488 F. Supp. 2d at 566 (discussing the influx of workers to the American Gulf Coast after Hurricane Katrina). The hotels in the area were confronted with a shortage of labor and therefore took other measures in accordance with labor laws of the U.S. government in order to recruit foreign labor. *Id.* at 567.

their H-2B visas.¹⁴² Workers were promised reimbursement for “travel, visa, recruitment, and other expenses incurred in migrating to the United States.”¹⁴³ Plaintiffs argued that when defendant failed to reimburse for those bills, it effectively pushed their wages below the minimum wage requirement, which violated the FLSA.¹⁴⁴

As a matter of first impression in the federal courts, the issue was whether the FLSA applied to non-immigrant alien workers that temporarily entered the United States on H-2B visas.¹⁴⁵ In advancing their argument, plaintiffs relied on the precedent setting case of *Arriaga* in which the Eleventh Circuit held that FLSA protection “indisputably appl[ies] to the Farmworkers.”¹⁴⁶ Plaintiffs in *Castellanos-Contreras* asked the court to extend this reasoning to H-2B visas.¹⁴⁷

Defendants argued that there were two completely different sets of statutes and regulations governing the H-2A and H-2B visa programs.¹⁴⁸ Their argument centered on their belief that the statutes focusing on the H-2B visas did not attach to any other employment-based regulations.¹⁴⁹ They further argued the only provisions included in the H-2B statutes required the employer to reimburse the worker for a return trip home, should the contractual period end before the date agreed upon.¹⁵⁰

142. *Id.* at 567 (detailing the process that employers must go through to get H-2B status for their guest workers). The U.S. government allowed H-2B workers on the condition that there was not a sufficient workforce available to fill the jobs available. *Id.* The H-2B workers, however, were only allowed to work for the requesting employer. *Id.*

143. *Id.* (listing the various expenses that the workers expected to be reimbursed). The workers were also promised a fair work environment including “high earnings, stable jobs, and good living conditions.” *Id.*

144. *Id.* (showing why workers’ wages fell below the acceptable minimum). Deducting the costs of travel expenses, visas, and miscellaneous expenses that the workers accumulated during the first week of labor puts the hourly wage below the minimum wage of \$5.15 an hour. *Id.*

145. *Id.* at 566 (listing the factors that made this case one of first impression).

146. *Arriaga*, 305 F.3d at 1235. The *Arriaga* court held that “transportation and visa charges are ‘inevitable and inescapable consequences of having foreign H-2A workers employed in the United States.’” *Id.* (citation omitted).

147. *Castellanos-Contreras*, 488 F. Supp. 2d at 569 (showing a need to extend the FLSA benefits to H-2B visa holders as well as H-2A visa holders). The *Arriaga* holding should be accommodated into the H-2B program in order for them to enjoy the same benefits as those under the *Arriaga* holding. *Id.*

148. *Id.* (describing the defense’s argument). The defense argued that precedent, specifically that of *Arriaga*, did not apply in the case at hand. *Id.*

149. *Id.* (relying on the differences in the statutes that created the two H-2 visa categories).

150. *Id.* (citing the only statutory guarantee for H-2B visa holders). When an employee who is working under the H-2B visa program is terminated prematurely, the employee is guaranteed the expenses incurred while making arrangements to work in the United States, otherwise he is not reimbursed any amount. *Id.*

After winding through the history of the H-2 worker program, the court decided to extend the FLSA protections to the H-2B workers.¹⁵¹ The court pointed out Congress's special concern for agricultural workers, and noted Congress did not intend to *exclude* the non-agricultural workers from protection against potential employer abuses.¹⁵² According to the court, "[t]he fact that the H-2B statutes and regulations do not expressly recognize the applicability of the FLSA is not determinative of the issue before the Court."¹⁵³ It was actually the fact that Congress had not expressly excluded them that convinced the court to rule in favor of the guest workers.¹⁵⁴ The court also believed that if FLSA provisions were applicable to undocumented workers, they should also be extended to H-2B visa holders.¹⁵⁵

In light of the recent regulations, and clarification from the Department of Labor regarding its rules, the Fifth Circuit reversed and remanded the lower court's ruling in *Castellanos-Contreras*.¹⁵⁶ Relying heavily on the new DOL information, the court found that the guest workers were entitled to protection under the FLSA, but that the FLSA did not require the employer to pay for costs incurred by the guest workers related to recruitment, transportation, or obtainment of their visa.¹⁵⁷ This does follow the discussion above regarding payment of so-called relocation costs. As mentioned above, the DOL focused its attention on costs which primarily benefit the employer, guest worker, or both

151. *Id.* at 571 (detailing the ways in which Congress does not expressly forbid extension of FLSA to H-2B visa holders). While there have been adjustments to the agricultural portion of the H-2 program, the non-agricultural portion has remained the same and there have been no amendments to the statutes and regulations. *Id.*

152. *Castellanos-Contreras*, 488 F. Supp. 2d at 571.

