# *The Exploitation of Legal, Temporary Workers in the United States*

Washington and Lee University

***Elise Hansen***

***Poverty 423***

***Pickett***

***04/06/2013***

## *Introduction*

Signal International LLC, a marine and fabrication company, currently faces criminal charges for "forced labor, human trafficking, fraud, racketeering and civil rights violations" (David et al.). Why? For their treatment of over 500 guestworkers from India, who secured H-2B visas to work in "welding, pipefitting, and other marine fabrication work" in Gulf Coast shipyards (David et al.). The men believed that through these jobs, they could eventually achieve permanent U.S. residency for themselves and their families, and with this hope in mind, each had paid $20,000 in fees for recruitment, visa processing, and travel (David et al.). Many had lived in India's poorer regions, and so "liquidated life savings…and sold family homes and possessions" to take out the loans necessary to begin to repay the fees (David et al.). Deeply in debt, the men arrived in the U.S. only to be "forced into involuntary servitude and [life] in overcrowded, guarded, and isolated labor camps" (David et al). The men slept twenty-four to a small bunkhouse that lacked sufficient toilet or bathing facilities, and mess hall meals were cooked in an unhygienic kitchen which made many of them ill (David et al). Yet workers claim they feared to protest, since their employers had threatened to remove their legal status or deport them if they complained (David et al). When workers began to organize a complaint anyway, the defendants attempted to deport five of the workers whom they considered the organizers (David et al). Security guards raided the living quarters with pictures of the men, demanding that they enter their custody. Three of the men were forced into a "locked, guarded room…for several hours…[guards] refused their pleas for drinking water and permission to use the bathroom" (David et al). Another man, terrified, attempted suicide when the guards pursued him, and had to be rushed to a nearby hospital (David et al).

The Signal case is an extreme example of employers who violate the rights of their legal, temporary employees. However, H-2 workers are abused and exploited regularly. This exploitation happens because of the massive imbalance of power between employer and employee. When one party has all the power, it can take advantage of the other's vulnerability for its own gain. This is precisely what happens so frequently in the temporary worker industry. Journalist Anne Hull explains that Mexican women in the blue crab industry "place their lives at the mercy of whomever had bought the rights to their work" (Vida Mejor, Palomas). This imbalance of power results from three underlying factors: a history of "agricultural exceptionalism;" that is, the government tendency to bend the rules for certain employers; insufficient legal protections; and ineffective enforcement of existing regulations. As long as these three conditions continue unchecked, temporary worker programs will remain easy avenues for abuse and near-slavery. Although this exploitation affects only a small segment of the population, any systematic violation of legal contracts should be a subject for deep concern and scrutiny. Moreover, both the Obama administration and a "Gang of Eight" in the Senate have been negotiating immigration reform policies, and both plans could substantially increase the population of legal temporary workers in the United States. If reforms do not address these three causes of skewed power, the U.S. could have a large-scale human rights crisis on its hands.



Who are H-2 workers, and what does an H-2 visa mean? The H-2 program is a temporary work program that is subdivided into two categories, H-2A and H-2B. The H-2A program allows employers in the agricultural industry to legally hire additional workers on a seasonal basis; H-2B allows employers in non-agricultural industries to hire seasonal workers based on need (www.foreignlaborcert.doleta.gov). Typical H-2B industries include

forestry, hospitality, carnivals, and crab harvesting, among others. Today, most H-2A workers come from Mexico (51,972), while a mere 624 and 326 hail from Guatemala and Europe, respectively (Close to Slavery 12). Fewer Mexicans receive H-2B visas, 36,179, but 2,907 Guatemalans and 2,104 Europeans fill the gap (Slavery 12). At 106,000 workers annually, H-2 workers comprise 4% of foreign-born residents in the U.S. (immigrationpolicy.com, 3). The population of legal temporary workers has fluctuated at different points in U.S. history, but their work conditions have remained almost universally abysmal. Historical patterns of employer behavior and political policy have allowed these conditions to exist today. "Agricultural exceptionalism," the political practice of granting special labor rights exemptions to agricultural employers, has been a critical cause in the failure of the nation's two largest temporary worker policies to date, the Bracero Program and the Immigration Reform and Control Act. An examination of these two moments in temporary worker history sheds insight on the negative power of agricultural exceptionalism, the precedent that it has set for the current day, and the type of policies that the U.S. must avoid in the future.



## *History*

Exploitation has trailed the agricultural industry since the creation of large, specialized farms in the 1800s, and agricultural exceptionalism, insufficient legal protections for workers, and negligence in regulation enforcement are all to blame.[1]

"Agricultural exceptionalism" refers to the privileged relationship that farm operators have historically enjoyed with government officials. It was born out of a variety of characteristics

[1] The history of non-agricultural, seasonal work is diverse and not always thoroughly documented, so this paper will focus on the history of seasonal work in the agricultural industry.

specific to the agricultural industry in the 1800s, in particular the industry's unusual labor needs and its economic power. Agriculture and other seasonal industries had rather exceptional labor needs, and used their economic power to secure favorable policies from Congress. Congress provided the immigration policies that supply farmowners' workforce and removed the rights that would make their employment more expensive. Abysmal work conditions even today are in part the result of Congress perpetuating the near-total power of the employer over employees.

The exceptional nature of the agricultural industry itself sets the stage for this exploitative treatment. Because farm work is seasonal and labor-intensive, farmers need a competent workforce that can adapt itself to the changing demands of different growing seasons and survive when growth (and labor hours) are not at their peak. Traditionally, many U.S. famers negotiated these demands by operating diversified family farms (Martin 1127). Their smaller size kept the labor more manageable, and everyone in the household could contribute to the life of the farm.



