

Invisible Hands: Forced Labor in the United States and the H-2 Temporary Worker Visa Program

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Each year, hundreds of thousands of workers enter the United States on H-2 temporary worker visas for low-wage, seasonal employment. These workers are each legally tied to their U.S. employer in industries largely outside of public view, such as agriculture, food processing, construction, landscaping, amusement, and forestry. Although H-2 visa workers are integral to the U.S. economy, exploitation against them and systemic violations of their legal rights are rampant.

Little scholarship has examined the working conditions that H-2 visa workers face through the lens of the international prohibition of forced labor. This Comment establishes that the conditions H-2 visa workers toil under in the United States may rise to the level of forced labor as defined under international law through a comprehensive review of reports regarding the H-2 visa program, a survey of international laws pertinent to the international prohibition of forced labor, and the use of a case study. The United States, through international conventions and customary international law, is obligated to ensure that all workers in the United States are not subjected to forced labor. This Comment then utilizes the human rights paradigm of prevention, protection, and accountability to analyze what changes the United States should make to the H-2 visa program to comply with this international obligation and to discuss some advocacy avenues currently available under domestic and international law to challenge forced labor in the H-2 visa program.

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INTRODUCTION

Four Star Greenhouse, Inc., a garden center located on the outskirts of a small Michigan town, advertises that it “produces superb young plants and finished crops for the wholesale grower, retail grower, garden retailer and

professional landscaper.”¹ Their website contains photographs of vibrant flowers and a company directory featuring headshots of their leadership and team members.² It proclaims: “The people at Four Star are what make the difference!”³ Not pictured nor named are the workers who transport plants from the greenhouses to the shipping department and then pack the plants for shipping across the country. These workers are invisible to customers buying the plants, yet crucial to the company’s ability to generate over \$18 million in annual sales.⁴

In 2017 and 2018, the Department of Labor (DOL) authorized a farm labor contractor to bring 145 Mexican workers to work at Four Star on H-2A Temporary Agricultural Worker visas.⁵ The workers were issued Job Orders, promising pay of \$12.75 per hour, for an anticipated thirty-six hours of work per week.⁶ They then obtained personal loans with high interest rates to pay for visa and travel costs.⁷ Despite H-2A visa program requirements, the workers were not reimbursed for their visa or travel costs within their first week in the United States.⁸ Instead, the workers began accruing interest on their loans.⁹

Once in the United States, the farm labor contractor moved the workers between different states and worksites outside of the terms of their contracts, with little to no notice about where they were being taken and for how long they would be required to work.¹⁰ The contractor, who was responsible for the workers’ pay, routinely failed to pay them or paid them with checks that had insufficient funds and could not be cashed.¹¹ Prior to being brought to Michigan to work at Four Star, the workers were not paid for weeks of work, and the farm labor contractor told them they would only be paid if they worked in Michigan.¹² By the time the workers got to Four Star, they were desperate for money for basic necessities, including food, and had no means of returning to Mexico.¹³ Their

1. *Four Star Partners with Growers and Retailers*, FOUR STAR GREENHOUSE, <https://pwfourstar.com/about-us> [<https://perma.cc/T5FM-42K8>].

2. *Company Directory*, FOUR STAR GREENHOUSE, <https://pwfourstar.com/resources/company-directory> [<https://perma.cc/J4P6-4SPL>].

3. *Id.*

4. *See Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 784–85 (E.D. Mich. 2021).

5. *Id.* at 775. The H-2A visa is a subcategory of the H-2 visa category, as explained in Part I.

6. *Id.* at 774–75. Each H-2 visa is associated with a Job Order, which contains the terms and conditions of the visa holder’s employment. *Id.* at 774 n.1; ANDORRA BRUNO, CONG. RSCH. SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 9, <https://crsreports.congress.gov/product/pdf/R/R44849> [<https://perma.cc/4A7V-W2F2>] (updated June 9, 2020).

7. *Reyes-Trujillo*, 513 F. Supp. 3d at 775.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 776.

visas had also expired, despite reassurances from the farm labor contractor that their visas would be renewed.¹⁴

While at Four Star, the workers continued to work without pay, and some workers complained to their supervisors at Four Star and the farm labor contractor about the lack of pay.¹⁵ The farm labor contractor told one worker that if the contractor found out he had complained to Four Star, he would be sent back to Mexico and blacklisted from the H-2A visa program.¹⁶ The farm labor contractor ultimately followed through on this threat and orchestrated several workers' arrests by immigration authorities.¹⁷ In March 2018, these workers were told to clean their apartments, pack their personal items, and board a private bus, ostensibly so they could shop at Walmart during an inspection of their apartments.¹⁸ When they arrived at Walmart, immigration agents were waiting, and the workers were arrested, jailed for over a month, placed in removal proceedings, and "forced to depart from the United States."¹⁹

Not only were the workers not paid for four weeks of work at Four Star, but they also incurred significant expenses when returning to Mexico that were not reimbursed.²⁰ Personal belongings, including clothing and identity documents, were left in their apartments and not returned.²¹ Some workers eventually filed suit for unpaid wages, retaliation, and breach of contract.²² Their complaint provides written documentation of the violations and abuses many similarly situated workers face and tells but one story of many of how U.S. employers and their agents exploit H-2 visa workers.

H-2 visa holders work throughout the United States but are often invisible, laboring out of public view in industries such as agriculture, domestic work, food processing, construction, janitorial services, landscaping, amusement, and forestry.²³ A 2020 study conducted by Centro de los Derechos del Migrante, Inc. (Center for Migrant Rights) found that all one hundred H-2A visa workers interviewed had experienced at least one serious legal violation while working in the United States.²⁴ Common violations experienced by H-2 visa workers

14. *Id.*

15. *Id.* at 777.

16. *Id.* at 790.

17. *Id.*

18. *Id.* at 777.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 773.

23. Briana Beltran, *The Hidden "Benefits" of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. LAW 229, 234 (2020); *Industries with High Prevalence of H-2B Workers*, WAGE AND HOUR DIVISION, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/data/charts/industries-h2b-workers> [https://perma.cc/DL6A-FQ4Z].

24. RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC. 4, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf> [https://perma.cc/3Q9W-RNR8] (defining a serious

include withholding wages, exposure to unhealthy and unsafe conditions, discrimination, verbal and physical abuse and harassment, substandard housing, restricted movement, unreimbursed travel to the job site, confiscation of identity documents, and failing to provide contracts in the worker's language.²⁵

The conditions that H-2 visa workers face upon arrival at their U.S. workplaces often rise to the level of forced labor as defined under international labor law. International law defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered [themselves] voluntarily."²⁶ However, little scholarship has examined the working conditions H-2 visa workers face through the lens of the international prohibition of forced labor. This lens is appropriate because the federal government administers the H-2 visa program and authorizes employers to hire workers under the program. The conditions that some H-2 visa workers face upon arrival at their U.S. workplaces should be named for what they are: forced labor. Forced labor is not limited to certain regions, historical events, or abusive regimes, but constitutes an "acute contemporary problem at the global level."²⁷

This Comment establishes that the conditions in which H-2 visa workers toil in the United States may constitute forced labor under international law and that international law obligates the United States to ensure that all H-2 visa workers are not subjected to forced labor conditions. Part I provides background information regarding the H-2 visa program. Part II surveys international labor and human rights laws pertinent to the international prohibition of forced labor and establishes that the United States has an international obligation to ensure no workers in its territory are subjected to forced labor. Part III applies this international law to the H-2 visa program and establishes that some H-2 visa workers labor under conditions constituting forced labor under international law. Part IV then turns to the human rights paradigm of prevention, protection, and accountability to analyze what changes the United States should make to the H-2 visa program to comply with its international obligation to eliminate forced labor, and that international law obligates the United States to ensure that no H-2 visa workers are subjected to forced labor conditions. Part IV further uses this paradigm to discuss some advocacy avenues currently available under domestic

legal violation as a "violation of legal rights with a substantial impact on the wages or working conditions of the worker").

25. See *id.* at 19–31; U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 36 (2017), <https://www.gao.gov/products/gao-15-154> [<https://perma.cc/UYK6-275V>].

26. Convention (No. 29) Concerning Forced or Compulsory Labour art. 2(1), June 10, 1930, 39 U.N.T.S. 55; *What Is Forced Labour, Modern Slavery and Human Trafficking*, INT'L LABOR ORG. [hereinafter ILO, *What Is Forced Labour, Modern Slavery and Human Trafficking*], <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> [<https://perma.cc/3TBR-5VBQ>].

27. Santiago Villalpando, *Forced Labour/Slave Labour*, in MAX PLANCK ENCYCLOPEDIAS OF INT'L LAW ¶ 2 (2007).

and international law to challenge forced labor conditions in the H-2 visa program.

I.

THE H-2 VISA PROGRAM

The H-2 visa program forms part of a long history of temporary and seasonal work programs in the United States.²⁸ The search for a cheap labor force to produce America's food, while maximizing agribusiness profits, has nearly always begun abroad.²⁹ During World War I, tens of thousands of Mexican workers performed agricultural work as part of a temporary worker program called the Mexican Labor Program, colloquially known as the Bracero program.³⁰ In 1942, the State Department reached a bilateral agreement with Mexico, which Congress later approved, that formally created a new Bracero program.³¹ At its peak, the Bracero program drew over 400,000 workers a year across the border.³² In 1964, Congress ended the program after years of rampant worker abuse captured the attention of the labor and civil rights movements and eventually the public.³³

However, Congress left in place another program for importing "inexpensive migrant labor": the H-2 visa program.³⁴ The Immigration and Nationality Act of 1952 authorized a temporary worker program that included an H-2 visa for low-wage agricultural and non-agricultural workers.³⁵ The H-2 visa provisions are similar to those of the Bracero program but the H-2 visa program was not accompanied by agreements between national governments.³⁶

28. RIPE FOR REFORM, *supra* note 24, at 14; BRUNO, *supra* note 6, at 1.

29. ETAN NEWMAN, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS, FARMWORKER JUSTICE 12 (2011), <https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf> [<https://perma.cc/DFV6-MB5B>].

30. ANDORRA BRUNO, CONG. RSCH. SERV., RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 1, https://www.everycrsreport.com/files/20040608_RL32044_bb5b3388f19c9abae5032cfb0e937e5c170316e.pdf [<https://perma.cc/B6PT-S6DG>] (updated 2004); Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 381 (2016).

31. MARY BAUER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES, S. POVERTY L. CTR. 3 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [<https://perma.cc/QST9-AJYV>].

32. *Id.*

33. NEWMAN, *supra* note 29, at 12–13. By 1964, about 4.5 million jobs had been filled by Mexican citizens under the bracero program. BAUER, *supra* note 31, at 3.

34. RIPE FOR REFORM, *supra* note 24, at 14; NEWMAN, *supra* note 29, at 13. While low-wage workers are employed under other visa programs, this Comment focuses on the H-2 visa program, which was specifically designed to supplement the U.S. workforce in agriculture and other "low skill" work. See Smith, *supra* note 30, at 381–82.

