

FREEDOM NETWORK USA

TO EMPOWER TRAFFICKED AND ENSLAVED PERSONS

Human Trafficking and H-2 Temporary Workers September 2012

Approximately 700,000 to 900,000 temporary foreign workers, sometimes referred to as “guest workers,” work in the U.S. each year to meet the labor needs of various industries.¹ Temporary workers are employed in nearly every sector of the U.S. labor market, including agriculture, manufacturing, domestic work, hospitality, nursing, and teaching. Recruiters hire them from overseas through legal means, recruiters or immigration attorneys assist the workers throughout the visa process, and the employer transports them to the United States. Once temporary workers are present in the U.S., their visas almost uniformly link them to a single employer without allowing them the most basic protection available to every other worker – the power to change employers if mistreated. Additionally, temporary workers have no pathway to permanent residency or citizenship. The imbalance of power between the employer and worker has led to many common scenarios, involving the trafficking and forced labor of thousands of temporary workers.² H-2 temporary unskilled workers have a significant presence amongst the larger group of temporary foreign workers; according to the Department of State; in 2010 it issued more than 106,000 H-2A or H-2B visas to foreign nationals bound for short-term jobs in the U.S..³ While not all temporary workers are trafficked, cases involving unskilled H-2 visa workers constitute some of the largest-ever criminal and civil human trafficking cases in U.S. history.⁴

Background of H-2 Visas

The H-2 temporary worker program, an outgrowth of the *Bracero* Program, was first codified in 1952 under the Immigration and Nationality Act. Under the temporary worker program, H visas authorize entry for agricultural workers (H-2A), unskilled non-agricultural workers (H-2B), workers with special skills (H-1B), and nurses (H-1C). Under the H-2 program, temporary workers enter the U.S. on short-term visas – typically nine or ten months – to take temporary or seasonal jobs in which they expect to earn wages that would improve

¹ Global Workers Justice Alliance, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Temporary Foreign Labor System* (“Visas, Inc.”) at 11 & n.5 and sources cited within, including Daniel Costa, Economic Policy Institute Briefing Paper #317, *Guestworker Diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market*, July 14, 2011, p.1 (at least 300,000 J-1 cultural exchange visitors worked in the U.S. in 2010). See also U.S. State Department, “Classes of Nonimmigrants Issued Visas – FY1987-2011 Detail Table” available at http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html (approximately 320,000 temporary workers entered the U.S. in 2011 on temporary work visas such as A-3, G-5, H-1B, H-2A, H-2B, L-1, and R-1); Institute of International Education, *Open Doors Data: International Students: Academic Level, 2009 - 2011* available at <http://www.iie.org/Research-and-Publications/Open-Doors/Data/International-Students/Academic-Level/2009-11> (An estimated 76,000 F-1 students worked in the U.S. labor market during the 2010-2011 school year via Optional Practical Training (OPT)).

² See, e.g., Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States*; Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*. See also *Kivanuka v. Bakilana*, 844 F. Supp. 2d 107, 111 (D.D.C. 2012) (G-5 visa); *Tanedo v. E. Baton Rouge Parish Sch. Bd.*, LA CV10-01172 JAK, 2011 WL 7095434 (C.D. Cal. Dec. 12, 2011) (H-1B visa); *Doe v. Siddig*, 810 F. Supp. 2d 127, 130 (D.D.C. 2011) (A-3 visa); *Doe v. Penzato*, C-10-05154 MEJ (N.D. Cal. Nov. 10, 2010) (A-3 visa); *Shukla v. Sharma*, 07-CV-2972 (CBA), 2009 WL 3151109 (E.D.N.Y. Sept. 29, 2009) (R-1 visa); *David v. Signal Int'l, LLC*, 257 F.R.D. 114 (E.D. La. 2009) (H-2B visa); *Catalan v. Vermillion Ranch Ltd. P'ship*, CIV.A06CV01043WYDMJW, 2007 WL 38135 (D. Colo. Jan. 4, 2007) (H-2A visa); *Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (B-1 visa); *United States v. Askarkbodjaev*, No.4:09-CR-00143 (W.D. Mo. May 27, 2009) (H-2B hospitality workers); *United States v. Manuel, Baldonado*, 9:10-cr-80057-KAM (S.D. Fl. 2010) (H-2B visa); *United States v. Orian et al.*, Cr. No. 10-576 (D. Haw. filed Sept. 1, 2010), *EEOC v. Global Horizons, Inc. et al.*, CV-11-00257-DAE-RLP(D.Haw. 2011), and *EEOC v. Global Horizons, Inc. et al.*, CV-03045-EFS (E.D. Wa. 2011) (H-2A visa).

³ See U.S. State Department, “Nonimmigrant Visas by Individual Class of Admission – FY2007-2011 Detail Table” available at <http://www.travel.state.gov/pdf/NIVClassIssued-DetailedFY2007-2011.pdf> (reporting 55,384 H-2A visas and 50,826 H-2B visas issued in 2010).