However, large farms, especially those that specialized in a particular crop, did not have recourse to this smaller-scale farming and family model. Instead, they propagated a business model rife with worker abuse. In the southern U.S., landowners used slaves to work the plantations of cotton and tobacco, and after the slaves' emancipation, sharecropping and tenant farming allowed large landowners to more or less maintain the status quo (Martin 1127). In the western U.S., large-scale grain operations in the mid-1800s flourished. Called "bonanza farming" by critics, these farms became infamous for their monopolistic control of the land and "'get-rich-quick' mentality" (Commission on Agricultural Workers 11). The completion of the transcontinental railroad in 1869 lowered

transportation costs and allowed farmers to switch from grain and livestock to fruit and nut production, which demands a heavy labor force for very specific seasons (Martin 1127). Waves of new immigrants settled the western states, and initially, few had employment opportunities. So many began their careers in the U.S. as seasonal workers. This work typically served as a transitional phase; workers moved into other industries as soon as they had accumulated sufficient resources (Martin 1127). Thus temporary workers were constantly leaving a gap behind them, which left farmers often hiring new workers. As a result, recent, migrant labor dominated the workforce (Martin 1127). Many were more willing to accept poor labor conditions and low wages, and those without a strong social network already established in the U.S. were particularly vulnerable to their employers.

In part because of these reasons, employers found migrant labor highly convenient. The plentiful supply of vulnerable laborers allowed farm operators to keep wages extremely low and their own operating costs down. They capitalized these low wage expenses into higher land prices, which further enriched them and ensured their power over the land (Martin 1127).



Farmowners gained substantial political power as well, and often used it to their advantage. Agriculture was the largest industry in the U.S. during the 19th and early 20th centuries, and their reputation for economic success further augmented their influence on government policy (Martin 1125). For much of the nation's history, migrant labor, immigration laws, and the political sway of the agricultural industry have been closely intertwined. The supply of migrant workers has shifted with the changing tides of immigration laws and trends, many of which have catered to the demands of farmowners. For instance, in the early 20th century, in the midst of a political climate unfavorable to

immigration, a number of immigration policies were imposed to restrict certain immigrants. A quota system dictated the permitted number of immigrants from different regions in the world, and a literacy test attempted to weed out less-educated migrants. However, exception was made for the agricultural industry. Mexican workers applying for temporary work visas were granted an exemption from the literacy test and the "head tax" for application was waived (CAW 13). These exceptions ensured the southwest a steady supply of temporary Mexican laborers--until public opinion turned against the influx of Mexicans who so freely found employment across the border. The U.S. Border Control was born in 1924, and for the first time, many Mexican workers were considered "illegal aliens" (Slavery 3).

However, the trend of agricultural exceptionalism continued: the 1935 Labor Relations Act (NLRA) and 1938 Fair Labor Standards Act (FLSA) all "explicitly excluded" agricultural workers (CAW 14). Provisions for these workers originally appeared in the NLRA, but according to one Senate member, "'For administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic services…" and a small group of other temporary workers (CAW 14-15). As a result, protecting these workers' rights fell to the states, many of which bowed to farmowners' pressure and restricted workers' rights to organize so that "'production, packing, processing, transporting, and marketing agricultural products'" could continue uninterrupted (CAW 15). Apparently, state and federal governments saw no problem in catering to demands of farmowners at the expense of workers' rights and so excluded agricultural workers from protective legislation.

Farmowners got their way again when the U.S. instituted the Bracero Program, which had horrific consequences for seasonal workers. At the advent of the Second World War, many U.S. industries were feeling the effects of labor shortages. Or, rather, as the Congressional Research Service pointed out, "Many of the reports of labor shortages in specific areas were based, not so much on the inadequacy of a supply sufficient to maintain full production, as on inability to continue the peacetime methods of employment, with underemployment and low wages" (Martin 1128). Humanitarian concerns notwithstanding, in 1942 the government caved to agriculture's demands and created the Bracero Program. The program was the first large-scale effort to create a legal guestworker system in the U.S., and it was a human rights disaster. Described as a "bi-national labor agreement between the United States and Mexico," it was created to bring Mexican workers to work in agriculture in the Southwest (Brinda and Casanova 96). The program took off almost immediately: between 1943 and 1947 approximately 220,640 laborers had crossed the border with work visas in hand (Brinda and Casanova 96). By the time the program had ended in 1964, some 1 to 2 million Mexicans entered the U.S. for the first time, and many returned repeatedly, bringing the net admissions to 4.6 million (Martin 1128).



The legal terms of the bracero program provided a number of protections for laborers, but many of these never materialized in practice. Employers were required to have individual contracts with workers and supply housing (Slavery 4). They had to pay minimum wage or prevailing wage for their labor (whichever rate was higher), and the U.S. government was liable for "supporting" the workers if employers failed to pay their workers their wages (Slavery 4). Employers also had to offer at least 30 days of work and share worker transportation costs with the workers themselves and with the U.S. government

(Slavery 4). The reality is that the bracero program was rife with abuse and its policies affected immigration trends and policies for years. Many of the Mexican workers could not read the English contracts drawn up by their employers and were frequently unaware of their rights (Slavery 4). Employers withheld 10% of their pay allegedly for investment in a pension plan, but never deposited the money in Mexican banks as promised (Slavery 4). Experts now believe that the cumulative money fraudulently extracted from the braceros reaches hundreds of millions of dollars (Slavery 4). Minimum workplace standards went unenforced, and the U.S. Department of Labor officer in charge of the program termed it "legalized slavery" (Slavery 4). The appalling conditions under which these laborers worked affected U.S. workers as well. Wages were depressed, and any U.S. worker who complained could be replaced with a cheaper, more compliant bracero (Slavery 4). Even though fruit and vegetable production rose sharply in California in the 1950s, farm wages did not: they went from $0.85 an hour in 1950 to $1.20 an hour in 1960 (Martin 1129). In contrast, factory workers' wages rose from $1.60 to $2.60 an hour over the same time span, meaning that farm wages fell relative to factory wages, another low-wage industry (Martin 1129). The rampant abuses eventually contributed to workers' rights protests led by Cesar Chavez. While his initiatives improved the wages of grape pickers, these gains fell apart and failed to gain traction in other industries once Chavez was dead and political power within his organization shifted hands (Martin 1129). Thus agricultural exceptionalism brought about the first large-scale temporary work program, and with it, thanks to negligent enforcement of regulations, a massive human rights crisis.



