

LEVELING THE PLAYING FIELD:



REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS



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Forward

Hundreds of thousands of workers enter the United States each year on temporary visas through federal guestworker programs. They work in critical industries—from landscaping to construction to education—often in deeply exploitative conditions that rise to the level of forced labor and involuntary servitude. The National Guestworker Alliance (“NGA”) was formed as the Alliance of Guestworkers for Dignity in the wake of Hurricane Katrina, when thousands of guestworkers were brought to the Gulf Coast. While U.S. workers were locked out of reconstruction jobs—guestworkers found themselves locked in as forced laborers.

NGA organized post-Katrina hotel workers in New Orleans who were brought in to undercut local workers, Indian welders and pipe-fitters who broke up a human trafficking chain, and Mexican workers who were trafficked to the United States with stimulus money. Through walkouts, hunger strikes, strategic litigation, and Congressional testimony, NGA members have built national power to win new rights and protections for all workers. We have partnered with local workers—employed and unemployed—to strengthen U.S. social movements for racial and economic justice.

Guestworker programs are a vitally important indicator of the future of the U.S. economy. Guestworkers help us see what all work will look like one day as employers relentlessly replace what were once stable, living-wage jobs with ever more precarious, poorly-paid temporary jobs. In the process, employers have treated guestworkers as the ultimate exploitable workforce and the ultimate tool for undercutting local workers.

In many ways, this dynamic has been most evident in the H-2B guestworker program. In June 2012, the NGA organized a group of H-2B guestworkers from Mexico on Wal-Mart’s seafood supply chain in Louisiana. For years, the Wal-mart supplier had been replacing increasing numbers of U.S. worker with guestworkers, whom he subjected to forced labor, shifts of up to 24 hours without overtime pay, constant threats, and discrimination. And Wal-mart—while claiming to hold its suppliers to the highest standards—profited from the guestworkers’ captivity.

NGA is committed to advancing reforms of the H-2B program to ensure that guestworkers and U.S. workers are protected. Among our most important priorities are:

- Eliminating debt servitude in the H-2B program by prohibiting recruitment fees and by shifting travel costs from workers to employers. This would ensure that guestworkers don’t arrive saddled with debts that make them vulnerable to threats of firing and deportation—and cheaper to hire than U.S. workers.
- Protecting workers’ rights to stop exploitation by filing complaints. When employers or recruiters violate labor laws or program rules, guestworkers and U.S. workers will have the same rights to speak up and organize to protect themselves.

- Requiring employers to provide at least seventy-five percent of the hours they promise to guestworkers in their contracts. This will stop employers from over-recruiting guestworkers to build a captive, desperate workforce that employers can use to undercut U.S. workers.
- Restricting the ability of temporary staffing agencies and job contractors to hire guestworkers. This will help to stop employers from using guestworkers to turn stable, permanent jobs into temporary, low-paid ones.

These priorities are reflected in a new set of rules that the Department of Labor has established for the H-2B program. The Department of Labor intended the new rules to go into effect on April 23, 2012, although employers who have built their businesses on exploitation continue efforts to permanently block their implementation. The report details the ways in which the new rules are an important step forward—and where guestworkers still need additional protections.

This report is intended as a resource for policymakers, advocates, and workers, all of whom have a vital role to play in building a strong economy. Guestworker programs should not force workers to trade in their basic rights for visas. We must ensure that the conversation about U.S. guestworker programs is also a conversation about the basic civil, labor, and human rights of all workers.

– Saket Soni, Executive Director, National Guestworker Alliance

Executive Summary

Leveling the Playing Field documents how, in sectors from manufacturing to food processing to hospitality, employers can treat H-2B guestworkers as the ultimate source of cheap, exploitable labor. Guestworkers frequently go into massive debt to take part in the program. Because their legal status is bound to a single employer, guestworkers are vulnerable to intimidation and retaliation. If a guestworker protests exploitation, the employer often threatens firing and deportation back to the worker's home country, where the worker will face crushing debts that he cannot pay back. Employers also often threaten blacklisting—long term immigration consequences that would block an H-2B worker from future immigration and employment opportunities.

At a time when historic numbers of Americans are struggling with unemployment, many employers are hiring guestworkers instead of U.S. workers, falsely claiming they can find no U.S. workers to fill the jobs. Such employers force guestworkers to accept low wages and poor conditions, leaving U.S. workers unable to compete. Over time, these employers use guestworkers to shift opportunities in entire sectors from permanent, stable, living-wage jobs to temporary, precarious jobs with poor pay and conditions. In the past five years, guestworkers have exposed deep and systemic violations in the program, violations that too often result in labor trafficking, forced labor, and other forms of severe labor exploitation.

Leveling the Playing Field makes the following recommendations, which constitute fundamental protections that all guestworkers, including H-2B workers and the U.S. workers who work beside them, should be afforded.

- **WORKERS SHOULD HAVE THE RIGHT TO ORGANIZE WITHOUT FEAR OF RETALIATION.** Employers should not engage in retaliatory practices against workers who file a complaint, exercise their rights, or help other workers to do so. This would ensure that guestworkers and U.S. workers have the same rights to organize and protect themselves. Further, employers should not force guestworkers into conditions of debt servitude. Currently, guestworkers enter the United States with exorbitant debt from recruitment fees and travel costs. The fear of returning to this debt allows employers to control guestworkers through threats of firing and deportation.
- **EMPLOYERS SHOULD BE PROHIBITED FROM USING GUESTWORKERS AS CHEAP AND EXPLOITABLE ALTERNATIVES TO U.S. WORKERS.** Employers should abide by rules that bar program participation by temporary staffing agencies and job contractors, except in narrow circumstances. This would help to ensure employers do not use the guestworker program to turn permanent jobs into temporary work.
- **EMPLOYERS SHOULD NOT SUBJECT GUESTWORKERS TO HUMAN TRAFFICKING.** Employers should not engage in labor trafficking; for instance, employers should refrain from conduct that gives rise to conditions of debt servitude. Employers should not confiscate guestworkers' passports, visas, and identity documents, thereby restricting guestworkers' movements and ability to leave a workplace—even when an employer is engaging in abusive and illegal conduct.

- **EMPLOYERS SHOULD BE SUBJECT TO MEANINGFUL GOVERNMENT ENFORCEMENT AND COMMUNITY OVERSIGHT.** The Government, workers, and workers’ organizations must work together to ensure meaningful protections for guestworkers and U.S. workers.

The U.S. Department of Labor (“DOL” or “the Department”) has taken a significant step toward ending the abuse of guestworkers and protecting U.S. workers with a new set of H-2B program rules, which had an original effective date of April 23, 2012. Employer interest groups have temporarily blocked implementation of the rules and are seeking to permanently block their implementation.¹ It is critical that DOL’s new H-2B Comprehensive Regulations are fully implemented and strongly enforced. If fully enforced, the new rules would constitute a significant step toward leveling the playing field between guestworkers and U.S. workers—employers would no longer prefer hiring guestworkers because they are more exploitable. The new H-2B Comprehensive Regulations should become the standard for all guestworker programs. The abuse of these programs reveals how the pursuit of profit at all costs is transforming the nature of work in the United States for all workers—from permanent and stable to temporary and precarious. The first step toward reversing that trend is ending the exploitation of guestworkers.

Furthermore, additional whistleblower protections—immigration-related protections for workers who come forward to expose workplace violations—are critical. Options for achieving these worker protections include federal legislation, such as the Protect Our Workers from Exploitation and Retaliation Act (“POWER ACT”),² and administrative reform within DOL and the Department of Homeland Security (“DHS”).

Background: the Sociological and Historical Framework of Guestworker Programs

1. Sociological Context

Guestworkers³ play an integral role in the U.S. workforce today. They have a presence in a wide variety of industries, sectors, and regions of the U.S. economy, reaching far beyond the agricultural and service industries many Americans associate them with. Often, the problems experienced by guestworkers are indicative of problems that U.S. workers⁴ currently face or will face in the future. Organizing guestworkers can therefore serve to expose and interrupt the cycle of exploitation and empower guestworkers and U.S. workers alike.

Guestworkers are commonly used to restructure the industries for which they are recruited. For example, the introduction of guestworkers frequently results in an effort by employers to transform permanent jobs into positions that are, and will remain, temporary. This transformation has had a major impact on local workers—particularly low-income workers who rely on these positions for their livelihood. Additionally, because guestworkers are often compelled by coercion, debt, and other circumstances to work for lower wages and in poorer conditions, employers use them to undercut wages and working conditions for all workers, including U.S. workers. Employers use the same tactics to stifle both guestworker and U.S. worker attempts to organize, form unions, and collectively bargain. In time, this exploitation results in a system of

forced labor in which guestworkers are unwilling and unable to stand up to employer abuses and U.S. workers are unable to find meaningful employment.

At a national policy level, lawmakers frequently use guestworkers to justify harsh immigration enforcement measures and the criminalization of undocumented workers. Guestworkers are portrayed as the legal counterpoints of undocumented workers, and this portrayal has led some to argue that the unauthorized population could easily depart and return to the U.S. with legal immigration status.

2. Historical Overview

Guestworkers first came to the United States in 1942 as part of the Bracero Program, which recruited Mexican workers to fill agricultural jobs left vacant by U.S. workers who transitioned to industrial jobs during World War II. While the original structure of the program allegedly sought to protect the temporary Mexican workforce,⁵ by the mid-1950s program abuses were well documented and opposition of the program by labor and civil rights groups spiked.⁶

The following year, a guestworker program was established to bring Caribbean workers to the United States. This program evolved and ultimately was dominated by the recruitment of workers for the sugar cane industry in Florida and the U.S. South.⁷ Like the Bracero Program, this program was characterized by appalling conditions and abuse of workers.⁸ In 1952, the program was codified under the Immigration and Nationality Act (“INA”) and became what is now known as the H-2 visa program.⁹ While economic instability and revelations of abuse led to the demise of the Bracero program in 1964, the H-2 program survived.¹⁰

In 1986, the Immigration Reform and Control Act amended the INA and divided the H-2 program into the H-2A and H-2B programs.¹¹ The H-2A program allows for the temporary admission of foreign workers to perform agricultural work of a seasonal or temporary nature, and requires employers to certify that U.S. workers are not available to perform the jobs.¹² Its counterpart, 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. The INA defines an H-2B nonimmigrant worker as:

having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service of labor cannot be found in this country...¹³

In addition to H-2A and H-2B guestworkers, there are other visa categories employers use to source workers into the same low-wage sectors as H-2B workers. This includes J-1, L-1, H-1B, and other visa categories that tie a worker’s visa to his employer. While this report focuses on the H-2B visa category, regulation of other categories is also critical or employers will simply shift their labor force to subvert worker protections.

For example, in 1961, Congress created the J-1 program to serve, in part, as an education and cultural exchange program in response to the ongoing Cold War crisis.¹⁴ Although the Cold War

ended long ago, the J-1 program continues and employers use the visa category to source temporary labor in sectors where H-2B workers are also employed.¹⁵

Like the H-2B program and its predecessors, the J-1 program has been abused. These abuses burst into the national consciousness in August 2011 when a group of J-1 students, working at a packaging warehouse for The Hershey Company (“Hershey”) in Pennsylvania, walked off the job to protest the low wages and harsh working conditions at Hershey. According to the students, many of them were not earning nearly enough to recover the amounts paid to participate in the program. Even worse, there was no “cultural exchange” element to the program—just work.¹⁶

In February 2012, the Department of State (“DOS”) announced that the sponsor responsible for the recruitment of the Hershey students would be removed from the program, and that DOS would issue new regulations for the Summer Work Travel Program.¹⁷ An accelerated review of the program by DOS found that students were placed in grueling jobs with “almost a complete lack of cultural activities,” and that complaints by student guestworkers were routinely met with threats that visas could be cancelled.¹⁸

These announcements by DOS coincided with the publication of new H-2B regulations by DOL on February 21, 2012¹⁹ (“2012 Regulations”), following almost one year of notice, comment, and departmental review. These changes were announced soon after DOL made similar changes to the H-2A program in 2010, which, among other provisions, raised farm worker wages, brought back key recruitment protections for U.S. workers, and renewed key government oversight roles.²⁰

These efforts by the Obama Administration to strengthen guestworker programs highlights both the importance and the weakness of the U.S. guestworker regime. Guestworker programs in the United States have historically been susceptible to abuse by employers seeking to fill labor shortages or minimize costs. Examples of these abuses include: (1) high recruitment fees abroad, (2) poor working conditions and the pressure of crushing debt in the United States, and (3) threats of deportation by employers in response to workers’ efforts to organize or otherwise assert their legal rights.

Daniel Castellanos Contreras

Daniel was among the first guestworkers to arrive in New Orleans after Hurricane Katrina. He and 300 others were brought to the U.S. on H-2B visas by Decatur Hotels, LLC. The workers found themselves in horrific conditions, and started to organize. Their legal fight became a battleground for the rights of guestworkers throughout the United States.

My name is Daniel Castellanos. I am from Lima, Peru, and I am a father and husband. I came to the United States on an H-2B visa but became an organizer. I am one of the founding members of NGA, a membership organization of guestworkers who came together to fight exploitation after Hurricane Katrina and grew to become the national voice of guestworkers in the United States.

Just after Katrina, I saw an ad in a Peruvian newspaper—an employer in New Orleans was looking for workers. My family was desperate for money. The economy of Latin America pushes us into hopelessness and vulnerability—the kind of vulnerability that Americans are just beginning to understand. We are forced to wander far from our families in search of jobs. I responded to the advertisement.