⁴ See, e.g., *United States v. Orian et al.*, Cr. No. 10-576 (D. Haw. filed Sept. 1, 2010), *EEOC v. Global Horizons, Inc. et al.*, CV-11-00257-DAE-RLP(D.Haw. 2011), and *EEOC v. Global Horizons, Inc. et al.*, CV-03045-EFS (E.D. Wa. 2011) (H-2A visa); *United States v. Manuel, Baldonado*, 9:10-cr-80057-KAM (S.D. Fl. 2010) (H-2B visa); *United States v. Askarkbodjaev*, No.4:09-CR-00143 (W.D. Mo. May 27, 2009) (H-2B hospitality workers); *David v. Signal Int'l, LLC*, 257 F.R.D. 114 (E.D. La. 2008) (H-2B visa); *Catalan v. Vermillion Ranch Ltd. P'ship*, CIV.A06CV01043WYDMJW, 2007 WL 38135 (D. Colo. Jan. 4, 2007) (H-2A visa).

their families' lives. H-2A workers perform agricultural work, such as planting and harvesting in the fields, and there is no cap on the number of H-2A workers who may be brought into the U.S. annually. The H-2B program allows for the temporary admission of foreign workers to perform non-agricultural work of a temporary nature—with a cap of 66,000 new visas annually.⁵ Common industries where H-2B workers are sent include, but are not limited to, the hospitality industry, caregiver/home care industry, construction, and welding. In addition to H-2A and H-2B temporary workers, there are other visa categories that employers use to source workers into the same low-wage sectors as H-2B workers.⁶ While this paper focuses specifically on the H-2 visa categories, regulation of other temporary visa categories is also critical to prevent unscrupulous employers from shifting their labor force to relatively unprotected temporary visa holders in order to subvert worker protections.

The Trafficking of H-2 Visa Temporary Workers

The trafficking of temporary workers is frequently misunderstood because it arises in situations where the victims, although legally sanctioned by U.S. immigration and employment law to come to the U.S. to work, are subject to working conditions that make individuals extremely vulnerable to human trafficking. Although the recruitment or mode of entry of the temporary worker to the U.S. is not necessarily conducted illegally, the manner in which the H-2 visas tie the employee's livelihood and legal status to their employers can easily create situations of subordination and exploitation, often found in cases of trafficking involving undocumented workers.⁷

The H-2 visas allow a migrant to work only for the employer who brought him or her into the country, limiting options if workplace conditions are abusive. Under these circumstances, temporary workers are vulnerable to trafficking and other workplace abuses, as employers can use the threat of deportation to coerce compliant labor. Conditions of the temporary jobs increase vulnerability to abuse. Many worksites are isolated, such as a domestic worker living in the employer's home or a temporary worker living on an employer work site, and the jobs are inherently temporary. Workers cannot easily develop relationships with civil society organizations or government authorities that would help them understand and assert their workplace rights. Under these circumstances, temporary workers are easily placed into scenarios where the workplace violations rise to a level of trafficking, involuntary servitude, debt bondage, and/or peonage as defined by the Trafficking Victims Protection Reauthorization Act.

Common H-2 Temporary Worker Trafficking Scenarios

Many H-2A and H-2B temporary workers are recruited through a third-party agency, which may require the workers to pay large recruitment fees to process the workers' visas, airplane tickets, and other exorbitant charges. Often, by the time the workers are finished paying recruitment fees for a seemingly lucrative job in the U.S., they are heavily in debt. The third-party agency will then place the temporary worker with a labor contractor or employer in the U.S., sometimes sending the worker out to different states to work rather than to sites originally promised to do different work than originally promised. Even if promised furnished housing, workers are frequently placed into cramped, unsanitary living situations where they are overcharged and not allowed the freedom to move to housing of their own choice.

Bound to their debts and desperate to earn money to support their families, many temporary workers are unable to earn enough to pay off their initial recruitment fees. Additionally, many temporary workers are

⁵ National Guestworker Alliance. *Leveling the Playing Field: Reforming the H-2B Program to Protect Guestworkers and U.S Workers*. 2012.

⁶A-3 and G-5 visas allow diplomats and consular officials to bring domestic workers into the U.S. (A-3 and G-5); certain B visas allow work as a "personal servant" or to work "in lieu of" H-category work visas; and J-1 and Q visas permit cultural exchange visitors to be employed in low-wage, temporary positions.

⁷Ezquerria, Sandra. "Gender, Migration, and the State: Filipino Women and Reproductive Labor in the United States," *Kasarinlan: Philippine Journal of Third World Studies* 2007 22(1): 117-44.

specifically bound by cultural notions of shame and the obligation to satisfy debts, creating psychological pressures that coerce them into staying in their trafficking situation. Furthermore, some traffickers subject the temporary workers to debt bondage by continually adding to their debts by deducting various unexpected expenses from the workers' pay, such as overcharging for housing, uniforms, visa renewals, and transportation. Some traffickers will also exercise illegal labor practices, such as confiscating passports, coercing workers into working when they are ill or injured, and threatening to report workers to immigration authorities for deportation.