153. *Id.* (showing that statutory language does not necessarily exclude if it fails to mention a specific guarantee). There has never been a statement issued by Congress or the federal agencies that does not permit benefits to be extended to non-agricultural employees. *Id.*

154. *Id.* (allowing the extension of FLSA benefits to H-2B workers). The courts have not turned up any research suggesting that the issue of the extension of the benefits should be given to all H-2B workers. *Id.*

155. *Id.* at 572 (referring to earlier case law which did extend certain FLSA provisions to undocumented workers allowing them to sue to receive back pay and overtime wages). The immigration status of the employee is not a restriction of the benefits given by the FLSA. *Id.* By not stating the specific exemptions of the FLSA, the FLSA did not limit the status of the H-2B employees for the case at hand. *Id.*

156. *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, No. 07-30942, 2009 WL 324636, at *1 (5th Cir. Feb. 11, 2009) (reversing and remanding the case).

157. *Id.* at *1, *3 (listing the various relocation costs that guest workers incurred on their way to their new jobs, and how the FLSA did not require reimbursement for those costs).

equally.¹⁵⁸ The court weighed the two sides, and found that when it comes to costs associated with recruitment, transportation and visa procurement, the guest worker was primarily the beneficiary, and not the employer.¹⁵⁹ While this result is disheartening, most cases involving guest workers involve many other egregious abuses, as highlighted by the other cases mentioned. While the Fifth Circuit seems to have cut off one avenue of compensation, there are still other forms of relief available for the other abuses guest workers endure, as highlighted by the case below.

A third case illustrating potential application and extension of FLSA to H-2B guest workers involved Guatemalans who sued a forestry company for claims similar to cases described above. In *Aguilar v. Imperial Nurseries*,¹⁶⁰ laborers had their passports confiscated and were forced to work upwards of eighty hours a week with no access to emergency health care.¹⁶¹ Once again, the employer blamed a subcontractor for the treatment of the workers, and denied any wrongdoing.¹⁶² Even after some of these workers fled without their passports, the forestry company went back to Guatemala to recruit more workers.¹⁶³ These Guatemalans also became plaintiffs in this suit where they utilized a provision in new human trafficking laws permitting compensation for the employer's trafficking.¹⁶⁴ The case later settled.¹⁶⁵

158. See Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,040 (Dec. 19, 2008) (to be codified at 20 C.F.R. pt. 655) (showing the different ways in which costs can benefit the two sides).

159. *Castellanos-Contreras*, 2009 WL 324636, at *4-8 (analyzing the intent behind the DOL regulations).

160. No. 3-07-CV-193, 2008 WL 2572250 (D. Conn. May 28, 2008).

161. Complaint at 2, *Aguilar v. Imperial Nurseries*, No. 3-07-CV-193, 2007 WL 1183549 (D. Conn. Feb. 8, 2007). See Nina Bernstein, *Suit to Charge That Nursery Mistreated Laborers*, N.Y. TIMES, Feb. 8, 2007, at B2 (“The lawsuit charges that agents of Imperial Nurseries confiscated the men’s passports to prevent their escape, forced them to work nearly [eighty] hours a week for far less than minimum wage, denied them emergency medical care and threatened them with jail and deportation if they complained.”).

162. Nina Bernstein, *Suit to Charge That Nursery Mistreated Laborers*, N.Y. TIMES, Feb. 8, 2007, at B2 (reporting how the defendant denied the charges and attempted to focus the responsibility on a subcontractor that worked in the recruitment of these workers).

163. Complaint at 8, *Aguilar v. Imperial Nurseries*, No. 3-07-CV-193, 2007 WL 1183549 (D. Conn. Feb. 8, 2007) (detailing the fact that the company continued to recruit workers from Guatemala, even after workers fled).