35. Smith, *supra* note 30, at 381; BRUNO, *supra* note 30, at 1.

36. NEWMAN, *supra* note 29, at 13.

In 1986, the Immigration Reform and Control Act separated the H-2 visa program into the two existing visa categories: H-2A for the agricultural industry and H-1A, which later became H-2B, for “unskilled, non-agricultural work.”³⁷

The H-2A and H-2B visas are both subcategories of the “H” nonimmigrant visa category for temporary workers.³⁸ The H-2A visa program permits U.S. employers or their agents, who meet certain regulatory requirements, to bring “foreign nationals” to the United States for temporary agricultural jobs.³⁹ The H-2B visa program permits “foreign nationals” to perform temporary nonagricultural work or work that meets a seasonal, peak load, or intermittent need.⁴⁰

The process of bringing workers to the United States under the H-2A and H-2B visa programs entails the same basic steps.⁴¹ A prospective employer must first apply for a labor certification from the DOL.⁴² After receiving a labor certification, a prospective employer can submit an application, known as a petition, to the Department of Homeland Security (DHS) to bring H-2 visa workers into the United States.⁴³ For the petition to be granted, the employer must offer a job that is temporary in nature, demonstrate that there are not enough U.S. workers “able, willing, qualified, and available to do the temporary work,” and show that employing visa workers “will not adversely affect the wages and working conditions of similarly employed U.S. workers.”⁴⁴ If the petition is

37. *Id.*; RIFE FOR REFORM, *supra* note 24, at 14–15.

38. BRUNO, *supra* note 6, at 2.

39. *Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Nov. 9, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> [https://perma.cc/6GFW-T38X].

40. *Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Oct. 12, 2022), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [https://perma.cc/TR6S-QSEQ]; ANDORRA BRUNO, CONG. RSCH SERV., R42434, IMMIGRATION OF TEMPORARY LOWER-SKILLED WORKERS: CURRENT POLICY AND RELATED ISSUES 8 (2012), <https://sgp.fas.org/crs/homsec/R42434.pdf> [https://perma.cc/G5VX-AWNT].

41. BRUNO, *supra* note 6, at 3.

42. *Id.*

43. *Id.*

44. *Temporary Agricultural Workers*, *supra* note 39; *Temporary Non-Agricultural Workers*, *supra* note 40. It is important to note that “employers easily evade compliance with the regulations governing [U.S.] worker recruitment.” Briana Beltran, *134,368 Unnamed Workers: Client-Centered Representation on Behalf of H-2A Agricultural Guestworkers*, 42 N.Y.U. REV. L. & SOC. CHANGE 529, 541 (2016). Investigators have documented how many employers “go to extraordinary lengths to skirt the law,” including advertising jobs in locations hundreds of miles away, posting incomplete job advertisements, intentionally writing job postings to deter U.S. workers, dissuading U.S. applicants by making the job sound as undesirable as possible, demanding prior work experience for entry-level jobs, lying to U.S. applicants by telling them there are no longer any job openings, rejecting all U.S. applicants, holding U.S. workers to unrealistic production standards, hiring U.S. workers only to fire them en masse and hand over the work to H-2 visa workers, and paying U.S. workers less and treating them worse than visa workers to drive them to quit. Jessica Garrison, Ken Bensinger, & Jeremy Singer-Vine, “All You Americans Are Fired”, BUZZFEED NEWS (Dec. 1, 2015), <https://www.buzzfeednews.com/article/jessicagarrison/all-you-americans-are-fired> [https://perma.cc/Q6FR-BM2K]; BAUER, *supra* note 31, at 31; NEWMAN, *supra* note 29, at 21.

approved, H-2 visa workers can go to a U.S. embassy or consulate to apply for an H-2 visa from the State Department.⁴⁵ If their visa application is approved, the worker is issued a visa that they can use to apply for admission to the United States.⁴⁶ If admitted, the H-2 worker can then commence employment on their work start date.⁴⁷

Use of the H-2A visa program has more than tripled in the past decade, with 258,000 H-2A visas issued in 2021.⁴⁸ Ninety-three percent of these visas were issued to Mexican citizens.⁴⁹ The overwhelming majority of H-2A visas are issued to men.⁵⁰ H-2A visa holders constitute 11 percent of the workforce in U.S. crop agriculture⁵¹ and also engage in range herding and livestock production.⁵² H-2A visa workers are in the United States for an average of six months to one year at a time.⁵³ There is no annual cap on the number of workers who may be issued H-2A visas.⁵⁴

The H-2B visa program was capped at 88,000 visas in 2021; all available visas were issued.⁵⁵ The program is expected to be capped at 130,716 visas for 2023.⁵⁶ H-2B visa holders work in a wide range of industries. The most common include food services, such as seafood and meat processing; construction; hospitality and janitorial services; landscaping; amusement, such as traveling carnivals and amusement park work; and forestry.⁵⁷

Despite the euphemistic term of “guestworker program,” the H-2 visa program is “rife with systemic violations of workers’ legal rights.”⁵⁸ H-2 visa workers routinely arrive at their U.S. workplaces in debt, and conditions upon

45. BRUNO, *supra* note 6, at 3.

46. *Id.*

47. *Id.*

48. Philip Martin, *A Look at H-2A Growth and Reform in 2021 and 2022*, WILSON CENTER (Jan. 3, 2022), <https://www.wilsoncenter.org/article/look-h-2a-growth-and-reform-2021-and-2022> [https://perma.cc/NY42-KQTB].

49. *Id.*

50. RIPE FOR REFORM, *supra* note 24, at 16.

51. Martin, *supra* note 48.

52. BRUNO, *supra* note 6, at 1.

53. Martin, *supra* note 48.

54. BRUNO, *supra* note 6, at 5.

55. H-2B visas have an annual statutory limit of 66,000, but Congress can authorize the DHS to make additional H-2B visas available. *Id.* at 11; 8 U.S.C. § 1184(g)(1)(B). On May 21, 2021, 22,000 additional H-2B visas were made available. *U.S. Departments of Homeland Security and Labor Issue Joint Rule Supplementing H-2B Visa Cap*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 21, 2021), <https://www.uscis.gov/news/news-releases/us-departments-of-homeland-security-and-labor-issue-joint-rule-supplementing-h-2b-visa-cap> [https://perma.cc/WC7M-SBKY].

56. On Oct. 12, 2022, the DHS announced that it would issue a regulation that will make available to employers an additional 64,716 H-2B visas for fiscal year 2023. Daniel M. Kowalski, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023*, LEXISNEXIS (Oct. 12, 2022), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insideneews/posts/dhs-to-supplement-h-2b-cap-with-nearly-65-000-additional-visas-for-fiscal-year-2023> [https://perma.cc/K2ZW-L2KB].

57. *Industries with High Prevalence of H-2B Workers*, *supra* note 23.

58. RIPE FOR REFORM, *supra* note 24, at 4.

arrival in the United States are often far different than promised.⁵⁹ The structure of the H-2 visa program, along with inadequate governmental oversight and enforcement and the challenges inherent to being a low-income foreign worker far from home, combine to make H-2 visa workers especially vulnerable to conditions rising to the level of forced labor.⁶⁰

A. Recruitment and Pre-Employment Debt

Once employers have received certification from the U.S. government for a certain number of H-2 visas, they generally turn to recruiters both in and outside of the United States to locate workers to apply for those visas and assist them with the visa process.⁶¹ Most H-2 visa workers are recruited in Mexico.⁶² The recruiting business is barely regulated and highly lucrative; recruiters “monopolize information and control access to jobs, imposing fees and other illegal terms as conditions for accessing job descriptions, visas, and employment.”⁶³ Recruitment fees are prohibited by both U.S. and Mexican law but nonetheless proliferate “at alarming rates and with increasing complexity.”⁶⁴ The State Department has recognized that the problem of recruitment fees persists even in the face of legal prohibitions.⁶⁵

Recruitment fraud is also rampant.⁶⁶ “[N]either United States nor Mexican agencies maintain reliable, public registries of authorized labor recruiters and job placement agencies,” and under U.S. law, recruiters are not required to register to be part of the H-2 visa program.⁶⁷ Fraudulent recruiters in workers’ home countries “fabricate job offers to extract months or years worth of salaries . . . by charging recruitment fees for job offers that are either false or nonexistent in the

59. *Id.*

60. See Smith, *supra* note 30, at 385.

61. CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., FAKE JOBS FOR SALE: ANALYZING FRAUD AND ADVANCING TRANSPARENCY IN U.S. LABOR RECRUITMENT 3 (2019) [hereinafter FAKE JOBS FOR SALE], <https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf> [<https://perma.cc/VK23-LC3A>]; CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 11 (2013) [hereinafter RECRUITMENT REVEALED], https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf [<https://perma.cc/S4UA-GN63>]; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 1.

62. FAKE JOBS FOR SALE, *supra* note 61, at 4; Bureau of Consular Affairs, *Nonimmigrant Visa Issuances by Visa Class and by Nationality, FY1997-2021 NIV Detail Table*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> [<https://perma.cc/SY79-GR6Y>].

63. FAKE JOBS FOR SALE, *supra* note 61, at 3; BAUER, *supra* note 31, at 9.

64. FAKE JOBS FOR SALE, *supra* note 61, at 4, 24; RECRUITMENT REVEALED, *supra* note 61, at 4, 13, 16 (finding in a 2013 study that 58 percent of workers surveyed reported paying a recruitment fee).

65. See U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 489–90 (2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/93T8-X7K9>].

66. See FAKE JOBS FOR SALE, *supra* note 61, at 4, 20–21.

67. *Id.* at 24; RIPE FOR REFORM, *supra* note 24, at 20.

United States.”⁶⁸ Once the worker pays the fees, the recruiter disappears and becomes unresponsive, and the worker is left without a visa or job.⁶⁹ Some recruiters retain the worker’s identification documents.⁷⁰ Neither U.S. nor Mexican law provides an efficient mechanism for workers to recoup stolen money.⁷¹ Studies show that about one in ten migrant workers have paid a recruiter an average fee of 9,300 pesos—three and half months of a minimum wage salary in Mexico—for a false or nonexistent job.⁷² But due to shortages of economic opportunities in workers’ home communities, lack of transparency in the recruitment process, and the context of impunity in which both fraudulent recruiters and legitimate recruiters who charge illegal fees operate, “many job seekers believe they have no choice but to gamble and potentially expose themselves to fraud if they want to find legal work in the United States.”⁷³

Due to unlawful recruitment fees and recruitment fraud, along with lawful pre-employment expenses including travel expenses and visa or passport fees, many H-2 visa workers enter the United States with pre-employment related debt.⁷⁴ Because many H-2 visa workers come from impoverished backgrounds and lack the means to pay these costs, “they often have no option but to take out loans, frequently at high interest rates.”⁷⁵ Surveys have shown that 47 percent of migrant workers took out loans to cover pre-employment costs at interest rates ranging from 5 to 79 percent.⁷⁶ This debt may be owed to an employer, labor contractor, recruiter, lending institution, private lender, friend, or family member.⁷⁷ Local banks, lenders, and recruiters sometimes require workers to leave collateral, such as deeds to property or titles to automobiles.⁷⁸ Federal law requires that H-2A visa workers be reimbursed for visa and travel expenses, but employers often fail to comply.⁷⁹ Workers’ pre-employment expenses may range

68. FAKE JOBS FOR SALE, *supra* note 61, at 4; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 31.

69. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 31; FAKE JOBS FOR SALE, *supra* note 61, at 15.

70. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 31.