Recruiters for Patrick Quinn III, a New Orleans hotel giant, promised us good jobs, fair pay, and comfortable accommodations. They asked for \$3,000 as payment for the opportunity to work in the United States. I plunged my family into debt to pay the fees.

When I came to the United States, I found that all the promises they made were false. Patrick Quinn had brought about 300 workers from Peru, Bolivia, and the Dominican Republic on H-2B visas. We were living in atrocious conditions and were subjected to humiliating treatment. When we raised our voices, we were threatened with deportation—and because of the terms of the H-2B visa, we could not work for anyone else.

I found out that in order to receive H-2B visas, Patrick Quinn had to convince the Department of Labor that he could not find a single U.S. worker willing or able to do the work he was offering. When I arrived in New Orleans, I found that his hotels were full of displaced African Americans—survivors of Hurricane Katrina—who were desperately looking for work. Quinn had received a multi-million dollar contract from FEMA to house Katrina survivors in his hotels.

If Quinn needed workers, all he had to do was to go to his own hotel and offer people work. Instead of hiring workers from the displaced and jobless African American community, he sent recruiters to hire us. At around \$6.00 an hour, we were cheaper. As temporary workers, we were more exploitable. We were hostage to the debt in our home countries; we were terrified of deportation; and we were bound to Quinn and could not work for anyone else. We were Patrick Quinn's captive workforce.

But Patrick Quinn underestimated us. We built an organization and filed a major federal lawsuit against him. Two days after the lawsuit was filed, Quinn retaliated by firing me. I fought back, and the National Labor Relations Board ordered him to reinstate me.

Meanwhile, we heard stories—some much worse than our own—of other guestworkers who were being stripped of their dignity by employers across the Gulf Coast. Employers were holding workers captive in labor camps, confiscating their passports, subjecting them to surveillance, leasing workers for a profit in violation of morality and the law, and trafficking workers into conditions of imprisonment. We called it modern-day slavery and decided to fight. With over 150 H-2B workers from labor camps and industries across the Gulf Coast, we founded a membership organization called the National Guestworker Alliance.

Priority Issues for Change

1. WORKERS SHOULD HAVE THE RIGHT TO ORGANIZE WITHOUT FEAR OF RETALIATION

All workers should have the right to speak out against employer abuses. But retaliation against guestworkers who speak out about illegal conditions is commonplace within the H-2B program. The structure of the H-2B program magnifies the effect of potential retaliation. Because guestworkers incur significant debt to participate in the H-2B program, they bear additional risks that a retaliatory firing or deportation will block their ability to pay debts they incurred to obtain the visa and travel to the U.S. for the H-2B job. For this reason, strong enforcement of regulations preventing employers from imposing debt upon guestworkers as well as from retaliating when the workers voice objections is critical. Guestworkers, workers’ centers, labor unions, and other worker protection advocates have an important role to play in assisting DOL in outreach and enforcement. DOL should engage in meaningful collaboration with guestworkers, workers’ centers, labor unions, and other stakeholders to detect and remedy illegal employer conduct and prevent future abuse of guestworkers.

a. Employers Should Not Retaliate Against Guestworkers Who Assert Their Rights

Guestworkers should be protected from employer retaliation when they attempt to expose workplace conditions that violate worker dignity and worker protection laws and when they negotiate to improve those workplace conditions. The 2009 Regulations²¹ were silent on this issue, effectively opening the door for employers to engage in retaliatory practices.

The actions of Decatur Hotels, LLC illustrates how an employer used retaliation to block guestworkers’ attempts to bargain for better workplace conditions. In the months after Hurricane Katrina ravaged New Orleans, Decatur Hotels, LLC (“Decatur”) brought guestworkers to the United States to perform guest services, housekeeping, and maintenance at its luxury hotels.²² When Decatur refused to provide the promised wages, hours, and working conditions, the guestworkers organized and met with the owner, Patrick Quinn, to negotiate an improvement in workplace conditions. To discourage workers from organizing, Decatur threatened to black list the workers—blocking their ability to apply for future H-2B visas or extensions. Weeks later, after the guestworkers had also filed a lawsuit alleging violations of the Fair Labor Standards Act (“FLSA”), Decatur fired Daniel Castellanos Contreras, a recognized worker leader and named

Plaintiff in the litigation—in retaliation for standing up against Decatur’s illegal treatment of the guestworkers.²³

The retaliatory actions of Cumberland Environmental Resource Company (“Cumberland”) also shows the importance of the anti-retaliation provisions of DOL’s H-2B Comprehensive Rule. In August 2005, Cumberland brought H-2B workers to the United States to perform jobs removing hazardous materials such as asbestos and lead in Louisiana. Like most guestworkers, Cumberland’s H-2B employees borrowed thousands of dollars to pay recruitment, transportation, and visa fees as a prerequisite to the H-2B job with Cumberland. When the guestworkers arrived, however, the company failed to provide them with work for weeks on end. When these workers requested a meeting with their boss regarding this failure, the company responded by firing the workers.²⁴

These retaliatory actions by Decatur and Cumberland are not isolated incidents. Across the board, guestworkers who face abuse or discrimination do not come forward for fear of retaliation by their employers.²⁵ This is true even when the guestworkers suffer severe labor exploitation. As Ignacio Zaragoza, an H-2B worker from Mexico, explained, “Guestworkers are afraid to report abuse. I’ve known people in Mississippi that have even been assaulted and didn’t report it because they were so afraid of losing everything—their job, their visa, everything. Guestworkers are really afraid of retaliation.”²⁶ In an April 2009 survey of over 100 guestworkers, NGA found across the board that guestworkers will not come forward to report employer abuse—even when facing severe exploitation.²⁷

DOL has recognized the importance of such a protection, stating: “Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person’s attempt to report or correct perceived violations of the H-2B provisions.”²⁸ The 2012 Regulations prohibit employers from directly or indirectly discriminating against a worker who has reported a violation of the H-2B provisions by his employer or has sought legal assistance or advice.²⁹

Effective and broad enforcement of the new anti-retaliation provision is fundamental to the enforcement of the other H-2B program rules and other worker protection laws. In order for the H-2B program to function properly, employers must adhere to the law and workers must be able to take action to enforce the law without facing threats or retaliation.

i. Worker Communications with Labor and Community Organizers Should be Protected

To be effective, anti-retaliation protections must protect the guestworkers from retaliation for contact with labor, community, and workers’ center organizers as well as with lawyers and government officials. When a worker has suffered abuse at the hands of his employer and decides to speak up about the abuse, that worker’s first point of contact will often be a labor organizer, worker’s center staff, or local community advocate. Guestworkers consult these “first contacts” to gather information about their rights and to see what legal options they may have. Many workers speak with organizers prior to filing a complaint with DOL, consulting with an attorney, or otherwise reporting a violation by their employer.

The 2009 Regulations did not include any specific protection for guestworkers' communication with first contacts. The 2012 Regulations fill this critical gap prohibition retaliation against "any person who has... (4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney..."³⁰

DOL's recognition of the importance of protecting guestworkers' consultation with those who regularly assist them in correcting or reporting perceived violations of the H-2B provisions is fundamental. Without strong anti-retaliation provisions, the risks to guestworkers in coming forward to report illegal employer conduct—including deportation into debt servitude and blacklisting from future immigration opportunities—are too high.³¹ Anti-retaliation protections are also critical to protect U.S. workers who work alongside guestworkers. If guestworkers face such structural barriers to enforcement of minimum worker protection standards, conditions for all workers in that workplace will deteriorate.

ii. Guestworkers Need Additional Whistleblower Protections

Neither the 2009 nor the 2012 Regulations include a provision that permits an H-2B guestworker to protect his work authorization in the United States after illegal retaliation by his employer. Whistleblower protections are critical to ensure a guestworker who suffers retaliation can mitigate the effects on himself and his family by obtaining other employment lawfully.

To protect guestworkers' right to organize, a guestworker must be able to change his visa to an employer that follows the law after reporting the abuse he has suffered at the hands of his original sponsoring employer.³² Because guestworkers lack the right to change jobs,³³ their right to organize with protection from retaliation is fundamentally restricted.³⁴ As Victor Becerra, a guestworker from Peru, expressed, the lack of portability means that guestworkers "have to accept everything the employer says or become illegal."³⁵

DOL has a key role to play in ensuring these protections. Additional regulations should permit a guestworker to port his H-2B visa, for the remainder of the time the visa is valid, if the guestworker has reported his employer for a violation of an H-2B provision. In this way, DOL would be encouraging guestworkers to report employer abuses. This, in turn, would allow DOL to investigate and ultimately sanction employers where unlawful conduct has occurred.

Whistleblower protections for guestworkers involved in labor disputes with their H-2B employer provides protection for guestworkers that is consistent with the goals of the statute—which seeks to protect both job access and job quality for U.S. workers.³⁶

Juana Reyes

In July 2011, Juana and twenty other H-2B guestworkers being paid under minimum wage requested a meeting with their employer, Baton Rouge Seafood processor Viet Seafood, Inc. Viet Foods refused to negotiate and the guestworkers went on strike. Viet Foods then fired the guestworkers in retaliation for their attempted negotiation and strike. The guestworkers joined NGA and asked the Department of Labor to open an investigation into violations of H-2B program rules and minimum wage laws.

My name is Juana Reyes I am a fifty-three year old woman from a small fishing community in Sinaloa, Mexico. Life in my village is hard. I have worked in the fields and on fishing boats all my life in order to survive. I have eight children and three grandchildren who depend on me. Some of my children did not finish high school. I offered to support them, but there is little work in my community and at times we didn't even have fish to eat, and we went hungry.

In February 2011, I came to work for Viet Seafood, Inc. I dreamt of earning enough to help my family succeed. My sister and I decided to come together to Louisiana to work. This was my first time coming and my first time away from my children. I had high hopes and was excited for the experience.

I borrowed about \$1,000 in order to come to the United States to work for Viet Seafood. I worked for five months peeling crab and crawfish. We worked twelve-hour days with only one half-hour break for lunch. Even working that much, the boss called us lazy Mexicans. We were paid per pound of meat we peeled, and at times our checks were as low as \$35 dollars for a week's work.

My co-workers and I started talking and decided to ask for a raise. We wanted to earn at least minimum wage. I was scared that the boss would cancel my visa and deport me. I was scared to get blacklisted and not be able to come back next year. But there comes a point where you let go of your fear and you find your strength. The other workers and I all went to talk to the boss; when he didn't listen, we went on strike.

I'm going back to Mexico empty handed—but I have found something special here. My co-workers and I, we have found strength and hope together. At the end of this fight, I hope our issue gets resolved, if not for us this time around, then at least for the workers in the future. I hope for greater wages for them and I hope for no more retaliation.

b. Employers Should Not Engage in Immigration-Based Retaliation

Protections for guestworkers from immigration-based retaliation when they attempt to organize, strike, file lawsuits, or report violations of employment conditions are also critical. Without these protections, employers may engage in immigration-based retaliation in the form of private deportation,³⁷ deportation by the U.S. government,³⁸ and blacklisting.³⁹

i. Private Deportation

One way employers retaliate against employees who stand up against abuses and discrimination is by threatening to and by causing workers to be deported back to their home country.⁴⁰⁴¹

NGA has exposed the collusion of federal immigration authorities with the private deportation activities of employer, Signal International LLC (“Signal”). From 2007 to 2010, two DHS agencies, Immigration and Customs Enforcement (“ICE”) and Customs and Border Patrol (“CBP”), colluded with Signal to develop policies and practices to enforce coercive conditions. For example, Signal has acknowledged receiving the following guidance as to facilitating deportation from an ICE agent: “Don’t give them any advance notice. Take them all out of the line on the way to work; get their personal belongings; get them in a van, and get their tickets, and get them to the airport, and send them back to India.”⁴² ICE actions also undermined what should have been a fair investigation into Signal’s labor management strategy by independent federal agencies including the Department of Justice.

Where the 2009 Regulations were silent on these issues, the anti-retaliation provisions in the 2012 Regulations prohibit employers from effectuating the private deportation of a worker who has reported employer abuses or otherwise voiced a complaint.

ii. Government Deportation

Another way employers threaten guestworkers with immigration consequences is by communicating regulatory reporting requirements to guestworkers in a threatening way. An employer has a responsibility to notify DHS when an employee abandons the workplace.⁴³ A guestworker is deemed to have “abandoned” his employment upon any separation from employment.⁴⁴ This separation could come as the result of the employer firing the employee, an employer’s actions that constitute a constructive discharge, or the worker voluntarily quitting the job.

Under the 2009 Regulations,⁴⁵ guestworkers reported that employers used this notification requirement in a threatening manner. An employer’s threat of immigration consequences—including arrest, deportation, and blacklisting—for those workers who spoke out against abuses often forced the workers to remain silent and accept the employer’s work conditions, including wages, housing, and deductions, whether or not those conditions were legal under the H-2B regulations. Because the report goes to a DHS agency, employers often successfully repress legitimate protected actions through these threats, even though this is not the intent of the regulation.

