



# NO WAY

WHY THE H-2A AGRICULTURAL VISA PROGRAM

# TO TREAT

FAILS U.S. AND FOREIGN WORKERS

# A GUEST



FARMWORKER  
JUSTICE

*A Report by Farmworker Justice*





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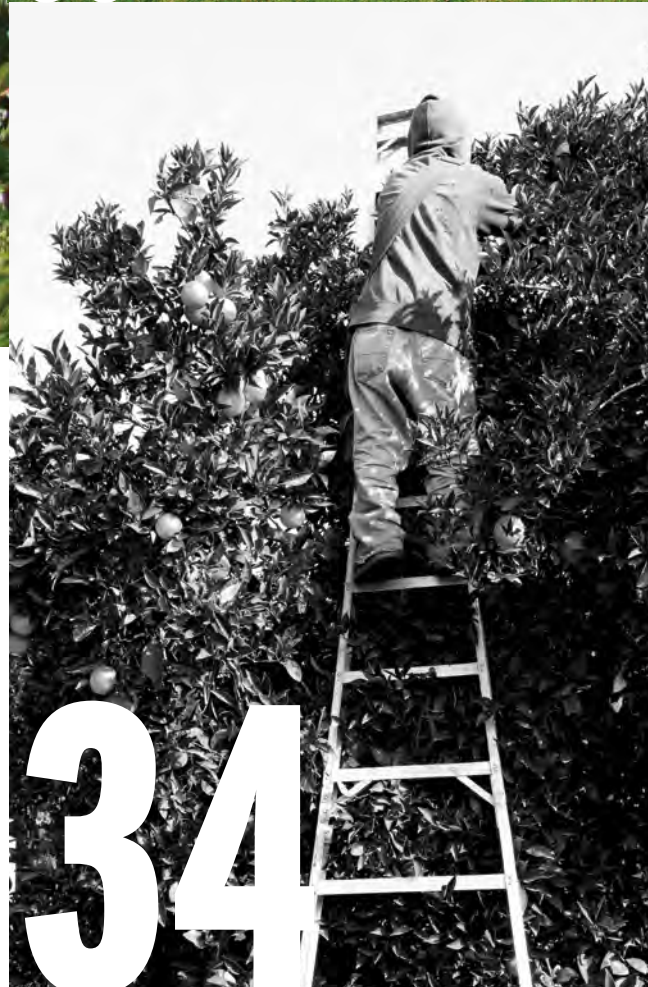
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# EXECUTIVE SUMMARY



What is the problem with a farm labor force composed of temporary foreign guest workers? Just ask Kathern, a truck driver, farmworker, and mother from Moultrie, GA, who knows all too well the abuses suffered by domestic and foreign workers as a result of the H-2A agricultural guest worker program. A lifelong Georgia resident, Kathern was fired in September 2010, after just three days of work, by an employer who primarily hires H-2A guest workers. She explains: >>



**"To me, it's just like the farmers can take advantage of the [guest workers], where they can't take advantage of the Americans- you know what I'm saying? Because we know the laws when the [guest workers] don't...It's not fair on their part that they come out here and work like they do and they [abuse] them like that. And it's not fair on our part, the way they treated us."**

The H-2A program allows agricultural employers to hire foreign guest workers on temporary work visas to fill seasonal jobs. In order to participate, employers must demonstrate a shortage of U.S. workers and that their wages and working conditions meet certain minimum requirements. Yet, as the stories in this report illustrate, the H-2A program is fundamentally flawed and characterized by rampant abuse of both domestic and foreign workers.

## SUMMARY OF FINDINGS

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*No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, a product of interviews with current and former H-2A workers, information from media exposés, lawsuits against H-2A employers, and the experiences of workers and advocates over the past 30 years, demonstrates that:

- Guest worker programs drive down wages and working conditions of U.S. workers and deprive foreign workers of economic bargaining power and the opportunity to gain political representation.
- The H-2A program's protections for U.S. workers and against exploitation of guest workers by employers are modest; in fact, they are similar to those in the Bracero program (1942-1964), which was terminated due to its notorious labor abuses.
- Once an employer decides to enter the H-2A program, the law creates incentives to prefer guest workers over U.S. workers. For example, the employer must pay Social Security and unemployment taxes on U.S. workers' wages but is exempt from paying these taxes on guest workers' wages.
- Violations of the rights of U.S. workers and guest workers by H-2A program employers are



rampant and systemic. The U.S. Department of Labor (DOL), which has primary responsibility for administering the H-2A program, frequently approves illegal job terms in the H-2A workers' contracts. U.S. workers who apply for H-2A jobs are rejected or forced to quit. Employees at H-2A employers routinely experience wage theft and other unlawful practices.

→ Abuses in the recruitment of foreign workers are endemic. H-2A employers and their recruiting agents in Mexico and other poor countries exploit the vulnerability of foreign citizens. Many guest workers must pay recruiters for H-2A jobs and enter the U.S. indebted, desperate to work, and fearful that the loss of their job will lead to financial ruin. The H-2A recruitment system has led to numerous documented cases of debt-peonage, human trafficking, and forced labor.

→ More than one-half of the farmworkers on U.S. farms and ranches lack authorized



immigration status. The presence of so many undocumented workers deprives all farmworkers of bargaining power and political influence. Deporting all or most undocumented farmworkers would be costly and impractical, inflict harm on hundreds of thousands of hard-working farmworkers and their families, many of whom are United States citizens, and deprive agriculture of the workforce it needs to produce our fruits, vegetables and livestock.

## RECOMMENDATIONS

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This report culminates in a series of recommendations to reduce the violations of the modest labor protections in the H-2A agricultural guest worker program, fix our

broken immigration system, and empower farmworkers to improve their wages and working conditions, occupational safety, health and access to justice. Foreign guest workers should not be treated as disposable human machines, nor should they be used to deprive U.S. workers of available jobs or to undermine wages and working conditions of U.S. workers. H-2A guest workers should be treated with dignity. Ultimately, the people who put food on our tables should have the opportunity to become full-fledged immigrants on a path to citizenship. Key recommendations include:

➔ **Cracking Down on Abusive Employers:** DOL should increase oversight and enforcement in the H-2A program. DOL must address illegal job terms and program violations more effectively, including rejecting terms aimed at discouraging U.S. workers, obtaining complete remedies for victimized workers, imposing fines on employers that deter illegal conduct, and barring employers from the program when serious violations occur.

➔ **Ending Systemic Abuses During Recruitment:** The Administration should exercise jurisdiction over H-2A recruitment abroad and hold employers accountable for the actions of their recruiters. The root of much guest worker exploitation lies in the foreign country when the workers are recruited, yet our government does almost nothing to protect workers during the recruitment process. Recruitment practices, including discrimination, that would be illegal if they occurred in the United States should not be tolerated just because they occur abroad. DOL should shine light on the dark world of labor recruitment, examine the international recruitment mechanisms that result in foreign workers' indebtedness, and hold employers accountable when recruiters and contractors acting on their behalf violate the law.

➔ **Collaboration with Local Stakeholders:** DOL should work closely with farm labor unions and other advocacy organizations to educate and empower workers to prevent and remedy abuses by employers.

➔ **Wages and Labor Protections that Protect U.S. and Foreign Workers:** H-2A program wage rates and labor protections should be strengthened to improve wages and working conditions to attract and retain U.S. farmworkers and stop abuse of guest workers.







The financial incentives for H-2A employers to prefer guest workers over U.S. workers, including exemptions from Social Security and unemployment taxes, should be removed. Proposals in Congress to reduce H-2A wage rates and labor protections or to create entirely new guest worker programs with little or no protections should be rejected.

→ **Freedom to Change Employers and Become Full Members of Society:** Congress should revise the status of H-2A workers to reduce their vulnerability. H-2A workers should be allowed the freedom to change employers and should be given the opportunity to earn immigration status. Guest workers' forced tie to a single employer leaves them reluctant to challenge illegal or unfair employer practices. Similarly, their inability to obtain a permanent

immigration status, no matter how many seasons they return to the U.S. on an H-2A visa, deprives them of the opportunity to better their conditions. Congress should apply the concept of a free labor market and our history as a nation of immigrants to the H-2A program.

→ **A Compromise to Ensure a Stable, Decently Treated Workforce:** Congress should pass the **Agricultural Jobs, Opportunities, Benefits, and Security Act (AgJOBS)**.

AgJOBS is a bipartisan compromise between growers and farmworker groups that would allow currently unauthorized farmworkers to earn legal immigration status by continuing to work in U.S. agriculture, make balanced changes to the H-2A program, and provide U.S. growers with a stable, productive, and decently-treated farm labor force.



PART  
01

# AN INHERENTLY FLAWED SYSTEM



Each year, thousands of workers from countries around the world leave their homes to spend a few months harvesting crops on American soil. Participants in the H-2A temporary foreign agricultural worker program, these “guests” have often paid significant sums to recruiters and government agencies to obtain jobs, visas, and transportation. They expect to work hard at jobs for which American workers are unavailable. They expect to be provided with livable housing and safe working conditions. And they expect to earn enough to return home and feed themselves and their families. >>



**Yet when they arrive in the United States,**

many H-2A workers find a much harsher reality. Social and geographic isolation, lower than advertised wages, less work than promised, dirty and dilapidated housing, dangerous working conditions, and even forced labor or slavery typify the experience of many guest workers. Some have been brought to replace domestic workers who still want the work and are entitled to such jobs. But, allowed to work only for a single employer who can send them home at will, most H-2A workers are too fearful of retaliation to speak out about these harsh (and frequently illegal) working conditions.

This report, *No Way to Treat a Guest*, documents the inherent flaws of the H-2A program and the abuses that result. The H-2A program allows agricultural employers to hire foreign workers on temporary work visas to fill seasonal jobs when they can demonstrate a shortage of U.S. workers and that their wages and working conditions meet certain minimum requirements. Short summaries of the history, legal framework, and current location of H-2A jobs provide the background necessary to understand the



**MORE THAN  
50%**

of the farmworkers  
on U.S. farms and  
ranches lack authorized  
immigration status.  
Deporting them  
all would decimate  
American agriculture.  
In fixing our broken  
immigration system,  
skilled, law-abiding  
farmworkers should be  
given the opportunity to  
earn legal immigration  
status and continue their  
work in agriculture.

program. The bulk of this report explores the various ways in which the H-2A program harms both U.S. and foreign farmworkers, using examples of abuse from recent media and lawsuits. Real-life stories, summarized from interviews conducted by Farmworker Justice with both domestic workers and H-2A workers, illustrate the effects of these abuses on workers.<sup>1</sup>

These stories are a wake-up call to policymakers and others who are searching for solutions to ensure an adequate supply of farm labor and continued production of abundant, safe, healthy food on the nation's farms and ranches. Currently, the majority—50% to as much as 70%—of the nation's 2 to 2.5 million farmworkers lack authorized immigration status. Many of the rest are U.S. citizens or lawful permanent resident immigrants. Though H-2A guest workers account for only a small percentage of farmworkers in the U.S, their treatment sets the bar low for the entire agricultural industry, and their availability depresses wages and working conditions for U.S. workers.



<sup>1</sup> Workers' last names and the names of their employers have been omitted to protect them from possible retaliation. Some workers have also requested that false names be used to further protect their anonymity.





“The H-2A guest worker program, like the infamous bracero program, is not a practical or humane solution to ensuring a productive and available farm labor force. The H-2A system virtually guarantees foreign workers will be exploited during recruitment abroad and in the fields of this country, and that U.S. farm workers will lose job opportunities and suffer depressed wages. The impact of mandatory E-Verify would be millions of new guest workers in agriculture on top of the millions of undocumented workers already here. The H-2A law and its enforcement should be strengthened to reduce abuses. But the only equitable and practical answer is for Congress to allow farm workers who are currently undocumented to earn legal status by continuing to work in agriculture.”

—Arturo Rodriguez,  
president, *United Farm Workers of America*

In the ongoing contentious debate about immigration policy in the U.S., some portray guest worker programs as necessary to provide a legal and stable labor force in industries, particularly agriculture, where the work is seen as undesirable to most Americans. Yet the abuses endemic to the H-2A program suggest that guest worker programs cannot and should not be the model for America's farms. The creation of a large temporary workforce with few rights, no freedom to change employers, and no path to permanent status not only harms both U.S. and domestic workers, but also runs contrary to our nation's commitment to economic and political freedom. Ours is a nation of immigrants, not of guest workers.