164. *Id.* at 24 (explaining that defendants recruited the new plaintiffs after a group of the previous plaintiffs fled from defendant’s facilities). See Nina Bernstein, *Suit to Charge That Nursery Mistreated Laborers*, N.Y. TIMES, Feb. 8, 2007, at B2 (reporting how two Guatemalans in the “second batch of recruits” were plaintiffs in this suit). All plaintiffs

Currently, the main avenue for relief for victims of trafficking is the Trafficking Victims Protection Act (TVPA).¹⁶⁶ When studying trafficking it is key to note the difference between trafficking and smuggling. “Trafficking differs from smuggling in that the smuggling involves the provision of a service albeit illegal, while trafficking involves a continued relationship of forced labor or other exploitation that profits the trafficker.”¹⁶⁷ The purposes of the TVPA were threefold: first, to prevent trafficking; second, to protect the trafficked person; and third, to prosecute the trafficker.¹⁶⁸ The Indian guest workers in Mississippi are using both the FLSA and the TVPA to go after Signal.¹⁶⁹ The American Civil Liberties Union joined the plaintiffs in the case against Signal, and are pushing for defendants to be found guilty of several actions under both Acts.¹⁷⁰

sued “under a 2003 provision of the federal laws against human trafficking, which added a right for victims to sue for compensation.” *Id.*

165. See John Christoffersen, *Migrant Workers Settle Claims Against Connecticut Nursery: Human Trafficking Still Alleged*, HARTFORD BUS. J., June 25, 2007, available at http://www.hartfordbusiness.com/article.php?RF_ITEM%5B%5D=article%0@1986;Article&css_display=print (stating that a settlement had been reached between the Guatemalan workers and the Connecticut nursery). The workers continued their lawsuit against Pro Tree Forestry Services, the recruiter, and eventually received an award of damages in the six figure range for each plaintiff. *Aguilar v. Imperial Nurseries*, No. 3-07-CV-193, 2008 WL 2572250 (D. Conn. May 28, 2008).

166. See generally Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at 22 U.S.C. § 7101 (2006)); see also Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004) (“The chief law relating to the trafficking of persons into the United States is the Trafficking Victims Protection Act.”). Although this law is designed to penalize traffickers, prosecution alone is insufficient to address the trafficking industry as a whole. *Id.*

167. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 5 (2004) (providing the differences between trafficking and smuggling of people for purposes of the law). Specifically, trafficking includes “the recruitment, transport, harboring, transfer, sale or receipt of persons through coercion, abduction, force, fraud, or deception for the purposes of exploitation.” *Id.* Therefore, consent is not dispositive when determining the difference between trafficking and smuggling. *Id.*

168. *Id.* (modeling the TVPA on the “three P” model in the international Trafficking Protocol). Because the international Protocol did not provide an interpretation to the various definitions of trafficking, this ambiguity continues in the TVPA passed by Congress. *Id.* In addition, the TVPA also has issues in enforcement mechanisms. *Id.*

169. First Amended Complaint at 11-18, *David v. Signal Int’l, L.L.C.*, No. 08-1220, 2008 WL 1751667 (E.D. La. Apr. 29, 2008), available at <http://www.aclu.org/intlhumanrights/immigrantsrights/362371gl20080429.html> (listing their complaints under the FLSA and TVPA).

170. See First Amended Complaint, *David v. Signal Int’l, L.L.C.*, No. 08-1220, 2008 WL 1751667 (E.D. La. Apr. 29, 2008), available at <http://www.aclu.org/intlhumanrights/immigrantsrights/362371gl20080429.html>.

What follows in Legal Analysis II is a discussion of these human trafficking laws, and how they impact guest workers that arrive on an H-2B visa.

IV. LEGAL ANALYSIS II

Guest worker programs have been described as “an attempt to resolve political demands for stricter immigration law enforcement with conflicting economic demands for access to [a foreign] labor supply.”¹⁷¹ Although guest workers differ from undocumented workers, they are still facing “barriers” to their rights, not unlike those faced by undocumented workers, because of fear factors, transnational logistical problems and transnational legal barriers.¹⁷²

Another argument is that guest worker programs inherently allow for a concentration of power in the employers hands, and this leads to fear and lack of action against mistreatment, or lack of fair pay for work.¹⁷³ Because the nature of their work and presence in the United States is inherently temporary, these guest workers find it almost impossible to have any of their rights enforced.¹⁷⁴ Most guest workers are “poor, Spanish-speaking, and unfamiliar with American institutions.”¹⁷⁵ They will face

171. Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 5 (2007) (showing the balancing act that brings in migrant workers). Wages of Mexican workers have remained low while the United States’ demand for low-wage labor has remained high. *Id.* “The Bush Administration escalated immigration enforcement Thus, many U.S. employers who normally employ undocumented workers instead have sought, in unprecedented numbers, guestworkers through the H-2 program.” *Id.*

172. *See id.* (listing the many factors that work against migrant workers).

