



5-2018

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Herrmann, Paige (2018) "Combatting Labor Exploitation in the United States by Modifying Visas for Migrant Workers," *Brigham Young University Prelaw Review*: Vol. 32 , Article 6.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol32/iss1/6>

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COMBATTING LABOR EXPLOITATION IN THE UNITED STATES BY MODIFYING VISAS FOR MIGRANT WORKERS

Paige Herrmann¹

The United States is well known as the land of opportunity, drawing immigrants and migrant workers from all over the world to seek better jobs and better lives. In October 2008, two Guatemalan natives, Carlos Humberto Cab Siquic and Santiago Yaxcal Cuz, entered the United States with valid H-2B visa status. With a temporary visa for migrant workers, they expected to begin employment with Star Forestry, LLC; however, their dreams for better opportunities were dashed by the schemes of their employer to take advantage of these migrant workers.²

Upon their arrival, Star Forestry failed to provide the men with a record of the terms and conditions of employment. Within the five years of their employment, Star Forestry exploited their labor by paying them less than minimum wage, neglecting to pay the workers for several months, and withholding pay documentation. The employer also deducted business expenses from their paychecks and failed to compensate the workers for long-distance travel. Siquic and Cuz pressed charges against Star Forestry, demanding damages totaling nearly

1 Paige Herrmann is a junior studying sociology at Brigham Young University. She plans on attending law school in the fall of 2020. She would like to thank Talley Timms and Elizabeth Young for researching for and editing this paper. She would also like to thank the Pre-law Review Board and Kris Tina Carlston for overseeing this program and providing this unique opportunity.

2 Siquic v. Star Forestry LLC et al, No. 3:13CV00043 (W.D. Va. filed Apr. 22, 2016).

\$800,000 for the plaintiffs and ten other migrant workers.³

The 2016 Global Slavery Index estimates that 57,700 people in the United States, including citizens and immigrants, reported having been victims of human trafficking in the last ten years.⁴ The Trafficking Victims Protection Act (TVPA) of 2000 defines trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”⁵ The purpose of the TVPA is to prevent trafficking, prosecute traffickers, and protect victims of trafficking; however, as demonstrated by the *Siquic* case, trafficking still occurs frequently in the United States in the form of labor trafficking.

A common perception concerning labor trafficking may be that businesses lure foreign workers into the country illegally and exploit them through unfair wages, long hours, and inhumane housing conditions, etc. In reality, recent statistics show that 71% of victims of labor trafficking in the United States enter the country in valid legal status.⁶ The most practical remedy for exploited workers is to change jobs; however, due to the current U.S. immigration policy, migrant workers’ visas are tied to their employers. If they leave their jobs, they lose their legal status in the United States and are subject to deportation.⁷ In order to counter efforts to exploit foreign laborers and improve labor conditions, the United States government must modify visa requirements for migrant workers

3 *Id.*

4 *The Global Slavery Index 2016*, THE MINDEROO FOUNDATION PTY LTD, <https://www.globalslaveryindex.org/country/united-states/> (last visited Nov. 17, 2017).

5 22 U.S.C. § 7102 (2017).

6 *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas*, POLARIS, (Oct. 2015), <https://polarisproject.org/human-trafficking/labor-trafficking>.

7 8 U.S.C. § 214.2(h)(2)(i)(D) (2017).

who have been victims of labor exploitation to allow them to seek new employment while remaining in valid legal status.

The following section [Part I] will investigate the TVPA's insufficient emphasis on prevention of trafficking in the United States. [Part II] will introduce the alternative solution to modify visa requirements. Later subsections in Part III will outline other proposed solutions, establish a new proposal to give migrant workers the option to change employers, and explain how this new system would prevent trafficking more effectively than the current statutes.

I. CURRENT STATUTES AND VISA CATEGORIES

Foreign workers performing seasonal or intermittent labor in the United States on a temporary basis qualify for employment-based nonimmigrant visas through the United States Citizenship and Immigration Services (USCIS).⁸ H-2A and H-2B visas are both examples of employment-based nonimmigrant visas; the H-2A visa is specific to seasonal agricultural workers whereas the H-2B visa is for all other temporary, nonagricultural jobs.⁹ Prospective employers, also known as petitioners, are eligible to apply for temporary labor certification for the prospective migrant or seasonal workers, referred to as beneficiaries, after proving that there are not enough willing and qualified U.S. workers to perform the specified labor.¹⁰ After the employer is approved, the migrant workers then complete the visa application process and are authorized to work for that employer for one year; under rare circumstances,

8 THOMAS ALEXANDER ALEINIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY* 412 (American Casebook Series 8th ed., 2016).