Instead, Congress should give undocumented farmworkers an opportunity to earn legal immigration status. If allowed to continue at all, the H-2A program should remain a supplementary source of labor in times of bona fide local labor shortages. Some policymakers and employers call for radically de-regulating the H-2A program by slashing wage rates, eliminating housing requirements, weakening labor protections and reducing government oversight. But this report makes clear that, on the contrary, the H-2A program's abuses need to be addressed through increased labor protections, oversight and enforcement.

## A HISTORY OF AGRICULTURAL GUEST WORKER PROGRAMS

The search for a cheap, seasonal, farm labor force to produce America's food while maximizing the profits of U.S. agribusiness has nearly always begun abroad. From the beginning of the American colonies, the importation and oppression of **slave labor** allowed growers of cash crops—including tobacco, sugar, and cotton—to minimize labor costs while maintaining a stable, highly productive workforce. Similar concerns led 19<sup>th</sup> century growers establishing new farms on the frontier to use low-paid

seasonal agricultural workers from **China**, the **Philippines**, and **Japan**.<sup>2</sup> The economic desperation and tenuous immigration status of foreign farmworkers, along with racial discrimination, deprived them of bargaining power with their employers and of political power to affect the policies of the U.S. government.

The **first bracero (literally, “strong-arm”)** guest worker program was created in 1917 at the behest of growers, who argued that World War I had created a labor shortage crisis in agriculture. The program allowed more than 70,000 Mexican workers to enter the US temporarily for work in cotton and sugar beets.<sup>3</sup> Though it ended in 1921, many workers stayed after their term of employment, some because employers refused to pay for their transportation home. The Great Depression led to a crackdown on immigrant workers, who were seen as a threat to American workers, and many of the former braceros were repatriated to Mexico.<sup>4</sup>

The onset of World War II led to renewed grower complaints of a labor shortage, despite pronouncements by the Secretary of Labor that there were 1.6 million surplus domestic farmworkers.<sup>5</sup> A new **bracero program** was established in 1942 through a bilateral agreement between the governments of the U.S. and Mexico. Over the next 22 years, an estimated two million Mexican men entered the U.S. to work as braceros.<sup>6</sup>

The bracero program became notorious for the rampant abuse of foreign workers, despite significant legal protections for both domestic and foreign workers. For example, workers were guaranteed sanitary housing, access to medical care, round-trip transportation, and the prevailing wage for their task and crop. They were not to be used as strikebreakers.<sup>7</sup> In practice, however, few braceros were willing to speak up to enforce their rights, because they were tied to a single employer, and renewal of their contract depended on the employer's good will.<sup>8</sup> Many were cheated out of wages. Housing conditions were deplorable. Workers were transported in unsafe vehicles and were denied access to healthcare. The

<sup>2</sup> Phillip Martin, *Importing Poverty: Immigration and the Changing Face of Rural America* (New Haven: Yale University Press, 2009), 20-23.

<sup>3</sup> Martin, 23-24.

<sup>4</sup> Garry G. Geffert, “H-2A Guestworker Program: A Legacy of Importing Agricultural Labor” in *The Human Cost of Food: Farmworkers' Lives, Labor, and Advocacy*, ed. Charles D. Thompson and Melinda F. Wiggins (Austin: University of Texas Press, 2002), 115.

<sup>5</sup> Deborah Cohen, *Braceros: Migrant Citizens and Transnational Subjects in the Postwar United States and Mexico* (Chapel Hill, NC: University of North Carolina Press, 2011), 22.

<sup>6</sup> Martin, 28.

<sup>7</sup> Cohen, 22.

<sup>8</sup> Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (San Jose, CA: The Rosicrucian Press, 1964), 237.



## David (Salinas, CA)

David, now 80, looks back fondly at the relationships he made as a bracero in the 1950s. "We thought of each other as brothers. We all got along very well," David said of his fellow workers.

Yet his description of his bracero experience makes clear the powerlessness and vulnerability of the men who came north to pick American crops. In large part, this was due to the abundant supply of willing young Mexican men desperate for a job. David fit this bill. A native of Zacatecas, Mexico, he traveled three days to the contracting office in Chihuahua, where he found 20,000 people angling for work. He slept in a ditch near the train station for one month, only to be sent home when they announced that the visas had all been distributed.

But David did not give up, and he finally got a visa and a job to drive tractors in Texas. Once in the U.S., the braceros were fumigated and sprayed with DDT before being shipped off to their workplaces. "We were shoved into the trucks, just like they do with animals," said David.

Like the H-2A program of today, David was tied to a single employer. When the contract was over, he had to return to Mexico. David travelled back and forth a number of times, each time obtaining a new contract, sometimes lasting just 40 days. He worked in Texas, Arkansas, and California. He picked cotton and was a tractor driver in corn, sorghum and other crops.

Living situations varied depending on the employer. During

one contract, David lived in crowded tin barracks filled with 40 workers or more. Workers slept in bunk beds in the same room with the stoves and kitchen facilities.

In Texas, David worked 12-hour days and was paid 50 cents an hour. But the desperation for work meant that no one demanded to see a contract or better pay. "No one asked [about wages] because they needed the work," said David.

David returned home after his last bracero contract in 1958. He returned to the U.S. in 1960 on a permanent work visa. David settled down in Salinas, studied welding, and started a family. He now has six children and nine grandchildren.

In the early 2000s, David and other former braceros discovered that the Mexican government had never repaid them the wages withheld in "savings accounts," legally guaranteed to them upon return to Mexico. Though the government agreed in 2008 to pay up to \$3,500 to those who could prove they had been braceros, David no longer had any documentation. "I fought and tried to get it," said David. But he ultimately failed to obtain even this token of acknowledgement for the years spent as a low-paid temporary worker in America's fields.



availability of braceros undercut the wages of U.S. workers.<sup>9</sup> In many locations where large numbers of braceros filled jobs, their lack of economic bargaining power meant that they could not seek wage increases; thus, the "prevailing wage" in such places stagnated and became unattractive to U.S. workers. In short, conditions were in many ways similar to today's H-2A workers, but the large scale of the bracero program captured the attention of the labor and civil rights movements and eventually the public.

Congress finally shut down the bracero program in 1964, but left in place another avenue to "import" foreign workers, the **H-2 program**.<sup>10</sup> This program began during World War II and

became codified in the immigration law in 1952. For many years, it was used mostly by East Coast apple growers and by Florida sugar cane growers to hire workers from the Caribbean. The H-2 program's provisions were similar to those in the bracero program, but it was not accompanied by government-to-government agreements. Abuses in the sugar cane industry were rampant, generating significant publicity and lawsuits.<sup>11</sup>

The Immigration Reform and Control Act (IRCA) of 1986 separated the H-2 program into two temporary worker programs: **H-2A for agricultural workers** and **H-2B for non-agricultural workers**. Both programs continue to be marked by worker abuses to this day, even as they expand into new industries and sectors. The H-2A program, in



Decades of experience have revealed that guest worker programs

**DRIVE DOWN WAGES**

and working conditions of U.S. workers, and deprive foreign workers of economic bargaining power and the opportunity to gain political representation.

<sup>9</sup> "Bittersweet Harvest: The Bracero Program, 1942-1964, Broken Promises," National Museum of American History, online at [http://americanhistory.si.edu/exhibitions/small\\_exhibition.cfm?key=1267&exkey=770&pagekey=780](http://americanhistory.si.edu/exhibitions/small_exhibition.cfm?key=1267&exkey=770&pagekey=780).

<sup>10</sup> The law that governs the H-2A program (8 U.S.C. §1188) uses the term "import" when referring to the human beings who are brought to work in the United States on temporary work visas. While the term "import" is associated with commodities, the U.S. Constitution used that term to refer euphemistically to chattel slavery.

<sup>11</sup> For example, Stephanie Black's film "H-2 Worker" (1990), won awards at the Sundance film festival for its exposé of worker exploitation in the Florida cane industry.



the tradition of the agricultural guest worker initiatives that came before it, provides growers with an endless supply of physically strong, economically vulnerable, politically powerless workers from poor countries, who will work to the limits of human endurance in dangerous conditions for low wages.

## REGULATORY FRAMEWORK: LESSONS FROM DECADES OF ABUSES

**Recognizing that guest** worker programs leave workers—both domestic and foreign—open to exploitation and abuse, policymakers since World War II have instituted procedures and labor protections for workers. The current H-2A regulations were codified by the Reagan Administration in 1987. Yet over the

years, employer groups have lobbied hard to “streamline” the program. In the final days of the second term of the George W. Bush Administration, the Department of Labor (DOL) substantially revised the H-2A program regulations, removing many labor protections, slashing wage rates and reducing government oversight. In 2010, the Obama Administration reversed these changes and restored most of these provisions.

The law and regulations governing the H-2A program require that in order to accept an employer into the program, the Department of Labor must certify that (1) there are not enough U.S. workers “able, willing, qualified, and available” to perform work at the place and time needed; and (2) the wages and working conditions of U.S. workers will not be “adversely affected” by the importation of guest workers. In theory, the law means that employers must recruit and hire qualified

### A FARMWORKER'S STORY

## Gilberto, Francisco, Gabriel, and Ramon (Yuma County, AZ)

These four men, all legal permanent residents of the United States, live in the border region of San Luis, Arizona/Sonora. With more than 50 years of farm work between them, they are hardly the inexperienced Americans that some growers claim are the only alternative to H-2A.

In June, 2009, all four obtained jobs harvesting melons for a farm labor contractor. Every day a bus would pick them up at 1:00 am for the two and a half hour trip. Sometimes they'd have to wait another two hours to enter the fields. Though the work ended around 3:00 pm, often the bus did not arrive for another two hours. The

men said they were not paid for the time spent on the bus, nor for the time spent waiting to enter the fields or board the bus.

One afternoon a few weeks into the season, the bus did not arrive to take them home. They heard that their bus had been diverted to pick up H-2A workers. The crew was forced to walk miles in

the hot desert to find the nearest phone. Finally, at around midnight, the labor contractor arrived to drive them home.

Sure enough, when reporting to work the next day, the crew was told that they had been fired and replaced by H-2A workers. “They told us there was no work for San Luis people,” said Gabriel. But why choose H-2A workers over domestic residents? Gabriel explained that while the domestic workers would finish working in the early afternoon, the employer could make the H-2A workers work longer hours, through the hottest and most dangerous part of the day.

Not only had they been abandoned in the fields, but they were now jobless. Francisco expressed his frustration: “I felt really bad because at that time there was not a lot of work available. I needed work...the contractor should be punished for what he did to us so it will not happen to other workers.”

Yet the employer was not punished. Though over 80 complaints of unpaid wages and violations of employment terms for this employer were submitted to DOL during summer 2009, DOL has continued to allow the contractor to employ more H-2A workers, approving its request for nearly 700 workers in the fall of 2009 and more than 1,160 workers in summer and fall 2010.





U.S. workers before hiring guest workers. In addition, the employer must offer and provide wages and other job terms high enough to attract and retain U.S. workers.

The labor *certification* process required by the H-2A law, in theory, demands more government oversight and employer accountability in the H-2A application process than the *attestation* process in place for the H-1B program for higher-skilled jobs, for example.<sup>12</sup> In practice, however, the additional scrutiny of employers and their job terms that should happen under labor certification rarely occurs. In Fiscal Year (FY) 2009, DOL certified 94% of the worker positions requested by growers<sup>13</sup> and routinely approved applications that contained illegal job terms.

Below is a list of the key H-2A program rules that, in theory, are supposed to protect workers. Unfortunately, in practice, many are not adequately enforced, and others have flaws leading to abuses:

**Wages** offered by H-2A growers must be the highest of: (a) the local labor market's "prevailing wage" for a particular crop as determined by DOL and state agencies; (b) the state or federal minimum wage; or (c) the "adverse effect wage rate" (AEWR), an hourly wage determined by DOL for each state based on the USDA's annual Farm Labor Survey of average regional hourly wages for non-supervisory crop and livestock workers. In most cases, the AEWR is the highest rate.

→ *In theory*, this protects U.S. farmworkers by ensuring that growers cannot undercut their wages, and protects vulnerable foreign workers who would feel compelled to accept a substandard wage.

→ *In practice*, the wage levels are based on surveys of wage rates that are depressed because they include earnings of undocumented workers, not just U.S. workers. The wage rates are also outdated because they are based on the previous year's surveys. In addition, many growers violate the wage requirements.

**Recruitment of U.S. workers** must occur through the interstate employment service system and

through private-market efforts to find and hire farmworkers. Growers must post job orders with the state workforce agency (SWA) between 60 and 75 days before the date of need. Job qualifications and requirements must be reasonable and must not discriminate against U.S. workers.

→ *In theory*, this protects U.S. workers by ensuring that growers attempt to hire U.S. workers first.