Once again in 1986, agricultural demands helped dictate immigration policy. Politicians at the time had voiced concerns over the rise in undocumented immigration and

work conditions. During this time, about 25 percent of the farm labor force in California was (conservatively) estimated to be illegal, and farmers worked hard to protect their supply of cheap, foreign labor from congressional intervention (Martin 1130). The Immigration Reform and Control Act (IRCA) launched a two-pronged effort to tackle illegal immigration that also set the stage for the modern guestworker system. The IRCA created a legal guestworker program to ensure a supply of labor to farmowners, and imposed stricter sanctions on employers who hired unauthorized workers (CAW xvii). The Special Agricultural Worker (SAW) program was an attempt to legalize the undocumented workforce already present in the United States (Martin 1131). Under this system, unauthorized migrants could receive legal immigration status if they could prove that they completed at least 90 days of farm work in the preceding year (Martin 1131). The H-2 certifications were intended to provide additional agricultural workers in the case of employer shortage. Legislators hoped the large, legal labor force would give workers some leverage against their employers and allow them to push for better wages and working conditions (CAW xvii). Beefed-up border control would choke the supply of undocumented workers, and harsher employer sanctions would discourage demand (Martin 1131).



In reality, however, the SAW program failed to legitimize the agricultural labor industry. Fraud ran rampant: false documents had "widespread availability and sophistication, and low cost" (CAW xx). Ineffective enforcement of legislation taught a generation of labor contractors that government oversight and enforcement were weak, and they could exploit the system with impunity. The immigration trends set off by the IRCA legislation set the stage for the next cycle of abuse and "corrective" legislation. While many temporary workers re-settled in their home countries after their visas expired, large

numbers of legalized workers began to settle in the U.S. and bring their families to join them. This increasing number of "anchor households" encouraged further migration, both authorized and unauthorized (CAW xxi). Many of these settlers moved upward out of agricultural work and into new industries (Martin 1132). As a result, the agricultural industry still needed a large number of new migrants to fill positions in the fields, and illegal immigration once again provided an answer (CAW xix). Although the number of temporary visas rose dramatically from 75,000 in 1985 to 430,000 in 1998, unauthorized immigration also increased from an estimated 7% of the agricultural workforce in 1989 to 28% in 1992, to 53%-75% in 2001 (Clark 360 and AgJobs, "Facts" 4). The presence of unauthorized workers had its usual effects: a glut of workers in the job market, which led to poor working conditions, and employers without a stable or legal work force (CAW xx). SAW's legalization efforts provided many opportunities for a number of workers and individual families; however, since the conditions in the agricultural industry stayed about the same, no changes were effected for the farm work industry (Martin 1132). Wages and working conditions remained poor; the Report of the Commission on Agricultural Workers (CAW) finds that from the 1980s to mid-1990s, "the living and working conditions of hired farmworkers have changed, but seldom improved...Real wages have fallen… Increasing numbers of workers are covered by state-mandated unemployment insurance, but employers are less likely to provide such non-mandated benefits as housing, meals, and transportation" (CAW xix). In other words, the IRCA failed in both its objectives: reduced illegal immigration and improved working conditions.



The Commission on Agricultural Workers (CAW) report of the IRCA's policies concludes with an attack on the influential connection between agriculture and politics. "In

retrospect," it declares, "the concept of a worker-specific and industry-specific legalization program was fundamentally flawed. It invited fraud…and ignored the longstanding priority of U.S. immigration policy favoring the unification of families" (CAW xx). Once again, this privileged relationship between Congress and agricultural employers resulted in policy failure. When government caters solely to business's demands, it causes worker hardship and creates immigration trends that only perpetuate the problem. When it passes restrictive regulations, farmowners have repeatedly been able to defy them with near-impunity; whether because government turns a blind eye or is simply an ineffective enforcer is an open question. From the turn of the 20th century and beyond, agriculture's exceptional business model and stand-out economic performance gave it the power to demand special treatment, and Congress complied. While agriculture's position today is rather more ambiguous, regulatory and enforcement policies still consistently favor the interests of employers at the expense of employees. Unless future policies reject the preferential treatment of business that results in human rights violations and policy failure, immigration policy will never truly be "reformed."



## *Today*

Many of the same factors that created an avenue for worker abuse in the past still exist today. The financial challenges of large farms still create incentives for employers to keep costs low, employers and Congress still exert their influence to check litigation on worker protection, enactment of protective laws is deficient and enforcement nearly non-existent. However, the situation is measurably different in other ways: agriculture no longer

dominates the U.S. economy, recent litigation provides new protections for some workers, and talks of immigration reform specifically target workers' rights.

### *Immigration Trends*

Immigration, particularly undocumented immigration, has surged in the last 15-20 years, with significant ramifications for the temporary worker industry. An estimated 11 million unauthorized immigrants were residing in the U.S. as of January 1, 2013 (immigrationpolicy.com, 3). Although authorized and the authorized migrants are not always in direct competition for employment, substantial overlap does exist. Not all unauthorized workers hold seasonal jobs, and many are not temporary migrants; over 50% stay for at least 10 years (immigrationpolicy.com, 4). Many who may have begun their careers in the U.S. with seasonal work have managed to move out of low-wage, seasonal industries and into more stable, productive careers. However, a large number of the undocumented workers have very little formal education: about 47% have not attained a high school diploma or its equivalent, and 27% have a high school education but no further, formal schooling (immigrationpolicy.com, 9). Thus many will, indeed, work in low wage, so-called "low-skill" professions—often those for which prospective H-2 migrants so eagerly enlist. The potential for substantial overlap exists, and recent data reinforces this hypothesis, particularly in the agricultural industry. Throughout the 1990s, the percentage of unauthorized immigrants in the agricultural sector began a dramatic rise, and by 2002, the official estimate was that 53% of unauthorized immigrants worked in agriculture ("Facts About Farmworkers" 4). However, many expert opinions put the number closer to 75% ("Facts About Farmworkers" 4). This competition between undocumented and documented workers, as well as the vulnerability of undocumented workers, affects work conditions for

all. Unauthorized workers suffer low wages, poor work conditions, and lack of bargaining power for fear of deportation ("Facts About Farmworkers" 7). While legal workers also frequently suffer harsh conditions, in industries with a mixed labor force of documented and undocumented workers, legal migrant workers and U.S. citizens must accept the wretched conditions or else risk unemployment ("Facts About Farmworkers" 7). Additionally, if employers in an industry use unauthorized labor to keep costs down, other employers in that industry will feel pressure to do the same in order to compete. Thus seasonal industries in which some labor is undocumented often provide poor conditions for all workers.