9 8 U.S.C. § 214.2.

10 *Id*; see also *Employer Information*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/working-united-states/information-employers-employees/employer-information> (last updated Jul. 15, 2015).

they are eligible for extensions for up to three years.¹¹

The rights of temporary foreign workers are protected under two statutes: the aforementioned Trafficking Victims Protection Act (TVPA)¹² and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).¹³ Under the MSPA, migrant and seasonal workers have a right to receive the written terms and conditions of their employment, as well as to file a complaint or a lawsuit “without being intimidated, threatened, restrained, coerced, blacklisted, discharged, or discriminated against in any manner.”¹⁴ However, as evident by Star Forestry’s failure to provide pay documentation to Siquic, Cuz, and others, employers continue to exploit the labor of migrant workers; for migrant workers, compliance to unfair labor practices is preferred over the threat of termination which results in deportation, allowing employers to take advantage of their employees.¹⁵

Under the current TVPA and MSPA statutes, the ability to stay in the United States with a temporary visa depends on continued employment with the employer who originally sponsored the visa.¹⁶ If migrant workers wish to change employers, they must obtain new visas with new employers before they can begin alternate employment.¹⁷ Similarly, if migrant workers wish to change visa status or employer, they face the possible need to leave the United States while

11 See *supra* note 9, § 214.2.

12 22 U.S.C. § 7102 (2017).

13 29 U.S.C. § 1803.

14 29 U.S.C. § 1801.

15 Chrissey Buckley, *Forced Labor in the United States: A Contemporary Problem in Need of a Contemporary Solution*, Topical Research Digest: Human Rights and Contemporary Slavery 116, 120 (2008), <https://www.du.edu/korbel/hrhw/researchdigest/slavery/us.pdf>.

16 22 U.S.C. § 7102 (2017); see also Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 UNIV. OF TOL. L. REV. 923, 926 (2007).

17 *Supra* note 9, § 214.2.

their new visa application is processed.¹⁸ These statutes are in place mainly to prevent workers from remaining in the United States illegally after their visas have expired.¹⁹

Many industries in the United States take advantage of the current visa requirements in order to increase profits.²⁰ Threats of termination of employment and deportation discourage temporary foreign workers from reporting abuse since migrant worker visas are linked to their employers. According to research carried out by the National Guestworker Alliance, workers with H-2B visas were unlikely to report abuse on the job due to threats from employers.²¹ In addition, a human-trafficking-help hotline received over 1,200 reports of labor exploitation in the United States between August 2014 and July 2015, proving that the issue is still prevalent and has not been adequately addressed.²²

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- 18 U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., KNOW YOUR RIGHTS: AN INFORMATION PAMPHLET DESCRIBING YOUR RIGHTS WHILE WORKING IN THE UNITED STATES 4, <https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf> (last visited Nov. 14, 2017).
- 19 David Seminara, *Dirty Work: In-Sourcing American Jobs with H-2B Guestworkers*, CENTER FOR IMMIGRATION STUDIES, (Jan. 15, 2010), <https://cis.org/Dirty-Work-InSourcing-American-Jobs-H2B-Guestworkers>.
- 20 Ethan Newman et al., FARM WORKER JUSTICE, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign workers*, https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6_fwj.pdf (last visited Dec. 15, 2017).
- 21 Jana Kasperkevic, *Migrant workers in US seafood industry exposed to forced labor conditions*, THE GUARDIAN, Jun. 8, 2016. <https://www.theguardian.com/business/2016/jun/08/us-seafood-workers-abuse-immigration-temporary-labor>.
- 22 See *Labor Trafficking in the U.S.*, *supra* note 6.

II. INSUFFICIENT PREVENTION OF EXPLOITATION IN CURRENT LEGISLATION

Though the TVPA includes provisions to combat trafficking in the United States, the statute fails to adequately prevent instances of labor exploitation. The TVPA outlines three prongs of combatting trafficking and exploitation: prevention of trafficking, prosecution of traffickers, and protection of victims.²³ Of these three, emphasis is currently placed most forcefully on prosecution and protection; the TVPA offers 14 different services to victims of trafficking, including housing, medical and dental care, mental health treatment, counseling, legal immigration services, education, and more.²⁴ However, these immigrant and social services offered to victims are dependent on the victims' willingness to prosecute the perpetrators. This is unlikely since the threat of deportation often prevents migrant workers from reporting the exploitation.²⁵

The issue with this approach is that the government spends more money on offering post-incident services due to the effects of trafficking and not enough on preventing the act of trafficking itself. Victims of trafficking are typically not even aware of their rights and the services available to them before they report cases of labor exploitation.²⁶ A better solution to the issue of forced labor in the United States would be to first ensure that foreign workers are better informed of their rights, and then to focus more on the prevention of the crime rather than only reacting to the crime after it happens.