→ *In practice*, growers' recruitment of U.S. workers often is inadequate and many employers impose inappropriate job requirements to "scare away" domestic workers.

**"Fifty Percent Rule"** requires employers to hire any qualified U.S. worker who applies for work until one-half of the season has ended.

→ *In theory*, this protects U.S. workers' jobs by preventing growers from choosing an H-2A guest worker over a qualified U.S. worker and by mandating that farms hiring additional workers for peak harvesting time must continue to accept domestic applicants.

→ *In practice*, many U.S. workers are not offered available jobs at H-2A employers or are quickly forced to quit.

**"Three-fourths work guarantee"** requires that employers offer recruited workers at least  $\frac{3}{4}$  of the number of working hours in the work period outlined in the contract (except when impossible due to "Acts of God") or pay wages for any shortfall in work opportunities.

→ *In theory*, this protects U.S. and foreign workers by discouraging over-recruitment and guaranteeing income for migrant workers who have traveled long distances to work.

→ *In practice*, many workers are not paid all the wages they are promised under the three-fourths guarantee.

**Housing** that meets DOL standards for temporary labor camps must be provided at no cost to the workers who do not live in the local area. Employers must also provide three meals a day (at a cost to the worker) or, alternatively, convenient cooking and kitchen facilities for workers to make their own meals.

→ *In theory*, this serves as an important safeguard against homelessness,



"The treatment of temporary guest workers is of great importance to the civil rights community because guest workers face severe social and economic discrimination as well as a shortage of labor protections. Guest workers have long been the most vulnerable and poorly treated workers among us. Ending the abuse of guest workers in America's fields and giving them a chance to earn legal status is critically important and will also help ensure the fair treatment of America's farmworkers."

—Wade Henderson,  
president and CEO  
of The Leadership  
Conference on Civil  
and Human Rights

<sup>12</sup> The attestation process allows employers to promise compliance with the H-1B requirements. DOL takes this promise at face value during the application process, with the assumption that it will later audit employers for compliance. By contrast, certification in the H-2A program means that DOL must review employment contracts and verify the employers' compliance before approving H-2A applications.

<sup>13</sup> "The Foreign Labor Certification Report: 2009 Data, Trends, and Highlights Across Programs and States," U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification (2010), online at: [http://www.foreignlaborcert.doleta.gov/pdf/2009\\_Annual\\_Report.pdf](http://www.foreignlaborcert.doleta.gov/pdf/2009_Annual_Report.pdf)





Growers complain that government oversight makes the H-2A program too difficult and costly for them to use. But they bring scrutiny upon themselves by routinely failing to comply with rules designed to protect workers. Growers' H-2A applications far too often contain **ILLEGAL OR QUESTIONABLE** job terms that would be easy to correct before submission to DOL. Troubling job terms that H-2A growers have frequently sought to impose include, for example, past experience or employer references for entry-level field work (aimed at discouraging U.S. workers from applying); inflated "productivity" requirements (to provide excuses for firing workers); and demands that workers agree to give up their rights to pursue legal remedies in court.

acknowledging that both foreign and U.S. workers would have trouble finding temporary accommodations in rural areas with limited housing.

→ *In practice*, housing is often appallingly substandard, oversight is lax, and farmworker advocates have been prevented from meeting workers in their homes, which growers claim is their private property. In some locations, employers claim that workers are "local" and can commute to their own homes each day, even when they have overly long commutes.

**Transportation costs** incurred by the worker to arrive at the place of employment must be reimbursed by the employer after workers complete half the season. Employers must pay the cost of returning home for those who complete the full season.

→ *In theory*, this facilitates recruitment of migrant domestic workers from outside of an employer's immediate location, reduces the debts incurred by foreign workers on their way to the U.S., and ensures that foreign workers can afford to return home.

→ *In practice*, workers are routinely fired

or coerced to sign voluntary quit forms before the end of the contract to subvert this requirement.

**Workers compensation** must be provided for occupational-related injuries.

→ *In theory*, this protects both U.S. and foreign workers by ensuring medical care for injured workers and that the cost of health care for work-related injuries will not be borne by the worker.

→ *In practice*, employers send injured foreign workers home after being injured, making it very difficult to access workers' compensation.

The modest legal protections put into place by DOL, many of which also existed under the bracero program, have not changed the inherent and systemic problems with the H-2A program. DOL oversight is lax, and most applications are approved, even for growers publicly known to ignore the law. The H-2A program continues to displace U.S. workers, and leads to rampant abuses, including wage theft, discrimination, and even debt-peonage. These abuses, with personal examples, are discussed in further detail in the next section.





## WHY DO EMPLOYERS USE GUEST WORKERS?

**Employers have a** long history of advocating for access to temporary foreign agricultural workers. In most cases, once growers enroll in the program, they never return to hiring domestic labor. But why do growers like H-2A workers so much? H-2A workers are an extraordinarily productive labor force employed at relatively low cost, for the following reasons:

### 1. Foreign workers are economically desperate.

Most H-2A workers come from home countries plagued by economic crises and poverty. They are thus willing to accept wages and working conditions that U.S. workers could never afford to accept due to the high cost of living in the U.S.

### 2. Temporary workers lack full rights.

H-2A workers have limited, non-immigrant status, and cannot stay in the U.S. beyond their work term with a particular employer. Workers are tied to the employer who brought them to the country and can only work for that employer. Most are hesitant to report abuses because employers can freely fire (and deport) “troublemakers,” or decide not to re-hire them again. H-2A workers are excluded from the main employment law for farmworkers. Additionally, foreign workers generally lack knowledge of U.S. laws and employment norms and may not know when an employer is breaking the law.

### 3. Employers can “hand-pick” a certain demographic of workers.

Our government has not sought to apply U.S. anti-discrimination laws to H-2A employers’ recruitment of foreign workers that occurs abroad. Growers thus can pick their ideal workforce—mostly young men removed from daily family obligations who will work long hours for low pay.

**4. H-2A employers are exempt from paying Social Security and unemployment taxes on guest workers’ wages.** Since H-2A employers must pay federal social security and unemployment taxes if they hire U.S. workers, they can save substantial money by hiring guest workers.

**5. Employers can avoid the wage demands of the labor market.** Once an employer receives approval of its job offer from the Department of Labor, it may reject qualified U.S. workers who seek a higher wage or an extra benefit, such



“Everyone is hurt when growers abuse the guestworker program...Not only do the guestworkers suffer, but U.S. workers are cut out of the labor market, and the growers gain an unfair advantage over their competitors.”

—Mel Fowler-Green,  
Southern Migrant Legal  
Services, Texas RioGrande  
Legal Aid, quoted in  
Southern Migrant Legal  
Services, Press Release:  
Workers Sue East  
Tennessee Tomato Farm  
For Discrimination  
and Retaliation  
(Apr. 12, 2011)

as paid sick days, and fill the slot with a guest worker willing to accept the approved terms. Similarly, a demand for higher wage rates by a labor union can be easily rejected. Thus, the minimum wage rates and other job protections required by the H-2A program usually become the maximum that a worker can hope to attain and that an employer need offer.

It is clear that a vulnerable foreign labor force allows employers to squeeze out maximum productivity at minimal labor cost. But an important question remains: Why can agricultural employers access unlimited numbers of foreign guest workers while employers in other industries must compete for workers in the labor market?

## WHO USES H-2A? AN ANALYSIS OF DOL DATA

The H-2A program historically has been concentrated in particular geographic areas and crops, but it has spread to new states and crops in the last decade. Every state had H-2A

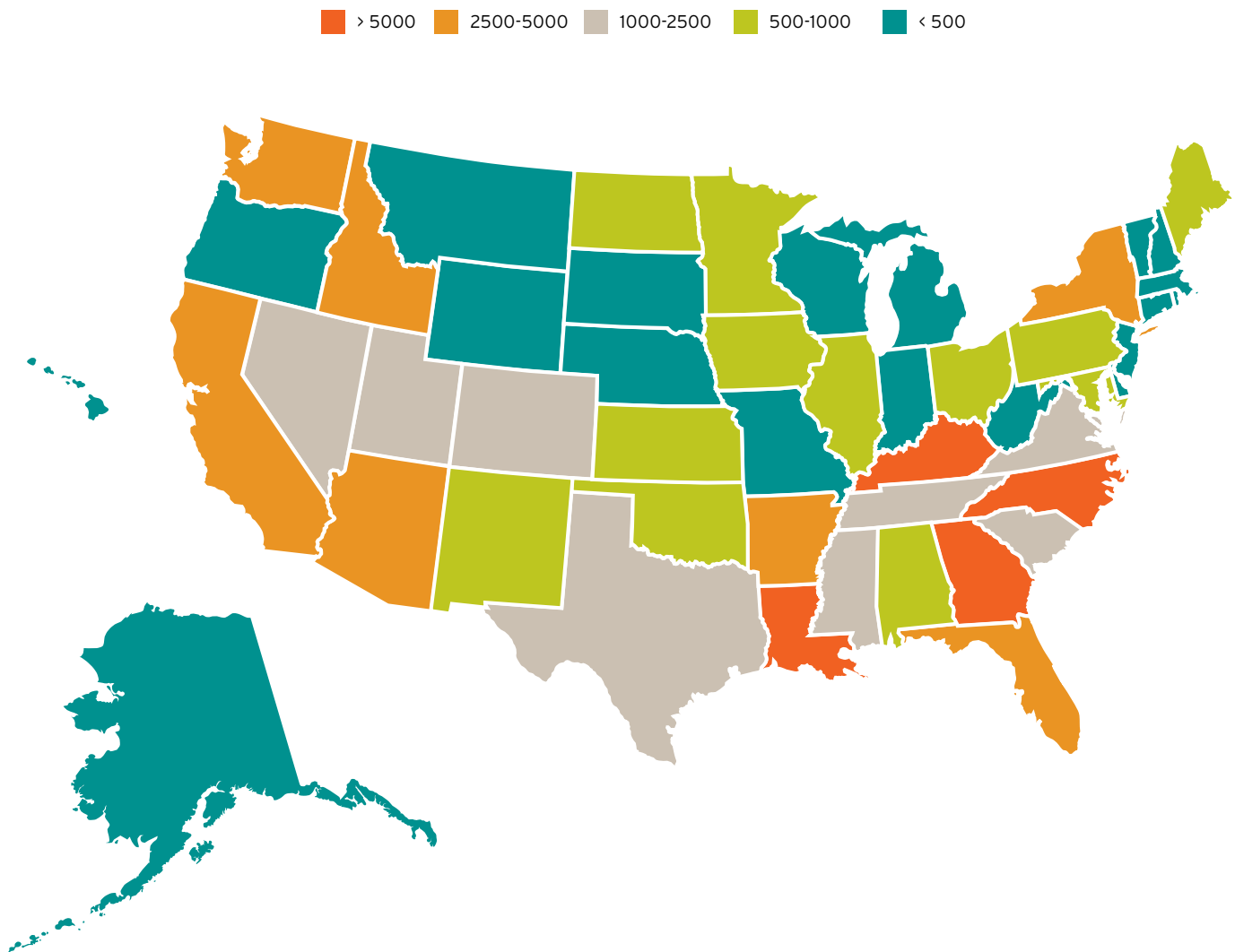


workers in fiscal year (FY) 2010 (see Figure 1). H-2A workers make up a significant section of the workforce in North Carolina tobacco, New York apples, Louisiana sugarcane, and Florida citrus. They pick strawberries in California, harvest onions in Georgia, and cut lettuce in Arizona. Some H-2A workers even labor in the wheat fields of Texas and the corn fields of Minnesota. In short, H-2A workers are involved in nearly every segment of the agricultural industry in the United States. Still, at approximately 80,000 certified positions, the H-2A

program represents only a small percentage of the nation's 2 to 2.5 million agricultural workers.

North Carolina has been the state most heavily invested in the H-2A program during the last 15 years, with 9,387 positions certified in FY 2010, comprising nearly 12% of the national H-2A workforce. Other states with more than four thousand H-2A positions in FY 2010 included Louisiana, Georgia, Florida, Kentucky, and Arizona (see Figure 2).

**Figure 1: Number of H-2A Workers Certified by State (FY 2010)<sup>14</sup>**



<sup>14</sup> Analysis by Farmworker Justice based on data from H-2A Disclosure Database at <http://www.flcdatabase.com/CaseH2a.aspx>. Analysis of the H-2A disclosure data file requires careful assessment, as the database contains some duplicate records for the same application. This occurs when a master application is submitted by a grower association filing as joint employer with its members, and both the master application and employers' requests are entered into the data file separately using the same case number. Therefore, to avoid double counting, we used only the record with the largest (summary) number from the column, "Number of Workers Requested" for records with the same case number. Source: Personal email from Charnessa Hanshaw, Program Management Analyst, Office of Foreign Labor Certification.