To minimize the threatening nature of this notification requirement, employers should be required to notify DOL—not DHS—of a guestworker’s separation from employment. DOL is the more appropriate agency to receive these reports, as it is responsible for promulgating labor regulations and enforcing labor laws. Shifting this notification requirement to DOL would help to avoid employer manipulation, as it would separate the notification requirement from immigration enforcement, thereby eliminating employers’ ability to hold guestworkers in servitude by threatening deportation. Because DHS is the government agency that is responsible

for filing immigration charges and effectuating deportations, the threat of an employer notifying DHS gives that employer greater power to intimidate guestworkers. In at least one case, DHS has actually colluded with an employer to attempt to ensure that guestworkers who spoke out about illegal conditions were deported.⁴⁶

While DOL has clarified that employers should not use the reporting requirement in a threatening way,⁴⁷ DHS remains the reporting agency. Until there are future changes, DOL continues to have a critical role to play in enforcing anti-retaliation provisions to ensure that employers do not inappropriately use this provision to threaten workers and force them to work in unlawful conditions or remain working against their will.

iii. Blacklisting

Employers also retaliate against guestworkers who file complaints of employer abuse by blacklisting the guestworker. Blacklisting involves actions that negatively impact a guestworker's ability to obtain a future visa and may permanently block a worker from returning to the United States. The 2012 Regulations explicitly prohibit employers from blacklisting guestworkers as retaliation for reporting employer abuses.⁴⁸

The anti-retaliation protections afforded guestworkers are an important first step to protecting guestworkers' right to organize. Broad and effective enforcement by DOL is critical to ensure that employers are no longer allowed to retaliate against workers when they stand up against abuses and discrimination.

Martha Gloria

In the aftermath of the BP oil spill, Martha Gloria and four other workers were laid off by their employer, Ramada Hotel, on the emerald coast of Florida. She was five months pregnant at the time. She and her coworkers joined NGA and demanded appropriate compensation from BP that both U.S. workers and guestworkers were owed and records from Ramada to document her temporary employment. The following year, Martha and her family members were blacklisted from coming to the U.S., but through NGA, they successfully beat the blacklist in April of 2011.⁴⁹

c. Employers Should Not Engage in Behaviors that Lead to Conditions of Debt Servitude

The provisions of the 2012 Regulations go a long way toward minimizing the pre-employment recruiting, visa, transportation, and other costs that lead many guestworkers into conditions of debt servitude.⁵⁰ For many guestworkers, the experience of participating in the H-2B program has been dominated by crushing debt—debt that is incurred by workers before arrival in the United States to pay required fees and costs to obtain the job. For low wage workers, the debt is

often obtained at high rates of interest and exacerbated by low wages and deductions from pay. This debt results in deeply coercive circumstances where guestworkers work for months—sometimes an entire season—without lifting themselves out of the debt or earning positive income. Guestworkers know that they will not be able to repay debts in their home country, and are therefore under significant pressure not to report illegal employer conduct because termination of their employment—even illegal termination—results in deportation back into this debt.⁵¹

These realities, when imposed upon foreign workers by unscrupulous employers, result in an overwhelming sense of desperation. The workers tolerate the conditions they are faced with, no matter how dire, because they need to work to attempt to recoup enough money to satisfy their debts at home. H-2B guestworkers have reported that instead of reporting violations of federal employment and labor laws, they have endured the violations in order to avoid terminations that would leave them unable to pay their debts. One such guestworker, Serman Morales of Bolivia, explained, “The fear of losing everything is greater than our rights.”⁵² This story of debt and desperation is a common one.

The 2012 Regulations present multiple solutions to the problem of debt servitude, including broader prohibitions of recruitment fees charged by employers and agents abroad;⁵³ requirements that employers reimburse workers for the full cost of visas and related expenses;⁵⁴ requirements that employers pay outbound and inbound travel and subsistence expenses if certain conditions are satisfied;⁵⁵ and requirements that employers provide, free of charge, all tools, supplies, and equipment needed to perform the job.⁵⁶ Each of these solutions will be addressed in turn below.

i. Prohibition of Recruitment Fees

Often, the first stage in the cycle of debt faced by guestworkers is the imposition of recruitment fees by employers and their recruiting agents.⁵⁷ Recruitment fees commonly take two forms. First, there are fees associated with the employer’s application to the Department to participate in the H-2B program. These fees are often passed along to guestworkers via cost shifting—the transfer of costs from the employer to the guestworker employee. Second, there are fees charged by agents and recruiters for the right to be recruited and hired by the U.S. employer. These fees are addressed separately by the regulations.⁵⁸

1. Shifting of Costs Associated with the Employer’s H-2B Application

The 2009 Regulations contained minimal protections against the shifting of costs associated with the employer’s H-2B application to guestworkers, stating that the employer and its attorneys or agents must not have sought or received any payment from the employee to cover the costs of obtaining the labor certification, attorney or agent fees, or recruiting costs.⁵⁹

The 2012 Regulations expand the list of individuals who are prohibited from seeking to shift these costs to guestworkers, adding all employees of the employer to the list of restricted parties.⁶⁰ This is an important way to prevent employers from instructing their employees to solicit fees that they themselves are prohibited from seeking.

2. Recruitment Fees Charged by Agents and Recruiters Abroad

The 2009 Regulations required employers to contractually forbid recruiters from seeking or receiving fees from prospective guestworkers.⁶¹ This restriction did not go far enough to prevent the levying of such fees because it failed to prohibit fees charged by parties other than the employer's recruiter, including the recruiters' agents and employees.

This provision of the 2009 Regulations resulted in guestworkers being charged exorbitant recruitment fees. For instance, Daniel Castellanos Contrerashas testified that when he was recruited to come to the United States in 2005, recruiters in Peru charged \$500 for a chance at employment in the United States.⁶² The recruiters received 800 such applications, but obtained visas for only 80 workers, netting a profit of approximately \$40,000 in initial application fees alone.⁶³ The "lucky ones" who were selected for employment were charged an additional \$1,500 for their job contracts. To cover these costs, Daniel sold household items and took out a bank loan at a high rate of interest.⁶⁴ NGA member Aby K. Raju has testified that he was among a group of about 500 guestworkers recruited from Kerala, India, to work for Signal. According to Aby, each guestworker in this group was charged as much as \$20,000 in mandatory recruiting, visa, and travel fees. Workers took out loans, liquidated their life savings, and sold family homes and valued possessions to scrape together the necessary funds.⁶⁵

These fees are staggering in any context, but in the context of workers who are desperate for work due to the lack of meaningful employment opportunities at home, they become even more coercive. Moreover, the extreme debt incurred by workers before they even arrive in the United States cripples their ability to stand up for themselves and demand higher wages, safe living and work conditions, and other basic protections.

The 2012 Regulations expand the group of people whom the employer must contractually forbid from seeking or receiving recruiting fees from prospective guestworkers. The rule extends this requirement to any agent or recruiter, and any employee of any agent or recruiter, engaged directly or indirectly by the U.S. employer to conduct international recruitment on their behalf. The rule also clarifies that this contractual prohibition must be in writing to ensure compliance.⁶⁶

These new provisions provide important protections for guestworkers pursuing H-2B employment in the United States—ensuring that workers arrive in the United States in stronger financial position. This also helps ensure that guestworkers will be better positioned to challenge poor working and living conditions, if necessary.

ii. Reimbursement for Visa Expenses

In addition to being required to pay recruitment fees abroad, guestworkers are also often required to incur all costs associated with obtaining the H-2B visa—including costs associated with consular appointments, visa applications, and travel to and from the consular city.

The 2009 Regulations were silent on this issue, imposing no obligation upon the employer to cover H-2B visa expenses. In August 2009, however, the Department's Wage and Hour Division

indicated that under FLSA, visa fees are primarily for the benefit of the employer and must be reimbursed during the guestworker's first workweek to the extent that they reduce the worker's wages below the minimum wage.⁶⁷

The 2012 Regulations go much further, requiring employers to pay or reimburse employees for the full cost of visa and related expenses during the first workweek.⁶⁸ Where the previous regulations were silent, and reimbursement was required only under FLSA standards, the 2012 Regulations tie this requirement directly to the H-2B visa regulations.⁶⁹ This addition is a clear mandate from the Department that the employer must pay for, or reimburse during the first workweek, all visa and related fees.⁷⁰ The supplementary information to the 2012 Regulations also clarifies that the employer must pay for travel to the consular city for visa processing, as well as for subsistence during that trip. As such, the employer is now obligated to pay, or timely reimburse, expenses related to the visa itself, travel to the consular city, overnight stays in the consular city (as needed), and daily subsistence.⁷¹

Ultimately, the strongest protection would be to mandate that employers pay all visa expenses up front. This requirement would establish a clear rule and would protect guestworkers from the need to take out loans in advance of their departure to cover visa expenditures—diminishing the risk of debt servitude.

iii. Payment of Outbound and Inbound Travel Expenses

Guestworkers also have traditionally been responsible for paying costs associated with their travel to and from the United States, frequently incurring additional debt to do so.

Under the 2009 Regulations, an H-2B employer was only required to pay outbound travel expenses⁷² of guestworkers, and this requirement only applied when the worker was dismissed prior to the end of the certified period of employment.⁷³ This left all guestworkers responsible for inbound travel,⁷⁴ and required the vast majority to pay outbound expenses as well. Daniel Castellanos Contreras, testifying before Congress, indicated that he was required to pay \$1,400 for his plane ticket from Peru to Louisiana.⁷⁵ Another H-2B guestworker associated with NGA, Gilberto Da Silva Neto, reported that he was charged 2,570 Brazilian real for his airfare to the United States. Gilberto also reported that his monthly salary in Brazil at that time was about 2,500 Brazilian real, meaning that he was required to commit more than one month's salary to his inbound airfare alone.⁷⁶

Under the 2012 Regulations, employers are liable for the reasonable costs of both inbound and outbound travel, including daily subsistence expenses. Inbound costs must be reimbursed once a worker has completed fifty percent of the job order,⁷⁷ and outbound costs must be paid for workers who have worked through the end of the job order or who have been dismissed early for any reason.⁷⁸ An employer is obligated to pay outbound transportation even if the H-2B guestworker has obtained subsequent H-2B employment, if the subsequent employer has not agreed to provide or pay for transportation to the subsequent worksite. All employer-provided transportation must comply with applicable Federal, State, and local laws.⁷⁹

While this rule represents significant progress, more can and should be done. Under the 2012 Regulations, an employer may fulfill its inbound travel obligations in one of three ways: “by actually providing the transportation, arranging for it directly, or advancing the reasonable cost of the transportation to the worker before the worker departs.”⁸⁰ Instead of permitting the employer this choice, guestworkers will have the most protection when employers are required to pay all inbound travel costs up front. This would establish a clear rule, and would protect guestworkers from the need to take out loans in advance of their departure to cover travel expenditures. Experience has shown that any debt incurred by guestworkers in advance of their travel to the United States will make them more vulnerable and less inclined to report violations or attempt meaningful organization.⁸¹

Requiring employers to pay inbound travel expenses directly would also help alleviate potential confusion surrounding the interplay of the H-2B regulations and FLSA. Under the new regulatory scheme, employers who do not directly pay inbound travel expenses will be required to reimburse costs to guestworkers once they have fulfilled fifty percent of their job order. However, the requirements of FLSA apply independently of the H-2B regulations and require that covered employers reimburse costs primarily for the benefit of the employer, including travel costs, during the first workweek if such costs would bring a non-exempt employee’s wages below the FLSA minimum wage.⁸² As a result, a guestworker who incurs inbound travel expenses might experience the following sequence of reimbursement (assuming the travel expenses would bring his wages below the FLSA minimum wage in his first week of work):

- First, the employer would be obligated to reimburse during the first workweek to ensure compliance with the FLSA minimum wage;
- Second, the employer may elect to recoup these funds by making deductions from the worker’s paychecks in subsequent weeks (provided the deductions do not trigger a violation of the FLSA minimum wage requirement);
- Third, once the worker has fulfilled fifty percent of his contract, the employer would again be required to reimburse the worker to fulfill his obligations under the H-2B regulations.

The overlap of these statutory and regulatory requirements is complex, and could provide unscrupulous employers with an opportunity to neglect their reimbursement obligations. Requiring direct payment of inbound travel costs would eliminate this risk.

As the 2012 Regulations still allow employers to choose reimbursement of travel expenses in lieu of direct payment, DOL has a critical role to play in enforcing FLSA requirements on behalf of guestworkers.

iv. Prohibition of Deductions for Tools and Other Employment-Related Expenses

Debts incurred by guestworkers abroad are often exacerbated when their already low U.S. wages are reduced by way of deductions for tools and other employment-related expenses. These deductions are significant for many guestworkers and exacerbate debts accumulated as a result of pre-employment expenses. The 2009 Regulations were silent on this issue. Moises Moreira Santos recounted that he borrowed approximately \$7,000 to come to the United States on the

promise that he would earn \$15.42 per hour and work 40 hours per week. When he arrived in the United States, however, there was no work and no money. As soon as he was provided with some work, significant deductions were made from his paychecks, including \$270 for welding tools.⁸³

The 2012 Regulations complement the longstanding and fundamental FLSA prohibitions on deductions from minimum wage. Under the new rules, employers are required to provide all tools, equipment, and supplies required to perform the job free of charge, *even* when the costs would not drive workers below the minimum wage.⁸⁴ Deductions not required by law and not disclosed on the job order are prohibited.⁸⁵ Deductions not required by law that are disclosed on the job order must be reasonable under FLSA to be permissible.⁸⁶

d. Employers Should Not Hire H-2B Workers to Replace Striking U.S. Workers

The H-2B program is designed to allow U.S. employers to bring foreign workers to the United States for a temporary period of time to fill positions that U.S. workers are unavailable to fill; however, employers sometimes undermine the H-2B program's fundamental preference for U.S. workers. One way employers try to undercut this preference is by using guestworkers to fill positions that have been vacated by U.S. workers who are on strike. Instead of resolving the labor dispute and getting U.S. workers back on the job, employers often replace them with guestworkers.