71. FAKE JOBS FOR SALE, *supra* note 61, at 4; RECRUITMENT REVEALED, *supra* note 61, at 20.

72. RECRUITMENT REVEALED, *supra* note 61, at 4; FAKE JOBS FOR SALE, *supra* note 61, at 11.

73. FAKE JOBS FOR SALE, *supra* note 61, at 22, 25.

74. Smith, *supra* note 30, at 386; RECRUITMENT REVEALED, *supra* note 61, at 4, 18.

75. Beltran, *supra* note 23, at 240.

76. RECRUITMENT REVEALED, *supra* note 61, at 18. *See also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 30 (noting that according to federal officials and nongovernmental organization representatives, “workers often had to take out loans, sometimes with high interest rates” to pay fees and pre-employment expenses).

77. Smith, *supra* note 30, at 386; RECRUITMENT REVEALED, *supra* note 61, at 18.

78. RECRUITMENT REVEALED, *supra* note 61, at 18; BAUER, *supra* note 31, at 9; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 30.

79. RIPE FOR REFORM, *supra* note 24, at 19; 20 C.F.R. § 655.122(h) (2015). The DOL has taken the position that if an H-2B visa worker’s pre-employment expenses bring their pay below the minimum wage in the first week of work, the employer is responsible for paying those fees. U.S. DEP’T OF LABOR, WAGE AND HOUR DIV., FIELD ASSISTANCE BULLETIN NO. 2009-2, TRAVEL AND VISA EXPENSES OF H-2B WORKERS UNDER THE FLSA 1, 3 (2009),

from \$100 to \$20,000, which can be well over a worker's annual income in their home country.⁸⁰ This debt, combined with workplace abuses, can lead to situations of forced labor, involuntary servitude, and human trafficking.⁸¹

B. *The Role of Middlemen*

The presence of middlemen, including multiple levels of recruiters, recruitment agencies, and labor contractors, further contributes to the web of exploitation that entraps many H-2 visa workers.⁸² The “recruitment supply chain” can take many different forms, and in some cases, recruiters may subcontract out to one or more third parties to find and recruit workers.⁸³ These third-party agents operate in tandem with employers, helping employers file paperwork to import workers.⁸⁴ As repeat players in the system, agents are likely to be familiar with the visa regulations and how to evade them.⁸⁵ For example, “agents know that regulations aiming to ensure that U.S. workers are first recruited to fill open positions are all too easy to skirt, and simply fulfill employers’ desires to hire more vulnerable and exploitable workers from impoverished backgrounds.”⁸⁶ As the “number of layers between the employer and the worker grow, there are more avenues for someone in the recruitment process to exploit workers.”⁸⁷

Many large employers of H-2 visa workers “attempt to avoid responsibility for unlawful practices by obtaining workers indirectly through a labor contractor.”⁸⁸ In some states, farm labor contractors are the actual employers of most H-2A visa workers at their U.S. workplaces, rather than the entity they are working for.⁸⁹ For example, in the case of the Four Star workers, Four Star contracted with farm labor contractor Vasquez Citrus & Hauling, Inc. (VCH) to bring the Four Star workers to the United States.⁹⁰ In March 2016, prior to the

http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf [<https://perma.cc/E2LH-73GQ>].

80. THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 23–24 (2013), <https://migrationthatworks.files.wordpress.com/2020/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf> [<https://perma.cc/NZ5E-35TG>]; Smith, *supra* note 30, at 386.

81. RECRUITMENT REVEALED, *supra* note 61, at 4, 22; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 23; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 30; NEWMAN, *supra* note 29, at 23.

82. See Beltran, *supra* note 23, at 239–40.

83. RECRUITMENT REVEALED, *supra* note 61, at 11–12; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 25.

84. Beltran, *supra* note 23, at 239.

85. *Id.*

86. *Id.* at 239–40.

87. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 28.

88. BAUER, *supra* note 31, at 28.

89. RIPE FOR REFORM, *supra* note 24, at 4.

90. Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 774 (E.D. Mich. 2021).

Four Star litigation, the Department of Transportation fined VCH nearly \$22,000 for a fatal bus crash that killed six H-2A visa workers it was transporting back to Mexico from Michigan.⁹¹ The DOL's Wage and Hour Division (WHD) had also debarred (temporarily banned) VCH and its owner from the H-2A visa program for three years due to VCH's violations of H-2A visa regulations in North Carolina, including failure to reimburse workers for inbound travel expenses and failure to provide accurate payroll of time records.⁹² When VCH returned to the H-2 visa program, it continued to violate workers' legal rights. Use of labor contractors "puts workers at greater risk of abuse and makes enforcement of their rights even more difficult."⁹³

C. Conditions H-2 Visa Workers Face at Their U.S. Workplaces

Statutes and regulations afford H-2A visa workers many written protections. Protections for H-2A visa workers include: a guarantee of employment for at least three-quarters of the employment contract period; a copy of the employment contract or the employer's visa program application materials; free and safe housing; workers' compensation insurance; reimbursement for the cost of travel to and (if a worker stays until the end of their contract) from their place of employment in the United States; free transportation in a safe vehicle between housing and workplace; the tools, supplies, and equipment needed to perform the job; three meals per day at cost or free cooking facilities; earnings statements; no seizure of passports or identity documents by employers; and wages at a certain level.⁹⁴

By contrast, H-2B visa workers' protections are more limited. Of the written protections H-2A visa workers receive, H-2B visa workers are not entitled to reimbursement for transit costs to and from the United States (unless they are dismissed prior to the end of their work contract period, in which case return travel costs must be paid); the guarantee of employment for at least three-quarters of the contract period; housing; meals or cooking facilities; nor workers' compensation or other injury insurance coverage.⁹⁵ As to both H-2A and H-2B workers, these protections are ineffective without adequate oversight and

91. *Id.*

92. *Id.*

93. BAUER, *supra* note 31, at 28.

94. 20 C.F.R. § 655.122 (2015); RIPE FOR REFORM, *supra* note 24, at 11–12; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 10. Wages for H-2A visa workers must be at or above the highest of the statewide Adverse Effect Wage Rate (which in 2020 ranged from \$11.71 to \$15.83 per hour), the local labor market's "prevailing wage" for a particular crop as determined by the DOL and state agencies, the agreed upon collective bargaining rate, or the federal or state minimum wage. RIPE FOR REFORM, *supra* note 24, at 12; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 10; 20 C.F.R. § 655.122(1) (2015).

95. BAUER, *supra* note 31, at 7–8; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 10; *see* 20 C.F.R. § 655.22 (2015). For H-2B visa workers, workers' compensation coverage depends on the laws of the state where the worker is employed. BAUER, *supra* note 31, at 25.

enforcement of the H-2 visa program rules and regulations by the responsible U.S. agencies, as discussed further in Section E of this Part and Part IV.

Despite these protections, many H-2 visa workers experience violations of federal labor laws and H-2 visa program rules and regulations.⁹⁶ Common violations of employment-related rights include: wage and hour violations, discrimination and harassment, physical injuries due to hazardous working conditions, unsafe housing conditions, and retaliation.⁹⁷ Wage and hour abuses include “minimum wage violations disguised by complicated piece-rate pay schemes, underreporting of hours, failure to pay overtime, and making unlawful deductions from workers’ pay.”⁹⁸ Wage violations can also include complete failure to pay, as the Four Star workers experienced. Furthermore, employers routinely fail to reimburse H-2A visa workers for travel and visa expenses to come to their U.S. workplaces and “frequently make deductions from workers’ paychecks for items that are for the benefit of the employer.”⁹⁹ These practices result in “chronic underpayment of wages, exacerbating guestworkers’ already precarious situation.”¹⁰⁰

These violations of H-2 visa workers’ rights occur against the backdrop of H-2 visa workers’ employment in dangerous industries, such as agriculture, forestry, amusement park work, and housekeeping.¹⁰¹ Access to medical treatment and workers’ compensation for injuries is not guaranteed, it is difficult for transnational workers to access ongoing treatment, and employers often discourage workers from seeking medical care.¹⁰²

H-2 visa workers also experience physical, linguistic, and social isolation.¹⁰³ Many H-2 visa workers live in isolated settings with little recourse available to address mistreatment or seek medical or other services.¹⁰⁴ For example, H-2A farmworkers typically live in employer-owned or controlled

96. See Smith, *supra* note 30, at 392.

97. *Id.*; RIPE FOR REFORM, *supra* note 24, at 19–31.

98. BAUER, *supra* note 31, at 18.

99. *Id.*

100. *Id.*

101. Beltran, *supra* note 23, at 241; BAUER, *supra* note 31, at 25 (noting that fatality rates for the agriculture and forestry industries are seven times the national average); AM. UNIV. WASH. COLL. OF LAW IMMIGRANT JUSTICE CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., TAKEN FOR A RIDE MIGRANT WORKERS IN THE U.S. FAIR AND CARNIVAL INDUSTRY 30 (2013) [hereinafter TAKEN FOR A RIDE], https://cdmigrante.org/wp-content/uploads/2018/02/Taken_Ride.pdf [<https://perma.cc/CDZ7-77RJ>] (noting that the Occupational Safety and Health Administration has documented ninety-two worker fatalities or catastrophes related to amusement rides since 1984); MEREDITH B. STEWART, CULTURE SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS, S. POVERTY L. CTR. 17 (2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf [<https://perma.cc/L526-GEN4>] (highlighting that a “peer-reviewed study of injury rates in the hotel industry found that housekeepers have a higher rate of injury and sustain more severe injuries than most other service workers”).

102. BAUER, *supra* note 31, at 25–27.

103. See Smith, *supra* note 30, at 385.

104. *Id.* at 389–90.

housing in remote rural locations located near the fields where they work, with little access to any support network.¹⁰⁵ Most H-2 visa workers do not have their own means of transportation and if they live in a rural or suburban area, may not have access to public transportation.¹⁰⁶ Furthermore, H-2 visa workers often do not speak English and depending on the location where they work, may not be able to communicate with anyone apart from their co-workers who speak the same language.¹⁰⁷

D. H-2 Visa Workers' Legal Ties to Their Employers

H-2 visa workers lack job mobility because their immigration status is tied to a single employer.¹⁰⁸ They are only permitted to work for the employer that requested their visa, and if they leave that employer, they lose their immigration status and ability to remain and work in the United States.¹⁰⁹ This link between immigration status and the employer can create an environment in which “workers’ fear of being fired and deported runs so deep that an employer may never even have to take the illegal step of articulating a threat to do so.”¹¹⁰ Employers also illegally but routinely seize identity documents, particularly passports and Social Security cards, to ensure that workers cannot leave in the middle of their work contract.¹¹¹ This structure creates disincentives to report abuse, as workers often fear retaliation if they complain about mistreatment.¹¹² Retaliation can include loss of work hours, exclusion from future employment opportunities through the same employer or recruiter (blacklisting), threats of removal, being fired and sent home, and threats of physical violence.¹¹³

105. ASHWINI SUKTHANKAR, VISAS, INC. CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM 48 (2012), http://mfasia.org/recruitmentreform/wp-content/uploads/2014/07/VisasInc_FINAL.pdf [<https://perma.cc/X6TV-R2L5>]; Smith, *supra* note 30, at 389.