The expansion of the H-2A program has continued during an economic downturn and high unemployment (see Figure 3). In FY 2005, the DOL's Office of Foreign Labor Certification (OFLC) approved 48,336 H-2A positions. In FY 2009, OFLC approved 86,014, an increase of nearly 80% in just four years.<sup>16</sup>

There are U.S. workers who want agricultural jobs, but the H-2A program often allows employers to avoid hiring them. All the

top six H-2A states, with the exception of Louisiana, had a 2010 average unemployment rate higher than the U.S. average of 9.6%. In North Carolina, for example, the 2010 average unemployment rate was 10.6%.<sup>17</sup>

Yet, because the H-2A program lacks an adequate test of the labor market, employers who could have recruited and hired U.S. workers were permitted by DOL to hire foreign guest workers instead.

**Figure 2: Top 15 H-2A States (FY 2010)<sup>15</sup>**

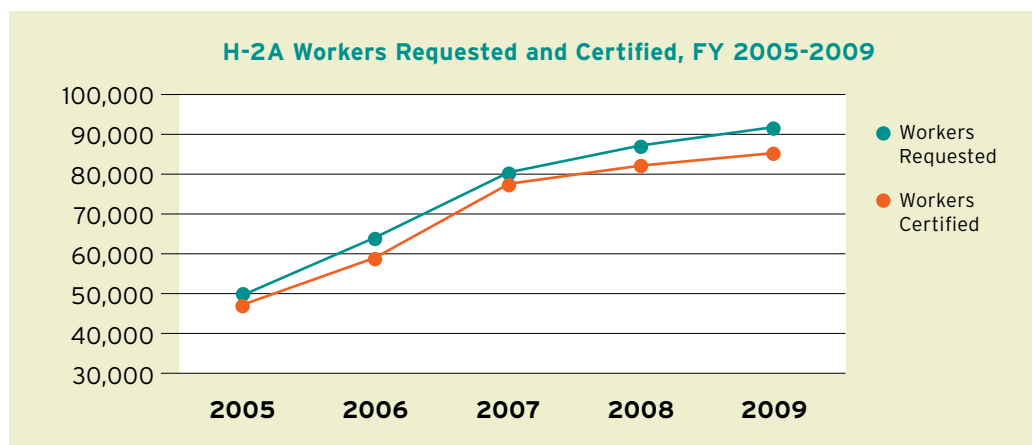
STATE	Workers Certified	% Certified
North Carolina	9,387	95.0%
Louisiana	6,981	93.3%
Georgia	5,561	69.8%
Kentucky	5,455	98.7%
Florida	4,510	92.7%
Arizona	4,309	86.0%
New York	3,858	94.1%
Washington	3,014	94.8%
Arkansas	3,006	86.9%
California	2,629	94.5%
Idaho	2,547	89.2%
Virginia	2,455	97.6%
Texas	2,319	75.3%
South Carolina	2,247	91.5%
Tennessee	2,183	96.5%



The H-2A program's protections for U.S. workers' job preference and against exploitation of guest workers by employers are modest; in fact, they are similar to those in the bracero program (1942-1964), which was terminated due to its

**NOTORIOUS  
LABOR ABUSES.**

**Figure 3: Increase in H-2A Requests and Certifications (FY 2005-2009)<sup>18</sup>**



<sup>15</sup> "% Certified" is  $N \times 100$ , where N = (the number of workers certified by DOL/number of workers requested by employers).

<sup>16</sup> U.S. Department of Labor, Office of Foreign Labor Certification, Foreign Labor Certification Performance Reports, FY 2006 and FY 2009. Online at: <http://www.foreignlaborcert.doleta.gov/>

<sup>17</sup> "News Release: Regional and State Unemployment - 2010 Annual Averages," U.S. Department of Labor, Bureau of Labor Statistics (25 February 2011), online at <http://www.bls.gov/news.release/pdf/srgune.pdf>.

<sup>18</sup> Data from Foreign Labor Certification Performance Reports, FY 2006, FY 2007, FY 2009. Online at: <http://www.foreignlaborcert.doleta.gov/>



PART  
02

# THE FACES OF ABUSE



## REPLACEMENT OF U.S. WORKERS

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Though the regulations governing the H-2A program require employers to give job preference to qualified U.S. workers, in practice the H-2A program puts U.S. workers out of work. Growers can often be heard chanting the chorus that U.S. workers “just don’t work as hard” or are “not as loyal” as foreign workers. But rather than prove the inherent laziness of all Americans, these claims simply reveal the disproportionate power that employers hold over a foreign labor force with few rights. >>



U.S. workers have alternatives and can change jobs if they are unhappy with their workplace—a freedom not allowed H-2A workers. Additionally, H-2A growers can save money by hiring guest workers; they do not have to pay Social Security and unemployment taxes on the wages paid to H-2A workers, but must do so for U.S. workers. Growers have thus gone to great lengths to unlawfully exclude qualified U.S. workers in favor of guest workers.

The gimmicks used to deny employment to qualified U.S. workers are plentiful. Real-life examples include interviews scheduled at inconvenient times or locations; hiring that occurs too early in the season, leading workers to arrive for work when there is none; limiting domestic workers' hours in order to discourage them from continuing to work; employment contracts demanding that workers give up their right to sue a grower for lost wages; and unrealistic work

demands and productivity quotas. Employers know that they can—and often do—chase away willing U.S. workers with such unfair terms.

Other times there is no pretense: Domestic farmworkers are simply turned away or fired in favor of guest workers. For example, in 2006, after harvesting citrus fruit for an Arizona labor contractor for three previous seasons, a crew of domestic employees was told by their foreman that the company would no longer hire domestic labor, but would instead use H-2A. Sure enough, when they arrived at the *corralon* (pick-up spot) the buses previously reserved for them were now filled with H-2A workers “from all over Mexico.” Fernando, a U.S. citizen and displaced worker, asserted, “I’m not against H-2A workers, but they should hire us, the experienced workers, first.” A complaint alleging discrimination against the U.S. workers is currently pending in federal district court.<sup>19</sup>



“I think it was more or less, they didn’t want the Americans out there.”

—Kathern (Colquitt County, GA)

#### A FARMWORKER'S STORY

## Mary Jo and Kathern (Colquitt County, GA)

Mary Jo and Kathern are longtime residents of Colquitt County, Georgia. Both have worked in agriculture for much of their lives, and Mary Jo grew up with her grandmother, who worked as the live-in housekeeper for a farm family. She learned to pick vegetables at the age of fourteen. More recently, she was a crew leader on some other farms in the area. “I love to work,” said Mary Jo.

In September 2010, both Mary Jo and Kathern were out of work. At the unemployment office they saw an H-2A job-order for zucchini picking advertising \$9.11 per hour for 40 hours a week of work. The work was at the same farm on which Mary Jo grew up, which was now owned by the sons of her grandmother’s employer. They both signed up.

But when Mary Jo, Kathern, and their coworkers arrived at the farm at 7:00 am, they found that to get the advertised wage, workers would have to meet a production standard of nine buckets an hour. Furthermore, the U.S. workers who arrived were forced to wait until 9:00 am before being allowed into the fields, even though a number of Mexican H-2A workers were already working.

Once in the fields, Kathern and Mary Jo had a hard time making the standard. After filling each bucket, they spent valuable time walking to the tractor—parked across the field—to unload. Meanwhile, the tractor serving the H-2A workers was close by. “They was trying to get us to quit,” said Kathern, “[but]

I said, ‘we need to prove to ‘em that we at least want to work.’”

At about 10:30 am, Mary Jo, Kathern, and their co-workers were told their work for the day was done. “They sent all the blacks home,” said Mary Jo, while the H-2A workers continued to work.

They were given work only every other day, and experienced the same frustrating routine. Finally, the workers who did not meet the production standard, including Mary Jo and Kathern, were fired. After transportation costs Mary Jo came home with less than \$30 for three workdays. “I’ve never been fired,” said Mary Jo. “This is the first time it’s ever happened to me.”

Kathern explained, “The farmers can take advantage of the [guest workers] where they can’t take advantage of the Americans... because we know the laws when [they] don’t... I think it was more or less, they didn’t want the Americans out there.”



<sup>19</sup> Personal phone interview, 16 May 2011. See Figueroa et al. v. Servicios Agrícolas Mex, Inc. et al., No. 2:07-CV-02581-EHC (D. Ariz, Filed 19 December 2007).



## Chinnawat (Johnston County, NC)

The soft tone of Chinnawat's voice indicates a man who possesses wisdom born of experience. A victim of human trafficking and recruitment fraud, Chinnawat was brought to North Carolina from his native Thailand to do farm work in 2005. He had previously been recruited for temporary work in other countries, including Taiwan, where he had a "good experience." But the U.S. guest worker program would prove much less hospitable.

The H-2A recruiter's promises sounded reliable: \$8 an hour; 40 hours a week; free housing and food; a year-long contract, with the promise that it would be extended for two years. Chinnawat took out loans with his house as collateral to pay the approximately \$11,250 recruitment fee, figuring that even at 3% interest per month it was a smart investment for three years of "good work, good pay" as an H-2A worker in America's vegetable fields.

On arrival in North Carolina in August 2005, the workers were sent to a motel where they slept as many as 6 or 7 to a room, the first sign, perhaps, that conditions might be different than promised. Chinnawat volunteered to cook for the workers and also worked picking broccoli and potatoes.

Soon they were moved to a barn behind the labor contractor's house, shared with insects and mice. They slept on the dirty vinyl floor and washed their hands and clothes at an outdoor faucet. At first the contractor provided decent food but soon became stingier, giving them only rice and vegetables. Workers had to scrounge for extra food in the fields. But the workers were afraid

to complain, explained Chinnawat, because they needed work.

Within weeks, work dried up, and only a few workers were allowed in the fields each day. The rest received no pay. Many "panicked," said Chinnawat, as they had no money to pay interest on their debt. Yet they were told not to leave the farm and feared that the police might arrest them if they disobeyed. The contractor would clean his gun in the workers' presence, an unspoken sign, said Chinnawat, of his power to endanger them and their families.

After Hurricane Katrina, the contractor took Chinnawat to New Orleans to do clean-up work. But this, too, lasted only a few days. Without money for food, Chinnawat was so hungry he caught and cooked a pigeon from the street.

Returning to North Carolina, Chinnawat decided that he could no longer live in these conditions.

Fortunately, he met a legal aid attorney, who helped him organize an escape from the farm and connected the workers with an organization in Virginia. Chinnawat obtained a visa reserved for victims of trafficking. He now works in northern Virginia as a chef in a Thai restaurant, and lives with his wife and one of his two children.



Once an employer decides to enter the H-2A program, the law creates incentives to

### PREFER GUEST WORKERS

over U.S. workers. For example, the employer must pay Social Security and unemployment taxes on U.S. workers' wages but is exempt from paying these taxes on guest workers' wages.

As Dawson Morton, a legal services attorney in Georgia, recently said on HDNet's *Dan Rather Reports*, growers are "using the temporary guest worker program not as a temporary replacement but as a permanent workforce."<sup>20</sup> The protections aimed at preventing the H-2A program from replacing U.S. workers are clearly ineffectual. H-2A employers are thus given wide latitude to turn away domestic workers in favor of vulnerable foreign workers.

## RECRUITMENT, DEBT, AND HUMAN TRAFFICKING

Temporary workers from Mexico, Jamaica, or Peru do not just happen to appear by magic in places like Moultrie (GA), Red Creek (NY),

Petoskey (MI), or Yakima (WA) to take jobs in the fields. Rather, nearly all H-2A employers rely on private recruiters to find available workers in their home countries and arrange their visas and transportation to the fields.

Because it takes place outside the United States, this recruitment network is unregulated and highly exploitative.

Despite recently revised regulations making growers promise that neither they nor their agents have received fees from workers to obtain a job, some growers are quite willfully ignorant of what goes on across the border. With many potential recruits hoping to escape poverty at home, recruiters have a significant incentive to charge recruiting fees at great personal profit.