### *Agricultural Exceptionalism*

Agricultural exceptionalism has survived to the present day, in part because the industry has retained its unusual labor needs. And although its economic status has slid, it still wields substantial political sway. The Agricultural Census from the USDA counts 2.2 million U.S. farms; a large farm is classified as one that reaps sales of over $250,000 (Demographics 3). As in the past, these large farms typically specialize in a certain high-value crop; the top three crops "in terms of net cash income" are grains and oilseeds, fruit and nuts, and nursery and greenhouse (Economics 4). Unsurprisingly, the top two sellers are precisely the types of farms that initiated the trend of large-scale, specialized production in the west in the 1800s. This was an economically viable choice in the 1800's; what about in the early 21st century?



The most recent Agricultural Census from the USDA finds that the net cash income of farms rose by 84% since 2002 levels and income from farm sales increased by 48% between 2002 and 2007 (Economics 1). Net cash income is defined as "the amount an operation

receives from sales of agricultural products, government payments, and farm-related income after expenses are subtracted" (Economics 1). But expenses also rose by 39%, making the average net gain in income from sales about 9% (Economics 1). The federal government also pumped in $8 billion into farms in 2007; up 22% from 2002, and the majority of the payments were made to large grain and oil-seed farms (Economics 1). The high increase in expenses is primarily the result of increased gasoline, fuel, and fertilizer prices; on the list of increased expenses, "farm labor" was at the bottom, at a 20% rise from 2002 (Economics 2). Of the 482,186 U.S. farms and ranches, about 22% used hired farm labor; about 40% of these employers were large farmers (Farm Labor 1, 4). Only about one-third of hired workers worked for more than 150 days on their employer's farm, suggesting that demand for hired farm labor is still very season-dependent, rather than year-round (Farm Labor 3). The industry with the highest cost was the greenhouse, nursery, floriculture, because of their labor-intensive crops and need for highly skilled employees in large quantities (Farm Labor 1). However, the fruit and tree nuts sector came in second, while the oilseed and grain sector had a mere 50% of the labor expenses of the greenhouse industry, and ranked fifth overall (Farm Labor 1). Hence the largest employer who reaps the most value from its crops spends far less on employment and labor costs than its competitors.



Taken together, these data reveal some interesting trends. Agriculture is no longer the giant of the U.S. economy that it once was. Small farms have become economically unviable for over half of their owners, and diversification, while increasing, remains rare. Large farms, though they do generally turn a profit, take vast subsidies from the U.S. government—even those large grain and oilseed farms with the highest crop values and lowest costs. Even with the support, increasing expenses almost keep pace with increased

sales. And these increased expenses are not from increased wages for farm labor. In fact, because the economic position of farmowners seems rather precarious, it is no wonder that they so strongly resist pressure to pay their workers higher wages. It seems probable that the low cost of labor, both in wages and primitive working conditions, in fact helps keep these farms afloat.

Nevertheless, farm operators have maintained much of their political influence. The agricultural industry has a high number of employers relative to employees: in 1997, there were 650,000 employers for 2.5 million employees (Martin 1126). One result of this relationship is that "farmers are more important in employer organizations than farm workers are in employee organizations" (Martin 1126). Farmers also continue to influence government decisions. As we shall see in more detail later, farmers and Congress have often collaborated to ensure that the supply of cheap labor continues unabated, and farms have a prominent place in government subsidies and economic policies (Slavery 2). In other words, farmers have retained much of their power within overarching institutions, and their employees remain under-enfranchised.



Thus many of the same structural factors that encouraged worker exploitation in the past still continue in the present. The glut of undocumented workers depresses wages and working conditions for all, and often directly competes with documented migrant workers. The agricultural industry is in an increasingly perilous financial position, making it that much less likely to concede to higher employee wages, and employers, especially in the agricultural industry, continue to wield political clout.

### *Deficient Legal Protection*

The U.S. legal system also contributes to foreign worker abuse. The law frequently omits key protections that could safeguard the well-being of workers; at other times, when the regulations are in place, lack of enforcement renders them practically defunct. Practices for recruiting legal workers abroad are entirely unregulated and rife with abuse. Hence exploitation often begins before workers even leave their country of origin; many will enter the U.S. deeply in debt to unscrupulous recruiters or labor contractors. Once on U.S. soil, their situation hardly improves. Although H-2A workers theoretically have some legal protections, many of these basic provisions do not apply to H-2B workers. And even when regulations are in place, employers regularly evade or ignore them without fear of repercussions, since enforcement of the laws remains half-hearted at best.



H-2 workers enter the country through an employer, who petitions the government for permission to hire them. The employer must prove that he or she fulfills a number of basic conditions, although some employers fraudulently evade even these most fundamental requirements. The employer must prove that the employment offered qualifies as temporary and that he or she does have need of temporary workers to meet demand. First, the petitioning employer must prove that his or her need qualifies as "temporary," "seasonal," "peak-load need," or "intermittent" (H-2B www.uscis.gov). "Temporary" equates to a "one-time occurrence;" the petitioner cannot have employed additional labor for this purpose in the past, nor plan to do so in the future, while a "seasonal" need is one whose timing is predictable insofar as it is tied to the seasons (H-2B www.uscis.gov). A "peakload need" implies that the petitioner "regularly employs permanent workers" to perform the job, but needs to "temporarily supplement permanent staff due to seasonal or short-term

demand;" moreover, these "temporary additions will not become permanent" ("H-2B" www.uscis.gov). The hospitality industry frequently falls under this category, since hotels and resorts often peak during the summer months. Lastly, "intermittent need" means that the petitioner "has not employed permanent or full-time workers to perform services or labor," but only "occasionally needs temporary workers for short periods" (H-2B www.uscis.gov). The remainder of the requirements for the petitioning employer is designed to protect U.S. workers from the effects of foreign competition. Petitioners must "demonstrate that insufficient U.S. workers are willing, qualified, and available" for the position and show that the employment of H-2 worker(s) will not "adversely affect the wages and working conditions of similarly employed U.S. workers" (H-2A www.uscis.gov). The former rule ensures that native U.S. workers "get the first shot" at scoring the job; the latter attempts to ensure that any poor treatment of foreign-born employees with regard to wages or working conditions does not create a toxic environment for native U.S. workers.