The 2009 Regulations attempted to prevent employers from circumventing the program requirements by requiring employers to attest that there were no strikes or lockouts in the positions that they wished to fill with H-2B workers. However, this rule allowed employers to avoid resolving labor disputes by transferring U.S. workers from one position within the workplace to the positions vacated by the striking employees, and then filling the new vacancies with H-2B workers.

DOL closed this loophole in the 2012 Regulations by denying an employer H-2B certification if there is a strike or lockout at any of the employer's worksites within the area of intended employment. By expanding the provisions to include all worksites within the area of intended employment, DOL added protection for U.S. workers, particularly those that are exercising their right to organize and strike against their employer. This provision will ensure that employers resolve labor disputes with striking U.S. workers instead of filling their positions with guestworkers.⁸⁷

e. Employers Should Not Discourage Efforts by Guestworkers to Organize

Employers should remain neutral and respect guestworkers' rights to communicate with worker organization—and should convey this information to guestworkers at the outset to avoid the perception of illegal threats or retaliation. DOL has a role to play in encouraging employers and recruiters to announce and make clear to workers that they will: (1) not discourage workers' communication with workers' organization or DOL and (2) not discourage workers' involvement

in other legally protected activities to improve workplace conditions or expose employment or recruitment violations.

In labor law generally, the National Labor Relations Act does not require that employers enter into neutrality agreements. However, major unions across various sectors of the U.S. economy have been successful in obtaining neutrality agreements with employers, and courts have often enforced these contracts. Notably, neither the 2009 nor the 2012 Regulations include a provision requiring neutrality agreements.

In addition to anti-retaliation provisions, provisions encouraging neutrality agreements between employers and DOL would promote independent decision making by guestworkers regarding whether or not to seek legal advice, organize, or take action to expose violations of the H-2B program. Neutrality agreements would allow the workers to make these decisions free of misleading or false information provided by the employers about the workers' rights or legal advisors.

2. EMPLOYERS SHOULD BE PROHIBITED FROM USING GUESTWORKERS AS CHEAP AND EXPLOITABLE ALTERNATIVES TO U.S. WORKERS

Enforcement of H-2B program requirements, as well as fundamental worker protections for all workers, is critical to ensuring that employers do not use guestworkers as a cheap and exploitable alternative to U.S. workers. DOL has a key role to play in ensuring that participation is limited to employers who comply with the regulations.

Tomas Arias

Tomas Arias came to the United States from Peru on an H-2B visa to work for Tennessee-based Cumberland Environmental Resource Company. He was forced to pay close to \$4,000 for the visa, and had to leave the deed to his house with Cumberland's recruiters "as a guarantee that [he] would not escape." Cumberland brought H-2B workers from Peru, Bolivia, and El Salvador for jobs that didn't exist, then leased them to work on military bases, in prisons, and at other work-sites across the South. Trapped in debt and desperate, Tomas and his coworkers decided to organize—and faced retaliation as a result.

I'm from Lima, Peru. I have four children—three girls and one little boy. Before I came to the United States, I was a construction worker.

The recruiter for Cumberland Environmental Resource Company promised me work in the United States as an assistant carpenter, doing debris cleanup on a construction site. She said the work would start in August 2008.

In order to apply, I would have to pay a \$250 application fee. If I received the visa, I would have to pay another \$2,000 and would have to pay for my own plane ticket—an additional \$600. I would also have to leave money behind for my family. All in all, it would cost me more than \$4,000 to come to the United States on an H-2B visa.

As a guarantee that I would not try to escape Cumberland, I had to leave the deed to my house with recruiter—agreeing that they could confiscate my house if I didn't pay the fee or if I tried to leave the company to work somewhere else.

On August 18, 2008, my H-2B visa arrived. It was a six-month visa. I took out a loan on my house through a private lender at 20% monthly interest, and paid \$2,000 for the visa.

Then Cumberland's recruiter announced that I would not leave for the U.S. until October 21, 2008. The work wasn't ready yet. But my visa was only valid for six months! They were making me lose two months waiting for a contract that I had already paid for.

When I arrived in Tennessee on October 21, 2008, a representative of Cumberland met me and told me that I had arrived too early. I shouldn't have come until November 2. He said that on November 3, he would pick me up and take me to the company office. So I had to wait another two weeks without work.

On November 3, I was taken to the company office. There they told me I would have to do a one-week training course in asbestos removal. I protested—that was not the job I had been promised. I had been waiting three months since my visa arrived to start work in construction. I was running out of money. They told me to be patient. They took me to the supermarket and told me not to worry. They bought me food—but later they charged me for it.

Cumberland's representatives then told me that in order to bring me here on an H-2B visa, they had to pay the recruitment agency in Peru \$2,500. They said I would have to pay this back. I said I had paid in Peru, and I couldn't pay again. But they said not to worry: I would make the money fast—"you'll recuperate the \$2,500 instantly," the manager told me.

The company told me that after the asbestos training I could apply for jobs all over the South. They promised that I would begin work "on Monday." Monday arrived and there was no work. Then another Monday arrived and still nothing.

On November 17, I was sent to work for four days in a children's prison in Murfreesboro, Tennessee. When I got my paycheck, it was full of deductions.

Another month passed without work. I was desperate. I went to the office every Monday asking for work and they always said the same thing: "work is coming." But it never did.

At last, I was sent to do a job at a U.S. Air Force base in Montgomery, Alabama. Since I didn't have an asbestos license for Alabama, they wouldn't let me work. I had to pay someone to take me back to Nashville—wasting another \$60.

By then my visa was about to expire. Cumberland asked me for more money. They told us that they had applied for visa extensions for us—and that we would have to pay \$682 to an agency in Baton Rouge and another \$600 to Cumberland for processing. I said I already paid fees in Peru.

That was when I started to organize with the other Peruvian workers of Cumberland. With the

help of NGA, we submitted a petition to Cumberland asking for a meeting with Gary Lang, the owner of the company. As soon as we asked for the meeting, Lang fired us in retaliation.

We know our rights in the United States, and know that we were fired illegally. We rejected the firing and went on strike. We filed charges with the National Labor Relations Board, and filed complaints with the Department of Labor, asking that the authorities investigate Lang and Cumberland.

a. Employers Should Recruit U.S. Workers in Good Faith and as Required by the H-2B Regulations

The 2009 Regulations introduced to the H-2B program, for the first time, an attestation-based model⁸⁸ by which employers were required to attest, but not fully demonstrate, that they had performed an adequate test of the U.S. labor market prior to turning to the labor of foreign guestworkers.⁸⁹ However, the Department found that during the first year the attestation-based system was in effect, employers were attesting to compliance with program obligations with which they had not complied.⁹⁰ Further, reports by the Department of Labor’s Office of the Inspector General (“OIG”)⁹¹ and the Government Accountability Office,⁹² cited by the Department both in its March 2011 Notice of Proposed Rulemaking (“Proposed Rule”) and in the Supplementary Information to the 2012 Regulations, have tied the attestation-based model to fraud and the rise in successful civil and criminal prosecutions under the H-2B program.

NGA’s national compliance monitoring program, including surveys of guestworkers across region and industry, further confirms the OIG’s findings and the Department’s conclusion: the 2009 Regulations prioritized the streamlining of the H-2B program at the expense of protecting the statutory limits and intent of the H-2B program. In the context of a struggling economy and high unemployment, the results have been devastating—unemployed U.S. workers have been passed over for jobs, foreign workers have been subjected to extreme exploitation, and U.S. workers employed in the same sectors have seen a significant drop in their wages and working conditions.⁹³

For example, an October 2009 *Associated Press* article documented the reactions of one U.S. worker and one H-2B guestworker to the unscrupulous practices of the Cumberland Environmental Resources Company of Brentwood, TN and its recruiter, Accent Personnel Services Inc. of Baton Rouge, LA.⁹⁴ Toribio Jimenez Martinez, an H-2B guestworker from El Salvador, was trapped in virtual servitude by Cumberland⁹⁵ while Robert Martin, a U.S. worker, applied for the job and was never contacted for an interview.⁹⁶ Cumberland, it appeared, preferred the inexpensive and exploitable H-2B labor force to U.S. workers. Toribio stated, “I feel terrible that I may have taken someone else’s job, only to end up being taken advantage of myself.”⁹⁷ Robert Martin put it pointedly, “To be doing what some companies are doing is just totally un-American. Just straight up greed that doesn’t care about anybody who needs work.”⁹⁸

The 2012 Regulations include specific measures to limit the potential for false reporting by employers. First, the Department reverted to the original, compliance-based program, which requires employers to submit documentation demonstrating proper recruitment and compliance

with the H-2B program requirements in advance of certification or approval of their application to recruit H-2B workers.⁹⁹ In addition, the 2012 Regulations provide a variety of other protections for U.S. and foreign workers.

Many of the major changes under the 2012 Regulations will be important to ensure that U.S. workers are aware of temporary job openings. For instance, U.S. employers are now required to continue to accept referrals of U.S. applicants until twenty-one days prior to the date of need.¹⁰⁰ U.S. employers must also contact former U.S. workers who have been employed by the employer during the previous year, including those who were laid off within 120 days of the date of need,¹⁰¹ in an attempt to fill the positions. Employers must also provide written notice of job opportunities to community-based organizations,¹⁰² and are required to reach out to bargaining representatives.¹⁰³ In the absence of such a representative, employers must post the availability of any job in a conspicuous on-site location.¹⁰⁴

Other changes to the regulations have a different purpose: ensuring that once a U.S. worker applies for an open position, they are not denied for a fabricated or unlawful reason. NGA's compliance monitoring has exposed employer fabrication of excuses not to hire qualified U.S. workers. For example, in the Cumberland case, an investigation into the employer's practices by NGA revealed that it failed to engage in good faith efforts to recruit U.S. workers. For example, with respect to Robert Martin, Cumberland indicated that he needed work "before Oct. 1st," even though Robert reported to NGA that no representative of Cumberland ever reached out to him in response to his application and that he desperately needed a job at that time.¹⁰⁵

DOL has a crucial role in making sure that employers do not make false efforts to hire U.S. workers. Under the 2012 Regulations, this type of fabrication is prohibited, as employers are now required to consider all U.S. applicants and hire any applicants qualified and available for the position.¹⁰⁶ The statutory language is mandatory. As a result, employers will only be permitted to reject U.S. workers for lawful, job-related reasons.¹⁰⁷ If there are no lawful grounds for rejecting the U.S. applicant, the U.S. applicant must be hired.

b. Employers Should Not be Able to Subvert the Rules of the H-2B Program by Using Job Contractors

Without adequate regulation and enforcement, employers use job contractors¹⁰⁸ to subvert the fundamental intent of the H-2B program—to allow limited employment of foreign workers in temporary jobs when no U.S. worker is available—and transform the nature of employment in the United States.

Under the 2009 Regulations, job contractors were entitled to full participation in the H-2B program. This created devastating problems for guestworkers and U.S. workers employed in the same sectors. One of the emblematic problems with the H-2B program has been that staffing agencies and contractors have hired foreign guestworkers for jobs that did not exist—forcing guestworkers to sit idly by while their debt grows.¹⁰⁹ Further, the allowance of job contractor participation made it possible for employers to restructure employment by transforming permanent positions into temporary jobs—as they have a permanent need for labor.

The story of Cumberland Environmental Resources Company is illustrative of these problems. In 2007 and 2008, Cumberland, with the assistance of Accent Personnel Services, Inc., recruited a group of guestworkers to perform janitorial and cleaning services for Jani-Care, located in Baton Rouge, Louisiana. However, upon arrival, the guestworkers realized they were bound for Nashville, Tennessee, to work for Cumberland removing asbestos. When the workers were given work, they were often sent to neighboring states to do work for other entities. For example, one worker reported that he was sent to work at a children's prison in Murfreesboro, then to an Air Force base in Montgomery, Alabama. Another worker reported being sent to work for two days at a casino in Mississippi, and then to a military base in Knoxville. Every worker reported that jobs were few and far between, and that they were required to pay for their own transportation to the distant work sites.¹¹⁰

Simply stated, a job contractor does not have a legitimate, temporary need for workers. A contractor typically has many employer-clients¹¹¹ with temporary need, but the contractor's need for workers to fulfill is contractual obligations is ongoing. Furthermore, contractors typically do not exert any day-to-day control over the workers—their involvement is usually limited to the hiring, firing, and payment of employees.

The 2012 Regulations permit such contractors to participate in the H-2B program only where they can demonstrate their own legitimate, temporary need, not that of their employer-client(s).¹¹² This provision is a step back from the Department's Proposed Rule, which excluded job contractors from the H-2B program as a whole.¹¹³ However, DOL still has a key role in enforcing this provision and ensuring that only job contractors who can demonstrate legitimate, temporary need can participate in the H-2B program. As the supplementary information to the 2012 Regulations indicates, the Department has excluded only those employers with a definitively permanent need, not those with merely a potentially permanent need.¹¹⁴ As such, job contractors will only be permitted to participate in the program if they can establish that they have a seasonal need or a one-time need. Job contractors will not be permitted to participate based upon a peak-load or intermittent need.¹¹⁵

In conjunction with robust enforcement of the 2012 Regulations on job contractors, DOL should be committed to securing H-2B regulations that prohibit, once and for all, indirect employment of guestworkers through job contractors. No worker should be placed in a job with a temporary staffing agency, subcontractor, or any other entity supplying subcontracted labor. As the Department has acknowledged, job contractors, by their very nature, have ongoing, permanent labor needs and are not temporary employers.¹¹⁶ The H-2B program was not designed with these employers in mind.