106. SUKTHANKAR, *supra* note 105, at 48; Smith, *supra* note 30, at 389; AM. UNIV. WASH. COLL. OF LAW INT’L HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLE OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 2, 17 (2012), <https://cdmigrante.org/wp-content/uploads/2018/02/PickedApart.pdf> [hereinafter PICKED APART] [<https://perma.cc/9W4X-EN85>].

107. Smith, *supra* note 30, at 390.

108. *Id.* at 387.

109. Although theoretically possible for H-2 visa workers to change employers under limited circumstances, it is exceedingly difficult in practice. *Id.* at 387 n.70. To change employers, a prospective new employer must file a petition requesting classification and extension of the worker’s stay in the United States, which must be approved by the DOL before the worker can begin employment with the new employer. 8 C.F.R. § 214.2(h)(2)(i)(D) (2015). Governmental agencies do not help mistreated workers switch employers. Beltran, *supra* note 23, at 238.

110. SUKTHANKAR, *supra* note 105, at 47.

111. BAUER, *supra* note 31, at 14.

112. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 37; RECRUITMENT REVEALED, *supra* note 61, at 22 (noting that retaliation against workers for filing a complaint or inquiring about their workplace rights is common practice among H-2 employers and their agents).

113. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 37–38; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 14; TAKEN FOR A RIDE, *supra* note 101, at 43–44.

Blacklisting refers to the widespread, organized practice by recruiters and employers of preventing workers from accessing H-2 visa employment opportunities in the future.¹¹⁴ Some employers and recruiters maintain blacklists of workers who have complained in the past.¹¹⁵ A worker who complains may risk blacklisting not only themselves but also their family, friends, or entire community in their home country.¹¹⁶ Because communities where workers come from often have ties to a single employer in the United States or a particular industry through recruiters, blacklisted workers have limited, if any, chances of obtaining an H-2 visa.¹¹⁷

Moreover, leaving an abusive employer is often not an option because it would be impossible for the worker to earn close to as much in their home country, even if their U.S. job pays less than the wages promised or the legal minimum wage.¹¹⁸ Additionally, many workers who enter the United States on H-2 visas rely on seasonal work in the United States as their principal income and, as discussed, take on debt to pay expenses incurred before entering the United States.¹¹⁹ Therefore, they may also lack the means to return to their home countries on their own and repay their debt if they leave their H-2 visa job early.¹²⁰ “Tethered to a single employer and often unable to return home due to crushing debt,” H-2 visa workers are particularly susceptible to forced labor.¹²¹

E. Inadequate Governmental Oversight and Enforcement

U.S. statutes and regulations theoretically provide written protections for H-2 visa workers. However, in practice, these protections fail to prevent abuses because the structure of the visa program facilitates worker exploitation and because “governmental enforcement agencies often turn a blind eye to mistreatment” and are “woefully ineffective” at enforcing H-2 visa program rules.¹²²

Several U.S. federal agencies are responsible for administering the H-2 visa program and enforcing its regulations.¹²³ The DOL and the DHS screen

114. INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 14, 43.

115. *Id.* at 14.

116. *Id.*; Smith, *supra* note 30, at 389, 393; BAUER, *supra* note 31, at 41.

117. Beltran, *supra* note 44, at 551–52, 551 n.114.

118. BAUER, *supra* note 31, at 12; Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 377 (2012) (noting that the “average minimum wage for nonprofessional occupations” was \$4.68 per day in Mexico and \$8.75 per day in Guatemala in 2012, rendering options and opportunities in workers’ home countries significantly worse than poor working conditions in the United States).

119. Beltran, *supra* note 23, at 232; RECRUITMENT REVEALED, *supra* note 61, at 22.

120. *See* RECRUITMENT REVEALED, *supra* note 61, at 22.

121. BAUER, *supra* note 31, at 13.

122. Beltran, *supra* note 23, at 237–38; Beltran, *supra* note 44, at 554; RIPE FOR REFORM, *supra* note 24, at 11, 18; RECRUITMENT REVEALED, *supra* note 61, at 7 (noting that oversight by responsible government agencies is lax); *see also* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 2 (noting that there has been criticism that protections for temporary workers are not adequately enforced).

123. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 1.

employers who want to hire H-2 visa workers, and the State Department screens workers who apply for H-2 visas at U.S. embassies and consulates overseas.¹²⁴ Once the DHS admits workers into the United States, the DOL, the DHS, the Department of Justice (DOJ), and the State Department provide enforcement.¹²⁵ The DOL has the primary authority to monitor and enforce H-2 visa program regulations and other relevant labor laws.¹²⁶ The DOL's Office of Foreign Labor Certification (OFLC), a branch of the DOL's Employment and Training Administration, reviews and adjudicates employer visa petitions and may certify all positions requested, a smaller number, or deny the petition.¹²⁷ The OFLC can audit employers after they have received their certifications to ensure fulfillment of employer obligations under the program.¹²⁸ The DOL's WHD is responsible for enforcing employer obligations such as the payment of required wages and the provision of transportation, meals, and housing.¹²⁹ The WHD can also carry out investigative functions, impose civil penalties, and seek equitable and injunctive relief.¹³⁰ The DOL's OFLC and WHD can debar an employer from further participation in the H-2 visa program.¹³¹ The DHS and the DOJ can pursue administrative and criminal cases.¹³² The State Department investigates passport and visa fraud violations.¹³³

U.S. agencies do not maintain "reliable, public registries of authorized labor recruiters and job placement agencies."¹³⁴ Although the DHS and the DOL collect data on H-2 visa jobs for which employers are seeking workers, key information, including the identity of recruiters, is not made available to workers and their advocates.¹³⁵ Existing certifications for available H-2 visa jobs are published by the DOL, but the information is incomplete, available only in English, and only published periodically throughout the year.¹³⁶ This makes it very difficult for workers and their advocates to verify job offers and avoid recruitment fraud.¹³⁷

124. *Id.* at 1.

125. *Id.* at 1–2.

126. *Id.* at 11.

127. *Id.* at 6.

128. *Id.* at 12, 47.

129. *Id.* at 12.

130. *Id.*

131. *Id.* at 13.

132. *Id.* at 54. For example, United States Citizenship and Immigration Services (USCIS) pursues administrative inquiries into petition fraud through site inspections, and the DHS's Immigration and Customs Enforcement and the DOJ's Federal Bureau of Investigation investigate criminal cases, such as human trafficking crimes. *Id.* at 13, 54.

133. *Id.* at 14.

134. FAKE JOBS FOR SALE, *supra* note 61, at 24.

135. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 33.

136. FAKE JOBS FOR SALE, *supra* note 61, at 3.

137. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at Introduction, 56.

The DOL regularly permits employers to continue to use the H-2 visa program even after violating its regulations.¹³⁸ The DOL is authorized to debar an H-2A employer for up to three years from the date of final agency decision if it finds that the employer “substantially violated a material term or condition of its labor certification.”¹³⁹ It is authorized to debar a H-2B employer for up to five years from the date of final agency decision if the employer willfully misrepresented a material fact during its visa application process or substantially failed to meet any of the terms or conditions of its application materials.¹⁴⁰ The DOL must complete an investigation and issue a notice of intent to debar within two years after the occurrence of the violation, but by the time a case has been investigated or gone through the court system, two years might have elapsed.¹⁴¹ And in the unlikely event that an employer is debarred, it is not difficult for them to get around their debarment by, for example, filing a new application under a different entity or individual’s name and address.¹⁴²

The DOL also conducts insufficient numbers of investigations and is ill-equipped to remedy violations of H-2 visa workers’ rights.¹⁴³ The availability of government resources to enforce employment and labor rights has generally decreased over the past several decades, and enforcement of the H-2 visa program is similarly deficient.¹⁴⁴ Additionally, as a practical matter, enforcement of some of the H-2 visa program’s terms is unrealistic.¹⁴⁵ For example, H-2A visa program regulations require employers to provide H-2A visa workers with at least three-fourths of the hours specified in their contracts and pay for their transportation, but there is no mechanism that allows DOL to effectively monitor employer compliance with these requirements.¹⁴⁶ Furthermore, because H-2 visa workers are in the United States only temporarily, it is very difficult for them to

138. Beltran, *supra* note 44, at 554. There are currently only thirty-five employers debarred from the H-2A visa program and forty-four employers debarred from the H-2B visa program. OFF. OF FOREIGN LABOR CERTIFICATION, PROGRAM DEBARMENTS, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf [https://perma.cc/U5W3-28X2].

139. 8 U.S.C. § 1188(b); 20 C.F.R. § 655.182(a), (c)(2) (2015).

140. 20 C.F.R. § 655.73(a), (c) (2015); 29 C.F.R. § 503.24(a), (c) (2015).

141. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 52; 20 C.F.R. § 655.182(c)(1) (2015).

142. Beltran, *supra* note 44, at 554; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 40–41.

143. BAUER, *supra* note 31, at 38–39; Beltran, *supra* note 44, at 555.

144. Beltran, *supra* note 44, at 555; BAUER, *supra* note 31, at 38 (noting that in 2011, the DOL certified 7,000 employer applications for H-2A workers but conducted only 157 investigations into H-2A employers and that between 2007 and 2012, the DOL cited only 27 H-2B employers for violations). The DOL’s budget does not mention the H-2 visa program so it is unclear what the current budget for oversight and enforcement is. DEP’T OF LABOR, FISCAL YEAR 2022 BUDGET IN BRIEF, <https://www.dol.gov/sites/dolgov/files/general/budget/2022/FY2022BIB.pdf> [https://perma.cc/WG6N-GRUJ].

145. BAUER, *supra* note 31, at 39.

146. *Id.*

participate in DOL investigations or litigation.¹⁴⁷ And if the DOL finds that a worker is owed wages, there are enormous hurdles in getting those funds to the worker in their home country.¹⁴⁸

The number of federal agencies involved in the H-2 visa program further complicates oversight and enforcement because there is a lack of interagency cooperation and coordination.¹⁴⁹ For example, the DOL does not consistently share the information it collects on employers with the DHS and the State Department, which also have roles in screening employers.¹⁵⁰ Even within one agency, there is a fragmentation of responsibilities. For example, the DOL's WHD conducts investigations into regulatory compliance and has the authority to penalize (for example, debar) employers, but it is the DOL's OFLC that reviews and approves new visa applications by employers.¹⁵¹

When widespread illegal recruitment fees, recruitment fraud, pre-employment debt, worker mistreatment, lack of ability to change employers while in the United States on an H-2 visa, and workers' preexisting vulnerabilities combine and collide with lack of governmental oversight and enforcement, such exploitation can fall within the definition of forced labor under international law.¹⁵²

II.

THE PROHIBITION OF FORCED LABOR UNDER INTERNATIONAL LAW

The International Labour Organization (ILO) has played a principal role in the creation and implementation of international law regarding forced labor.¹⁵³ The ILO was established at the Paris Peace Conference in 1919 and became the first specialized agency of the United Nations (UN) in 1946.¹⁵⁴ Today, nearly all UN member states are members of the ILO.¹⁵⁵ It has a unique tripartite representative structure consisting of governments, employers, and workers in its Governing Body, which meets three times a year to make decisions about ILO policy, determine the agenda for the International Labour Conference, and adopt the ILO's draft program and budget.¹⁵⁶ The ILO has declared that the

147. Beltran, *supra* note 44, at 556; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 43.

148. Beltran, *supra* note 44, at 556–57.

149. *Id.* at 554.

150. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 41–42.

151. Beltran, *supra* note 44, at 554–55.

152. *See* Beltran, *supra* note 23, at 232.

153. Villalpando, *supra* note 27, at ¶ 4.

154. Int'l Lab. Org. [ILO], *History of the ILO*, <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> [<https://perma.cc/U9RA-89NZ>].

155. *See* Int'l Lab. Org. [ILO], *Member States*, <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm> [<https://perma.cc/NY7H-2N4G>]; U.N., *Member States*, <https://www.un.org/en/about-us/member-states> [<https://perma.cc/VYH4-XP65>].

156. Int'l Lab. Org. [ILO], *Constitution*, at art. 3(1), 7(1) (Apr. 1, 1919) [hereinafter *ILO Constitution*],

organization should give special attention “to the problems of persons with special social needs, particularly the unemployed and migrant workers.”¹⁵⁷

The United States holds one of the Governing Body’s ten titular government seats, which are permanently held by “[S]tates of chief industrial importance.”¹⁵⁸ The United States is also the largest donor to the ILO, contributing 22 percent of the organization’s regular budget.¹⁵⁹ This is perhaps not surprising: the ILO is strategically important to the United States’ “effort to strengthen competitiveness, extend democratic values worldwide and ensure global peace and prosperity.”¹⁶⁰

Despite the ILO’s strategic importance to the United States, the United States has ratified only fourteen of the ILO’s 189 conventions and only two of its eight fundamental conventions: the Abolition of Forced Labour Convention and the Worst Forms of Child Labour Convention.¹⁶¹ The United States has not ratified the Forced Labour Convention, the fundamental convention ratified by the highest number of countries that includes the ILO definition of forced labor.¹⁶²

Nevertheless, as I will demonstrate in this Part, the prohibition of forced labor— “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered [themselves] voluntarily”¹⁶³—is binding on the United States under international law.

https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [<https://perma.cc/U7JC-YQDT>]; *The US: A Leading Role in the ILO*, INT’L LAB. ORG., <https://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang-en/index.htm#> [<https://perma.cc/63TW-GD9A>].

157. Int’l Lab. Org. [ILO], *Declaration on Fundamental Principles and Rights at Work (1998) As Amended in 2022*, [hereinafter ILO, *Declaration on Fundamental Principles and Rights at Work*], https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO [<https://perma.cc/P95F-NT3C>].

158. *The US: A Leading Role in the ILO*, *supra* note 156. Brazil, China, France, Germany, India, Italy, Japan, Russia, and the United Kingdom hold the other permanent seats. The International Labour Conference elects the remaining government members of the Governing Body every three years.

159. *See id.* (noting that in 2016, the United States contributed about \$95 million to the regular budget).

160. *Id.*

161. *Id.* Fundamental ILO conventions the United States has not ratified include the Forced Labour Convention (No. 29), the Freedom of Association and Protection of the Right to Organise Convention (No. 87), the Right to Organise and Collective Bargaining Convention (No. 98), the Equal Remuneration Convention (No. 100), the Discrimination (Employment and Occupation) Convention (No. 111), and the Minimum Age Convention (No. 138). The ILO governing body has identified these eight conventions as fundamental because they cover “subjects that were considered to be fundamental principles and rights at work.” Int’l Lab. Org. [ILO], *Conventions and Recommendations*, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> [<https://perma.cc/Q4FA-JNXK>].

162. Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26, at art. 1, 2(1). As of 2023, 180 countries have ratified this Convention.

163. *Id.* at art. 2(1).

A. *Binding Conventions on the United States that Prohibit Forced Labor*

The two ILO conventions that prohibit forced labor are the Forced Labour Convention and the Abolition of Forced Labour Convention. The United States ratified the Abolition of Forced Labour Convention in 1991 and was actively involved in its drafting process.¹⁶⁴ Ratification of this Convention was part of an “externally-focused, post-Cold War moment, in which forced labor and free market democracy were touted as mutually incompatible.”¹⁶⁵ The Secretary of Labor at the time declared that the Convention was “intended to promote the elimination of one of the most pernicious assaults by 20th century governments on economic freedom and the private rights of individuals: forced or compulsory labor” and added, without apparent irony, that “such State practices are completely foreign to our nation and other democracies.”¹⁶⁶

The Abolition of Forced Labour Convention requires the abolition of any form of forced or compulsory labor in five specified cases:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; and (e) as a means of racial, social, national or religious discrimination.¹⁶⁷

Members must undertake effective measures to secure the immediate and complete abolition of forced labor in these specified cases.¹⁶⁸

The Forced Labour Convention calls for the general abolition of forced labor, subject to narrow exceptions.¹⁶⁹ Specifically, it calls on ILO members to

164. Adelle Blackett & Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Convention*, 67 UCLA L. REV. 1504, 1515 (2021).

165. *Id.* at 1518.

166. *Id.* at 1518–19; ILO Convention (No. 105) Concerning the Abolition of Forced Labor. Ex. K, 88-1: *Hearing Before the Comm. on Foreign Relations*, 102nd Cong. 12, (1991) (statement of Lynn Martin, Secretary of Labor).

167. Convention (No. 105) Concerning the Abolition of Forced Labour art. 1, June 5, 1957, 320 U.N.T.S. 291; Int'l Lab. Org. [ILO], *Abolition of Forced Labour, General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ¶ 9, Int'l Labour Conference, 65th Session (1979) [hereinafter ILO, *Abolition of Forced Labour*, General Survey of 1979 by the Committee of Experts], [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1979-65-4B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1979-65-4B).pdf) [https://perma.cc/K5Q3-NMFC].

168. Convention (No. 105) Concerning the Abolition of Forced Labour, *supra* note 167, at art. 2.

169. ILO, *Abolition of Forced Labour*, General Survey of 1979 by the Committee of Experts, *supra* note 167, at ¶ 9. The narrow exceptions include work exacted through compulsory military service laws for work of a purely military character; work which forms part of normal civic obligations; work exacted as a consequence of a court conviction, provided that the work is carried out under the supervision and control of a public authority; work exacted in cases of emergency, such as war or calamities such as fires, floods, and famines; minor communal services, provided that community members or their representatives have the right to be consulted regarding the need for such services. Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26, at art. 2.

“suppress the use of forced or compulsory labour in all its forms within the shortest period possible.”¹⁷⁰ It further requires States to punish forced labor as a criminal offense.¹⁷¹ Although the United States has not ratified this Convention, the ILO has declared that

[A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the [ILO], to respect, to promote and to realize . . . the principles concerning the fundamental rights that are the subject of those Conventions, one of which is “the elimination of all forms of forced or compulsory labour.”¹⁷²

In 1979, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) noted that the Abolition of Forced Labour Convention is not a revision of the Forced Labour Convention but may be regarded as supplementing it.¹⁷³ Moreover, forced or compulsory labor is listed as one of the worst forms of child labor in the Worst Forms of Child Labour Convention, lending additional support to the assertion that the general prohibition of forced labor in the Forced Labour Convention is binding on the United States.¹⁷⁴

Several non-ILO conventions ratified by the United States also prohibit forced labor. The International Covenant on Civil and Political Rights (ICCPR) includes an explicit prohibition of forced labor, stating that “no one shall be required to perform forced or compulsory labour,” subject to narrow exceptions.¹⁷⁵ The Convention to Suppress the Slave Trade and Slavery (Slavery Convention) requires that parties “take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.”¹⁷⁶ Where forced or compulsory labor for non-public purposes¹⁷⁷

170. Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26, at art. 1.

171. *Id.* at art. 25.

172. ILO, *Declaration on Fundamental Principles and Rights at Work*, *supra* note 157, at Preamble, ¶ 2.

173. ILO, *Abolition of Forced Labour*, General Survey of 1979 by the Committee of Experts, *supra* note 167, at ¶ 9.

174. *See* Convention (No. 182) Concerning the Worst Forms of Child Labour art. 3, June 1, 1999, 2133 U.N.T.S. 161.

175. Exceptions include performance of hard labor in pursuance of a sentence for punishment for a crime by a competent court; work or service normally required of a person under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; service of a military character and any national service required by law of conscientious objectors; service exacted in cases of emergency or calamity threatening the life or well-being of the community; and work which forms part of normal civil obligations. International Covenant on Civil and Political Rights art. 8(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

176. Convention to Suppress the Slave Trade and Slavery art. 5, Sept. 25, 1926, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

177. During the drafting of the Slavery Convention, the Assembly of the League of Nations passed a resolution which “effectively requested that the International Labour Office take over responsibility for addressing forced labour.” Jean Allain, *Slavery Convention, Introductory Note*, AUDIOVISUAL LIB. OF INT’L L. (Sept. 7, 2017),

survives, the contracting parties “shall endeavour progressively and as soon as possible to put an end to the practice.”¹⁷⁸ The Convention further specifies that “the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned.”¹⁷⁹

B. The Prohibition of Forced Labor Has Reached the Status of a Jus Cogens Norm

In addition to being prohibited under the above conventions, the ILO has recognized that the prohibition of forced labor is a *jus cogens* norm in international law. A *jus cogens* norm is a norm “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted.”¹⁸⁰ *Jus cogens* norms are “hierarchically superior to other rules of international law and are universally applicable.”¹⁸¹

A 1998 ILO Commission of Inquiry concluded that the rule prohibiting forced labor has reached the status of a peremptory (*jus cogens*) norm in international law.¹⁸² In drawing this conclusion, the Commission highlighted that “many States have prohibited forced labour at the constitutional level” and that several human rights instruments explicitly prohibit forced labor.¹⁸³ The

<https://legal.un.org/avl/ha/sc/sc.html#:~:text=Beyond%20this%20Commission%2C%20the%20League,Experts%20on%20Slavery%20in%201934> [https://perma.cc/W5UM-KRX9]. The ILO Forced Labour Convention includes exceptions for public purposes such as military conscription, penal labor, and work which forms part of normal civic obligations. *Id.*; Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26, at art. 2.

178. Slavery Convention, *supra* note 176, at art. 5(2) (further specifying that until such forced labor practices end, the labor must be of an exceptional character, receive adequate remuneration, and not involve the removal of laborers from their usual place of residence).

179. *Id.* The regional American Convention on Human Rights also mentions the prohibition of forced labor. American Convention on Human Rights arts. 2, 3, Organization of American States, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The United States has signed, but not ratified, this Convention, which means that it cannot take actions that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 22, 1969, 1155 U.N.T.S. 331. The American Convention declares that “[n]o one shall be required to perform forced or compulsory labor.” American Convention on Human Rights, *supra* note 179, at art. 6. Derogation from this provision is not permitted even in times of “war, public danger, or other emergency.” *Id.* at art. 27.

180. Int’l Law Comm’n, Report on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 142 (Aug. 9, 2019).

181. *Id.*

182. Int’l Lab. Org. [ILO], *Forced Labour in Myanmar (Burma), Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No 29)*, at ¶ 203 (July 2, 1998) [hereinafter *ILO Forced Labour in Myanmar Report*], [https://www.ilo.org/public/libdoc/ilo/P/09604/09604\(1998-81-serie-B-special-suppl\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09604/09604(1998-81-serie-B-special-suppl).pdf) [https://perma.cc/3H7W-ZHEH].