These rules attempt to regulate the domestic side of temporary worker recruitment. However, they make no reference to recruitment practices while workers are still living in their home country. The exploitation of workers frequently begins before workers set foot on U.S. soil. Recruiters use a variety of techniques to lure prospective employees into their snares and then exploit them, often to the tune of thousands of dollars a person. The Southern Poverty Law Center has documented multiple cases in which recruiters seek out workers in Central American or Asian countries and promise them lucrative work in the U.S. as well as the possibility of eventually earning citizenship (Slavery 10-11). These claims are blatantly false, since the H-2 program is not intended as a path to citizenship; workers may have their visas renewed for up to three years, but after this they must return to their

country of origin for at least three months before returning to the U.S., again on a temporary work contract (H-2A www.uscis.gov). Aside from these false claims, recruiters then charge workers up to thousands of dollars in "recruitment fees," claiming that they will cover the costs for immigration applications, visas, and travel (Slavery 10). Guestworkers from Guatemala frequently pay $2,000 to $5,000 per person for recruitment, and the SPLC has documented some cases in which Asian workers pay $20,000 for recruitment for a short-term, low-wage job in the U.S. (Slavery 10, Brinda and Casanova 110). Because these populations often live in severe poverty, they must undertake extreme measures to raise the exorbitant amounts demanded by the recruiters. Many will liquidate life savings, borrow from loan sharks, or even leave deeds to their homes with the recruiter as collateral (Slavery 11). Thus temporary workers often enter the U.S. deeply in debt, vulnerable, and misled.



One reason for these abuses is the prevalence of third-party recruiters; employers themselves often do not recruit the workers from their native countries, so they can dodge legal responsibility for the recruitment process (Slavery 27). The DOL still regularly fulfills labor contractors' petitions for H-2 workers, even though they do not always have jobs readily available since they merely meet the demand of employers (Testimony 16). Hence workers can go for weeks or months without the job contractually promised them—or any job at all (Testimony 16). They sink deeper into debt as the interest on their loans accumulates and they must rely on the labor broker for food and shelter, which are often provided at exorbitant rates (Testimony 16 and Slavery 28). Allowing labor contractors to import workers undermines many of the rights to which they are legally entitled (Testimony 16).

Once in the U.S., the workers' situation hardly improves. While a number of different laws protect H-2A worker wages and conditions, there is a growing body of evidence that employers often intentionally violate these laws without any severe repercussions. H-2B workers enjoy even fewer legal protections than their H-2A counterparts, making them still more vulnerable to exploitation. The lack of regulation clears a wide avenue for employers who wish to manipulate workers under the H-2B system. This is less the case for H-2A workers, but existing rules are so under-enforced that they might as well be null and void. So while in theory H-2 workers are entitled to a number of protections, employers have found ways to sidestep or outright violate each one--at the expense of their employees.

With regard to wages, H-2 workers are required to be paid the highest among three different possible measures: the "prevailing wage" for the particular crop, which is determined by the DOL and state agencies; federal (or state) minimum wage; or the "adverse effect wage rate" (Testimony 21). This latter measure applies only to H-2A workers. Established annually by the DOL, it is a wage rate that has been calculated to not adversely affect the wages of U.S. workers, either by offering "alien" workers more than their U.S. counterparts or by depressing wages for U.S. workers (20 CFR SS 655.207). In reality, wage rates often fail to meet the *minimum* of these three measures. In 2010, the Government Accountability Office reviewed ten different court cases of alleged abuse of H-2B workers. Of these ten, they found six allegations of underpaid wages, either when employers failed to pay minimum wage or overtime, or both (GOA 4). In one example, a New York carnival operator paid employees on a weekly, not hourly basis, which resulted in an effective hourly rate of $5.00 an hour, well below the promised $8.00 hourly rate (GOA 4). In the forestry industry, workers are frequently paid a piece-rate wage, which is calculated based on the number of

trees planted during the day. On days when workers perform other work tasks, such as clearing land, they receive no pay at all (Brinda and Casanova 111). Additionally, employers will addend "excessive fees" that bring wages down below the minimum wage level (GOA 4 and Brinda and Casanova 110). The GOA again found that in six of ten cases, "these charges included visa processing fees far above actual costs, rent in overcrowded apartment that drastically exceeded market value, and transportation charges subject to arbitrary 'late fees.'…Workers left the United States in greater debt than when they arrived" (GOA 4). The New York carnival operator "housed employees in overcrowded, cockroach- and bedbug-infested trailers with unsanitary restrooms," and charged exorbitant rent for it (GOA 6). In one South Dakota hotel, the employer paid employees $3.00 an hour rather than the promised $6.00, charged *each* of the nine employees $1,200 in visa processing fees, although the actual fees were $1,200 for all nine, and charged seven of the employees $1,050 a month for an apartment whose normal rent rate was $375 (GOA 6). Good grief.



H-2A employees are theoretically protected by the "three-quarters guarantee," which assures them that they will receive at least three-quarters of the work hours promised in their contracts (Testimony 12). This is an important guarantee; one problem that H-2B workers face is that employers will often over-hire and give all workers fewer hours than promised in their contracts, or have their contracts begin too early, so that there is no actual work available until weeks or months after they arrive (Testimony 12). H-2A workers are further entitled to reimbursement for the cost of travel, housing costs while in the States, and workers' compensation for on-the-job injuries (Slavery 2). While they often do not receive these benefits, H-2B workers do not have these rights to begin with (Slavery 2). Even more importantly, H-2B workers are ineligible for "federally funded legal services,"

meaning that should they wish to complain about work conditions, they have no access to lawyers. Frequently, they have no knowledge of their legal rights at all (Testimony 21). They have no way to protest illegal violation of their rights in court. They cannot help hold employers legally accountable for their actions. While they technically have some legal rights, they have no way to sue for them. This leaves employers with an extraordinary amount of free reign in their treatment of employees, and it leaves employees with a disturbing lack of bargaining power. Of all causes of exploitation, this lack of accountability between employer and employee is surely among the strongest.