Providing Legal and Social Services

Providing appropriate services for temporary workers can be difficult, as many of these cases involve multiple survivors. Adult male survivors of human trafficking cannot easily be placed into domestic violence shelters, and require additional resources to identify appropriate housing, and even when survivors are women, shelter services are limited. The lack of resources, particularly with male survivors, may lead to them to travel to seek more services and benefits. This can cause instability in criminal and civil cases when the witnesses are spread across different geographic locations. Consequently, obtaining immediate immigration relief for trafficked persons, such as Continued Presence (temporary immigration status), and benefits are key and crucial to successful legal responses.

It is also common that civil and criminal liability for the trafficking of temporary workers is spread among several parties, both domestic and foreign. This makes these cases confusing and difficult to prosecute. As a result, most temporary worker survivors are often misidentified or not identified as victims of the crime of human trafficking, and their plight is usually written off as labor exploitation and civil violations.⁸ Law enforcement agencies and other government agencies must be trained on how to identify the nuanced complexities of trafficking schemes, including those perpetrated by seemingly legitimate organizations operating with several partners on a global scale.

Like other trafficked persons, trafficked temporary workers are entitled to seek not only civil redress and restitution through criminal proceedings, but also immigration relief through U-visas and T-visas. It is important that agencies that traditionally seek to safeguard employment and labor rights also recognize that temporary workers may be entitled to other forms of redress when identified as trafficking survivors. To that end, it is important to educate and inform agencies such as the Department of Labor (DOL), Equal Employment Opportunity Commission, and state labor agencies to assist temporary workers with appropriate immigration remedies.

⁸In addition to existing trafficking laws, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008) (TVPA 2008) created a new criminal statute, 18 U.S.C. § 1351, prohibiting fraud in foreign labor contracting. This statute imposes criminal liability on those who, knowingly and with the intent to defraud, recruit workers from outside the U.S. for employment within the U.S. by means of materially false or fraudulent representations.

Recommendations

Enforcing labor protections across all worksites will help prevent labor abuses that can lead to human trafficking. Creating strong and consistent protections across visa categories will help to stop employers from shopping for workers in the programs with the weakest oversight. The government should consider the following:

1. **Utilize a victim-centered perspective to identify and understand how temporary workers are trafficked and abused.** Although not all abused temporary workers are trafficked, temporary workers should be appropriately screened and identified as potential trafficking survivors.
2. **Permit temporary workers to change employers.** Giving temporary workers portability among employers will reduce the opportunity for employers to exploit and take advantage of them.
3. **Create a path to permanent residency.** Temporary work visas currently only allow workers to contribute to the U.S. labor market without offering them entry into the community as a legal permanent resident or citizen.
4. **Create oversight by an enforcement agency administering a single set of workplace protections.** Bring the fractured temporary visa systems into a single system with consistent regulations and oversight by an agency with workplace enforcement powers, such as the Department of Labor. Currently, temporary visas are administered by various federal agencies in an incoherent disarray of differing rules. Creating a consistent approach to temporary work visas would improve transparency and equalize access to workplace protections.⁹
5. **Maintain vigorous support for work place protections for temporary workers, including supporting the Department of Labor's efforts to enact regulations for temporary workers.** Some employers and elected officials are calling for new temporary worker programs with reduced worker protections. If Congress passes stripped-down temporary worker programs, more temporary workers will be vulnerable to human trafficking. In contrast, the DOL took steps to strengthen protections for H-2B temporary workers by issuing new rules set to go into effect in April 2012. These rules have been blocked from taking effect; both by a lawsuit brought by business owners and also by the Senate Appropriations committee vote to prohibit funding to implement the new H-2B rules. The implementation of these final rules would serve to greatly reduce the circumstances under which H-2B temporary workers are subject to trafficking. The new H-2B visa wage methodology rule would make H-2B wages more accurate and fair. In the new H-2B visa comprehensive rule, the DOL sought to more accurately predict labor demand in the U.S. The new comprehensive rule also sought to end debt servitude by requiring employers to pay the temporary worker's visa fees and transportation costs to and from the home country under certain circumstances, as well as requiring employers to pay foreign workers for at least 75 percent of the period for which work was promised to the migrants.¹⁰
6. **Make temporary workers eligible for representation by Legal Services Corporation grantees.** Agencies funded by the federal Legal Services Corp. (LSC) that protect basic workplace rights should be authorized to represent all workers. Currently, LSC grantees are barred from representing most H-2B visa holders.
7. **Collect and report information about all temporary workers.** The U.S. government does not currently release the number of holders of certain visa categories in the labor market, such as B visa personal servants. Such information should be gathered and released about numbers of workers within each visa category, including the names of employers recruiting and employing foreign workers, to promote accountability, transparency, and oversight.

⁹See Visas, Inc. at n.1 for more detailed suggestions about creating a consistent program for temporary visas.

¹⁰U.S. Dep't. of Labor. Wage and Hour Division: Final Rule: Temporary Non-agricultural Employment of H-2B Aliens in the United States available at <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm>; see also Thompson, Gabriel. "The Big, Bad Business of Fighting Guestworker Rights." The Nation. July 3, 2012 available at <http://www.thenation.com/article/168715/big-bad-business-fighting-guest-worker-rights#>.