The current design of temporary foreign worker visas

23 22 U.S.C. § 704, 705, 709 (2017).

24 U.S. Dep't of Health & Hum. Serv., *Services Available to Victims of Human Trafficking: A Resource Guide of Social Service Providers* (May 2012), https://www.acf.hhs.gov/sites/default/files/orr/trafficking-services_0.pdf.

25 8 U.S.C. § 214.2.

26 Newman, *supra* note 20.

essentially fuels forced labor in the United States because employers threaten workers with deportation to keep them in unfair or forced labor situations.²⁷ As mentioned previously, victims of trafficking are subject to deportation if they lose their employer since their visas are tied to their employers.²⁸ As a result, foreign workers are more likely to endure exploitation than to risk deportation by leaving their jobs; similarly, the fear of losing their worker's visa and valid legal status can also prevent victims of labor exploitation from reporting their employers' crimes to law enforcement.

The Migrant and Seasonal Worker Protection Act (MSPA) does require employers to provide written notice of the terms and conditions of employment upon recruitment for the position.²⁹ The MSPA also requires employers to adhere to these terms and conditions. Migrant workers have the right to file a complaint without being threatened, coerced, intimidated, or discriminated against.³⁰ However, the threat actually stems from the system itself because the government will deport the migrant worker if they leave their employer;³¹ as a result, many migrant workers feel threatened and unsafe in reporting abusive employers for the fear of unexpectedly losing employment and facing deportation. For many workers, deportation is worse than any mistreatment from their employer, which is why exploitation still occurs regularly without criminal report. Clearly, the laws in place have a good purpose; unfortunately, they do not address the issue that visas, which are linked to employers, can engender labor exploitation.

27 United States v. Calimlim, 538 F.3d 706, 713 (7th Cir. 2008).

28 8 U.S.C. § 214.2.

29 29 U.S.C. § 1803.

30 *Wages and Hours Worked: Worker Protections in Agriculture*, U.S. DEP'T OF LABOR, <http://webapps.dol.gov/elaws/elg/mspa.htm> - EmplRights (last updated Dec. 2016).

31 8 U.S.C. § 214.2.

III. ELIMINATING EMPLOYER-SPECIFIC VISAS FOR TEMPORARY WORKERS

A. Using UN principles to begin framing a solution

The United Nations has addressed the problem of human trafficking worldwide, asserting that the state has the responsibility to protect against human rights abuses by third parties and acknowledging the corporate responsibility to respect human rights.³² The United Nations also presents the mandate that both the state and the corporations are responsible to provide effective remedies after infringement on human rights has occurred.³³ The UN asserts that there is more that the state can do to prevent trafficking and exploitation; it states that “there is a need for more proactive policies to prevent harmful corporate involvement in conflict situations.”³⁴ The responsibility to protect the rights of individuals and prevent corporations from abusing these rights lies within the state. If the current statutes are not effective in preventing these human rights violations, then a new system must be adopted.

B. More Freedom to Migrant Workers to Decrease Power of Exploiting Employers

The current legislation is insufficient to properly prevent exploitation of temporary foreign workers because

32 *UN ‘Protect, Respect and Remedy’ Framework and Guiding Principles*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER, <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles> (last visited Nov. 14, 2017).

33 *Id.*

34 U.N. HRC, 8th Sess., U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

visas are tied to employers;³⁵ in order to effectively prevent labor exploitation, the statutes must first more clearly define labor exploitation as it relates to human trafficking. The TVPA outlines three elements that must be met in order to identify a case of trafficking: Action (induce, recruit, harbor, transport, provide, or obtain), Means (force, fraud, or coercion), and Purpose (commercial sex or labor and services).³⁶ However, despite the outline of what determines trafficking, the TVPA does not give a clear definition of what constitutes labor exploitation in relation to trafficking; labor exploitation is caused by employers failing to properly compensate workers for their labor and should be classified as a form of labor trafficking.