The lack of legal recourse also leaves workers vulnerable to forces beyond their employers. Domestic violence and sexual assault, in the home or in the community, go unreported. Any other crimes perpetrated against migrants will not receive judgment in courts. In this way, despite their status as legal migrants, H-2B workers are left highly vulnerable. They may theoretically have legal rights to not be sexually assaulted, to not be exploited, to not be robbed or held captive, but they have no means of asserting these rights.



Another key determinant in H-2 worker exploitation is a system that ties them to a single employer. H-2 workers are only permitted to work for the employer stated in their contract; otherwise, their work is illegal and they can be deported. If a worker quits the job or is fired, he or she must return to his or her country of origin, or else risk deportation for illegal residence and employment in the U.S. Thus employers can threaten or coerce employees with deportation, and evidence from a variety of investigations and court cases suggests that this is not an uncommon occurrence (Testimony 11). In 2007, a federal criminal law suit was filed against a hotel-owning couple in South Dakota, who, among other abuses, “confiscated the employees’ passports and threatened deportation in a ‘box’ if they

disobeyed orders" (GAO 6). In Pennsylvania, a landscaping company "fired workers who complained or threatened the company with breach of contract" (GAO 9). When Human Rights Watch examined the circumstances of H-2A workers in South Carolina, it found "widespread fear and evidence of blacklisting against workers who speak up about conditions, who seek assistance from Legal Services attorneys, or who become active in the union" (Unfair Advantage). A related problem is employer seizure of identity documents such as passports and Social Security cards; the SPLC's "Close to Slavery" report ranks this "one of the most chronic abuses reported by guestworkers" (14). Many employers will claim to hold identification documents for safekeeping, but in reality this is often a strategy to hold workers in their employ against their will (Slavery 14). One employer, facing court action, even stated in her deposition that "'if [employees] have their Social Security card, they'll leave'" (Slavery 14). In extreme cases, employers have even destroyed identification in order to obliterate their workers' proof of legal status; this leaves them utterly vulnerable to their employer, who could call Immigration Services to deport them at any time (Slavery 15). Any system that puts employees so entirely at the mercy of employers ultimately invites abuse. If politicians hope to reform immigration policy, they should start by increasing written protections for legal migrants.



### *Ineffective Enforcement*

How do so many employers perpetrate such crimes? How is abuse so common, how do court cases and investigative reports continue to pile up, and yet the abuses continue? In the case of H-2B workers, the answer lies in its inception. The H-2A program was born out of 1986 IRCA regulation; the H-2B program, in contrast, was founded at the same time, but by "internal DOL memoranda" (Testimony 24). Technically, instead of being governed by

legal regulations, many H-2B protections are established by "administrative directive" (Testimony 24). Thus the DOL has historically claimed that it "lacks legal authority" to enforce a variety of H-2B rules, including fair wage rates (Testimony 24). In recent years, the DOL has attempted to extend certain protections to H-2B workers, but with little success. In 2011 and 2012, the DOL proposed new regulations that would enhance the legal rights of H-2B workers, including a stronger wage regulation system, worker reimbursement for visa and travel fees, and a ban on recruitment fees (Slavery 7-8). Thus far, however, these measures have not gone into effect because of certain Congress members and the opposition of employers who wish to protect their ability to legally acquire cheap, malleable workers (Slavery 8). In fact, one argument that they are currently using to stall the DOL's regulation efforts relates to this very point: "employers, in a series of lawsuits, have asserted that the DOL has no authority to regulate employers' use of the H-2B program *at all*" (Slavery 8). As in the past, the power of employers and the sway that many of them have in the legislative branch work to block any measures that would mitigate the financial edge that cheap, unregulated labor provides them.



Yet regulation and enforcement of policies remains low for H-2A workers as well, even though they are legally protected by DOL regulations and some federal laws. The DOL could exert itself to protect these rights, or they could be handled through litigation, but thus far neither method has yielded overwhelming results (Testimony 30). Government agencies frequently do not allocate sufficient resources for the detailed and time-consuming task of closely regulating employers, and clearly, political will on this issue is unfavorable (Testimony 30). In 2004, the DOL investigated only 89 workplaces, although it approved 6,700 businesses to employ H-2A workers (Testimony 32). Investigations are rarely

thorough, and even when they do find instances of regulation violation, penalties are so weak as to hardly deter determined employers (Testimony 39). The most frequent penalty is a "civil money penalty," often a pitiful amount, and workers do not even receive any compensation money (Testimony 40). Frequently, even this fine is waived if employers assert that they will follow the laws in the future (Testimony 40). Furthermore, although the DOL has records of employers who have broken laws in the past, it still grants their petitions to receive H-2 workers in successive years (Testimony 34). With such a track record, it is little wonder that employers find it advantageous to simply continue their abuses.

Thus the H-2 system leaves workers easy targets for exploitation. H-2B workers do not have the same legal protections as their H-2A counterparts, opening a direct route for employers to charge them unfair, arbitrary, and excessive fees, and underpay wages. Because employers face relatively painless sanctions, in the unlikely case that they are caught violating the law, they have little incentive to change their actions. As a result, the system is rife with abuse. The requirement that workers be tied to a single employer skews the balance of power vastly in favor of the employer, a dynamic that is only strengthened by workers' inability—legal or practical--to seek legal redress. The exploitation that often begins in the recruitment process can easily continue once workers reach U.S. soil, since wage laws, housing and transportation laws, and numerous other protections are consistently violated. The combination of disproportionate employer power, insufficient regulatory protection, and negligible enforcement create a powerful trio that makes exploitation easy.