173. *Id.* at 6 (suggesting that all the power is in the hands of the employer, thus making the guest worker weaker).

Guestworker programs concentrate power in the hands of the employers by binding the workers’ immigration status to their labor for a specific employer. Living under the thumb of their employers and bound by their work visas, guestworkers fear persecution by immigration and law enforcement and/or employer retaliation and blacklisting if they challenge maltreatment. *Id.*

Guest workers also face living in poor housing, exposure to toxic chemicals, and dangerous working conditions. *Id.* at 5. “According to a 2004 investigative report by the Associated Press, Mexican workers in the U.S. are 80[%] more likely to die in the workplace than U.S.-born workers, and nearly twice as likely to die than the rest of the immigrant population.” *Id.*

174. Ruben J. Garcia, *Labor as Property: Guest Workers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 28 (2006) (suggesting the mere fact that these guest workers are here on a temporary basis makes their access to rights virtually impossible).

175. Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan*, 15

an uphill battle to get legal representation, and if they do, they may still have a problem understanding their rights and ultimately having their rights enforced.¹⁷⁶

A. *Barriers to Legal Remedies*

The FLSA protects guest workers from employer mistreatment such as lack of access to the minimum wage, serves as a safeguard against working too many hours per day, allows for some travel reimbursement, provides compensation for illness or injury sustained on the job, and prevents employer retaliation.¹⁷⁷ Though courts are working on extending FLSA benefits to include guest workers, most employee problems stem from “procedural barriers [which] impede pursuit of these protections.”¹⁷⁸ Should a guest worker decide to lodge a complaint against an employer, several of the procedural pieces of the puzzle end up operating against the worker. For example, workers are required to leave the country at the end of their employment period with that employer by nature of their visa.¹⁷⁹ This makes the worker’s availability during the discovery process impossible.¹⁸⁰ Most courts and administrative organizations require presence of the complainant.¹⁸¹ This is impossible to achieve once the worker has returned to their home country. The guest

BERKELEY LA RAZA L.J. 125, 142 (2004) (describing the average guest worker and the reasons they become increasingly marginalized).

176. *Id.* (suggesting that even if these guest workers had legal representation, they face a difficult challenge getting their rights enforced). In the event that the worker is able to secure representation at all, it will likely be from a legal services program. *Id.* Fear of retaliation by employers, for example, is a hindering factor to even utilizing this form of legal representation. *Id.* An additional hurdle to enforcement is the forum in which guest workers are allowed to sue. *Id.* Guest workers may only sue in a state’s court system, “which is more likely to be biased.” *Id.*

177. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-16 (2006); *see also* Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 6 (2007) (listing the ways in which a guest worker is protected under FLSA).

178. Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 6 (2007) (suggesting that despite protections that should be awarded to guest workers under FLSA, what actually impedes a worker from protections is more procedural).

179. *See id.* (showing the way a guest worker is tied to his employer and to a previously set time table in which the worker has to remain in the country).

180. *See id.* (proving that procedure is hard to follow if a complaining guest worker is not present in the United States because the worker has returned to his home country after his visa has expired).

181. *See id.* (describing the procedural requirements of most courts and administrative bodies).

workers from India will likely face this impossibility should they return home.

For those workers whose home country is closer to the United States than for others, legal services may be available.¹⁸² But, even though there are services available, further barriers remain.¹⁸³ Many of these free legal service organizations available to workers are unable to extend their resources abroad to gather information for these cases, largely due to a lack of funding.¹⁸⁴ Although intended to protect workers, “[l]egal and logistical barriers systematically deny guest workers access to justice in the U.S.”¹⁸⁵ United States-based law firms and public interest groups experience further complications trying to gain access to workers in places such as Mexico, because their limited resources prevent them from investigating deeply to uncover pertinent information and build strong cases.¹⁸⁶

Despite these difficulties, groups are persevering to overcome obstacles through creative strategies. Specifically, these groups use a “unique bilateral approach.”¹⁸⁷ One such group, Centro de los Derechos del Migrante (CDM), has organized information sessions regarding rights for guest workers before they depart to the United States.¹⁸⁸ CDM also works as a legal assistance group to law firms and public interest groups to complete depositions and other discovery on their behalf, in places that would re-

182. *See id.* (beginning a discussion of some programs in place in Mexico, and how returned Mexican guest workers are gaining more access to organizations inside of Mexico to aid in their complaints).