Moises Moreira Santos

Moises organized to hold his Mississippi job contractor accountable and was fired. He continued to fight, winning a favorable decision from the National Labor Relations Board.

My name is Moises Moreira Santos, and I am a welder from Sao Paulo, Brazil. I am married and have two small children. I came to Pascagoula, Mississippi on an H-2B visa on December 11, 2007, to work for a company called Five Star Contractors, LLC.

In Brazil, Five Star's agents promised that three days after I arrived in the United States, I would be put to work. I was told that I would get a minimum of forty hours each week, overtime pay, and that I would work directly for Five Star. I was promised good living conditions, free of charge.

When I arrived, I was shocked. We were forced to live in storage containers on a concrete lot—and were charged \$75 week for it. And there was no work. We learned that Five Star was a job contractor that rented workers out to the shipyards in the area. I asked when I would start working, and the company said it would be soon. Every week they said, "You will start work soon," but we never did. What could we do? We just waited.

Before I came to the United States, I had to borrow about \$7,000 from a loan office to pay all of the recruitment and travel costs. As time passed, my debt grew to almost \$10,000.

And still, weeks after we arrived, there was no work.

With the help of NGA, we started to organize and held meetings to decide our course of action. We wrote a petition demanding our rights—I signed and told other people about it too. I was nominated to be one of the people to speak when we gave it to our boss.

We gathered to confront our boss, Brian Knight, the owner of Five Star. I explained to him why we were there, and turned in the petition. He became furious—and insulted me by saying I was a bad welder who was just there to cause problems. He said I would be fired for my bad behavior.

Twenty minutes later, he called me into his office and he told me to pack my belongings because I was going to be deported. I was fired for insubordination. I packed my things and escaped before they could deport me. I became a fugitive.

Later, I reported the company to the National Labor Relations Board. The Board ruled in my favor, and punished Brian Knight.

c. Employers Should Provide Full-Time Jobs at 40-Hours Per Week

Under the 2009 Regulations, employers were allowed to advertise jobs as "full time" when those jobs only carried thirty hours per week. For U.S. workers, accepting a low wage, temporary job

that only provides thirty hours per week can be a significant risk, as such a job may not pay them enough to cover their monthly expenses. Therefore, U.S. workers may forgo a full-time job that only gives thirty hours per week and continue to look for a job that will provide the standard forty hours. By creating employment conditions that made it difficult for U.S. workers to accept positions, such as by providing less than standard full-time hours, employers were able to satisfy the attestation process and still hire H-2B guestworkers. In this manner, employers purposefully bypassed qualified U.S. workers in order to bring guestworkers to the United States to work at a lower price.

The Department has increased the full-time hour requirement under the 2012 Regulations to thirty five hours per week.¹¹⁷ This provision is significant step that more accurately reflects full-time employment expectations in the United States. This increase in required hours for full-time designation will help to encourage more U.S. workers to accept work from employers who would otherwise bring H-2B guestworkers to fill these positions. However, DOL should be committed to securing H-2B regulations that define full-time work as forty hours every week, an hour amount that is more consistent with what the U.S. economy considers to be full-time¹¹⁸ and will more effectively attract U.S. workers to vacant jobs.

d. Employers Should Guarantee the Hours Promised in the Job Order

In addition to the increased hour requirement for full-time designation, the 2012 Regulations also include a three-fourths hour guarantee.¹¹⁹ The three-fourths guarantee requires that employers provide, at a minimum, three-fourths of the hours that the employer promised a worker in the job order. This guarantee is calculated over the course of twelve weeks (or six weeks if period of employment is less than 120 days). If the employer has not provided the worker with at least three-fourths of the promised hours, the employer is required to pay the worker for the hours that were not provided. While the regulatory goal should be a full, 100% guarantee of hours, the three-fourths guarantee is an important step to ensure that employers provide the hours promised in the job order.

Under the 2009 Regulations, employers could promise both guestworkers and U.S. workers a specific number of hours of work per week, and the workers had no mechanism for enforcing that promise if the employer did not comply. As a result, employers misused the H-2B program by overstating their need for full-time, temporary workers—particularly by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, and the total number of workers required to do the work available. This resulted in both guestworkers and U.S. workers agreeing to work for an employer, and then spending valuable working hours sitting around waiting for their employer to find work for them.

To illustrate, Daniel Castellanos Contreras was promised sixty hours every week at \$10-\$15 every hour. According to Daniel, “[t]he guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay [\$6.02 to \$7.79 per hour] it was impossible to even cover our expenses in New Orleans, let alone pay off the debt we incurred to come to work and save money to send home.”¹²⁰

When Cumberland failed to give him work after he arrived in the United States, Tomas Arias, an H-2B worker from Peru, stated, “I went to the office every Monday asking for work and they always said the same thing. They said work is coming it’s coming, but it never did.”¹²¹ Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of forty hours of work per week. Miguel testified, “[i]nstead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two-week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks.”¹²² Without working the hours they were promised, guestworkers struggle to pay back the costs they incurred in coming to the United States, much less send money home to support their families—the main reason most guestworkers come to the United States in the first place.

The 2012 Regulations require that the employer provide, at a minimum, three-fourths of the hours that the employer promised a worker in the job order. Robust enforcement of this provision by DOL is a significant step toward ensuring that guestworkers like Daniel, Tomas and Miguel, as well as their U.S. counterparts, will be paid for the work that their employers have promised them. By guaranteeing workers that they will be paid for at least three-fourths of the hours they were promised, these workers will be able to make informed decisions as to whether accepting a job with the employer is worth leaving their families and potentially traveling thousands of miles. It allows workers to compare multiple job offers and decide which job will be best for them—taking into consideration the wage, the number of hours, the type of work, and the location of the job.

In addition, this guarantee imposes a minimal burden on employers. As the Department stated in the 2012 Regulations, “When employers file applications for H-2B labor certifications, they represent that they have a need for full-time workers during the entire certification period.”¹²³ The guarantee serves as incentive for an employer to more accurately predict the period of time for which it needs temporary workers and how many hours per week the workers are needed, as the employer will pay whether or not there is work to be done. Furthermore, to avoid paying workers for work that they have not performed, H-2B employers can simply apply for fewer H-2B visas and offer all workers more hours. By offering fewer workers more hours, employers may avoid paying unearned wages. Additionally, because the guarantee is spread over twelve weeks, employers have flexibility in spreading the required hours over a period of time “such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from fulfilling their guarantee.”¹²⁴

Finally, when employers more accurately describe the number of workers needed, more H-2B visas may open up for other employers whose businesses need H-2B workers, as the number of H-2B visas is capped each year. This allows more U.S. employers and foreign nationals to take advantage of the H-2B program.

e. Employers Should Promote Fair and Dignified Employment for All Workers

Employers should provide all workers with fair and dignified employment by enforcing the requirement that all workers are provided the same protections and employment benefits.

Typically, this disparity of wages and benefits leads U.S. workers to not apply for or to decline employment, which in turn allows employers to bring guestworkers to the United States that will work for lower wages. For example, employers sometimes provide housing for H-2B workers either in labor camps or in houses or apartments near the worksite. These employers, however, do not extend their offer for living arrangements to U.S. workers—workers who may be relocating to accept a position with the employer and who otherwise would not have housing. For these U.S. workers, having lodging provided by the employer, even at a fee, would help ease the burden of relocating for the job. The same analysis applies to other benefits, such as transportation, the three-fourths guarantee, and full-time employment.

The 2012 Regulations require that employers provide U.S. workers engaged in “corresponding employment”¹²⁵ during the period of the job order at least the same protections and benefits as those provided to H-2B workers.¹²⁶ This requirement does not preclude an employer from offering the U.S. workers a higher wage rate, more generous benefits, or working conditions, as long as the employer offers to U.S. workers all the wages, benefits and working conditions offered to and required for H-2B workers.

The 2012 Regulations expand the definition of corresponding employment to protect additional workers. First, the 2009 Regulations only provided corresponding protections to U.S. workers that were hired during the H-2B recruitment process. This forced U.S. workers to quit their jobs with the hope that the employer would rehire them, making them eligible for the protections and benefits afforded to H-2B workers. The 2012 Regulations eliminated this need by including incumbent employees within the definition of corresponding employment. Similarly, the 2009 Regulations only protected U.S. workers that worked in the same position as the employer listed on the job order. However, when employers violated the H-2B regulations and placed H-2B workers in jobs outside the scope of the job order, the U.S. workers in those jobs were not afforded any protection. The 2012 Regulations require that the employer provide the same benefits and protections to U.S. workers who work either in the location for which the H-2B workers were recruited or the location to which the H-2B workers are actually assigned.¹²⁷

When employers are required to provide the same benefits and protections to both U.S. and H-2B workers, all workers benefit. U.S. workers may be more likely to accept employment if the employer will ensure that the job opportunity is full-time;¹²⁸ guarantee three-fourths of the hours offered in the job order;¹²⁹ and provide all tools, supplies, and equipment required to perform the duties assigned.¹³⁰ Increasing the availability and hiring of U.S. workers is in line with the goal of the H-2B program to only bring foreign workers for positions for which U.S. workers are unavailable and unwilling to work. Additionally, the increased protection for U.S. workers will lead to better protections and benefits for H-2B workers, so that H-2B workers will no longer be a cheap and exploitable alternative to U.S. workers.

f. Employers Should Pay Guestworkers the Prevailing Wage

DOL regulations require that wages offered to foreign workers meet the prevailing wage, or the average wage paid to similarly employed workers in the occupation and in the area or region of intended employment.¹³¹ Final Prevailing Wage regulations were published by DOL on January 19, 2011, but were challenged by employer interest groups who alleged that the additional costs

of paying prevailing wage constituted an unfair burden.¹³² Contrary to these allegations, the current prevailing wage methodology, implemented under the Bush Administration, has been struck down by a federal court because it results in a wage rate *lower* than the average wage for occupations by region. DOL's new, improved wage methodology¹³³ establishes an average wage for all workers by occupation and region that corrects problems with the previous methodology. While wage rates generally rise under the new methodology, they rise to a level consistent with both the wages in the occupation and region as well as the requirements of the H-2B statute.¹³⁴

The 2011 prevailing wage regulations are necessary to ensure that employers are not using H-2B workers as a cheap and exploitable alternative to U.S. workers and that the employment of H-2B workers does not adversely affect the wages and working conditions of U.S. workers similarly employed.

3. EMPLOYERS SHOULD NOT SUBJECT GUESTWORKERS TO FORCED LABOR AND HUMAN TRAFFICKING

Employers who manipulate H-2B program rules to subject guestworkers to labor trafficking, involuntary servitude, and other forms of forced labor should be subjected to appropriate criminal and civil penalties. These forms of labor exploitation have been well documented.¹³⁵ Worker protections, including the ones discussed in further detail below, are necessary to ensure that guestworkers are not subjected to human trafficking.¹³⁶

Juan Jose Trejo Hernandez

In January 2007, Juan Jose Trejo Hernandez paid thousands of dollars to the agents of a U.S. H-2B employer named Matt Redd. Redd promised jobs that didn't exist, and illegally seized workers' passports to prevent them from "deserting" him. Juan and his coworkers staged public protests to get their passports back, but they were never given the work they had been promised. As their debts grew, so did their desperation.

My name is Juan Jose Trejo Hernandez. I was born in Queretaro, Mexico and am the proud father of three beautiful children—and the lucky husband of a woman whose love God has graced me with forever.

One day, I saw an ad in the paper looking for welders in New Orleans. I met the recruiters for a U.S. employer by the name of Matt Redd. His agents told me how much I would earn and how I would live in the United States, a country where I could better my life financially. They said I would only have to pay for the passport-processing fee.

I arrived home and told my wife. Our happiness was unstoppable. I was going to try to make our dreams come true. With tears in my eyes, I said goodbye to my family.

Then the problems began. First, the recruiters told us we would have to pay \$400 for the visas. I was very uncomfortable with this news because this was not our original agreement. But they said we would quickly earn back the money. Then we were transported from Matamoros to Texas. At the border we met our employer, Matt Redd. He walked through the bus and took our passports, telling us that he needed them for immigration.

We started to ask him questions. Redd told us he would not reimburse us the money we had spent on our visas. The recruiters had lied to us. He tried to calm us down, saying that there was no need to worry; we would get plenty of work when we got to New Orleans. Another lie. We never arrived in New Orleans. Redd transported us to a small town called Westlake, Louisiana. He handed us over to the person in charge of his apartments. We were told to get settled—eight men packed into two-room apartments. There weren't enough mattresses for all of us—we were given box springs to sleep on.

The next day, we were told we had the day off. Another day went by, and another—and still no work. “What’s happening?” we asked. We waited for answers, but they never came. There was no work. At the end of the week, Redd informed us that the contract for the company we were going to work under had fallen through. How could I call home? What would I say? Somehow I managed to explain to my wife that there was no work. She said she would find money to eat.