## *Responsibility?*

Despite these abuses, temporary workers continue to eagerly apply for H-2 visas, and not just those who have been duped with false promises by labor contractors. Women from the Palomas region of Mexico, "despite the rip-offs and the captive nature of their employment… still begged and bribed their way into jobs in the crab houses" (Hull, Money). Why do they do this? Why would prospective workers pay so much for this opportunity in the first place? Beyond the lure of prospective citizenship, recruiters specifically target those whom they perceive as the poorest, most vulnerable groups. Most of the workers recruited for jobs in the southern U.S. in the forestry and pine straw industry come from Huehuetenango, an extremely poor region composed primarily of indigenous people who survive off of subsistence farming, or from the interior of Mexico or Honduras (Slavery 10-11, and Brinda and Casanova 105). Increasingly, people from these regions are struggling to provide for themselves and their families; as the "Close to Slavery" report explains, "In recent years, rural Mexicans have had an increasingly difficult time making a living at subsistence farming, and in some regions there are virtually no wage-paying jobs. Where jobs exist, the pay is extremely low; unskilled laborers can earn 10 times as much, or more, in the U.S. than they can at home" (12). So, if they want to come here, and many return repeatedly to the U.S. for these temporary jobs that most native U.S. citizens consider horrible, why interfere? There is still demand for these jobs, even when conditions are bad. The worst cases of exploitation are fairly clear-cut, and the migrants who suffer in these environments are not those who hope to return. But, when employers do not pay wages in full or do not reimburse travel costs, should we really stop them? Many migrants are still

arguably better off than they would be in their native countries. Many are certainly better off financially.

But the actors in contractual obligations have a moral obligation to honor these contracts. This includes both the labor contracts between employers and employees and indirectly, the conferral of an H-2 visa itself. The visa is a form of contract between employers and the government. The government grants certain benefits (additional labor) under a number of conditions (such as wage regulation). Employers who disregard stipulations inconvenient to them break the law and violate their obligations to abide by the agreement that the visa implies. Moreover, philosophers Robert Goodin and Thomas Pogge argue that when people are vulnerable to us, we have a moral obligation to not cause harm, and further, an obligation to correct harm that we may have inflicted (Goodin 111 and Pogge 136). In particular, we have a special responsibility to protect those whose "vital interests" lie within our power, where "vital interests" include "food, clothing, shelter, self-respect and civil liberties" (Goodin 111). Employers of H-2 workers frequently have significant power over many or all of these vital interests, implying that they have a special moral duty to protect the employees so vulnerable to them.



Pogge discusses the moral imperatives imposed by negative duties. A negative duty is "any duty to ensure that others are not unduly harmed through one's own conduct" (Pogge 136). This definition requires a few basic decisions; in particular, whether one group's actions harms the other, and if so, if they harm the other "unduly" (Pogge 136). To determine these questions, we must consider the notion of harm. According to Pogge, "harm" fulfills several qualifications: the conduct "sets back [the victim's] most basic interests…the human rights deficits are causally traceable to social institutions...[the

conduct's effects] are foreseeable…and reasonably avoidable" (Pogge 26). The violation of H-2 workers' rights fulfills each of these conditions. Workers often lack adequate shelter and toilet facilities, not to mention personal freedom; agricultural exceptionalism and insufficient regulation are the social constructs which enable the exploitation; these causes that have created human rights violations in the past predictably continue to do so in the present; and changes in temporary worker policy could assuage many of these ills. Thus employers' treatment of their workers does indeed harm them, even if living conditions in their native countries were not ideal either. Is this harm "undue"? I argue that it is. H-2 workers enter the United States legally, at the request of its citizens and with the authorization of its government. Excessive abuse from those same sources which sought out the workers in the first place seems unjust in the extreme.



Thus employers violate their moral obligations to not unduly harm others, and this violation demands compensatory measures. These measures, according to Pogge, are due to those whose rights have been harmed and due from those who have imposed the harm; the extent of compensatory measures demanded from each actor in the harm is limited to "one's share of that part of the human rights deficit that foreseeably is reasonably avoidable through a feasible alternative in institutional design" (Pogge 26). This applies the obligation to employers, to the Department of Labor, and to Congress, who collaborate in the framework of the legal structure and decide the extent to which they will apply the law evenly and thoroughly to all. Pogge and Goodin agree that workers' vulnerability (and legal status) require employers, regulatory agencies, and lawmakers to strive for the protection of H-2 employees and ensure that future H-2 workers do not suffer from exploitative conditions.

## *Politics*

What are some of the "feasible alternatives in institutional design" that Pogge demands? (26) Politicians are asking the same questions; immigration reform is once again moving to the forefront of political debate. In order to be effective, reforms must target the causes of exploitation and find plausible means of reducing their influence. The imbalance of power between employer and employee is the primary cause of H-2 worker exploitation, and this skewed power results from three main factors: agricultural exceptionalism, the lack of protective regulation, and insufficient enforcement of existing regulations. Any alternative formulations of legal immigration policy must address these factors. President Obama has issued his administration's goals for immigration reform, and a group of eight Senators is crystallizing its own recommendations. Each contains some provisions for temporary workers, but even provisions that do not explicitly mention H-2 workers could affect their rights and work environment.



President Obama's manifesto emphasizes a variety of initiatives, including strengthening border security, "protecting workers against retaliation for exercising their labor rights," and "streamlining" legal immigration (Fact Sheet 1). Each of these could substantially affect H-2 workers. The move to "protect workers against retaliation for exercising their labor rights" is an important one (Fact Sheet 15). Should such a measure go into effect, it could help ameliorate workers' intimidation and blacklisting by employers, and help shift the balance of power slightly in the direction of workers. Another significant resolution could radiate to all immigrant workers: the "streamlining of immigration law to better protect vulnerable immigrants, including those who are victims of crime and domestic violence" (Fact Sheet 28). While the details remain unclear, any changes to regulation that

make temporary workers more likely to report crime would reduce their vulnerability to sources outside their employers. This would certainly be a step in the right direction.