183. *Id.* ¶ 202 (citing the following universal and regional instruments as prohibiting forced labor: the Universal Declaration of Human Rights, ICCPR, International Convention on the Suppression and Punishment of the Crime of Apartheid, Convention on the Rights of the Child, International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Convention for the Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, and African Charter on Human and People’s Rights).

Commission further indicated that a State “which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act for which it bears international responsibility.”¹⁸⁴ In 2003, the ILO reiterated that the abolition of forced labor is a “peremptory norm from which no derogation is permitted.”¹⁸⁵ In 2007, the ILO again propounded the view that “[t]he prohibition of the use of forced or compulsory labour in all its forms is considered now as a peremptory norm of modern international law on human rights.”¹⁸⁶ It drew attention to the fact that today, forced or compulsory labor is almost universally banned, the two ILO conventions on the subject are the most widely ratified of all international labor conventions, and the principles embodied in these two ILO conventions have been incorporated into international instruments at both the universal and regional levels.¹⁸⁷

C. The United States’ International Responsibility to Eliminate Forced Labor

Under the above conventions, the United States has an international obligation to eliminate forced labor within its territory, including within the H-2 visa program. Under the Abolition of Forced Labour Convention, the United States is required to abolish any form of forced labor used for the purpose of economic development, among other purposes, and to take effective measures to secure the immediate and complete abolition of forced labor used for this purpose.¹⁸⁸ Many industries in the United States heavily rely on and exploit H-2 visa workers’ labor for economic development. Under the Forced Labour Convention and under the ICCPR, the United States is required to eliminate all forms of forced labor.¹⁸⁹ Under the Slavery Convention, the United States is

184. ILO *Forced Labour in Myanmar Report*, *supra* note 182, at ¶¶ 203–04 (also noting that supporting, instigating, accepting, or tolerating forced labor on its territory “could be qualified, if committed on a widespread scale, as an international crime under the terms of article 19 of the draft articles of the International Law Commission on state responsibility” and that “any person who violates this peremptory norm is guilty of a crime under international law and thus bears individual criminal responsibility”).

185. Max Kern & Carmen Sottas, Int’l Lab. Org. [ILO], *The Abolition of Forced or Compulsory Labour*, in *FUNDAMENTAL RIGHTS AT WORK AND INTERNATIONAL LABOUR STANDARDS* 44 (2003), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087424.pdf [<https://perma.cc/NY7H-2N4G>] (noting that exceptions to the prohibition on forced labor contained in the Forced Labour Convention “may no longer be justified”).

186. GENERAL SURVEY CONCERNING THE FORCED LABOUR CONVENTION, 1930 (No. 29), AND THE ABOLITION OF FORCED LABOUR CONVENTION, 1957 (No. 105), in *REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS* xi, xi, (1st Ed. 2007), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_089199.pdf [<https://perma.cc/K36V-C4FT>].

187. *Id.* at xi, 1, 34.

188. Convention (No. 105) Concerning the Abolition of Forced Labour, *supra* note 167, at art. 1–2.

189. Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26, at art. 1; ICCPR, *supra* note 175, at art. 8(3).

required to end forced labor practices progressively and as soon as possible, and any recourse to forced labor rests with the central governmental authorities.¹⁹⁰ The prohibition of forced labor's status as a *jus cogens* norm further strengthens the assertion that the United States cannot support, accept, or tolerate conditions of forced labor in its territory.¹⁹¹

The prohibition of forced labor includes "both an obligation to abstain and an obligation to act."¹⁹² The United States "must neither exact forced or compulsory labour nor tolerate its exaction and it must repeal any laws and statutory or administrative instruments that provide or allow for the exaction of forced labour" by private or public persons.¹⁹³

The Human Rights Committee, which monitors implementation of the ICCPR, has stated that a State with documented violations of the forced labor prohibition is under an obligation to take all steps necessary to prevent similar violations in the future.¹⁹⁴ Specifically, the State should

ensure the removal of legal, practical and administrative obstacles that hinder the filing and investigation of complaints and effective access to justice and compensation for victims of . . . forced labour, including by amending the legislation and statutes of limitations in accordance with international standards[.]¹⁹⁵

Having established that the United States bears an international responsibility to ensure that no workers in its territory are subjected to forced labor, Part III turns to an analysis of how the conditions H-2 visa workers toil under often constitutes forced labor under international law.

III.

H-2 VISA WORKERS TOIL UNDER CONDITIONS CONSTITUTING FORCED LABOR UNDER INTERNATIONAL LAW

As previously mentioned, forced labor is defined under international labor law as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered [themselves] voluntarily."¹⁹⁶

190. Slavery Convention, *supra* note 176, at art. 5.

191. See ILO *Forced Labour in Myanmar Report*, *supra* note 182, at ¶ 203.

192. Kern & Sottas, *supra* note 185, at 34.

193. *Id.*

194. Human Rights Committee, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2773/2016, U.N. Doc. CCPR/C/126/D/2773/2016, at 14 ¶ 9 (Aug. 22, 2005).

195. *Id.*

196. Convention (No. 29) Concerning Forced or Compulsory Labour, *supra* note 26 at art. 2(1); ILO, *What Is Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 26.

The Human Rights Committee has further commented on the definition of forced labor for purposes of the ICCPR.¹⁹⁷ It has indicated that forced labor covers a range of conduct extending from “labour imposed on an individual by way of criminal sanction” to “lesser forms of labour in circumstances where punishment . . . is threatened if the labour directed is not performed.”¹⁹⁸ As in the ILO definition, intensity of penalty and degree of voluntariness are considered.¹⁹⁹

The case of the Four Star workers meets all aspects of the international law forced labor definition.

The first aspect of the forced labor definition is that the worker performs “work or service.”²⁰⁰ The exaction of work or service is distinguished from instances where the obligation to perform work or service is imposed to undergo education or training.²⁰¹ It is clear that the Four Star workers were performing work in the United States.

The second aspect of the definition is that the worker performs their labor under the menace of any penalty.²⁰² The penalty can take the form of “a loss of rights or privileges.”²⁰³ Penalties commonly incurred by H-2 visa workers include violations of H-2 visa program rules and regulations, as well as violations of workers’ rights under federal or state law. Both explicit and implicit menaces of penalty are widely present in the H-2 visa program.²⁰⁴ The Four Star workers case study provides examples of explicit threats: removal to Mexico and blacklisting from the H-2A visa program (retaliation) for complaints about unpaid wages.²⁰⁵ The structure of the H-2 visa program lends itself to an inherent implicit threat. Because H-2 visa jobs are tied to immigration status, leaving or losing a job means losing immigration status, which could lead to removal or the inability to repay debt accrued from the H-2 visa application and travel process.²⁰⁶

The third aspect of the definition is that the worker agrees to perform the work voluntarily.²⁰⁷ According to the ILO, work is voluntary when (1) there is

197. See Human Rights Committee, *Bernadette Faure v. Australia*, Communication, U.N. Doc. CCPR/C/85/D/1036/2001, at 11 ¶ 7.5 (Oct. 31, 2005) (observing that the ICCPR does not define “forced or compulsory labour” and that while the definitions of relevant ILO instruments may be of assistance, it falls on the Committee to elaborate on what is prohibited conduct).

198. *Id.*

199. See *id.* at 7 ¶ 4.13.

200. Kern & Sottas, *supra* note 185, at 34.

201. *Id.*

202. *Id.* at 36.

203. ILO, *Abolition of Forced Labour*, General Survey of 1979 by the Committee of Experts, *supra* note 167, at ¶ 21.

204. International labor law sources do not specify whether the threats must be explicit. In this comment, I interpret “menace of any penalty” to include implicit threats.

205. *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 775, 777, 790 (E.D. Mich. 2021).

206. See Smith, *supra* note 30, at 387; SUKTHANKAR, *supra* note 105, at 47–48.

207. See Kern & Sottas, *supra* note 185, at 36.

“free and informed consent of a worker to take a job” and (2) the worker has the “freedom to leave at any time.”²⁰⁸

First, workers that take H-2 visa jobs are often unable to provide free and informed consent. Consent may not be free due to severe shortages of economic opportunities in workers’ home countries, such that working in the United States, even under appalling conditions, is perceived as the only viable option.²⁰⁹ Additionally, the work demanded once a worker arrives in the United States may be so different than the work promised that consent to take the job is not free. For example, according to a DOL Office of Inspector General official, some workers are “sold” or provided for use by different employers once they enter the country because employers inflate the total number of H-2 visa workers needed or employer agents fraudulently submit applications on behalf of an employer.²¹⁰

Consent to take an H-2 visa job is often not informed because recruiters and employers routinely make false promises in terms of pay, the type of work to be performed, job conditions, and sometimes even location.²¹¹ For example, the Four Star workers were issued contracts to work at Four Star in Michigan with a pay rate of \$12.75 per hour for an anticipated thirty-six hours of work per week.²¹² Once in the United States, they were forced to work in other states and were not paid for weeks on end.²¹³ The ILO has specifically indicated that there is not free and informed consent “when an employer or recruiter makes false promises so that a worker takes a job [they] would not otherwise have accepted.”²¹⁴ Further, even if the promises themselves are not false, workers are often provided with inadequate and incomplete job information, which precludes informed consent. Many workers do not receive written contracts before making financial commitments to their jobs, if at all, and workers may not receive contracts in languages they understand.²¹⁵ Some recruiters misrepresent the

208. ILO, *What Is Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 26.

209. See FAKE JOBS FOR SALE, *supra* note 61, at 22 (noting that due to shortages of economic opportunities in workers’ home communities, many workers believe they have no choice but to gamble and potentially expose themselves to fraud to find work in the United States).

210. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 51.

211. See RIPE FOR REFORM, *supra* note 24, at 4; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at Introduction.

212. *Reyes-Trujillo v. Four Star Greenhouse, Inc.*, 513 F. Supp. 3d 761, 775, 777, 790 (E.D. Mich. 2021).

213. *Id.*

214. ILO, *What Is Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 26.

215. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 29, 31; RIPE FOR REFORM, *supra* note 24, at 7, 31. Note that DOL regulations require H-2A employers to provide workers a copy of their work contract (which typically includes information such as the type of work, wage basis and rate, and number of hours per week) no later than when they apply for the visa. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 32; 20 C.F.R. § 655.122(q) (2015). Employers are not required to provide H-2B visa workers with a copy of their work contract. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 31.

terms of work to prospective workers.²¹⁶ According to the Government Accountability Office (GAO), “[w]ithout accurate information about the terms of the employment before making a commitment, prospective workers are not able to evaluate whether taking the job is beneficial either personally or financially.”²¹⁷ Lastly, wage theft is so widespread that many workers accept jobs believing that they will earn more than they actually do earn.²¹⁸

Second, H-2 visa workers are not free to leave their jobs at any time because their legal status is tied to a single employer. They cannot practically find a new employer in the United States with whom they can earn money to afford living expenses or pay for transportation back to their home countries. Further, employers and their agents exploit this power by engaging in coercive behavior. The ILO has indicated that employer practices such as the seizure of identity documents, a common practice in the H-2 visa program,²¹⁹ can constitute a form of coercion that interferes with a worker’s freedom to offer themselves voluntarily.²²⁰ The ILO has further indicated that “where migrant workers [are] induced by deceit, false promises and retention of identity documents or force to remain at the disposal of an employer” there is a violation of the Forced Labour Convention.²²¹

Pre-employment debt and physical isolation create further barriers to workers freely leaving their H-2 visa jobs. As noted in Part I, many H-2 visa workers arrive at their U.S. workplaces in debt. Recruitment fees, despite being prohibited, are common, and many workers take out loans to pay these fees.²²² Although H-2A visa regulations require reimbursement of travel expenses, employers often fail to comply with this obligation.²²³ For example, the Four Star workers obtained personal loans with high interest rates to pay for their visa and travel costs, which were not reimbursed.²²⁴ Consequently, by the time the workers were brought to Four Star in Michigan, they lacked money to pay for basic necessities, including food, let alone money for transportation back to their homes in Mexico.²²⁵ Finally, many H-2 visa workers also live in employer-owned or controlled housing in remote locations and may rely on their employers for all transportation, making it physically impossible to leave their employer.²²⁶

216. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 31.