183. *See* Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 6 (2007) (pointing out that many legal service providers are unable to assist certain groups of society because of federal funding and restrictions that are attached to that funding).

184. *See id.* (showing the barriers that American legal service providers would face if they were to go abroad).

185. *Id.*

186. *See id.* (suggesting that legal services for guest workers are impeded by the sheer expense of locating witnesses and building a case on behalf of a client who has relocated to his or her home country).

187. *Id.* (discussing a convention aimed at bringing together immigration attorneys, advocates, and community organizers to figure out how to navigate the laws of the United States and Mexico and share resources to help immigrant workers).

188. Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 6 (2007) (showing the benefits of giving guest workers a presentation of their rights and information regarding their specific employer, before leaving for the United States).

quire American-based groups more resources than they have available to them.¹⁸⁹

As an additional creative tactic, CDM advocates that American-based companies be liable for breaking Mexican labor law, in addition to existing American laws.¹⁹⁰ When American-based companies reach out to the Department of Labor for their labor certifications, they agree to abide by state, local, and federal laws.¹⁹¹ CDM advocates for the inclusion of various pieces of Mexican labor law as local law, because American companies are recruiting workers from Mexico.¹⁹² This is evidence that more work is being done by CDM and like-minded organizations to “identify new methods of representing binational workers and build a binational network to organize ongoing efforts to advocate on behalf of migrant workers.”¹⁹³

Another organization that made headway into increasing education for Mexican workers is the Farm Labor Organizing Committee (FLOC).¹⁹⁴ In addition to informing guest workers of their rights, this group has implemented grievance procedures for workers, which they can obtain inside Mexico.¹⁹⁵ FLOC is expanding to many Mexican towns, thus allowing more potential workers access to this type of helpful information.¹⁹⁶

Still others are advocating that H-2B workers and all other guest workers should have access to free legal services provided by legal aid organizations internally, within the United States.¹⁹⁷ In addition, many advocate these organizations be allowed to file class action lawsuits

189. *See id.* (describing the network that some organizations have created, with American legal service providers, to allow them cheaper and more available access to their clients inside of Mexico).

190. *See id.* (providing more unique ways legal services are being extended to guest workers).

191. *See id.* (listing the agreements that are required under the DOL regulations for employers who are requesting guest workers).

192. *See id.* (establishing a connection with the DOL regulations and Mexican labor laws).

193. *See* Victoria Gavito, *The Pursuit of Justice Is Without Borders: Binational Strategies for Defending Migrant Rights*, 14 HUM. RTS. BRIEF 5, 7 (2007).

194. *See* Jacob Wedemeyer, *Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa*, 10 J. GENDER RACE & JUST. 143, 189–90 (2006) (listing organizations that have emerged to work on behalf of guest workers to enforce their rights against abusive employers).

195. *See id.* at 190 (describing some of the programs implemented by organizations like the FLOC).

196. *See id.* (listing the expansion plans of the FLOC).

197. *See id.* at 188 (listing ways the H-2 program can be improved so as to incorporate more avenues for abused guest workers to seek justice).

against employers on behalf of guest workers, combining their status as guest workers to define their class.¹⁹⁸

What becomes evident from this discussion is just how important it is that guest workers gain access to legal assistance before they return to their home country. Even though there are resources available to the guest workers once they leave, these resources seem to be limited to those workers originally hailing from Mexico, and only those Mexicans who live close to the Mexican border with the United States. Another very evident fact, though, is that guest workers come from across the globe. Perhaps requiring that employers or recruiters train these workers on their rights, or having a third party train these workers before they begin their jobs will be a more satisfactory way for the government or any overseeing entity to ensure that these atrocities are not repeated.

It is clear that the H-2B program lacks rights and does not provide proper protections for workers, and as a result employers are rarely punished for their abuses.¹⁹⁹ There is limited recourse, as mentioned, for the violated guest worker. The main reason for this is the DOL's resistance to enforcing regulations based on its decision that it has no authority to respond.²⁰⁰ In addition to the fact that the H-2B visas offer no express labor protections, it seems the entire program is void of any oversight, and seems logical that the entire system would be ripe for abuse.²⁰¹ One of positive movements coming out of the court cases discussed, particularly the cases that settled, is that more and more employers are beginning to understand that they should follow FLSA guidelines.²⁰²

Expanding on this movement toward employer awareness of FLSA obligations leads some to suggest that Congress "should consider a far more potent 'employer sanction' in order to abate . . . conditions for all workers."²⁰³ Advocates suggest progressing to a more egalitarian system, and

198. *See id.* ("[C]ongress should allow legal aid attorneys to file class action suits on behalf of H-2A and H-2B workers using their H-2A and H-2B status and employer to define the class.").