New regulations should explicitly outline labor exploitation as employers requiring workers to work for less than minimum wage, work long hours without overtime pay, live in and pay for inhumane housing, or not receive proper documentation of contracts and pay. In addition, migrant workers must be better informed about their rights as foreign workers, since they generally lack an understanding of U.S. employment and labor laws and may not know when an employer is breaking the law.³⁷

In addition to a more explicit definition of labor exploitation, a change in visa requirements for migrant workers is necessary so that they are free to leave an employer in instances of labor exploitation and remain in valid legal status. Employers currently have excessive power over migrant workers, since they can threaten deportation if the workers do not comply and remain quiet under unfair labor conditions, making it difficult for victims to extricate themselves from oppressive employers. According to Buckley, “increasing opportunities for regularized migration and changing visa requirements for foreign workers

35 8 U.S.C. § 214.2.

36 *Understanding the Definition of Human Trafficking: The Action-Means-Purpose Model*, POLARIS PROJECT (2012), https://humantraffickinghotline.org/sites/default/files/AMP_Model.pdf.

37 Newman, *supra* note 20.

so that they can change employers would help decrease the vulnerability of workers, and would therefore help to prevent them from falling victim to forced labor.”³⁸ A flexible visa allowing migrant workers to change employers during their time in the United States would eliminate employers’ power to exploit these workers. If the workers were mistreated, the threat of deportation would no longer have an influence on their decision of whether or not to leave that employer. The following section will illustrate the benefits of adopting flexible visas for migrant workers.

C. Preventing Labor Exploitation of Migrant Workers through Flexible Visas

The right to change employers provides a needed defense against oppressive hours, pay, working conditions, or treatment.³⁹ The implementation of a new visa system that allows foreign temporary workers to change employers would provide extra protection to migrant workers to combat employers exploiting labor. This new provision would include a system for migrant workers to seek new employment while still in valid legal status through their temporary work visas. Migrant workers would demonstrate reasonable cause for the change of employment by reporting the offense of exploitation with reasonable proof in the form of documentation, testimony from a second witness, or other legitimate evidence in order to be granted a grace period to seek new employment. Using features of Canada’s flexible visa system and the U.S. H1B program, this modified system would not only discourage employers from exploiting their foreign workers, but would also provide a built-in method for exploitation to be reported.

38 Buckley, *supra* note 15, at 118.

39 Juan Carlos Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 DENV. J. OF INT’L L. & POL’Y. 321, 350 (2006).

1. Requirements for allowing change of employer to migrant workers

The United States should adopt a system using the UN's framework and examples from other countries with successful systems, such as Canada, that allow temporary workers to change employers if they are being exploited. Canada's immigration policy includes work permits for foreign temporary workers that allow the laborers to alter the conditions of their work or change employers if they receive written permission from an immigration official.⁴⁰ Generally, migrant workers in Canada are able to receive the same coverage as Canadian citizens, but they are not afforded the ability to freely circulate within the labor market.⁴¹ This provision of a more flexible visa gives foreign workers greater freedom and reduces the power of employers.

One aspect of the Canadian system which would be critical to adopt is the method of reporting a change of employer to the immigration services.⁴² The Canadian immigration system is not designed to give migrant workers excessive freedom by allowing them to roam free in the labor market. Likewise, our proposed revisions in the U.S. would include clear regulations delineating under what circumstances the foreign worker can terminate his/her employment while maintaining valid legal status and outline the length of the "grace period" afforded to victims of exploitation to find new employment.

2. Addressing concerns of a flexible visa system

The current H-2A and H-2B visas which are tied to employers have evident benefits, including lowering costs for

40 Judy Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights For Migrant Workers*, 34 COMP. LAB. L. & POL'Y J. 95, 105 (2012).

41 *Id.*

42 *Id.*

employers to obtain foreign laborers and preventing migrant workers' abuse of visas. The employers are responsible for the migrant workers, and information about the status of migrant workers is readily available to the government.⁴³ In return, costs of labor and turnover are reduced for H-2A and H-2B employers; they can keep wages low and increase profits.⁴⁴ This system clearly benefits the government and protects the rights of businesses, and changing from the current system to a flexible visa system would remove some of these advantages.