<sup>20</sup> "All I Want is Work," Dan Rather Reports (HDnet), Episode 532 (12 October 2010), online at: [http://www.hd.net/ui/inc/show\\_transcripts.php?ami=A6680&t=Dan\\_Rather\\_Reports&n=532](http://www.hd.net/ui/inc/show_transcripts.php?ami=A6680&t=Dan_Rather_Reports&n=532)

Thus, most H-2A workers arrive in the United States with significant debt. Some have paid as much as \$11,000 for the chance at a job. Others have left the deed to their house or car in the hands of a recruiter as collateral to ensure that they will “comply” with the terms of their contract. Some fear for their own physical safety or that of their family members if they cannot repay their debt. Many have been lied to about the conditions of the work, including wages, crops to be picked, length of their visa, and type of housing. Tied to one employer, workers have no choice but to work at whatever wage the employer offers. In short, the H-2A program creates conditions ripe for debt-peonage, not unlike the labor arrangements suffered by many African Americans in the post-Civil War South.

This system of debt can lead to forced labor as well. The H-2A recruitment company Global Horizons Manpower, Inc. faces well-publicized and documented accusations of human trafficking and enslavement. During 2004-2005, the company allegedly brought more than 400 Thai H-2A workers to farms in Hawaii and Washington with promises of long-term employment, forced them into debt with recruiting fees of up to \$21,000, and held them in forced labor conditions. According to an indictment filed by the Department of Justice

against the company's CEO and other executives, the object of this scheme was

**...to obtain cheap, compliant labor performed by Thai H2A guest workers indebted by the defendants' recruiting fees, and to compel the workers' labor and service through threats to have the workers arrested, deported, or sent back to Thailand, knowing the workers could not pay off their debts if sent home, thus subjecting the workers to serious economic harm including loss of their family property.<sup>21</sup>**

The Global Horizons scheme is the largest human trafficking case in U.S. agriculture, but it is by no means a unique case of recruitment abuses. As long as the H-2A program allows growers to rely on unregulated foreign recruiters, worker debt, fear, and illegal human trafficking will be the program's inevitable byproducts.

## WAGE THEFT

**Foreign workers' vulnerability** and lack of knowledge about their rights make them



I'm working, doing my best, feeling the sun on my back, working hard like a donkey, just so I could give my money to these people? How do you think I feel? You just feel like crying.

—Manuel  
(Okeechobee, FL)



<sup>21</sup> U.S. v. Orian et al., Indictment, No. 1:10-CR-576 (Dist. Hi., filed 1 September 2010), at 4.





“They want to keep the beds filled with hands that can work. They don’t care about the people.”

—Javier (Yadkin County, NC)

particularly susceptible to wage theft and other labor law violations.

Employers have devised many ways of ducking their obligations to pay workers the DOL-mandated wage, leading to lawsuits compelling H-2A employers to pay workers what they are rightfully owed. For example, in 2007, 80 H-2A workers in Georgia sued their employer for routinely underpaying them and missing paychecks. The employer had allegedly prepared backdated checks to hide late payments and false checks to hide non-payments, and had made the workers endorse blank checks.<sup>22</sup> In another class action suit in 2007 in Florida, an H-2A employer was sued for failing to report

all the hours employees had worked, in order to pay them less than required by the AEWR.<sup>23</sup> These are hardly isolated incidents; it is clear that wage theft is rampant throughout the H-2A program.

Some employers pay a piece rate rather than hourly wages. In theory, a piece rate encourages workers to work faster than they would under an hourly rate and produce more for the employer. But when employers set the rate low, and workers’ earnings fall below the minimum H-2A rate, H-2A employers are required to supplement piece-rate earnings with “build up” pay to equal the AEWR or minimum wage for every hour worked. Often, however, the opposite happens:

## A FARMWORKER’S STORY

### Manuel\* (Okeechobee, FL)

Manuel, a father of four from Veracruz, Mexico, has been working in citrus orchards since he was a child. But in recent years, Manuel has had trouble making ends meet from work in Mexico. “There’s nothing here, nothing to eat,” said Manuel, so he looked north for work.

In December 2008, Manuel was able to land an H-2A job picking oranges for a Florida contractor that provides labor for one of the largest citrus companies in the U.S. He was told he’d be making \$8.82 an hour. On arrival in Florida, he set out working long, hard days, sometimes 12 hours or more in the fields. But when his first paycheck arrived, Manuel learned that in order to keep his job he would have to kick back some of his promised pay to his employer.

“When we came out of the bank, the boss was already on the bus waiting for us,” remembered Manuel. The boss had a “blacklist” in his hand indicating how many tubs of oranges each worker had filled. Workers were forced to pay back the difference between their piece rate earnings and the legally-required Adverse Effect Wage Rate (AEWR)—also known as build-up pay—to the crewleader. “He was robbing us...he stole a lot of money,” said Manuel, who had to kick back as much as \$130 some weeks.

Though the workers knew that they were legally entitled to be paid the hourly AEWR, their employer took advantage of the fact that their visas were dependent on him. “Many people wanted to complain but they were afraid...to have to come back to Mexico,” Manuel explained. In fact, they had been told that anyone who

refused to kick back the build-up pay would be sent home.

When it came to the halfway point in the season, the employer decided to change the terms of transportation reimbursement, as well. “The boss said, ‘I’ll reimburse you [for the cost of getting to Florida], but then you have to pay me for where you live.’ But how is that possible? We, the farmworkers, know we have the right to a house, transportation, stove, and a refrigerator. We didn’t know why he was charging for that,” exclaimed Manuel.

The loss of money for transportation and kick backs left Manuel struggling to feed even himself, much less send money back home to support his family. “I didn’t have anything to eat...I was starving,” said Manuel. He left to return to Mexico two months before the contract was over, forced out by the employer for daring to voice his concerns.

Manuel spoke passionately about the feeling of being cheated: “I had the money in my hands; I thought it was mine. But I’m working, doing my best, feeling the sun on my back, working hard like a donkey, just so I could give my money to these people? How do you think I feel? You just feel like crying.”



\*Not real name

<sup>22</sup> Morales-Arcadio et al. v. Shannon Produce Farms, Inc. et al. 2007 U.S. Dist. Lexis 51950 (S.D. Ga. 2007).

<sup>23</sup> Paseco-Castillo v. N & R Services of Cent. Fla., No. 8:07-CV-01804 (M.D. Fla., filed Oct. 3, 2007).



Employers claim that employees worked fewer hours than they actually did in order to make it appear that the workers averaged the minimum wage per hour. Other times workers are forced to “kick back” the make-up pay to a crew leader, rendering the AEWR meaningless.

Growers have also been known to apply productivity standards, requiring workers to fill a specified number of buckets per hour or day. Often this is another way to weed out American workers; as the productivity demands get harder without a real pay increase, U.S. workers are less likely to apply for the jobs that desperate guest workers will reluctantly accept.

H-2A workers are dependent on employers for their visas and livelihoods. They are often fearful that if they demand the wages owed to them they will be fired and deported or refused re-hire

next year. But even when H-2A workers do decide to seek out help to recoup their rightful wages, potential remedies are limited. H-2A workers are excluded from the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the chief labor law aimed at protecting farmworkers. H-2A workers are thus not entitled to sue in federal court for lost wages, housing benefits, transportation reimbursement, and other requirements of the H-2A contract.

H-2A workers often cannot receive back pay for wage theft because they lack meaningful access to attorneys and the court system. Few private attorneys accept farmworker cases due to language barriers, the low dollar value of cases even when they are egregious, the slim chance that losing employers will pay attorneys’ fees (the law usually does not require that they do so), rural isolation of the



“The growers only want single men with no families and the H-2A jobs make it worse.”

—*Testimony from a female farmworker to the Michigan Civil Rights Commission, quoted in A Report on the Conditions of Migrant and Seasonal Farmworkers in Michigan (2010).*





Recruitment abuses are endemic to the H-2A program, and the vulnerability and powerlessness of guest workers has led to numerous cases of debt-peonage,

## HUMAN TRAFFICKING AND FORCED LABOR.

clients, conflicts of interests in suing local farmers who they have represented, and the workers' inability to remain in the local area during the litigation. Legal aid programs are permitted to represent H-2A workers, but they are underfunded and cannot reach many of the workers who need help.

## AGE, GENDER, AND ETHNIC DISCRIMINATION

Though DOL does not publish statistics on age and gender of H-2A workers, it is well known that women and older adults are basically absent from the H-2A program. That is because the H-2A program allows agricultural employers a luxury denied to all other domestic employers:

access to a demographically “ideal” workforce.<sup>24</sup> Since the Civil Rights Act of 1964 and the Age Discrimination Employment Act of 1967, employers in the U.S. have been forbidden to use race, color, religion, sex, national origin, and age as factors in hiring practices. Yet the government refuses to investigate and curb abuses that occur during recruitment abroad.

Consequently, H-2A employers' recruiters often search out a very specific demographic, thought to be perfect for farm work: young single men without family in the United States, who will devote all day every day to work. Workers who don't fit into this category have very little chance of being selected for an H-2A visa. Thus, the H-2A program is fundamentally anti-family. Young men come to the U.S. without their family members, often for separations of many months, causing stress for spouses and children, as well as guest workers.



<sup>24</sup> See Reyes-Gaona v. NCGA, 250 f.3d 861 (4th Cir. 2001).

## Javier\* (Yadkin County, NC)

Javier, 50, has more than 15 years experience as a worker in the H-2A program. Every year, Javier would travel from his home outside Guanajuato, Mexico to North Carolina for a job in the tobacco fields. With few jobs at home, this was the only way he could provide for his wife and four children.

Since the summer of 2010, however, Javier has been physically unable to work. That summer, Javier and his H-2A coworkers were exposed to pesticides on more than one occasion. Once, an employee of the grower was spraying pesticides less than 20 meters from them. Another time, on a hot day in August, Javier and about 18 other workers began to feel sick. Some were vomiting, and many experienced such strong cramps that they couldn't stand up and had to lie down. "We fell. We fell like animals in the field," Javier reported. He reports feeling that he had "chilies all over his body."

Many of the workers returned to the labor camp, but housing conditions were crowded and not suitable for recovery. Sixteen workers were packed into each room, sleeping nearly on top of each other. Javier explained: "I was so close to others, sometimes I'd wake up feeling someone's foot in my back or in my stomach." There were only two showers to use to wash the chemicals off their bodies.

For a few days, Javier felt sick but continued to go to work. "I had to work...for my kids," said Javier. Finally, he felt so bad

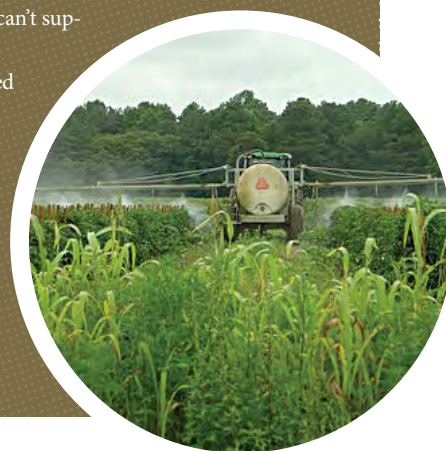
that he phoned a local clinic outreach worker to take him to the hospital. He was sent back to the camp with a note that he could not work in tobacco.

No longer useful to his employer, Javier was told that he should go back to Mexico to recover. He was encouraged to sign a paper saying that he was leaving, with the understanding that if he signed he'd be allowed back in future seasons. He paid his own bus ticket for the trip home to Mexico.

Nine months later, Javier still has nausea, feels dizzy, and has trouble walking. He feels too sick to work, but still owes the debt he incurred to support his family when he could not finish the season. He cannot afford the necessary specialized medical care and has even had to take one of his kids out of school because he can no longer pay for it.

"I am full of outrage that I can't support my family," he said.

Javier succinctly described why H-2A employers dispose of workers injured on the job. "They want to keep the beds filled with hands that can work," he said. "They don't care about the people."



*\*Not real name*

Women constitute more than 20% of farmworkers, yet there are very few, if any, in the H-2A program. Often, women interested in being guest workers are funneled into the H-2B non-agricultural guest worker program, a program with even fewer protections than H-2A. This systematic gender discrimination came to light in a class action lawsuit led by Marcela Olvera-Morales, a Mexican farmworker, against International Labor Management Corporation, Inc. (ILMC), a major labor recruiter connected with the North Carolina Growers' Association. Olvera-Morales contended that ILMC had chosen less-qualified male workers for H-2A jobs, while intentionally sending her and other women to H-2B jobs, knowing that those jobs were less desirable.<sup>25</sup>

The culture of discrimination in H-2A extends to race and national origin as well. Indeed, employers are basically free to act on negative racial and ethnic stereotypes regarding both U.S. and foreign

workers. For example, one H-2A employer from North Carolina has explained that he hired Asian workers to "try a new breed" because Hispanic workers had been "Americanizing" and "getting lazy."<sup>26</sup> This kind of explicit racial discrimination, illegal in the rest of the country, seems commonplace in the fruit and vegetable fields of this country.