Other goals of the Obama plan could indirectly affect legal immigration. Obama's plan calls for revised annual country caps to increase family immigration, which, if the overall ceiling for immigration is not correspondingly raised, could cut back the number of immigrants admitted for employment purposes (Fact Sheet 21). Perhaps in response to this, the administration's plan calls for additional visas to be added for employment immigration (mostly high-skill) as well as to exempt "certain categories" from annual visa limitations in an effort to combat "outdated legal immigration programs" (Fact Sheet 22). The precise meaning of these phrases remains ambiguous, true to political norms. However, the initiative to remove annual country caps for employment-sponsored immigration would probably open the doors for more documented Latin American and Asian workers, many of whom are H-2 visa holders (Fact Sheet 22). The plan also calls for strengthened border control to prevent undocumented workers from entering U.S. borders. And under the Obama administration, deportation of undocumented migrants continues in record-breaking numbers (immigrationpolicy.com). Effective crackdown on illegal immigration has in the past led to labor "shortages" in many low-skill, low-wage industries. As a result, there may be an increased call for expanded legal temporary worker programs, and politicians and businesses alike have expressed interest in new temporary visas (Immigration Spring, and Brinda and Casanova 96). A similar situation created the 1986 IRCA. Legislators had hoped that a more robust legal temporary worker system would lead to better work conditions and less exploitation. However, both SAW and the H-2 programs failed to provide systemic change. If the Obama administration does plan to expand temporary work programs, it is

vitally important that it enact further legislation to ensure that the programs do not continue in their current state of disarray and abuse.

What conclusions has the Senate drawn about immigration reform? Details are still forthcoming, but on March 31st, the New York Times published an editorial that hinted at some of the potential proposals. It seems that business and labor may have finally agreed upon a compromise: business will receive four years of rising visa totals, from 20,000 to 75,000, ensuring them a steady stream of labor, while labor will win enhanced worker protections, including the right for workers to change jobs (Immigration Spring 3-4). Such a compromise would be encouraging if the changes do take effect. Since the Senate also proposes to tie future visa levels to the unemployment rate and set the maximum ceiling at 200,000, the bill could avoid several pitfalls that plagued the 1986 IRCA (Immigration Spring 3). That act failed to provide for future workforce needs; it attempted to cut off business's supply of undocumented workers, but "failed to account for an increased need for immigrant workers," which catalyzed further unauthorized immigration (Immigrationpolicy.com 24). Consequently, "regulating the flow of immigration so that it reflects constantly shifting employment needs" becomes a crucial part of any immigration reform (immigrationpolicy.com 25). On labor's side, the right to change employers would be an enormous stride in the right direction. Workers will be much less dependent on the good graces of a single employer for their livelihood, and competition among employers could force all to raise their work and wage standards. However, this measure will be meaningless without enforcement and some means to ensure that employers can no longer hold identification documents captive.

These measures alone will not halt worker exploitation; Congress should adopt additional priorities for change in the temporary worker system. The government response should address the main factors behind exploitation: a seasonal worker industry that creates an imbalance of power between employer and employee, insufficient legal protections for H-2B workers, and insufficient enforcement of protections for all H-2 workers. Perhaps government and market forces cannot change the existence of large, specialized farms or a cut-throat blue crab industry, and it may be unwise to try. That is a subject for another capstone paper. However, government regulation and its enforcement can work to whittle away at the current power structures that enable employers to exploit their H-2 employees. Regulatory policies should begin where the exploitation begins: the recruitment process abroad. The DOL should not authorize labor contractors to petition for H-2 workers, and the actions of recruiters abroad should fall under the same legal standards as in the U.S..



Allowing employees to transfer their employment to another employer within the same industry is an excellent initiative, but some measures should be taken to ensure that employees truly have the ability to leave; for instance, employers cannot hold identification documents without the written and informed consent of employees. Also, temporary workers need an increased right to organize without fear of retribution and the right to swift legal recourse, since they do not remain long in the country (Human Rights Watch). Legal recourse, along with the protections that cover H-2A workers, should be extended to H-2B visa holders. This includes the three-quarters guarantee, the right to the adverse effect wage rate, and speedy compensation for travel expenses.

Without increased enforcement, however, additional regulations will not impact actual work conditions. Congress should specifically permit the DOL to conduct

investigations and enforce labor regulations for the H-2B program (Slavery 43). While ideally, the DOL should conduct regular, thorough investigations of labor sites, other, inexpensive policies can also aid in this effort. Among others, legal immigrants should be made aware of their legal rights when they enter the U.S., and they should be informed of these and the details of their contracts via an interpreter. Migrants should be informed of the existence and role of the DOL and the contact information of the nearest agencies. These agencies should be staffed with fluent Spanish-speakers, at the least. In this way, workers would actually know their rights and have a resource to contact if their rights were in any way violated. Hopefully, this knowledge of their legal rights would also help mitigate fear of local police, so that domestic violence or crime would be reported with greater frequency. Were all these measures to take effect, worker exploitation may not end altogether; however, each step that effectively eliminates or minimizes certain forms of abuse is a step that should be taken.



## *Conclusion*

The exploitation of H-2 workers in the United States happens, and happens with disturbing regularity. Yet to date, no immigration policy reform has successfully addressed the exploitation that plagues the temporary worker system. The causes of unequal power range from government exceptions for certain employers to insufficient regulation to ineffective enforcement. These causes are not new; they are rooted in the turbulent history of the agricultural industry and business-labor-government relations. However, now is the time to address these issues. Immigration reform is again at the center of heated political discussion, and conditions are ripe for the proposed expansion of temporary worker

programs. Should these expansions occur without any changes to worker protections, the United States could find itself with a 21st-century replay of the horrifying Bracero Program. Even if H-2 visa quotas do not change, the clear harm done to temporary workers by employers and regulatory agencies mandates corrective action. Both the Obama administration and the senatorial Gang of Eight have forwarded a number of regulations and policy changes that would help promote change in temporary work programs; however, without additional measures that further attack exploitation's causes, abuses will persist. The United States should enact policies sufficient to create lasting change; policies that will undermine the causes of exploitation and address specific abuses prevalent today. No more should employers like Mickey Daniels Jr. be able to boast: "with the Mexicans, you can get all you want, when you want" (Hull, Palomas).

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