3. Using the H-1B visa system as a pattern

The H-1B visa system allows for flexible visas while still affording information about workers' status to the United States Citizenship and Immigration Services. The H-1B visa is for specialized workers and lasts for up to six years with the possibility of extensions beyond that if the foreign worker is in the process of applying for a green card.⁴⁵ Though this would not offer the same decreased labor and turnover costs to employers as the current H-2A and H-2B visa system does, it still affords easy governmental access to information about the workers while better protecting the rights of foreign workers by allowing for change of employer. Workers can change employers through the "H-1B portability" provision, stating that an individual previously granted H-1B status may start working for a new employer without waiting for the USCIS to approve a new petition. The worker is authorized to work for the new employer once that employer files a new "non-frivolous" H-1B petition,

43 Newman, *supra* note 20.

44 Madeline Zavodny & Tamar Jacoby, LAB., IMMIGR. & EMP. BENEFITS DIVISION, US CHAMBER OF COMMERCE, *The Economic Impact of H-2B Worker* 3, https://www.uschamber.com/sites/default/files/legacy/reports/16102_LABR_H2BReport_LR.pdf (last visited Dec. 15, 2017).

45 Aleinikoff, *supra* note 8, at 404.

meaning that the petition “has some basis in law or fact.”⁴⁶

One concern with creating a flexible H-2A and H-2B visa system is the cost of implementation. Would it be worth the cost to design new requirements and regulations, train USCIS officers, and create new materials for issuance of and information about flexible visas, as well as the time it would take for the government to change the statutes themselves? If the USCIS were to adopt the current “H-1B portability” petition for H-2A and H-2B visas, this would provide a simple transition to the modified system, decreasing potential costs of implementing new visa requirements and regulations.

4. Benefits of a flexible visa system

It is very difficult for migrant workers to escape abusive situations, change employers, or negotiate terms of employment because these workers lose their legal status once they leave their abusive employers.⁴⁷ This provision of a system that allows change of employers will remove the threat of deportation that prevents many foreign workers from reporting exploitation or leaving their employers.

If the system is successful, the government will not need to allocate as many funds toward the protection prong of the TVPA. Currently, the legal, social, and protection services and programs provided to trafficking victims cost over \$10 million dollars per year.⁴⁸ If trafficking and exploitation are largely prevented by this new visa system, as anticipated, the

46 *Questions and Answers: Changes to the H1-B Program*, IMMIGR. & NATURALIZATION SERV., U.S. DEP'T OF JUST. (Nov. 21, 2000) https://www.uscis.gov/sites/default/files/files/pressrelease/ChangesH1BProgram_112100.pdf.

47 Linares, *supra* note 39.

48 Alison Siskin and Liana Sun Wyler, *Trafficking in Persons: U.S. Policy and Issues for Congress*, CORNELL UNIVERSITY (Dec. 7, 2012), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1986&context=key_workplace.

government will not require as much money to provide these services to the victims. In addition, on an economy-wide scale, full mobility would allow the supply of labor to shift between sectors to meet changing demands over the maximum period a migrant worker could stay in the United States with an H-2A or H-2B visa.

Every worker in the United States, including temporary foreign workers, has the right to fair wages and working conditions.⁴⁹ While the current visas for migrant workers benefit employers and government services, they fail to afford enough protection of these foreign workers to prevent labor trafficking and exploitation. Since employers have abused the power they have been given over their migrant foreign employees, the new flexible visa system will reallocate this power to potential victims of exploitation in order to defend their rights.

IV. CONCLUSION

Trafficking is a severe infringement on the human rights of individuals for the purpose of decreasing costs and increasing profits for businesses. Although the United States does have statutes and regulations in place to prevent labor trafficking, this article has demonstrated the efforts are insufficient since thousands of people each year are victims of labor trafficking. The current visa regulation, which requires visas to be tied to employers, not only makes it more difficult for foreign workers to leave abusive employers, but also creates a cycle of exploitation for employees on temporary work visas.

By implementing a flexible visa system, victims of labor trafficking would have the freedom to change their circumstances by leaving their employers and seeking new employment without needing to leave the country and re-apply for a visa. If temporary foreign workers can leave their employers, abusive employers will be discouraged from exploiting workers and, as a result, labor trafficking will decrease. Modifications to the visa regulations will also lower costs, because it will reduce the number of trafficking victims receiving government funded services. Where the TVPA and MSPA have fallen short, this provision will be successful in preventing labor trafficking

49 Daniel T. Griswold, CATO INSTITUTE, *Willing Workers: Fixing the Problem of Illegal Mexican Migration to the United States*, 19 TRADE POLICY ANALYSIS 21-22 (Oct. 15, 2002), <https://object.cato.org/sites/cato.org/files/pubs/pdf/tpa-019.pdf>.

and protecting the rights of migrant workers in the United States.