217. *Id.* at 32.

218. See RIPE FOR REFORM, *supra* note 24, at 7 (noting that 43 percent of workers surveyed were not paid the wages they were promised).

219. BAUER, *supra* note 31, at 14 (noting that “one of the most chronic abuses reported by guestworkers concerns the seizure of identity documents”).

220. Kern & Sottas, *supra* note 185, at 37.

221. *Id.* at 36.

222. See NEWMAN, *supra* note 29, at 22–23; RIPE FOR REFORM, *supra* note 24, at 20–21.

223. See RIPE FOR REFORM, *supra* note 24, at 5, 19, 33.

224. Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 775 (E.D. Mich. 2021).

225. *Id.* at 776.

226. SUKTHANKAR, *supra* note 105, at 48; Smith, *supra* note 30, at 389; PICKED APART, *supra* note 106, at 2, 17.

Each case must be examined individually to determine whether each element of the forced labor definition is met. However, as demonstrated in Part I, the Four Star workers' case is not an outlier.²²⁷ Rather, it is emblematic of systemic problems with the H-2 visa program that result in a significant number of workers being subjected to conditions that constitute forced labor under international law.

IV.

PREVENTING FORCED LABOR IN THE H-2 VISA PROGRAM, PROTECTING H-2 VISA WORKERS, AND HOLDING VIOLATORS ACCOUNTABLE

This Part turns to the human rights paradigm of prevention, protection, and accountability²²⁸ to analyze and synthesize changes the United States could make to the H-2 visa program to comply with its international obligation to ensure that no workers in its territory are subjected to forced labor. These paradigm categories are interrelated, and many of the proposals within each contribute to each other. For example, robust enforcement would protect workers and prevent future violations. This discussion intends to provide a framework for conceptualizing reforms that could minimize forced labor in the H-2 visa program.²²⁹

A. *Preventing Forced Labor in the H-2 Visa Program Before It Occurs*

1. *Job Mobility*

The ability to leave an abusive employer and find new employment in the United States would help prevent H-2 visa workers from being subjected to forced labor. Advocates have repeatedly identified lack of job mobility as one of the most problematic aspects of guestworker visa programs.²³⁰ Because H-2 visa workers' immigration status is tied to a single employer, H-2 visa workers cannot leave an abusive workplace without losing their immigration status.²³¹ Decoupling the visa from a specific employer would eliminate a threat of penalty inherent to the H-2 visa program—loss of immigration status.

227. See *supra* Part I (describing the H-2 visa program and widespread mistreatment and abuse of H-2 visa workers).

228. Interview with Carolyn Blum, Clinical Professor of Law (Emerita) at University of California, Berkeley School of Law, in Berkeley, Cal. (Jan. 12, 2023) (discussing prevention, protection, and accountability as a way to frame a paradigm reflecting the values behind international human rights law).

229. It is beyond the scope of this Comment to provide a comprehensive treatment of each of these categories.

230. See, e.g., NEWMAN, *supra* note 29, at 39; RIPE FOR REFORM, *supra* note 24, at 32; BAUER, *supra* note 31, at 14–17; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 14.

231. RIPE FOR REFORM, *supra* note 24, at 4.

However, increasing job mobility would require fundamentally reimagining the H-2 visa program. The statutory and regulatory structure of the H-2 visa program (and other temporary worker visa programs) is built on the model of employers petitioning for visas and visas being tied to specific employers.²³² Furthermore, changing statutes and regulations to permit H-2 visa workers to seek new employment in the United States alone would be insufficient; workers would also need reliable access to legal assistance in order to switch employers and be protected from retaliation by their current employers.

2. *Worker Debt and Transparency*

Preventing forced labor also requires minimizing the debt with which workers enter the United States. As demonstrated in Part III, the existence of pre-employment debt is a major contributor to the persistence of forced labor conditions within the H-2 visa program.²³³ Pre-employment related debt includes unlawful recruitment fees, visa fees, and travel expenses.²³⁴

Illegal recruitment fees and fraud are rampant in the complex H-2 visa recruitment process.²³⁵ To address this, Congress could enact legislation holding employers strictly liable for recruitment fees charged to workers, create a public registry containing information about all recruiters and available jobs, create a federal agency or commission to monitor international recruiters, require employers to use only recruiters and recruitment agencies authorized by the U.S. or Mexican government, and require job orders, which contain the terms and conditions of the visa holder's employment, to be treated as enforceable contracts.²³⁶ Treating job orders as enforceable contracts is important because many workers never receive written work contracts.²³⁷

Federal law requires employers to reimburse H-2A visa workers for their lawful pre-employment expenses, including visa and travel expenses, but employers often fail to comply.²³⁸ The DOL should ensure that H-2A visa workers are reimbursed for their visa and travel expenses, and Congress should pass legislation requiring that employers reimburse H-2B visa workers as well. To achieve this end, the DOL could condition participation in the H-2 visa

232. See *id.* at 32; MIGRATION THAT WORKS, PROPOSAL FOR AN ALTERNATIVE MODEL FOR LABOR MIGRATION, <https://migrationthatworks.files.wordpress.com/2020/01/alternative-model-for-labor-migration.pdf> [<https://perma.cc/TW4V-53RX>] (detailing a model for a fair international worker program).

233. See NEWMAN, *supra* note 29, at 7, 23; RECRUITMENT REVEALED, *supra* note 61, at 4.

234. Smith, *supra* note 30, at 386.

235. See FAKE JOBS FOR SALE, *supra* note 61, at 4, 24; RECRUITMENT REVEALED, *supra* note 61, at 13, 16.

236. RECRUITMENT REVEALED, *supra* note 61, at 5; FAKE JOBS FOR SALE, *supra* note 61, at 34, 37–38; BAUER, *supra* note 31, at 43.

237. RECRUITMENT REVEALED, *supra* note 61, at 20 (finding that “fifty-two percent of workers surveyed reported that they were never shown a written work contract”).

238. RIPE FOR REFORM, *supra* note 24, at 5, 19, 33; 20 C.F.R. § 655.122(h)(1) (2015).

program on U.S. employers filing end-of-year reports that include documentation of reimbursement of these expenses.²³⁹

Transparency regarding both recruitment and job availability is crucial to ensure workers do not go into debt attempting to obtain jobs that do not exist or that are falsely advertised. The DHS and the DOL should ensure that all job and recruiter information is publicly available in a centralized location, in an accessible format, and in multiple languages.²⁴⁰ Job-related material should be updated in real time and should include information about employers who have obtained authorization to hire H-2 visa workers, including the number of vacancies approved per employer.²⁴¹ This could help limit the need for recruiters²⁴² and could decrease the risk of abuse during recruitment and employment.²⁴³ Lastly, during U.S. consulate interviews, consular officers should ask workers if they have been charged illegal recruitment fees. Currently, “workers who reveal to the U.S. consulate that they have paid illegal recruitment fees risk being denied passage to the U.S.”²⁴⁴ U.S. consulates should transmit this information to U.S. governmental agencies. These agencies should aggregate information about recruiters who charge illegal fees and assist workers in getting the fee reimbursed by their employer.

3. Oversight and Enforcement

Effective oversight and enforcement of the H-2 visa program by responsible U.S. agencies is critical to ensure that employers and their agents comply with existing rules and regulations and to intercept the acts of exploitative employers.²⁴⁵

To ensure effective oversight and enforcement, significantly more resources should be devoted to overseeing and enforcing H-2 visa program rules

239. RECRUITMENT REVEALED, *supra* note 61, at 28. This proposal could encompass other reporting about H-2 visa workers’ experience and become a source of regular publicly available data collection, in addition to providing for greater transparency.

240. FAKE JOBS FOR SALE, *supra* note 61, at 34, 37; RIPE FOR REFORM, *supra* note 24, at 33.

241. FAKE JOBS FOR SALE, *supra* note 61, at 38.

242. *See id.* at 3, 24 (noting that “given the lack of available information, those seeking work in the United States oftentimes have no other option than to trust in recruiters to learn about work opportunities and access H-2 visas”).

243. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 56.

244. RECRUITMENT REVEALED, *supra* note 61, at 16; 8 C.F.R. § 214.2(h)(6)(i)(B) (2015) (specifying that an employer’s H-2B petition may be denied or revoked upon a determination that fees were collected from visa workers); 9 FAM 402.10-10(C), (U) *Prohibited Fees*, U.S. DEP’T OF STATE (July 15, 2021), https://fam.state.gov/search/viewer?format=html&query=prohibited+fee&links=PROHIBIT,FEE&url=/FAM/09FAM/09FAM040210.html#M402_10_10_C [https://perma.cc/37YS-Y8HH] (noting that if there is reason to believe a visa applicant paid a prohibited fee, the employer’s petition should be returned to USCIS for reconsideration).

245. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 56 (noting that “[i]dentifying and investigating exploitative employment situations and then preventing employers who committed certain violations from further participating in the H-2A and H-2B programs is critical to protecting workers”).

and regulations.²⁴⁶ U.S. agencies should have staff dedicated specifically to the enforcement of laws as they relate to temporary visa workers.²⁴⁷ The DOL, which has primary enforcement authority over the H-2 visa program, should conduct more regular audits and investigations of employers. For example, the DOL could regularly inspect payroll records for compliance with wage and travel reimbursement provisions.²⁴⁸ The DOL should regularly conduct on-the-ground inspections of worksites that have large numbers of H-2 visa workers. Congress should require that, at the conclusion of H-2 visa workers' employment, employers report to the DOL on their compliance with H-2 visa program rules and regulations and on their compliance with the terms and conditions in workers' contracts.²⁴⁹ Lastly, given the temporary nature of H-2 visas, the DOL should create an expedited investigation process to ensure that witness testimony and evidence is preserved.²⁵⁰

Effective oversight and enforcement would not only aid in preventing future abuses but would also help hold violators accountable for their actions.

4. *Education, Outreach, and Unionization*

Increasing worker education and outreach is also crucial for prevention.²⁵¹ Educational initiatives should include community leaders, community organizations, and relevant government agencies.²⁵² These initiatives could build on the work of legal advocacy organizations, which are currently the main actors informing H-2 visa workers about their legal rights and conducting know-your-rights trainings.²⁵³ These nongovernmental organizations (NGOs) are well-positioned to provide trainings given their depth of knowledge about the intricacies of worker experiences with the H-2 visa program and ties with worker communities. Government funding could be made more readily available for their work.²⁵⁴

Notice to workers about their employment-related rights and what to expect at their places of employment in the United States is an important prevention measure. Currently, consular officers have at their disposal a comprehensive

246. BAUER, *supra* note 31, at 44; RIPE FOR REFORM, *supra* note 24, at 34.

247. RIPE FOR REFORM, *supra* note 24, at 34.

248. *Id.* at 33–34.

