



# Freedom Network USA

## Human Trafficking and H-2 Temporary Workers May 2018

Over 1 million temporary foreign workers, sometimes referred to as “guest workers,” work in the U.S. each year to meet the labor needs of various industries.<sup>1</sup> Temporary workers are employed in nearly every sector of the U.S. labor market, including agriculture, manufacturing, domestic work, hospitality, nursing, and teaching. Employers hire them from overseas often relying on recruiters or immigration attorneys to assist the workers throughout the visa process. 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 in the U.S. – 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 scenarios involving the trafficking and forced labor of temporary workers.<sup>2</sup>

H-2 temporary lower-skilled workers are one of the largest groups of temporary foreign workers in the country. According to the Department of State, in 2017 it issued more than 240,000 H-2A or H-2B visas to foreign nationals bound for short-term jobs in the U.S.<sup>3</sup> While not all temporary workers are trafficked, cases involving lower-skilled H-2 visa workers constitute some of the largest-ever criminal and civil human trafficking cases in U.S. history.<sup>4</sup>

### **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

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<sup>1</sup> Daniel Costa & Jennifer Rosenbaum, *Temporary Foreign Workers By the Numbers*, Mar. 7, 2017, <https://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/> (1.42 million temporary foreign workers authorized for employment in U.S. in 2013); Justice in Motion, *Visa Pages*, <http://justiceinmotion.org/visa-pages/> (last visited Mar. 24, 2018).

<sup>2</sup> 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*; American University & Centro de los Derechos del Migrante, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*. See also *Casilao et al v. Hotelmacher LLC, et al.*, 5:17-CV-00800 (W.D. Okla. 2017) (H-2B hospitality workers); *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. Askarkhodjaev*, 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); *EEOC v. Global Horizons, Inc. et al.*, CV-03045-EFS (E.D. Wa. 2011) (H-2A visa).

<sup>3</sup> See U.S. State Department, *Nonimmigrant Visas by Individual Class of Admission – FY2013-2017 Detail Table*, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf> (reporting 161,583 H-2A visas and 83,600 H-2B visas issued in 2017).

<sup>4</sup> 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); *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. Askarkhodjaev*, 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. 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 admission of foreign workers to perform non-agricultural work of a temporary nature—with a statutory cap of 66,000 new visas annually.<sup>5</sup> Common industries where H-2B workers are sent include, but are not limited to, hospitality, landscaping, 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.<sup>6</sup> 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 permitted 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, which are often found in cases of trafficking involving undocumented workers.<sup>7</sup>

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, H-2 workers are vulnerable to trafficking and other workplace abuses, as employers can use the threat of deportation to coerce compliant labor. Conditions of the jobs increase vulnerability to abuse. Many worksites are isolated, such as a worker living in the employer's home or on the 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 the 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 travel expenses. 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 to different states to work rather than to sites originally promised, and to do different work than what was originally promised. Even if promised furnished housing, workers are frequently placed into cramped, unsanitary living situations where they are overcharged for rent 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

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

<sup>6</sup> A-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.

<sup>7</sup> Ezquerra, 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 for housing, uniforms, visa renewals, and transportation. Some traffickers will also engage in 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 if they complain.

### **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. 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, is 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 dynamic 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.<sup>8</sup> 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, Equal Employment Opportunity Commission, and state labor agencies to assist temporary workers with appropriate immigration remedies.

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<sup>8</sup> In 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.<sup>9</sup>
5. **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.
6. **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.

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<sup>9</sup> See *Visa Pages* at n.1 for more detailed suggestions about creating a consistent program for temporary visas.