199. *See* Lindsay M. Pickral, *Close to Crucial: The H-2B Visa Program Must Evolve, but Must Endure*, 42 U. RICH. L. REV. 1011, 1018 (2008) (stating that the issues within the H-2 program inherently prevent guest workers from being able to protect themselves from employer abuses).

200. *See id.* at 1019 (suggesting that the DOL refuses to get involved on the behalf of guest workers).

201. *See id.*

202. *See id.* at 1023 (showing the evolution of employers settling out of court, to describe that employers are realizing that H-2B guest workers are probably protected against abuses).

203. Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 556 (2006) (suggesting that a better way of giving

encourage immigration reform organizations to work alongside the labor law reformers in order to create a more viable system.²⁰⁴ This Comment primarily focuses on temporary guest workers, but does agree that “all low-wage workers would benefit from additional protection of and enforcement of their labor rights, and correction of the many abuses that have existed under current guest worker programs.”²⁰⁵

V. CONCLUSION

The United States has a long history of immigration. Along with waves of immigration come backlashes against waves of immigrants.²⁰⁶ “Nativism was evident in America as early as the days of Benjamin Franklin even though, aside from the Native Americans, few Americans were truly ‘native.’”²⁰⁷ Over time, labor shortages have forced the United States to regulate immigration so that it benefits the American economy.²⁰⁸ This has led to the current guest worker programs.

As discussed above, the guest worker programs have been mired in problems since their inception. “[I]f a guest worker program is not the best solution, it should be recognized that proposals calling for immediate permanent legal status are also not free from problems.”²⁰⁹ A completely new system is needed to solve the problems facing guest workers and the programs that bring them to the United States.²¹⁰

The Bush Administration put forth a proposal to address this issue. The basic premise behind it was that temporary workers would be allowed to work in the United States for a limited amount of time if they

rights to guest workers is for Congress to revisit the issue and be more concrete about what protections guest workers have, either under existing guidelines, or by creating new, more implicit ones).

204. *See id.* (suggesting a novel idea that immigration reform ought to be thought of alongside labor law reform, in order for guest worker visa programs to have the best effect for employers and their workers).

205. *Id.* at 557 (implying that evolution of guest worker protections will most likely benefit all lower wage workers).

206. *See* Sara Catherine Barnhart, Note, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of “The Pursuit of Happiness,”* 42 GA. L. REV. 525, 527 (2008) (focusing on the cyclical nature of immigration patterns and the waves of anti-immigration backlash).

207. *Id.* (showing that no group is necessarily able to truly be a nativist).

208. *See id.* at 528 (showing how immigration waves are closely tied to the needs of American employers).

209. Krissy A. Katzenstein, Note, *Reinventing American Immigration Policy for the 21st Century*, 41 VAND. J. TRANSNAT’L L. 269, 271 (2008) (discussing the various problems involved with proposals to solve illegal immigration).

210. *Id.* (“By looking to history and considering the needs of the country, the U.S. may discover that the ideal solution requires a fundamentally new policy, rather than a slightly modified old policy.”).

paid a registration fee and were employed by a company willing to hire them.²¹¹ These workers could renew their work authorization only one time.²¹² In an attempt to resolve the mammoth problem that the United States faces regarding undocumented workers, this program would allow these undocumented people to identify themselves in a manner not detrimental to them, and would allow them to sign up to take part in this temporary worker program, with no penalty.²¹³ These undocumented workers would be given a grace period in which they would be allowed to identify themselves, but once that grace period expired, only workers from outside the United States would be allowed to participate in the guest worker program.²¹⁴

Another aspect to the same proposal is that the Bush Administration would put more emphasis on the federal government to enforce rules and regulations under the program, and most importantly against the employers.²¹⁵ The Bush proposal had two main purposes: “To match searching employers with willing workers and to allow those working illegally in the country to ‘come out of hiding’ and participate legally in the workforce and society.”²¹⁶ Critics of this proposal think there would be too much

211. *See id.* at 279 (describing the proposal that the Bush administration offered as a solution to the immigration problem with undocumented workers).

The administration’s proposal relies heavily on a temporary worker program, which appears to be a return to the Bracero Program days. The proposal would allow “immigrants . . . to enter or remain in [the United States] for a limited period of time, provided that they paid a registration fee and worked for a willing U.S. employer.” *Id.* (footnote omitted).