We demanded our passports back. Redd said he needed to keep them to prevent us from deserting our jobs. Thanks to the advice we got from NGA, we knew we had a right to have our passports.

We organized a protest to demand our passports with the help of the African American community of New Orleans. Redd was forced to give the passports over to the police—and we got our passports back. After that, weeks passed. It had been over two months, but the work Redd promised never came. We could not work for anyone else, and we could not go back home to our debts. We were trapped.

We came with documents to work, not to commit crimes. We leave behind our families and debts with hopes and dreams for a better life. The emotional toll is high. We are all in terrible desperation. Our debts continue to rise, and we don't know if it is going to get better.

We are worse than dead.

a. Employers Should Not Retain Guestworkers' Immigration Documents

When certain employers confiscate and hold a guestworker's passport, visa, or other immigration documents, the worker is unable to travel freely without fear of arrest and detention when outside the employer controlled labor camps and is prohibited from leaving abusive employers prior to the end of the term of the contract.¹³⁷ This is of particular concern in an environment of increased

cooperation between local police and federal immigration authorities. Guestworkers in these situations are in essence held captive at the worksite, where they continue to suffer abuses at the hands of their employers—and become victims of human trafficking.

The 2009 Regulations stated, “employer[s] must comply with all applicable federal, state, and local employment-related laws and regulations.”¹³⁸ This includes the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), which, among other things, prohibits the knowing destruction, concealment, removal, confiscation, or possession of an individual’s passport or other immigration documents, when doing so restricts the individual’s liberty to move or travel, in order to maintain the labor or services of that individual.¹³⁹

Despite the 2009 Regulations, unscrupulous employers were able to confiscate immigration documents from guestworkers. NGA members report that employers regularly forcibly held their passports and immigration documents.¹⁴⁰ When confronted by workers and/or their supporters, the employers often claimed that they were unaware of the prohibition and that they were holding the documents at the request of the workers.¹⁴¹ Despite these clear provisions, there has been little, if any, enforcement of the TVPRA’s criminal prohibitions by the Department of Justice against H-2B employers.

The 2012 Regulations added an explicit civil prohibition on holding a worker’s immigration or identity documents *for any reason*, directing that “neither the employer nor the employer’s agents or attorneys may hold or confiscate workers’ passports, visas, or other immigration documents.”¹⁴² This provision eliminates an employer’s ability to claim ignorance by explicitly prohibiting an employer’s retention of an employee’s immigration documents. Enforcement of this provision is particularly important as it allows guestworkers to travel freely during the term of their work contract and allows guestworkers to leave abusive employers prior to the end of the term of the contract.

b. Guestworkers Should be Able to Maintain Lawful Employment Authorization After Reporting Employer Abuses

DOL should ensure guestworkers are able to maintain lawful employment authorization with other employers for the time the visa is valid, after the guestworker has reported his employer for a human trafficking violation. By tying guestworkers’ visas to a specific employer, an employer may push the boundaries of acceptable behavior under the H-2B program, leaving guestworkers with the untenable choice of either accepting the behavior or returning to their home country. This gives rise to conditions of human trafficking.

While the TVPRA provides some protections including the status of continued presence, many guestworker victims of human trafficking often are not afforded protections in a timely manner—as their claims must be investigated and authenticated before they are deemed to be victims of human trafficking.¹⁴³ To fill this void, guestworkers who report conditions of human trafficking should be able to obtain whistleblower protections—including lawful employment authorization with other, law-abiding employers.

Aby K. Raju

Aby K. Raju, a member of the National Guestworker Alliance, is one of 500 former H-2B Guestworkers trafficked by Signal International, LLC. Aby has testified before Congress on guestworker programs and lead a campaign for justice including a truth march through the Deep South and a twenty-nine day hunger strike in front the White House.

To protect guestworkers and enforce the law, the Department of Labor must understand and respond to the situation guestworkers find themselves in—deeply indebted and with a visa tied to one employer. We have experienced firsthand how workers who make complaints face retaliation from their employers and surveillance by Immigration and Customs Enforcement. When guestworkers escape abuse, the Department of Labor needs to enforce the law and protect them.

c. Employer Provided Benefits Should be Voluntary, Nondiscriminatory, and at Market Rate

Some H-2B employers attempt to control workers by charging above-market rates for benefits such as housing, food, and insurance, while also requiring that the workers live where the employer tells them, eat where the employer tells them, and purchase the insurance that the employer provides.¹⁴⁴ These restrictions deprive workers of the opportunity to make basic living choices for themselves, which in turn fosters an environment of human trafficking.

While there is no requirement that the employer actually provide the above-mentioned benefits, the 2012 Regulations require that employers disclose in the job order whether the employer will provide workers with board, lodging, or other facilities, or intends to assist the worker to secure housing.¹⁴⁵ Additionally, as long as the costs do not drop the worker below minimum wage, the 2012 Regulations allow employers to deduct the “reasonable cost or fair value” of providing such benefits—deductions which also must be disclosed in the job order.¹⁴⁶ The definition of “reasonable costs” prohibits employers from charging more than the “actual cost to the employer” for the board, lodging, or other facilities,¹⁴⁷ and prohibits the employer or any affiliated person from receiving a profit from these costs.¹⁴⁸

The enforcement of these regulations is important to ensure that guestworkers are treated humanely while working for their employers. Before Moises Moreira Santos came to the United States to work for Five Star Contractors (“Five Star”) as a welder, he was promised that good living conditions would be provided to the workers free of charge. When he arrived in the United States, however, he learned that he would be living in a storage container, for which he would be charged seventy-five dollars each week.¹⁴⁹ Similarly, Aby Raju was charged thirty-five dollars each day for food and lodging by Signal. Aby and co-workers asked whether they could find their own apartments outside Signal’s labor camps. While they were told that they could, Signal would continue to charge each worker thirty-five dollars each day for food and lodging

regardless of whether the worker lived in the camp. As a result, no workers could afford to live outside the camp.¹⁵⁰

By enforcing the provisions in the 2012 Regulations, DOL can ensure that if employers are providing lodging for their employees, the lodging and charges are not mandatory or discriminatory and the charges are reasonable. At the same time, DOL can also ensure that employers comply with FLSA's limits on deductions from minimum and overtime wages.

4. EMPLOYERS SHOULD BE SUBJECT TO MEANINGFUL GOVERNMENT ENFORCEMENT AND COMMUNITY OVERSIGHT

Maria Eugenia Montes

Maria Eugenia Montes, a single mother from La Paz, Bolivia, came to the United States on an H-2B visa to work in a hotel in LaPlace, Louisiana. After spending more than \$3,000 in recruitment fees and arriving in the United States, she was told there was no work for her. She became homeless and jobless and desperate for work—then joined NGA, where she became a leader and community educator of other guestworkers.

a. Enforcement of H-2B Program Requirements Should be Broad and Consistent

Workers, organizations, and DOL share important roles in ensuring that H-2B employers comply with all legal obligations that seek to protect guestworkers and U.S. workers alike. Both broad and consistent enforcement across sector and region, as well as strict application of the debarment provisions, are critical.

In addition to potentially imposing financial penalties, DOL has a key role to play in debarring employers, agents, and attorneys who fail to comply with the requirements of the H-2B program.¹⁵¹ The debarment system should be straightforward and must provide a meaningful outlet for violations reported by guestworkers.

The 2009 Regulations provided for the debarment of an employer, attorney, or agent who engaged in a substantial violation of a material term or condition of the employer's temporary labor certification for a period of one to three years.¹⁵² Under this section, substantial violations were limited to five enumerated types of violations: (1) fraud involving the application for temporary employment certification or in response to an audit; (2) a significant failure to cooperate with a DOL investigation; (3) a significant failure to comply with one or more sanctions or remedies imposed; (4) a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot be reasonably expected; and (5) a pattern or practice of acts or omissions that reflect a significant failure to comply with obligations pertaining to audits, recruitment, wages, and the area of intended employment.¹⁵³ The Department had two years from the date of the occurrence of the violation to issue a Notice of Intent to Debar.¹⁵⁴

The 2012 Regulations make several significant advancements to the regulatory debarment scheme. First and foremost, they significantly expand the list of conduct that will trigger debarment of an employer, agent, or attorney. For example, the new regulations include as violations the failure to pay or provide the required wages, benefits, or working conditions; the failure, except for lawful and job-related reasons, to offer employment to a qualified U.S. worker; and impeding an investigation or audit of an employer.¹⁵⁵ Second, the maximum period of debarment has been raised to five years.¹⁵⁶ Finally, attorneys and agents may now be debarred for independent violations, and where the employers have worked in collusion with attorneys and agents to facilitate violations, the employer may be debarred as well.¹⁵⁷

DOL should facilitate the intervention and participation of workers and worker organizations in debarment, audit, and revocation processes. Worker participation in the debarment process is important to ensure that employers are being held accountable for their violations, and that reports of violations are being investigated in a meaningful manner. Further, guestworkers and U.S. workers alike should be able to obtain information about employers who are engaged in debarment proceedings.

b. Community Oversight of the H-2B Program Should be Strong and Transparent

In addition to meaningful and consistent government enforcement, strong worker and community oversight is critical to ensure broad and consistent protections for guestworkers and U.S. workers across sector and region. Three specific provisions of the 2012 Regulations contribute to strong community oversight: (1) public access to H-2B program information; (2) notification to employees regarding the contents of their job orders, and (3) notification to local labor representatives and organizations.

i. Public Access to Information Regarding the H-2B Program

Expanding the electronic job registry previously created for the H-2A program to include H-2B job orders is a critical step toward achieving the transparency necessary for appropriate worker and community oversight of the H-2B program.¹⁵⁸ The job registry effectively alerts U.S. workers of jobs opportunities and H-2B recruitment.

The creation of a national electronic job registry for H-2B job orders is an important tool for combating employers who seek to use the H-2B program to transform permanent U.S. jobs into temporary positions for which H-2B workers may be hired. U.S. workers will be able to use the registry to search for jobs—and since employers are obligated to hire U.S. applicants unless there is a lawful, job-related reason for rejecting them—employers will be unable to act upon any unlawful preference for H-2B workers. Further, the registry will help ensure that the H-2B program complies with Congressional intent by furthering the program’s overall preference for U.S. workers.

ii. Disclosure of Job Order

Employer disclosure of the job order to workers under the 2012 Regulations is also a critical component of worker and community oversight of the H-2B program. There were no comparable provisions under the 2009 Regulations.

Under the 2012 Regulations, the H-2B employer or his agent must provide a copy of the job order to a guestworker outside of the United States no later than the time at which the worker applies for his visa. For workers in corresponding employment, the copy must be provided no later than the day work commences, and H-2B workers changing employment within the United States must be provided with a copy no later than the date that the offer of employment is made by the second or subsequent employer.¹⁵⁹

As the Department indicated in the Proposed Rule, worker notification of the terms of the job order is a vital component of worker protection and program compliance.¹⁶⁰ Workers who are able to see their job orders before beginning their employment will be able to make more educated decisions about which jobs they accept. Workers who have already begun work will be better prepared to challenge working environments and wages that do not comply with the conditions of employment.

Transparency of this kind will prevent employers from promising high wages when recruiting workers overseas while intending to pay substantially less once the guestworker arrives in the United States. Individuals like Ronivan Luiz Muller, a guestworker employed with Five Star Construction, may not have pursued U.S. employment if they had been told they would be paid only \$8.00 per hour instead of the \$16-18 promised by the recruiter in Brazil.

iii. Notification to Local Labor Representatives and Organizations

Under the 2009 Regulations, employers party to a collective bargaining agreement (“CBA”) were required to formally contact the local labor union that was also a party to the CBA regarding position openings.¹⁶¹ The regulations did not require notification to labor organizations not party to the CBA, nor did it require employers not party to a CBA to provide notification of job openings to local labor representatives.

DOL’s inclusion in the 2012 Regulations of a requirement that State Workforce Agencies¹⁶² notify labor organizations in the industry and area of intended employment upon the acceptance of an employer’s H-2B application is crucial.¹⁶³ This notification will allow the labor organizations to disseminate information regarding job orders to their U.S. worker members, who in turn may apply for the positions. Once the U.S. workers are alerted to the positions and apply, employers will be required to hire them unless there is a lawful, job-related reason for rejection. Like the national registry, providing notification to labor organizations will prevent employers from being able to act upon an unlawful preference for H-2B workers.

Conclusion

Guestworkers who come to the United States pursuant to the H-2B program are particularly vulnerable to exploitation by employers. This report outlines a set of recommendations that would level the playing field for U.S. and foreign workers in the H-2B program. In order to end the abuses that have permeated the program, full enforcement of the 2012 Department of Labor Regulations is necessary, along with strong worker and community monitoring.

As mentioned in the opening of this report, the H-2B program is one of a number of U.S. guestworker programs. The Department of Labor and other federal agencies that regulate *all* guestworker programs should emphasize the following points:

- Workers should have the right to organize without fear of retaliation;
- Employers should be prohibited from using guestworkers as cheap and exploitable alternatives to U.S. workers;
- Employers should not subject guestworkers to human trafficking; and,
- Employers should be subject to meaningful government enforcement and community oversight.