## INJURED WORKERS

**Agriculture is one of** the most dangerous industries in the United States. According to the Bureau of Labor Statistics, crop production workers had a fatal injury rate nearly ten times the average rate for all industries. Non-fatal injuries are extremely common as well; in 2009,

<sup>25</sup> Olvera-Morales v. Int'l Labor Mgmt. Corp., Inc. et al., 2008 Westlaw 506090, \*1 (M.D.N.C. Feb. 20, 2008). See also, "Close to Slavery."

<sup>26</sup> Deposition of Roy Raynor, Volume 1, in *Bracero v. New Tree Personnel Services, Inc.*, 3:05-CV-02074-CCC (D. P.R., 2006) at 226, 320.



there were 4.9 non-fatal work-related injuries for every 100 full-time crop workers.<sup>27</sup>

On paper, the H-2A regulations require employers to provide H-2A workers with workers' compensation insurance to protect them in case of a work-related injury. But in reality, complex workers' compensation rules, which vary from state to state, often prevent H-2A workers from accessing these benefits, especially after they have returned to their home country, which the program demands.<sup>28</sup>

Severely injured workers and their families are thus never compensated for the lost income from their injury. Employers may also encourage workers not to apply for benefits, may simply return injured workers to their home countries, or may get injuries taken care of quietly, in order to prevent a hike in insurance premiums.

The H-2A program does not require employers to provide health insurance, and foreign non-immigrants are not eligible for Medicaid, so few H-2A workers can access health care for non-work-related illnesses or injuries. Though there is no data on the number of H-2A workers with health insurance, a 2003 report estimated that only 5-11% of all farmworkers had employer-provided insurance.<sup>29</sup> Federally funded community health centers are available to H-2A workers at

low cost but often are not located near enough to workplaces.

The experiences of injured or ill workers highlight the status of guest workers as disposable commodities to be retained only as long as they are useful to an employer. H-2A workers with health problems are often fired or coerced to sign "voluntary" quit forms in exchange for unenforceable promises that they will be hired the following year. When workers return to their home countries, it is often very difficult for them to pursue their workers' compensation claim, and frequently comprehensive medical care is inaccessible.

## UNSAFE AND UNHEALTHY HOUSING

**Under the regulations,** H-2A employers are required to provide or pay for housing for all guest workers and any domestic workers who are not reasonably able to return home each day.<sup>30</sup> Employer-provided housing must meet DOL safety standards for farm labor camps, including adequate sanitation, water supply, toilet, laundry, bathing facilities, and pest control.

In reality, H-2A workers frequently describe their housing as dirty, cramped, unsanitary,



<sup>27</sup> U.S. Department of Labor, Bureau of Labor Statistics, Census of Occupational Injuries and Illnesses 2009, Hours-Based Fatal Injury Rates, online at [http://www.bls.gov/iif/oshwc/cfoi/cfoi\\_rates\\_2009hb.pdf](http://www.bls.gov/iif/oshwc/cfoi/cfoi_rates_2009hb.pdf); Industry Injury and Illness Data 2009, Summary Table 1, online at <http://www.bls.gov/iif/oshwc/osh/os/ostb2435.pdf>

<sup>28</sup> "Close to Slavery," at 26.

<sup>29</sup> Villarejo D. 2003. The Health of US Hired Farmworkers. *Annu Rev Public Health* 24: 175-93.

<sup>30</sup> 40 C.F.R. 655.122 (d)

## Juan (Rockcastle County, KY)

Juan, 30, lives in Hidalgo, a state in central Mexico, where he has two young children, ages four and one and a half. In 2008, he began working in Kentucky tobacco on an H-2A visa. Because he speaks some English, Juan became the leader of his crew, serving as the liaison between his employer and the other workers. Still, Juan's leadership position did not protect him from the poor housing and working conditions faced by H-2A workers on his employer's farm.

In the summer of 2010, Juan's crew was housed by his employer in dilapidated trailers near the fields. According to Juan, the trailers had holes in the roofs, leaky pipes, and were infested with rodents. He and his coworkers were given dirty second-hand mattresses, blankets, and sheets. "The mattresses were in bad shape," said Juan. When it rained, water would leak in from the roof and moisture would infiltrate from below, leaving the trailers damp and moldy.

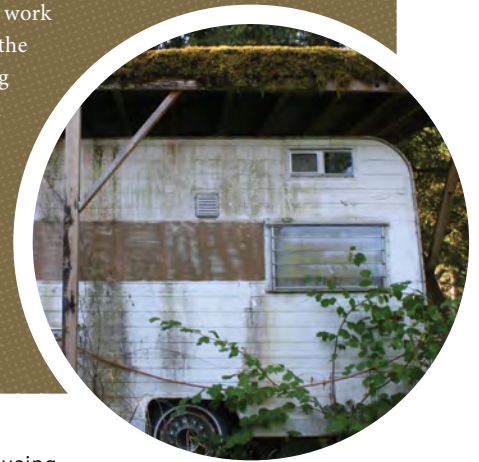
Juan and his fellow H-2A workers spent their own money and time trying to fix up the trailers, including multiple attempts to repair the water pipes and patch the holes in the roof, but the conditions were constantly deteriorating. "Even after we fixed it, water would get in," Juan explained. They were also illegally required to pay for utilities, including electricity and water.

Conditions in the fields were not much better. Juan and his coworkers were exposed to pesticides but did not

receive any training or protective equipment to help them reduce the risks to their health. Some workers became sick from pesticide exposure, and many suffered from nausea and dizziness. A few seasons ago, one worker was taken to the hospital for pesticide poisoning.

All the while, Juan wasn't paid adequately for his work. Though Juan and his coworkers had been promised \$8.00 an hour, they were often paid only about \$6.00. A recruitment fee of \$800 was deducted from Juan's paycheck. Many weeks they only were needed for three days of work. During these idle times they were forced to seek work on neighboring farms to make money.

In August, 2010, Juan was fired. He says his employer was not satisfied by the workers' pace and demanded they work faster. But it is clear that the employer was not keeping up his side of the bargain – providing livable housing, honest wages, and decent working conditions. "[The H-2A contract] had no enforceability," said Juan.



or pest-ridden—and sometimes all of the above. Indeed, farmworker housing has not improved much since the images portrayed in Edward R. Murrow's documentary on the conditions of farmworkers, "Harvest of Shame," shown on Thanksgiving, 1960. H-2A employers have placed five men in a single motel room with one bathroom, and reports have described workers sleeping on the floor because of worn and moldy mattresses. Other problems have included crumbling buildings; rat infestations; moldy toilets, showers, and sinks; and in one case workers were even known to be living in a converted chicken coop.<sup>31</sup> Because a tangled mass of state and federal regulations and agencies

holds authority over farmworker housing, deplorable conditions may go unnoticed.<sup>32</sup>

Employers have long tried to reduce or eliminate the housing requirement. For example, H-2A growers in border regions, particularly in the Yuma, AZ region, have recently claimed that their workers don't want housing, and would rather cross the border to return to their homes in Mexico each night.<sup>33</sup> Instead, they have advocated for a "border commuter" program that would exempt employers near the border from the H-2A housing requirement. Sen. Chambliss (R-GA), though not from a border state, introduced a bill including such a program in 2010. This idea is not new; similar claims were made in the 1970s by H-2 employers

<sup>31</sup> For reports of these conditions, see: Complaint in *Asanok et al. v. Million Express Manpower, Inc.*, et al. 5:07-CV-00048-BO (E.D. NC 2007); Barry Yeoman, "Silence in the Fields," *Mother Jones* (January/February 2001), accessed 21 April 2011 at <http://motherjones.com/poitics/2001/01/silence-fields>; U.S. Department of Labor, WHISARD Compliance Action Report, Demski Farms, Coloma, MI, (21 August 2007); Leah Beth Ward, "Desperate Harvest," *Charlotte Observer* (30 August 1999), accessed 21 April 2011 at <http://are.berkeley.edu/APMP/pubs/agworkvisa/desperate103099.html>.

<sup>32</sup> Depending on the kind of housing and date it was built, H-2A housing may be governed by OSHA, ETA, state or local housing standards, or a combination of these. See 20 C.F.R. 655.122(d).

<sup>33</sup> Griselda Nevarez, "Jones: Change farmworker housing rules," *YumaSun.com* (9 March 2011), accessed 21 April 2011 at <http://www.yumasun.com/news/workers-68302-housing-farmers.html>.



from the Presidio region of Texas when they refused to offer housing to their guest workers.

Of course, under the current regulations, workers are not required to accept housing if they would rather commute daily from Mexico. Furthermore, anecdotal evidence suggests that current H-2A workers in the border region come from a variety of places, including Guanajuato in central Mexico and Oaxaca in distant southern Mexico.<sup>34</sup> A “border commuter” housing exemption would leave Mexican border towns with the burden of providing sufficient housing for the influx of workers from other regions arriving for the opportunity to become H-2A workers. Many workers could end up in substandard housing or homeless, sleeping

on the streets or in fields. Additionally, the existence of large numbers of workers crossing the border daily would increase the danger that Mexican drug cartels could take control of labor camps in Mexico and recruit workers for drug smuggling. A border commuter program would harm H-2A workers, U.S. workers, and the border communities.

## RETALIATION AND LABOR ORGANIZING

**H-2A workers who wish** to stand up to unfair or illegal conduct have reason to fear retaliation

### A FARMWORKER'S STORY

## Diego (Harnett County, NC)

Diego, 48, has experienced first-hand the stark contrast between life before and after the signing of a union contract. A veteran of nine seasons in the North Carolina tobacco fields, Diego is a lifetime farmworker from San Luis Potosi, Mexico. He is proud of his strong work ethic and his participation in the protests that led to the collective bargaining agreement between the Farm Labor Organizing Committee, AFL-CIO (FLOC) and the North Carolina Growers Association (NCGA). “There have been many positive changes,” since the adoption of the contract, Diego said.

Diego first came to North Carolina under a 6-month H-2A contract in 2003. He paid a recruiter \$470 to obtain the job, and had to pay similar sums to return each year. The wages were low, and he was often paid on a piece rate. Workers were on call 24/7. “We were obligated to go to work at any time the boss wanted to take us to the field,” explained Diego.

Diego described his housing conditions as especially bad in those first years; he recalled abandoned houses, insect-infested mattresses, and overflowing toilets that went unrepaired for days. “The boss didn’t care,” remembered Diego.

Remarkably, Diego and many of his fellow H-2A workers risked their jobs by protesting for better conditions. In 2004, FLOC, a farmworker union with roots in the Midwest, signed a collective bargaining agreement with NCGA, the umbrella company that organizes H-2A visas and paperwork for many North Carolina growers. The agreement covers thousands of H-2A workers and has set up a grievance procedure for

workers and growers to address complaints.

Since the signing of the FLOC contract, Diego has seen marked improvements. Workers no longer pay recruitment fees to be hired back each year and are reimbursed for visa fees on arrival in North Carolina. Wages have increased. Workers can take water breaks to protect themselves from heat-related illness without fear of getting fired, and they even get paid leave in the event of a family death. Growers respond to union concerns - when FLOC representatives came to Diego’s camp to document poor housing conditions, his boss immediately bought new mattresses and kitchenware for the workers.

Diego is overjoyed that the wages and working conditions as part of the FLOC contract have allowed him to support his family, including 11 children. “I’ve been able to provide for them, give them clothes...not the best clothes...I’m very happy now that they can be in school and college,” exclaimed Diego.

“I encourage all workers to join a union,” said Diego. “[Workers] should get involved in FLOC because of all the good they’ve been able to do. I invite all the friends to join us and work with us.”



<sup>34</sup> Mara Knaub, “Farmworkers - ‘Who Else Would Do All the Work?’” [YumaSun.com](http://www.yumasun.com/articles/workers-65945-migrant-duron.html) (6 December 2010), accessed 21 April 2010 at <http://www.yumasun.com/articles/workers-65945-migrant-duron.html>.

in the form of discharge and deportation as well as denial of a job and visa in a future season. Because foreign citizens have no ability to apply independently for an H-2A visa, they must hope that an employer will request a visa for them. Employers have been able to retaliate against H-2A workers who assert themselves simply by refusing to offer visas to the workers in a following season.

In other industries, workers may achieve bargaining power and protection from retaliation through unionization. Though California's Agricultural Labor Relations Act grants farmworkers the right to join a union and mechanisms to engage in collective bargaining, farmworkers in most other states do not have the right to unionize, and agricultural workers are excluded from the National Labor Relations Act, leaving them vulnerable to being fired for simply joining a union.