212. *See id.* (showing the time limitations that guest workers would have under the Bush proposal). “After the renewal period expired, temporary workers would be required to return to their home country.” *Id.*

213. *See* Krissy A. Katzenstein, Note, *Reinventing American Immigration Policy for the 21st Century*, 41 VAND. J. TRANSNAT’L L. 269, 279 (2008) (discussing the ways in the which the Bush proposal has decided to deal with undocumented immigrants who are already present in the United States).

214. *See id.* (focusing on a lack of penalty or punishment for undocumented workers who would take part in the Bush program).

215. *See id.* at 279–80 (“In addition to the guidelines governing the temporary workers, the Bush Administration proposal also would require federal authorities to work more diligently to seek out and punish those U.S. employers who hire undocumented migrant workers.”). Even though immigration is a big part of the American way of life, the proposal will strongly encourage companies to hire citizens before resorting to hiring undocumented workers. *Id.* “American employers who are considering hiring temporary workers would [b]e required to make ‘every reasonable effort to find a U.S. citizen to fill the job in question’ before hiring a guest worker.” *Id.*

216. *See id.* at 280 (showing that the undocumented immigrants would not be punished for participating in the Bush program).

emphasis on enforcement and policing of immigrants.²¹⁷ One of the reasons the Bush proposal got a great deal of attention is that it was closely tied in with strengthening national security.²¹⁸

On the opposite end of the spectrum is a proposal set forth by Shelia Jackson Lee, where the emphasis rests on permanent legal status for the guest workers.²¹⁹ This proposal seems to be more promising between the two. Lee's proposal would only extend the guest worker privileges for those undocumented workers that have been present in the United States for over five years.²²⁰ The proposal states the only way to eliminate the perception that undocumented and guest workers must work for low wages and no benefits is to offer them a means to unionize.²²¹ It contains three major components: Earned Access to Legalization, Employee Protections, and Family Reunification.²²²

217. See Krissy A. Katzenstein, Note, *Reinventing American Immigration Policy for the 21st Century*, 41 VAND. J. TRANSNAT'L L. 269, 281 (2008) (“[S]ome believe that, [w]hile those purposes sound legitimate, evaluated in the context of the Bracero Program, it seems that they really amount to providing a cheap labor source for employers and to monitoring illegal immigration, both of which were reasons behind the first government sponsored migrant worker plan.”).

218. See Ryan Petersen, Comment, *Be Our Guest, but Please Don't Stay: A Comparison of U.S. and German Immigration Policies and Guest Worker Programs*, 14 TULSA J. COMP. & INT'L L. 87, 103-04 (2006) (highlighting the emphasis of the Bush proposal on border security). The three-part plan that Bush proposed included “1) returning every illegal immigrant caught at the border, 2) reforming the existing immigration laws on the books and streamlining these laws to make them more effective, and 3) preventing illegal border crossing.” *Id.* at 103. By tightening security at the borders, the government is attempting to keep terror outside of the United States. *Id.* at 104.

219. See Sheila Jackson-Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267, 279 (2006).

Due to the inadequacies in current immigration policy, the United States is in need of comprehensive immigration reform. I [Sheila Jackson-Lee] have introduced the Save America Comprehensive Immigration Act (SACIA) to address the undocumented worker population growth problem. The bill includes the proposed reforms described immediately below. I expect many of its provisions to be adopted when Congress enacts a comprehensive immigration bill. *Id.*

220. See *id.* (“SACIA would only provide access for undocumented immigrants who have lived in the United States for more than five years.”).

221. See *id.* at 280 (“SACIA would empower employees, both domestic and immigrant, to benefit from the collective power of worker unions.”).

222. See generally *id.* at 279–84; Krissy A. Katzenstein, Note, *Reinventing American Immigration Policy for the 21st Century*, 41 VAND. J. TRANSNAT'L L. 269, 280–81 (2008) (highlighting the three main focuses of Sheila Jackson-Lee's proposal to help solve the current undocumented worker situation in the United States). The first component of the proposal, Earned Access to Legalization, allows certain undocumented workers to remain in the United States. *Id.* at 281. Employee Protections, the second concept of SACIA, is designed to alleviate the exploitation of migrant workers and to help domestic workers. *Id.*