In addition to the administrative policy reforms that must be implemented, Congress must ensure that there are legislative protections for workers—domestic and foreign alike. From a labor perspective, legislation that raises the minimum wage and minimum employment standards for all workers is paramount. From an immigration perspective, legislation that addresses the inadequacies of our current system is vital, and there are a number of proposals in Congress aimed at achieving this goal, including Comprehensive Immigration Reform¹⁶⁴ and the Protect Our Workers from Exploitation and Retaliation Act (“POWER ACT”).¹⁶⁵ A combination of these administrative and legislative reforms will ensure that all workers are afforded the protections necessary for the success of the H-2B program.

About the Authors

National Guestworker Alliance

The National Guestworker Alliance (“NGA”) is a membership organization representing thousands of workers, across sector and industry, who enter the United States through the U.S. guestworker programs. NGA is a project of the New Orleans Workers’ Center for Racial Justice, and was formed as the Alliance of Guestworkers for Dignity in the aftermath of Hurricane Katrina when thousands of guestworkers were brought to the United States to work in the Gulf Coast and subjected to forced labor. Organizing in labor camps across the Gulf Coast, these guestworkers formed an organization to help expose the impact of guestworker programs on workers, their families, and the industries in which they work. Today, NGA is a rapidly expanding national organization of guestworkers across many industries including metal work, construction, landscaping, factory work, food processing, janitorial services, and hospitality. NGA members are committed to working in partnership with U.S. workers in the same sectors to transform their workplaces from exploitative to dignified, change the terms of migration, and expand the right to organize for all excluded workers—thereby reversing a long legacy of retaliation against workers who organize to win dignity and freedom.

<http://www.guestworkeralliance.org/about-nga/>

Pennsylvania State University, Dickinson School of Law’s Center for Immigrants’ Rights

This report was prepared by law students Stacie A. Hunhoff and Allie K. Sievers under the supervision of Shoba Sivaprasad Wadhia and on behalf of the National Guestworker Alliance. Launched in 2008, the Center for Immigrants’ Rights is an immigration policy clinic where students work on innovative advocacy and policy projects relating to U.S. immigration, primarily through the representation of immigrant advocacy organizations. The mission of the Center is to represent immigrants’ interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. In furtherance of this mission, students at the Center have produced policy-oriented white papers of national impact, prepared practitioner toolkits on substantive areas of immigration law, and assisted with individual casework for detained immigrants, among other projects.

<http://law.psu.edu/immigrants>

¹ Changes to the Labor Certification Process for the Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Revisions to Transition Period, 77 Fed. Reg. 24,137, 24,138 (Apr. 23, 2012) (explaining that the final rule was reported to Congress on February 27, 2012, and requires sixty days to become operational).

² Protect Our Workers from Exploitation and Retaliation Act (“POWER ACT”), H.R. 2169, 112th Cong. (2011)

³ In this background section, the term guestworkers refers to foreign workers employed in the United States in a variety of non-immigrant statuses. These non-immigrant statuses include H-2B, H-2A, H-1B, J-1, and L-1 visas. However, in the substantive sections of this report, the term guestworker refers specifically to foreign workers employed in the United States pursuant to an H-2B visa.

⁴ U.S. workers include workers who are citizens or nationals of the United States, lawful permanent residents and asylees. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,156 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20).

⁵ *See* Lorenzo A. Alvarado, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 58-59 (2001).

⁶ *See* JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 605 (2002).

⁷ *See generally* CINDY HAHAMOVITCH, *NO MAN’S LAND: JAMAICAN GUESTWORKERS IN AMERICA AND THE GLOBAL HISTORY OF DEPORTABLE LABOR* (2011).

⁸ *See* S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 5 (2007), *available at* http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf.

⁹ *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952); *see also* HAHAMOVITCH, *supra* note 7; 8 U.S.C. §1101(a)(15)(H)(ii) (2011).

¹⁰ *See generally* HAHAMOVITCH, *supra* note 7.

¹¹ *See* S. POVERTY LAW CTR., *supra* note 8, at 5.

¹² *See* 8 U.S.C. §1101(a)(15)(H)(ii)(a) (2011).

¹³ 8 U.S.C. §1101(a)(15)(H)(ii)(b) (2011). *See also* Wage & Hour Div., *H-2B Program*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/immigration/h2b.htm> (last visited Apr. 23, 2012).

¹⁴ *See* Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 937-939 (2011).

¹⁵ *See* 8 U.S.C. §1101(a)(15)(J) (2011).

¹⁶ *See generally* Nat’l Guestworker Alliance, *Justice at Hershey’s*, <http://www.guestworkeralliance.org/category/justice-at-hersheys-2/> (last visited Mar. 5, 2012); *see also* Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES, Aug. 18, 2011, at A11.

¹⁷ See Julia Preston, *Company Banned in Effort to Protect Foreign Students From Exploitation*, N.Y. TIMES, Feb. 2, 2012, at A12.

¹⁸ See *id.*

¹⁹ See generally Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 FR 10038-01 (Feb. 21, 2012) (to be codified at 20 C.F.R. pt 655; 20 C.F.R. pt 503); see also Julia Preston, *supra* note 17.

²⁰ See 20 C.F.R. § 655 (2012); 29 C.F.R. § 501 (2011).

²¹ In this report, the H-2B regulations promulgated during the George W. Bush administration will be referred to as the 2009 Regulations. These regulations were proposed on May 22, 2008, published on December 19, 2008, and entered into effect on January 18, 2009.

²² See Plaintiffs' Original Complaint at 2, *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (E.D.L.A. 2010).

²³ See Plaintiffs' First Amended Complaint at 7-9, *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2006) (No. 06-4340).

²⁴ See NEW ORLEANS WORKERS' CTR. FOR RACIAL JUSTICE, LOCKED IN: EXPLOITATION OF INTERNATIONAL WORKERS UNDER THE H-2B VISA (2009) (on file with NGA).

²⁵ See *The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 2 (2009) (statement of SaketSoni, Executive Director, New Orleans Workers' Center for Racial Justice) (referencing the results of an April 2009 survey of Alliance of Guestworkers for Dignity members).

²⁶ *Id.* at 6.

²⁷ *Id.* at 8.

²⁸ Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,079 (Feb. 21, 2012).

²⁹ See *Id.* at 10,158 (to be codified at 20 C.F.R. § 655.20(n)) (defining discrimination as including conduct intended to intimidate, threaten, restrain, coerce, blacklist or discharge).

³⁰ *Id.*

³¹ This protection is of particular importance as most guestworkers are isolated from workers' centers, unions, and other worker protection organizations. Further, most H-2B workers are not eligible for services from federally funded legal assistance programs. See 45 C.F.R. § 1626.3 (2011).

³² Portability is currently permitted for H-1B visa holders. For the requirements of H-1B portability, see 8 U.S.C. § 1184(n) (2008).

³³ See Nat'l Guestworker Alliance, *About Guestworkers*, <http://www.guestworkeralliance.org/about-guestworkers/> (last visited Mar. 5, 2012).

³⁴ See generally James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

³⁵ *Hearing*, *supra* note 25, at 8 (statement of SaketSoni, Executive Director, New Orleans Workers' Center for Racial Justice).

³⁶ Press Release, U.S. Dep't of Labor, US Labor Department Issues Proposed Rulemaking Revising H-2B Program: Proposed Rule Seeks to Enhance Access to Jobs, Benefits, and Protections for US Workers (Mar. 17, 2011), *available at* <http://www.dol.gov/opa/media/press/eta/ETA20110384.htm> (quoting Secretary Solis as saying, "As our economy continues to recover, it is important for U.S. workers to receive access to all jobs, and that the H-2B program is used as it was intended."); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2011).

³⁷ Private deportation refers to forced return of a foreign worker to his or her home country by the employer as retaliation for a worker's attempts to organize or report violations.

³⁸ Government deportation refers to adjudication by the U.S. government, by way of a hearing before an Immigration Judge, which results in the return of a foreign worker to his or her home country.

³⁹ Blacklisting refers to an employer telling other H-2B employers that a guestworker has been "trouble" for the employer and recommending that other employers not hire that guestworker.

⁴⁰ Vanderbilt Landscaping LLC is not affiliated with Vanderbilt University.

⁴¹ See First Amended Complaint at 2-3, *Jimenez v. Vanderbilt Landscaping, LLC*, 2011 WL 3027190 (No. 3:11-0276).

⁴² Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 1, 2010, <http://www.nytimes.com/2010/02/02/us/02immig.html?hpw>.

⁴³ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(y)).

⁴⁴ See *id.*

⁴⁵ See 20 C.F.R. § 655.22(f) (2011).

⁴⁶ See *supra* section 1(b)(i) (discussing government collusion with private deportation).

⁴⁷ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,085. *But see* Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss at 3-4, *Ramos-Madrigal v. Mendiola Forestry Service, LLC*, 799 F. Supp. 2d 958 (2011) (No. 10-1078).

⁴⁸ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(n)).

⁴⁹ Tamar Lewin, *Mexican Guest Workers Laid Off, Want BP's Help*, N.Y. TIMES, Aug. 6, 2010, at A13.

⁵⁰ “Debt Servitude” refers to the debts incurred by workers before arrival in the U.S., combined with low wages and deductions from pay, often results in the reality that guestworkers come to the U.S. to work for free. *See* Letter from Jennifer J. Rosenbaum, Counsel to the Nat'l Guestworker Alliance, to Michael Jones, Acting Adm'r, Office of Policy Dev. and Research, U.S. Dep't of Labor (May 17, 2011) (on file with the National Guestworker Alliance).

⁵¹ U.S. legal regimes to eradicate slavery and involuntary servitude have long recognized the coercive role debt plays for workers. In the reconstruction era, employers used debts and laws requiring labor upon defaulting of debts to limit workers' ability to leave deeply coercive employment. *See, e.g.,* *Clyatt v. U.S.*, 197 U.S. 207, 216 (1905) (holding that Thirteenth Amendment prohibits peonage arrangements); *Bailey v. Alabama*, 219 U.S. 219, 238-39 (1911) (extending *Clyatt* to "antifraud" statutes where black workers, who were not allowed to testify, were convicted based on statutory "presumptions"); *Taylor v. Georgia*, 315 U.S. 25, 29-31 (1942) (extending *Bailey* to situations where accused workers are allowed to make unsworn statements in their defense); *Pollock v. Williams*, 322 U.S. 4, 22-25 (1944) (extending *Bailey* to situations where accused workers are allowed to offer sworn testimony in their defense); Tobias Barrington Wolfe, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (May 2002). The reconstruction era Congress passed criminal anti-peonage statutes including 42 U.S.C. 1994 (1994) (abolishing peonage and nullifying any act or law that establishes or maintains such a system). *See also, e.g.,* Peonage Act of 1867, 14 Stat. 546, ch. 187, 1 (1867), codified at 18 U.S.C. § 1581 (2000) (prohibiting peonage in Reconstruction era). While these statutes are often not generally applicable to guestworkers now, because their debts are owed to a third party and not the employer or his agent, these laws recognize the deeply coercive nature of debt related to employment. For more information on the relevance of reconstruction era prohibition on slavery related practices that are relevant to labor trafficking within the guestworker program, see James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L. J. 1474 and Maria Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007).

⁵² *See Hearing, supra* note 25, at 2 (statement of SaketSoni, Executive Director, New Orleans Workers' Center for Racial Justice) (referencing the results of an April 2009 survey of Alliance of Guestworkers for Dignity members).

⁵³ *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(o) and (p)).

⁵⁴ *See id.* at 10,158 (to be codified at 20 C.F.R. § 655.20(j)(2)).

⁵⁵ *See id.* (to be codified at 20 C.F.R. § 655.20(j)(1)).

⁵⁶ *See id.* (to be codified at 20 C.F.R. § 655.20(k)).

⁵⁷ *See id.* at 10,150 (to be codified at 20 C.F.R. § 655.5) (defining agent as “a legal entity or person who: (i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes; (ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and (iii) Is not an association or other organization of employers. (2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.”).

⁵⁸ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(o)); Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(p)).

⁵⁹ See 20 C.F.R. § 655.22(j) (2011) (defining payment as any monetary payment, wage concession, kickback, bribe, tribute, in kind payment, or free labor).

⁶⁰ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(o)).

⁶¹ See 20 C.F.R. § 655.22(g)(2) (2011).

⁶² See *Hearing*, *supra* note 25, at 2 (statement of Daniel Castellanos Contreras, Organizer and Founding Member, Alliance of Guestworkers for Dignity).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *Hearing*, *supra* note 25, at 2 (statement of Aby K. Raju, Member, Alliance of Guestworkers for Dignity).

⁶⁶ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,159 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(p)).

⁶⁷ See Emp. Benefits Sec. Admin., *Field Assistance Bulletin No. 2009-02*, U.S. DEP'T OF LABOR (July 20, 2009), <http://www.dol.gov/ebsa/regs/fab2009-2.html>.

⁶⁸ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(j)(2)).

⁶⁹ See *id.*

⁷⁰ See *id.* (stating that all visa fees must be paid for directly by the employer or reimbursed during the first work week. Unlike the prior rule, this reimbursement requirement is not tied to the FLSA. As such, the employer is obligated to reimburse all visa and related fees; the reimbursement is no longer limited to amounts that would reduce the wage below the FLSA minimum wage.)

⁷¹ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,077-10,078 (Feb. 21, 2012).

⁷² Outbound travel expenses refer to travel back to the worker's home country at the conclusion of his H-2B employment in the United States.

⁷³ See 20 C.F.R. § 655.22(m) (2011).

⁷⁴ Inbound travel expenses refer to the costs of transportation and subsistence from the place from which the guestworker has come (i.e. his home country) to the place of U.S. employment.