H-2A workers experience even greater barriers to unionization than do other farmworkers, as their livelihoods are precariously dependent on the goodwill of their employer. They work for short periods in seasonal work, so they often lack the trust established among co-workers over a longer period of time. Furthermore, an H-2A employer may recruit guest workers at the wages and working conditions approved by DOL and can reject U.S. workers and guest workers who ask for higher wages or benefits, making it difficult for unions to persuade workers that they can negotiate better job terms. As a result, few H-2A workers enjoy collective bargaining rights.

However, in recent years, as a result of intensive outreach and organizing efforts, farmworker unions have begun to win contracts with some H-2A growers. The Farm Labor Organizing Committee, AFL-CIO (FLOC) now represents several thousand guest workers employed at several hundred North Carolina H-2A growers through the North Carolina Growers' Association, an umbrella organization that is the largest H-2A importer in the country. In these unionized fields, workers have seen positive changes in their working conditions. For example, FLOC has been able to set up an office by the U.S. Consulate in Monterrey, Mexico to help secure visas and educate new workers about their rights under the contract. Through its grievance-arbitration procedure, FLOC has



worked to ensure that H-2A workers gain employment in future seasons, free from retaliation.

In 2010, FLOC's President Baldemar Velasquez reported that several hundred disputes were resolved through grievance-arbitration. For example, 57 complaints regarding the proper reimbursement of workers' transportation costs were settled. The union helped workers in more than 50 cases address health and safety needs and handled 60 wage dispute cases. In some cases, the union's presence helped overcome problems that were primarily failures to communicate effectively. FLOC has said that it still faces challenges in representing workers under the H-2A program but expects to continue making progress, particularly if it succeeds in its campaign to organize additional H-2A employers in North Carolina.

The opportunity to bargain collectively allows farmworkers to assert their rights, improve their wages and working conditions, protect themselves from retaliation, and achieve a voice in the workplace and in the public sphere. The presence of a union that helps workers in both the U.S. and the workers' homelands can be especially helpful in reducing the extensive and serious abuses associated with recruitment. Unions can also help ensure that job applicants need not pay recruiters for access to jobs under the H-2A program. Expansion of union capacity to help H-2A workers would reduce exploitation and abuse in the H-2A program and enable workers to improve their wages and working conditions.



*"It's really changed for the better...I encourage all workers to join a union."*

*—Diego (Harnett County, NC)*



# A PROGRAM TO FILL SEASONAL JOBS



## **SHEEPHERDERS: A DANGEROUS EXCEPTION**

The H-2A program is designed by law to satisfy temporary, seasonal jobs that would otherwise go unfilled. Yet the ranching lobby, politically powerful in western states like Colorado, Utah, and Wyoming, has effectively lobbied DOL for a special exemption for sheep- (and goat-) herders. Herding is extremely tough, year-round work, and herders often spend extensive time in complete isolation, following the herd as they move through grazing areas. >>



## Pedro\* (Delta County, CO)

Pedro arrived in the U.S. from Peru on an H-2A visa in spring 2009. In Peru, Pedro had worked for ten years in farming before becoming a philosophy and Spanish teacher. When he heard he could make significant money as a sheepherder in the U.S., he jumped at the chance to better provide for his wife and child. He paid approximately \$5,500 in visa and recruiting fees.

But when he arrived in Colorado, Pedro's image of the U.S. as a land of opportunity quickly vanished. He learned that he would be working 11-14 hour days, seven days a week, for only \$750 a month, minus a \$27 deduction for health insurance. His employer, a rancher contracting with the Western Range Association, took his passport and other documents and refused to return them.

On the ranch, he was housed in a small sheepwagon with holes and a door that did not shut properly. There was no bathroom or refrigerator to store food. Though his employer was supposed to provide him with food every weekend, he would often not show up. When he protested, the ranch owner threatened to send him back to Peru.

"One thinks that life over here is easy, that everything is beautiful and that all the people...but once one arrives here, well, I had the misfortune of bumping into very bad people," said Pedro.

*\*Not real name*

Soon, Pedro was sent to herd sheep in the mountains and subsequently became ill. Though money was being deducted from his pay each month for health insurance, the rancher refused to take him to the doctor. He had no easy access to a phone and was mostly cut off from communication with the outside world. He could not use ranch vehicles to go to town and buy food. When he asked if he could have a friend take him to town, the rancher replied that he could not have friends or talk to neighbors.

Finally, in August 2009, Pedro realized that the only way out was to escape. He called 911, but could not identify his exact location. He then walked to a neighbor's house and found someone to drive him to the police station. The local police led him to a legal services attorney, who was able to help him reclaim his documents and some of his stolen wages.

"I knew that slavery had once taken place," said Pedro. "But here in the United States, slavery is still being experienced...a form of modern-day slavery."



DOL directives allow ranchers to employ H-2A herders for year-long contracts with possibility of extension, and pay them only \$750 a month (the current "prevailing wage" for sheepherding in many western states), though they are required to be on call nearly 24 hours a day, 7 days a week. Special regulations allow sheepherders to be housed in wagons or tents and permit employers to provide alternatives to toilets, showers, running water, and electricity if these amenities are not available.<sup>35</sup>

Sheepherders are particularly vulnerable to abuse. A survey of 93 herders by Colorado Legal Services found that more than 80% were not permitted to leave their ranch, to have visitors, or to engage in social activities at any time during their employment. Seventy percent reported that they never had access

to a functioning toilet and less than one-third had refrigerators to store food in their mobile campers. Many herders reported that their employer confiscated their passports and other documents, and some had pay withheld until they returned home to Peru. Wage theft, dilapidated housing, and forced labor are commonplace in this industry.<sup>36</sup>

It is no wonder that with conditions like these, which often border on modern slavery, ranchers cannot find U.S. workers to fill sheepherding jobs. Indeed, the experience with H-2A in the herding industry highlights how easy it is for unscrupulous employers to use the H-2A program to find low-paid exploitable workers, rather than improving pay and conditions to attract workers in the normal job market. In fact, a recent lawsuit in Utah alleges



"I knew that slavery had once taken place. But here in the United States, slavery is still being experienced... a form of modern-day slavery."

—Pedro (Delta County, Colorado)

<sup>35</sup> U.S. Department of Labor, Employment and Training Administration, Field Memorandum No. 32-10, "Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program" (14 June 2011), online at: <http://wdr.dola.gov/directives/attach/TEGL/TEGL32-10ACC.pdf>

<sup>36</sup> Colorado Legal Services Migrant Farm Worker Division, "Overworked and Underpaid: H-2A Herders in Colorado" (14 January 2010), online at <http://users.frii.com/clsfcdsl/CLSoverworkedandunderpaid.pdf>





“This guestworker program’s the closest thing I’ve ever seen to slavery.”

—Rep. Charles Rangel  
(D-NY), quoted in  
*Southern Poverty  
Law Center, Close to  
Slavery* (2007)

that in order to pay the low monthly prevailing wage, an employer categorized one worker as a shepherd, though he was primarily engaged in non-range work, including mowing private lawns.<sup>37</sup> These stories should provide pause for those who would expand the H-2A program into other non-seasonal agricultural work.

## DAIRY, MUSHROOMS, GREENHOUSES: AN UNCHECKED EXPANSION OF GUEST WORKER INDUSTRIES

In recent years, dairy farmers, recipients for many years of significant government subsidies and price regulations, have begun to turn their political power toward a new goal: gaining access to the H-2A program.

Though dairy barns clearly require year-round, permanent workers, the industry has argued that the lack of willing and available domestic workers has created a desperate need for foreign workers, and that those workers should come through the H-2A program. At the time of this report’s preparation, companion bills called “The H-2A Improvement Act,” introduced in the Senate (S. 852) and the House of Representatives (H.R. 1720), would codify the shepherd exception and add dairy to the list of non-seasonal industries open for H-2A work.

But supporters of the dairy extension fail to mention the history of poor working conditions in the dairy industry, even without the H-2A program. For example, legal advocates in California, the largest dairy-producing state, have noted that many milkers work more than 12 hours a day, six days a week, with no overtime pay, rest breaks, or meal periods.<sup>38</sup>



<sup>37</sup> See complaint in: Saenz Mencia et. al. v. Allred et. al., No. 2:11-CV-00200 (C.D. Uta., filed Feb. 24, 2011).

<sup>38</sup> Julia Montgomery, “The Impact of Limiting Workforce-wide Lawsuits on Low-Wage Workers,” *The California Labor & Employment Law Review*, Vol. 22, No. 3, May 2008, at 21.





Workers are also subject to the hazards of lax safety requirements; for example, a dairy worker in upstate New York was recently killed when trying to climb over a gate, a “common” practice, according to the newspaper report.<sup>39</sup> Rather than being allowed to bring in foreign workers, dairy owners should be required to attract U.S. workers by offering jobs with fair pay and workplace safety.

Rather than “improve” the H-2A program, the dairy extension would simply expand the guest worker scheme into an already abuse-ridden industry. If it passes, other year-round agricultural industries, including mushroom

farms and greenhouses, seem ready to line up and demand access to H-2A guest workers.<sup>40</sup> There is no end to the list of industries that could lower wages, claim “labor shortages,” and demand cheap foreign labor. Soon, all our low-wage industries could become populated by low-paid guest workers with few rights.

Instead, the H-2A program should be restricted to seasonal work, and both U.S. and foreign workers must be provided with stronger protections. The H-2A guest worker program should not be the model for American agriculture or other low-skilled jobs. America is a nation of immigrants and should remain so.



**Proposals to slash wage rates and remove labor protections from the H-2A program are not only cold-hearted but bad public policy.**

<sup>39</sup> David C. Shampine, “Death of migrant worker caused by fall, ruled accident,” Watertown (NY) Daily Times (24 March 2011), at <http://www.watertowndailytimes.com/article/20110324/NEWS03/303249965>

<sup>40</sup> See, for example, the testimony of Pennsylvania state senator Arthur Hershey before the U.S. Senate Judiciary Committee (5 July 2006), where Mr. Hershey suggested that the mushroom industry should be allowed to use guest workers.



# RECOMMENDATIONS



## H-2A PROGRAM RECOMMENDATIONS

The narrative and worker stories in this report show the mistreatment of both domestic and foreign workers under the H-2A temporary foreign agricultural worker program. The abuses are widespread because the guest worker program model is deeply flawed. The constraints on guest workers deprive them of the ability to protect themselves from illegal and unfair treatment and from retaliation for speaking out. The law gives employers incentives to discriminate against U.S. workers. >>



The inability of the government to monitor the job terms and practices of thousands of agricultural employers encourages employers to take advantage of the guest workers' vulnerability with little risk of getting caught violating the law. The H-2A guest worker program cannot and should not be the principal vehicle for filling the nation's agricultural job needs. Farmworkers should be given the opportunity to become immigrants and productive citizens of this country.

Though the Department of Labor under Hilda Solis restored most of the longstanding wage and other labor protections that Secretary Elaine Chao had removed, systematic problems persist. Farmworker Justice suggests a number of further steps that policymakers must take, in both the short- and long-term, to protect U.S. workers in agriculture, prevent exploitation of guest workers, and help ensure an adequate supply of citizens and authorized immigrants to keep America's agriculture sector productive.

At the time of writing, a new campaign is underway to eliminate or weaken job protections, government oversight, and enforcement mechanisms under the H-2A program, or to create a new guest worker program altogether. Some policymakers have argued that, in the face of a government crackdown on employers who hire unauthorized immigrants, these changes are necessary to facilitate the hiring of legal guest workers. This report demonstrates that instead of diminished protections, the H-2A program requirements should be strengthened and enforcement increased to end abuses in the program.

## SHORT TERM

### **Congress should pass the Agricultural Jobs, Opportunities, Benefits, and Security Act (AgJOBS).**

→ AgJOBS is a bipartisan compromise between growers and farmworker groups that would allow currently unauthorized farmworkers to earn legal status by continuing to work in U.S. agriculture, make balanced changes to the H-2A program, and provide U.S. growers with



a stable, productive, and decently-treated farm labor force.

### **DOL should increase oversight and enforcement of worker protections in the H-2A program.**

- DOL should investigate more H-2A employers and do so more thoroughly to remedy violations and deter unlawful practices.
- DOL should undertake regular unannounced visits to all H-2A employers to gauge compliance with H-2A regulations and work orders.
- DOL should require State Workforce Agencies (SWAs) to be more vigilant in reviewing H-2A applications for illegal job terms.
- DOL should take steps to eradicate common employer violations, including misstating the number of hours worked by piece-rate workers to deny workers the minimum hourly wage rate, erecting artificial and illegal barriers against U.S. workers who apply for H-2A jobs, and falsely claiming that workers are not entitled to their outbound transportation expenses because they quit work before the end of the season.