It is obvious from the differences in the two programs offered that there is a wide gap between the two sides regarding how to solve the problem of guest workers. What both proposals are still lacking are foundations to resolve the ever-increasing problem of worker abuses. It is clear that “[g]uest worker programs create a cycle in which employers become dependent on a steady supply of cheap labor and immigrant workers become accustomed to earning wages at much higher rates than can be found in their home country.”²²³ One thing is true: “[T]he guest worker experience has led to the conclusion that there is nothing more permanent than temporary workers.”²²⁴

One of the main difficulties is making a concerted effort to identify the sorts of abuses that take place as forms of human trafficking. The laws exist to punish those involved in human trafficking, and it would be an effective eye opener to attach those punishments when employers abuse their guest workers. Perhaps a more conducive method to pique legislators’ interests is to combine, on the one hand, the idea of border security regarding illegal aliens, and on the other, the need to monitor human smuggling.²²⁵

Clearly, the international community does not have the means to effectively combat the problem of human trafficking and the number of abuses of guest workers by employers. The problem is perpetuated by the need for low-wage labor. The truth is, obtaining the funds necessary to educate and inform groups such as police authorities, or lawmakers often gets funneled to seemingly more important projects.²²⁶

This Comment sheds light on the fact that more is needed to protect the guest worker, no matter the industry. Allowing for rampant employer abuse, regardless of the fact that workers will make more money

The final section of the SACIA is Family Reunification, promoting family togetherness of immigrant families. *Id.* at 282.

223. Ryan Petersen, Comment, *Be Our Guest, but Please Don't Stay: A Comparison of U.S. and German Immigration Policies and Guest Worker Programs*, 14 *TULSA J. COMP. & INT'L L.* 87, 103 (2006) (discussing the cyclical nature of employers needs and guest workers’ availability).

224. *Id.* at 117 (emphasizing that many guest workers do not leave after their employment contract is expired). “[W]orkers do not want to return to a country that will not provide the same wages they have grown accustomed to in the host country.” *Id.* at 118.

225. See James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 *VA. J. INT'L L.* 1, 5 (2008).

226. See Rachel Williams, *Human Trafficking Police Unit to Close*, *GUARDIAN*, NOV. 10, 2008, available at <http://www.guardian.co.uk/world/2008/nov/10/human-trafficking-police-prostitution> (discussing the dissolution of human trafficking units in the United Kingdom due to a lack of funds). What was once an effective “11-strong human trafficking team” securing “convictions of a gang of six traffickers, brothel keepers and pimps” is scheduled to be shut down, due to a lack of funding. *Id.*

than if they stayed in their home country, does not help in the long run. Once an employer is scrutinized by the court system, it gives notice to the others that someone is watching. But, this method could take far too long if it is the only way to shine a spotlight on the employers. What is needed is more stringent laws and more effective ways to enforce them. There is a new administration heading to the White House, and immigration reform is bound to become a key issue. Though the focus of that discussion will most likely be on ways to stave off illegal immigration and methods to protect the borders, time spent discussing guest worker programs will only benefit the struggling American industries, leading to a strong and ethical base with which to invite workers for the chance to improve their lives.

As for the Indian workers in Mississippi, many have been scattered around the country as the Department of Justice continues its investigation into their allegations.²²⁷ Most recently, Immigration and Customs Enforcement officials picked up some of these guest workers, and many feel that the enforcement arm of the Citizenship and Immigration Services is targeting them.²²⁸ It is hopeful that with the help of the ACLU and others, these guest workers will receive the justice they deserve, and eventually will be treated as a guest in the United States, and not as slaves to a system keen on abusing as many as it can.

227. See Nicole Gaouette, *Guest Workers in U.S. Say They Are Being Exploited*, L.A. TIMES, June 12, 2008, available at <http://articles.latimes.com/2008/jun/12/nation.na-immig12> (reporting about a food strike lead by the Indian guest workers who were opposing the exploitation of workers in the United States trying to get a green card).

228. See Press Release, New Orleans Workers' Ctr. for Racial Justice, ICE Raid Targets, Snares Human Trafficking Victims (Oct. 29, 2008), available at <http://www.nowcrj.org/press-releases/ice-raid-targets-snares-human-trafficking-victims-102908> (“Over [twenty] Indian Guest Workers who triggered a high-profile federal investigation into human trafficking were targeted . . . by the U.S. Immigration and Customs Enforcement . . .”). Furthermore, after workers repeated requests for counsel, ICE refused their requests and questioned each worker “individually without attorneys or interpreters.” *Id.* The denial of counsel to these workers by ICE has outraged advocates and national experts. *Id.*