⁷⁵ See *Hearing, supra* note 25, at 2 (statement of Daniel Castellanos Contreras, Organizer and Founding Member, Alliance of Guestworkers for Dignity).

⁷⁶ In addition, Gilberto was required to pay an application fee of R\$2,500, the equivalent of another month's salary, and was required to have a family member sign a guarantee that they would pay R\$2,700 if he left Five Star. He also incurred transportation costs each time he met with the recruiter, and was required to pay all costs associated with his visa appointment, including \$230 for the visa, R\$200 for the bus trip, and R\$300 for hotels and food.

⁷⁷ See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(j)(1)(i)); see also *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,037, 10,150 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.5) (defining job order as “the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR § 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their job clearance systems.”).

⁷⁸ See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(j)(1)(ii)).

⁷⁹ See *id.* (to be codified at 20 C.F.R. § 655.20(j)(1)(iii)).

⁸⁰ U.S. Wage & Hour Div., *Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H-2B Program*, U.S. DEP'T OF LABOR (Feb. 2012), <http://www.dol.gov/whd/regs/compliance/whdfs78f.pdf>.

⁸¹ See *Hearing, supra* note 25, at 2 (statement of SaketSoni, Executive Director, New Orleans Workers' Center for Racial Justice) (referencing the results of an April 2009 survey of Alliance of Guestworkers for Dignity members).

⁸² U.S. Wage & Hour Div., *supra* note 80.

⁸³ Interview with Moises Moreira Santos, NGA member.

⁸⁴ See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(k)).

⁸⁵ See *id.* at 10,156 (to be codified at 20 C.F.R. § 655.20(c)).

⁸⁶ See *id.*

⁸⁷ See CHARLES I. COHEN, NEUTRALITY AGREEMENTS: WILL THE NLRB SANCTION ITS OWN OBSOLESCENCE? 2-3, 6 (2000).

⁸⁸ Under an attestation-based model, employers conduct recruitment of U.S. workers to test the labor market and establish that there is no willing and qualified U.S. applicant without federal or state oversight. Employers then asserted, but were not required to demonstrate, that they had performed an adequate test of the U.S. labor market. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 76 Fed. Reg. 15,130-01, 15,131-15,132 (proposed Mar. 18, 2011).

⁸⁹ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130-01, 15,159-15,160 (proposed Mar. 18, 2011).

⁹⁰ See *id.*

⁹¹ Program Design Issues Hampered ETA's Ability to Ensure the H-2B program Provided Adequate Protections for U.S. Forestry Workers in Oregon, Office of the Inspector General of the U.S. Department of Labor, Report No. 17-12-001-03-321 (Oct. 17, 2011), *available at* <http://www.oig.dol.gov/public/reports/oa/2012/17-12-001-03-321.pdf>.

⁹² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL AND CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD AND ABUSE (2010), *available at* <http://www.gao.gov/assets/320/310640.pdf>.

⁹³ See Letter from Jennifer J. Rosenbaum, *supra* note 50.

⁹⁴ See John Moreno Gonzales, U.S. Workers, Immigrants Unite vs. Work Visa Program, THE ECONOMIC TIMES, Oct. 22, 2009, *available at* http://articles.economictimes.indiatimes.com/2009-10-22/news-by-industry/27661950_1_guest-worker-program-immigrant-workers-immigration-debate.

⁹⁵ See *id.*

⁹⁶ See NEW ORLEANS WORKERS' CTR. FOR RACIAL JUSTICE, LOCKED OUT: U.S WORKERS WHO APPLIED TO CUMBERLAND ENVIRONMENTAL RESOURCES CO. AND WERE DENIED THE JOBS (2009) (on file with NGA).

⁹⁷ John Moreno Gonzales, *supra* 94.

⁹⁸ *Id.*

⁹⁹ The compliance-based model allows the Department to identify problems in the initial review of the application. Under the attestation-based model, the Department did not have this capacity to identify problems prior to approving an employer's application. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130-01, 15,133 (proposed Mar. 18, 2011).

¹⁰⁰ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,162 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.40(c)).

¹⁰¹ See *id.* at 10,163 (to be codified at 20 C.F.R. § 655.43).

¹⁰² See *id.* at 10,163 (to be codified at 20 C.F.R. § 655.45(c)).

¹⁰³ See *id.* at 10,163 (to be codified at 20 C.F.R. § 655.45(b)).

¹⁰⁴ See *id.*

¹⁰⁵ See NEW ORLEANS WORKERS' CTR. FOR RACIAL JUSTICE, *supra* note 96.

¹⁰⁶ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,162 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.40(e)).

¹⁰⁷ See *id.* at 10,159 (to be codified at 20 C.F.R. § 655.20(r)).

¹⁰⁸ See *id.* at 10,150 (to be codified at 20 C.F.R. § 655.5) (defining job contractor as “a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.”).

¹⁰⁹ See Letter from Jennifer J. Rosenbaum, *supra* note 50.

¹¹⁰ See NEW ORLEANS WORKERS’ CTR. FOR RACIAL JUSTICE, *supra* note 96.

¹¹¹ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,150 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.5) (defining employer-client as “an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.”).

¹¹² See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,050 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.6(c)).

¹¹³ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130-01, 15,137 (proposed Mar. 18, 2011).

¹¹⁴ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,052 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.6(c)).

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 10,051.

¹¹⁷ See *id.* at 10,156 (to be codified at 20 C.F.R. § 655.20(d)).

¹¹⁸ For instance, under FLSA, employees must be paid overtime for all hours worked over forty in a workweek. See U.S. Dep’t of Labor, *FLSA Overtime Calculator Advisor*, <http://www.dol.gov/elaws/otcalculator.htm> (last visited Apr. 18, 2012). Additionally, in its Proposed Rule, DOL itself indicated that a 40-hour threshold is more in line with what the U.S. labor market generally considers as fulltime. DOL also cited to the December 2010 Bureau of Labor Statistics’ Current Population Survey, which found that that the average workweek for non-agricultural workers who usually work fulltime is 42.4 hours. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,136 (Feb. 21, 2012).

¹¹⁹ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,157 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(f)).

¹²⁰ *Id.* at 10,073 (Feb. 21, 2012).

¹²¹ See NEW ORLEANS WORKERS' CTR. FOR RACIAL JUSTICE, *supra* note 96.

¹²² *Hearing, supra* note 25 (statement of Miguel Angel Jovel Lopez, Member, Alliance of Guestworkers for Dignity).

¹²³ Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,073 (Feb. 21, 2012).

¹²⁴ *Id.*

¹²⁵ See *id.* at 10,149 (to be codified at 20 C.F.R. § 655.5) (defining corresponding employment as “the employment of workers who are not H-2B workers by an employer that has a certified H-2B Application for Temporary Employment Certification when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H-2B workers, except that workers in the following two categories are not included in corresponding employment: (i) Incumbent employees continuously employed by the H-2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H-2B workers during the 52 weeks prior to the period of employment certified on the Application for Temporary Employment Certification and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer’s payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or (ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H-2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause. (2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.”).

¹²⁶ See *id.* at 10,154 (to be codified at 20 C.F.R. § 655.18(a)(1)).

¹²⁷ See *id.* at 10,149 (to be codified at 20 C.F.R. § 655.5).

¹²⁸ See *id.* at 10,156 (to be codified at 20 C.F.R. § 655.20(d)).

¹²⁹ See *id.* at 10,157 (to be codified at 20 C.F.R. § 655.20(f)).

¹³⁰ See *id.* at 10,158 (to be codified at 20 C.F.R. § 655.20(k)).

¹³¹ See Department of Labor, *Wage and Hour Division, Information and Resources, Online Wage Library*, <http://www.foreignlaborcert.doleta.gov/wages.cfm> (last visited Mar. 6, 2012).

¹³² See Julia Preston, *Louisiana Business Owners Sue Over New Rules for Guest Workers*, N.Y. TIMES, Sept. 12, 2011, at A12.

¹³³ See Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, 76 Fed. Reg. 3011, 3452 (Jan. 19, 2011) (to be codified at 20 C.F.R. § 655.10).

¹³⁴ See Daniel Costa, *H-2B employers and their congressional allies are fighting hard to keep wages low for immigrant and American workers*, ECON. AND POL'Y INST., Oct. 6, 2011, <http://www.epi.org/publication/2b-employers-congressional-allies-fighting/>.

¹³⁵ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 92; U.S. Dep't of Labor, Office of the Inspector General, Report No. 17-12-001-03-321, Program Design Issues Hampered ETA's Ability to Ensure the H-2B Visa Program Provided Adequate Protections for U.S. Forestry; *U.S. v. Glah et al*, U.S. District Court for the Eastern District of Pennsylvania, U.S. Attorney Charge, *available at* <http://www.justice.gov/usao/pae/News/Pr/2009/dec/GlahInfo.pdf>; *U.S. v. Askarkhodjaev*, 2010 WL 4038783 (8th Cir. 2011); *U.S. v. Farrell*, 563 F3d 364 (8th Cir. 2006).

¹³⁶ See generally James Gray Pope, *supra* note 34 (arguing that labor protections do diminish trafficking).

¹³⁷ See *Hearing*, *supra* note 25, at 2 (statement of SaketSoni, Executive Director, New Orleans Workers' Center for Racial Justice); see also Letter from Jennifer J. Rosenbaum, *supra* note 50. NGA members have reported employer confiscation of their immigration documents. See First Amended Complaint at 2-3, *Jimenez v. Vanderbilt Landscaping LLC*, 2011 WL 3027190 (No. 3:11-0276).

¹³⁸ 20 C.F.R. § 655.22(d) (2011).

¹³⁹ See 18 U.S.C. § 1592 (2008).

¹⁴⁰ See Letter from Jennifer J. Rosenbaum, *supra* note 50.

¹⁴¹ See *id.*

¹⁴² Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,160 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(z)).

¹⁴³ For general information regarding the process for obtaining a T Visa (for victims of human trafficking), see U.S. Citizenship & Immigration Services, *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. DEP'T OF HOMELAND SECURITY (Oct. 3, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=02ed3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD>.

¹⁴⁴ See generally Complaint at 12-13, *Jimenez Martinez v. Cumberland Environmental Resources Company*, 2010 WL 2389275 (M.D. Tenn. 2010); John Gonzalez, *As Obama Weighs Immigration Overhaul, U.S. and Foreign Workers Agree: Guest Worker Visas Abused*, ASSOCIATED PRESS (Oct. 21, 2009) *available at* <http://inform.com/politics/workers-immigrants-unite-work-visa-program-712966a>.

¹⁴⁵ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,155 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.18(b)(10)).

¹⁴⁶ See *id.* at 10,155 (to be codified at 20 C.F.R. § 655.18(b)(11)).

¹⁴⁷ 29 C.F.R. § 531.3(a) (2011).

¹⁴⁸ See *id.* § 531.3(b).

¹⁴⁹ See Interview with Moises Moreira Santos, *supra* note 83.

¹⁵⁰ See Second Amended Complaint at 44, David v. Signal International LLC, 2010 U.S. Dist. LEXIS 128614 (E.D. La. 2010) (Civ. No. 08-1220), *available at* <http://www.guestworkeralliance.org/wp-content/uploads/2011/05/signal-second-amended-complaint.pdf>.

¹⁵¹ The U.S. Department of Labor, Office of Foreign Labor Certification maintains the list below of debarred employers from the H-2B program. See Emp't & Training Admin., Office of Foreign Labor Certification, *Program Debarments*, U.S. DEP'T OF LABOR, http://www.foreignlaborcert.doleta.gov/pdf/Debartment_List_Revisions.pdf (last visited Apr. 21, 2012). For more information on debarments under the H-2B program, see 20 C.F.R. § 655.31.

¹⁵² See 20 C.F.R. § 655.31(a-c) (2011).

¹⁵³ See *id.* § 655.31(d).

¹⁵⁴ See *id.* § 655.31(a-b).

¹⁵⁵ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,168 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.73(f)).

¹⁵⁶ See *id.* at 10,167 (to be codified at 20 C.F.R. § 655.73(c)).

¹⁵⁷ See *id.* at 10,107.

¹⁵⁸ Emp't & Training Admin., *ETA Open Government Initiative: H-2A Job Registry Factsheet*, U.S. DEP'T OF LABOR (June 28, 2010), http://www.foreignlaborcert.doleta.gov/pdf/H2A_JobRegistry_Factsheet.pdf.

¹⁵⁹ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,158 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.20(l)).

¹⁶⁰ See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15,130-01, 15,146 (proposed Mar. 18, 2011).

¹⁶¹ See 20 C.F.R. § 655.15(g) (2009).

¹⁶² See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 10,037, 10,172 (Feb. 21, 2012) (to be codified at 20 C.F.R. § 655.5) (defining State Workforce Agency as “a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 et seq.) to administer the State’s public labor exchange activities).

¹⁶³ See *id.* at 10,161 (to be codified at 20 C.F.R. § 655.33).

¹⁶⁴ Immigration Policy Ctr., *Comprehensive Immigration Reform: A Primer* (June 24, 2009), <http://www.immigrationpolicy.org/just-facts/comprehensive-immigration-reform-primer>.

¹⁶⁵ The POWER Act seeks to expand the right of immigrant workers to organize without the fear of retaliation, and seeks to increase the availability of temporary visas for workers who attempt to report employer abuses. See Jobs with Justice, *POWER Act Introduced*, <http://www.jwj.org/blog/power-act-introduced> (last visited Mar. 6, 2012).