“The reality is that the majority of farmworkers in our country are undocumented. We need a fair, orderly way for those who harvest our fruits and vegetables to come out of the shadows and for farmers to retain a skilled, stable, and productive workforce. The H-2A program needs reform to better protect workers from abuses, but even if reformed it is not a practical solution for filling the hundreds of thousands of jobs in agriculture. The AgJOBS compromise, supported by farmworker groups and growers, is the solution.”

— Rep. Howard Berman (D-CA)





“I think the Department of Labor has to take responsibility for these workers. We are inviting them; they’re called ‘guest workers.’ This isn’t how you treat guests.”

—Rep. George Miller (D-CA), quoted in “Corruption Leads to Deep Debt for Guest Workers,” NPR (May 8, 2007)

→ DOL should work closely with labor unions, community-based organizations, and legal advocates to communicate effectively with H-2A workers. To collect evidence of illegal conduct, DOL must recognize and overcome the guest workers’ fear of retaliatory discharge, deportation and denial of jobs in future seasons, as well as educational, linguistic and cultural barriers.

→ DOL should take better advantage of its power to bar employers from the program for violating workers’ rights.

#### **DOL should exercise jurisdiction over H-2A recruitment abroad.**

→ The Department of Labor, in cooperation with the Department of State and the Department of Homeland Security (DHS), should examine the international recruitment mechanisms that result in foreign workers’ indebtedness. Workers’ desperation to earn enough money to repay the employers’ recruiters and bring home money to their families leaves them vulnerable to exploitation.

→ Employers should be required to disclose any arrangements with and identities of labor contractors and recruiters and to determine and disclose all contracting and recruiting in foreign countries, including by sub-contractors and sub-agents.

→ DOL should require H-2A employers to disclose in advance how foreign workers will be transported to the place of employment in the U.S. and by whom.

→ All recruiters and employers’ agents should be licensed and listed online in an easily accessible format.

→ DOL should cooperate with labor unions to establish fair recruiting processes in the foreign country.

#### **DOL should relieve workers’ debt by mandating immediate reimbursement for work-related expenses.**

→ Workers should be reimbursed for transportation to the place of employment within the first week of arrival, rather than at the halfway mark of the contract.

→ Employers should be required to reimburse visa and passport fees paid by workers.

#### **DOL should ensure that both domestic and H-2A workers, especially those employed near the U.S.-Mexico border, are provided with housing as required by the H-2A program.**

→ Special attention must be paid to worker housing and conditions at the U.S.-Mexico border to ensure that employers do not deny housing to those workers who want it based on the claim that workers can commute to their homes in Mexico each night.

→ Employers should be required to pay workers for time spent waiting to cross the border, reducing the incentive for employers to give preference to “border commuters” and deny them housing.

#### **DOL, DHS, and the State Department should coordinate data and action on H-2A workers.**

→ DOL currently collects data on employer requests/certifications, DHS collects worker entry and exit data at the port of entry, and the Department of State collects data on visas issued. Collaboration between agency data collection activities would paint a fuller picture of the origin and destination of H-2A workers, allow for better assessment of regional labor needs, and facilitate



enforcement against unscrupulous employers and recruiters.

→ The Department of State should ask workers to present an H-2A contract at their visa interview to ensure that workers have been given a contract in their language that complies with the law. H-2A employers should be penalized when workers have not been given their contracts.

**Employers under the H-2A program should take responsibility for foreign recruitment.**

→ Employers must monitor the actions of recruiters in foreign countries that supply them with guest workers and act to end recruitment abuses.

→ Employers should be held jointly liable when recruiters working for them break the law.

## LONG TERM

**H-2A workers should be allowed the freedom to change employers.**

→ Tying guest workers' visas to a single employer leaves them vulnerable to abuse and reluctant to challenge illegal or unfair employer practices. Congress should amend the law to extend the fundamental protections of a free labor market to H-2A workers.

**H-2A workers should be able to earn permanent immigration status in order to enforce their rights and improve their conditions.**

→ No matter how much time they spend in the United States, H-2A guest workers can never earn permanent status or become citizens with the right to vote. Congress should end this anti-American system that treats guest workers as short-term commodities, and provide a process for H-2A workers to obtain permanent residency.

**The H-2A program should remain available for temporary and seasonal workforce needs only.**



→ The H-2A program was designed for seasonal jobs where U.S. applicants are lacking. Proposals to extend the H-2A program to year-round jobs in dairies or other industries should be rejected.

→ The exemption for sheepherding, a year-round industry with a history of worker abuse, should be ended.

**H-2A workers should be covered by the labor laws applicable to farmworkers.**

→ H-2A workers are currently excluded from the most important labor law that protects farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Congress should end this unfair exclusion and extend AWPA rights to H-2A workers, including a federal private right of action to enforce their job terms, disclosure of job terms at the time of recruitment, and safe transportation vehicles.

→ Congress should deter wage theft by ensuring that H-2A workers are entitled



“H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations...fearing they will lose their jobs or will not be hired in the future.”

—U. S. General Accounting Office (GAO), *H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers* (1997).





“NCLR has serious concerns about the treatment of farmworkers in this country. Our broken immigration system, including the problematic H-2A guest worker program, contributes to the poor wages, working conditions and health of farmworkers. The ability to legalize immigration status is instrumental to enabling farmworkers to bargain for better working and living conditions. Congress should fix our broken immigration system to ensure our country has a productive, legal farm labor force that benefits from strong workplace protections for all workers.”

—Janet Murguía,  
president, National  
Council of La Raza  
(NCLR)



to liquidated (double) damages when employers fail to pay the AEWR.

→ To encourage attorneys to accept farmworkers' cases, workers who win litigation for violations of the H-2A program protections should be entitled to an award of attorneys' fees and court costs.

#### **H-2A program wage rates should reflect the wage necessary to attract U.S. workers in the labor market:**

→ The H-2A hourly wage rates set under the Adverse Effect Wage Rate methodology are too low, as they fail to account for wage depression caused by the presence of guest workers and undocumented workers in the farm labor force. Wage rates are outdated, as they are based on the previous year's surveys, and they allow growers who have trouble finding workers to avoid offering *higher than average* wages, as the market would demand. Instead, the AEWR is a regional average. DOL should revise the method for determining the AEWR to prevent downward pressure on the wages of domestic farmworkers.

→ The rules regarding piece rates should be changed to end abuses. Piece rates delineated in the H-2A contract should rise annually with changes in the Adverse Effect Wage Rate.

#### **Employers should be required to pay Social Security and unemployment taxes on guest worker wages.**

→ The exemption from Social Security (FICA) and federal unemployment (FUTA) taxes on wages paid to H-2A workers is currently a huge monetary incentive for H-2A employers to choose guest workers over domestic workers. Congress should end this incentive for H-2A employers by requiring them to pay an amount equivalent to FICA and FUTA taxes for their H-2A workers. Payment of these taxes would also strengthen the social safety net.

#### **Anti-discrimination laws should apply to recruitment of H-2A workers abroad.**

→ Workers recruited abroad for employment in the United States, including for H-2A program jobs, should not be subjected to hiring practices that would be illegal if they occurred in the U.S. Employers should be held “strictly liable” for recruitment practices by recruiters or sub-contractors on their behalf.

#### **Workers who have already worked in the H-2A program should have a guaranteed “right of recall.”**

→ Workers who perform well and complete their contracts for an H-2A employer should be entitled to be hired the following season, assuming there remains a labor shortage. This requirement would reduce workers' fear of retaliation for joining a labor union or raising a concern.

→ Employers should be obligated to arrange a visa for returning workers, rather than subjecting workers to the process of paying recruiters in the foreign country every year for access to a visa and a job.

#### **Increased union representation would help H-2A workers protect themselves from abuse and exploitation.**

→ DOL should recognize and support the important role of union organizing and collective bargaining for workers on both sides of the border. DOL should work with the State Department and other agencies to support the efforts of unions to open foreign offices to prevent recruitment abuses.

→ DOL should facilitate the efforts of unions to provide workers with bona fide grievance-arbitration processes, which can be efficient mechanisms to resolve disputes.

# APPENDIX:

## RESOURCES ON H-2A PROGRAM ABUSE

### Recent Media Coverage:

*Courthouse News Service:* Dan McCue, "[Blacks Say Mexicans Favored on Farm,](#)" (June 23, 2011)

*Honolulu Star Advertiser:* Nelson Deranciang, "[Aloun Farms owners hit with more accusations,](#)" (June 20, 2011)

*Yakima (WA) Herald:* "[Farm workers laid off in 2008 win settlement against grower,](#)" (May 21, 2011)

*The Denver (CO) Post:* Felisa Cardona, "[Third Peruvian shepherd claims abuse in Craig ranch lawsuit,](#)" (April 29, 2011)

*The Wenatchee (WA) World:* Amy Taxin, "[Yakima farms named in human trafficking case,](#)" (April 21, 2011)

*Courthouse News Service:* Dan McCue, "[Labor Abuse Reported in Tennessee,](#)" (April 14, 2011)

*The Gainesville (FL) Sun:* Kimberley Moore Wilmoth and Karen Voyles, "[Federal officials: Human trafficking a pervasive problem,](#)" (March 29, 2011)

*Moultrie (GA) Observer:* Kevin Hall, "[Labor Dept. hits J&R Farms,](#)" (November 18, 2010)

*Deseret (UT) News:* Lee Davidson, "[A Story of Modern Slavery in Utah,](#)" (April 15, 2010)

*Yuma (AZ) Sun:* James Gilbert, "[In the Fields, Farmworkers see abuse, fraud,](#)" (January 24, 2010)

*The Honolulu Advertiser:* Jim Dooley and Christie Wilson, "[Aloun Farms owners indicted in forced labor of Thai workers,](#)" (August 29, 2009)

*New York Times:* Dan Frosch, "[In Loneliness, Immigrants Tend the Flock,](#)" (February 21, 2009)

*FoxNews.com:* Jennifer Lawinsky, "[Tennessee Woman Accuses Farm of Favoring Foreigners,](#)" (January 6, 2009)

*High Country (CO) News:* Rebecca Claren, "[Guest workers: Laborers or commodity?](#)" (June 13, 2008)

*Yakima (WA) Herald:* Leah Beth Ward, "[Farm workers' lawsuit names Zirkle fruit,](#)" (March 3, 2008)

*WTVD-TV (NC):* Steve Daniels, "[Guest worker program: Are we treating them like guests?](#)" (November 15, 2007)

*The Washington Post:* Laura Wides-Munoz, "[Migrants See Abuse in Guest Worker Jobs,](#)" (June 2, 2007)

*NPR:* Jennifer Ludden, "[Corruption Leads to Deep Debt for Guest Workers,](#)" (May 8, 2007)

*Raleigh (NC) News-Observer:* Kristin Collins, "[Workers: Promise became a prison,](#)" (March 10, 2007)

*New York Times:* Eduardo Porter, "[Who Will Work the Farms?](#)" (March 23, 2006)

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### Magazine/ TV:

*Dan Rather Reports (HDNet TV),* "All I Want is Work," (October 12, 2010) - [transcript](#)

*Mother Jones:* John Bowe, "[Bound for America,](#)" (May/June 2010)

*The Nation:* Felicia Mellow, "[Coming to America,](#)" (June 25, 2007)

*The Nation:* David Bacon, "[Be Our Guests,](#)" (September 27, 2004)





# APPENDIX:

## (CONT).

*Boston Magazine*: Michael Blanding,  
“The Invisible Harvest,” (October 2002)

*Equal Justice Magazine*: Daniel Cox,  
“Discrimination on the Farm,” (Fall 2002),  
reprinted in *Reed Magazine* (February 2005)

*Vanity Fair*: Marie Brenner, “In the Kingdom of  
Big Sugar,” (February 2001)

*Mother Jones*: Barry Yeoman, “Silence in the  
Fields,” (January/February 2001)

*Charlotte (NC) Observer*: Leah Beth Ward,  
“Desperate Harvest,” (October 1999) -  
three-part series

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### Reports:

Colorado Legal Services Migrant Farm Worker  
Division, Overworked and Underpaid: H-2A  
Herders in Colorado (January 2010)

Farmworker Justice, Litany of Abuses: More -  
Not Fewer - Labor Protections Needed in the  
H-2A Guestworker Program (December 2008)

Southern Poverty Law Center, Close to  
Slavery: Guestworker Programs in the United  
States (March 2007)

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