249. BAUER, *supra* note 31, at 44.

250. RECRUITMENT REVEALED, *supra* note 61, at 27.

251. *See* FAKE JOBS FOR SALE, *supra* note 61, at 29 (noting that, given the absence of effective mechanisms for holding fraudulent recruiters responsible and recovering workers' stolen funds, preventing such abuses through workers' rights trainings is a critical strategy).

252. *Id.* at 36.

253. *See id.* at 9–11, 27–31, 39–41 (detailing some of Centro de los Derechos del Migrante, Inc.'s educational and outreach initiatives).

254. *See* 22 U.S.C. § 7104(b)(2) (authorizing the Secretary of Health and Human Services to award grants to local educational agencies to educate school staff and provide age-appropriate information to children about labor and sex trafficking). Such grants could be extended to organizations working to prevent forced labor or protect migrant workers' rights generally.

“Know Your Rights” pamphlet available in numerous languages to distribute at employment-based nonimmigrant visa interviews, which include H-2 visa applicant interviews.²⁵⁵ According to NGO officials, these brochures “have been effective in helping workers understand their rights and request help.”²⁵⁶ However, confusion and misinformation regarding rights remain, due, among other factors, to employees’ limited legal knowledge and geographic isolation.²⁵⁷ These pamphlets should be simplified, include phone numbers for legal service providers, and discuss forced labor in addition to human trafficking.²⁵⁸ Additionally, every worksite that employs H-2 visa workers should be required to provide workers with information about their rights and contact information for organizations that can assist with legal questions and concerns in the United States. Oversight by the DOL would be required to ensure such notice is provided.

Education and notification of rights alone are insufficient. As the ILO CEACR has noted, migrants cannot be easily reached by awareness-raising campaigns or educational measures because of the contexts in which they work.²⁵⁹ For this reason, the United States must also regulate effectively.²⁶⁰

255. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 39 n.91; *Know Your Rights, An Information Pamphlet Describing Your Rights While Working in the United States*, U.S. DEP’T OF STATE [hereinafter *Know Your Rights Pamphlet*], <https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf> [<https://perma.cc/E9JE-6LDK>]. The Trafficking Victims Protection Reauthorization Act of 2008 orders the development of this pamphlet, details the obligations of Consular Officers with respect to the pamphlet, and requires that Consular Officers notify employment-based nonimmigrant visa applicants of their legal rights. Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §§ 202(a)(1), 202(e), 122 Stat. 5044, 5055–56. This pamphlet is available in numerous languages. See *Rights and Protections for Temporary Workers*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/temporary-workers.html> [<https://perma.cc/34WD-LMUU>].

256. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 36 (noting that an official from the National Human Trafficking Hotline told the GAO that the hotline saw an increase in reported complaints by H-2 visa holders since the State Department started providing these brochures).

257. Smith, *supra* note 30, at 389–91.

258. The pamphlet is currently fifteen pages long and includes information specific to a variety of nonimmigrant employment-based visas. Given the large number of H-2 visa workers that regularly travel to the United States, a shorter pamphlet specific to their rights should be created. Key terms like discrimination and harassment should be explained. The pamphlet should make clear on the first page that workers have the listed rights regardless of immigration status. The pamphlet provides the phone number for the National Human Trafficking Hotline, but workers who do not recognize themselves as trafficked may be hesitant to call this number. Websites with additional information are provided on page fourteen, but few H-2 visa workers have computer access. Phone contact information for legal service organizations that regularly assist H-2 visa workers should be provided. Another concern with the pamphlet is that the explanation of human trafficking on pages 10–12 includes many aspects of forced labor, but the term forced labor is not used. It is not clear to the reader that forced labor can exist independently of human trafficking. See *Know Your Rights Pamphlet*, *supra* note 255.

259. *Observation (CEACR) – adopted 2014, published 104th ILC session Worst Forms of Child Labour Convention, 1999 (No. 182) – United States of America*, ILO (2015), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3189946 [<https://perma.cc/V2RY-CH4Q>].

260. See *id.*

In addition, increased union representation of H-2 visa workers could help prevent abuse.²⁶¹ Under ILO instruments, the United States is obligated to respect and promote freedom of association and the right to collective bargaining,²⁶² and the ICCPR states that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions.”²⁶³ Enforcing H-2 visa workers’ right to collective bargaining would require addressing the numerous barriers H-2 visa workers face when they attempt to organize and join unions. One barrier is the prevalence of staffing agencies and third-party contractors, which prevents workers at the same job site from having the same employer.²⁶⁴ Another is the common practice of employers and labor contractors punishing or blacklisting workers for union membership or participation in union activities.²⁶⁵ An additional barrier faced by many H-2A visa workers is that they are not covered by the federal National Labor Relations Act, necessitating action by individual states.²⁶⁶ Furthermore, unions may have difficulty accessing H-2 workers due to their geographic isolation and employer control of their transportation and housing. As a start, the DOL could work with the State Department and other agencies to support the efforts of unions to open offices abroad.²⁶⁷

B. *Protecting H-2 Visa Workers Subjected to Forced Labor*

As an initial matter, H-2B visa workers should be afforded the same protections as H-2A visa workers.²⁶⁸ Studies suggest that H-2B visa workers experience proportionally more labor violations, which indicate that comparable

261. NEWMAN, *supra* note 29, at 31, 40; THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 40–41. For example, in 2004, the Farm Labor Organizing Committee, AFL-CIO, organized Mexican H-2A visa workers in North Carolina and executed a contract with growers, which made employers responsible for all recruitment costs and had a “profound effect on working conditions.” THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 40–41.

262. ILO, *Declaration on Fundamental Principles and Rights at Work*, *supra* note 157, at ¶ 2(a).

263. ICCPR, *supra* note 175, at art. 22.

264. MIGRATION THAT WORKS, *supra* note 232.

265. See THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 16.

266. See National Labor Relations Act, 29 U.S.C. § 152 (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer.”). A recent example of state action is California’s passage of legislation making it easier for farmworkers to form unions. AB-2183; Jeanne Kuang, *Newsom Relents, Signs Farmworker Union Bill After Pressure From Biden and Labor*, CALMATTERS (Sept. 28, 2022), <https://calmatters.org/california-divide/2022/09/newsom-farmworker-union-bill/> [<https://perma.cc/P3KH-TYZL>].

267. NEWMAN, *supra* note 29, at 40. See also THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 41 (noting that in 2005 the Farm Labor Organizing Committee, AFL-CIO opened an office in Monterrey, Mexico, to communicate with members across the U.S.-Mexico border).

268. See *supra* Part I.C. (describing the difference in protections that H-2A and H-2B visa workers receive).

protections are needed.²⁶⁹ Additionally, adequate complaint processes and immigration protections are needed for all H-2 visa workers.

1. Complaint Processes

Although H-2A visa workers, in particular, receive many written protections, these protections are meaningless if violations are not caught in the first place. In addition to adequate oversight and enforcement of program rules and regulations, federal agencies “should ensure workers have access to meaningful complaint processes.”²⁷⁰ DOL WHD officials have said they see a high number of violations and low number of complaints in the agriculture industry (which uses H-2A visa workers) and the hotel, construction, and landscaping industries (which use H-2B visa workers).²⁷¹ This is indicative of an insufficient complaint mechanism²⁷² and fear of retaliation for filing complaints. The burden should be on employers to provide workers with notice of complaint procedures at their worksite and in employee housing. Notice is important to workers’ confidence that complaints will not end up precipitating retaliation.

Workers should also be able to submit complaints by calling a phone number anonymously. Hotlines exist and have been used by H-2 visa workers in related contexts. For example, the National Human Trafficking Resource Center (NHTRC), funded by the Department of Health and Human Services, maintains a toll-free national human trafficking hotline that provides urgent assistance, such as referring workers to law enforcement or service providers, as well as nonurgent assistance, such as providing general information.²⁷³ This number is provided on the front of the “Know Your Rights” pamphlets given to workers at

269. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 36, 51 (noting that the National Human Trafficking Resource Center received nearly twice as many complaints between 2011 and 2013 alleging labor violations involving H-2B visa workers compared to complaints involving H-2A visa workers and that some federal officials and NGOs believe there are proportionally more abuses in the H-2B visa program).

270. RIPE FOR REFORM, *supra* note 24, at 34.

271. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 50.

272. Under the current regulatory framework, H-2A visa workers who believe their rights under the H-2A regulations were violated can file complaints through the Job Service Complaint System or with a local WHD Office. *Employment Law Guide, Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEP’T OF LABOR (Dec. 2016), <https://webapps.dol.gov/elaws/elg/taw.htm> [<https://perma.cc/5AEZ-STFA>]. In addition, some federal agencies will forward complaints received about contractual H-2A labor standards to a local WHD office. *Id.* H-2B visa workers can file complaints with a local WHD office. *Employment Law Guide, Work Authorization for Non-U.S. Citizens: Temporary Nonagricultural Workers (H-2B Visas)*, U.S. DEP’T OF LABOR (Dec. 2016), <https://webapps.dol.gov/elaws/elg/tnw.htm> [<https://perma.cc/8QQ3-EWPC>]. It is beyond the scope of this Comment to analyze this complaint system. However, the limited access many H-2 visa workers have to transportation and computers to file complaints likely make the utilization of these complaint mechanisms unrealistic.

273. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 36 n.86. The U.S. Embassy also has a Fraud Prevention Hotline through which workers can report incidents of recruitment fraud. FAKE JOBS FOR SALE, *supra* note 61, at 30. However, the U.S. Embassy rarely makes information about reported fraud public, so this reporting mechanism does not warn other workers about recruitment fraud. *Id.*

employment-based nonimmigrant visa interviews.²⁷⁴ While the focus of the NHTRC is human trafficking, the GAO found that 90 percent of the complaints to the hotline between 2011 and 2013 were from H-2 visa workers reporting labor violations other than human trafficking.²⁷⁵ A similar government-funded hotline could be implemented for H-2 workers to report abuses directly to the DOL. An additional hotline would require sufficient staff to receive calls and initiate and follow up with investigations. Lastly, data received by the NHTRC pertaining to labor violations should be shared with the DOL.

Access to legal representation is an important factor in whether workers file complaints.²⁷⁶ Legal complaints brought under the H-2 visa program generally come from advocacy groups or attorneys.²⁷⁷ The use of private attorneys is often not viable, however, due to prohibitive costs, language barriers, the low dollar value of even egregious cases, rural isolation of clients, and workers' inability to remain in the local area during litigation.²⁷⁸ Hence, worker access to legal services is critical. Although all H-2 visa workers can access brief advice and consultation by telephone from federally funded Legal Services Corporation (LSC) grantee organizations, only H-2A visa workers, H-2B visa workers who work in forestry, and victims of "severe forms of trafficking of persons"²⁷⁹ can access a full range of free legal services and continuous representation, subject to some notable restrictions.²⁸⁰ "Many H-2B workers may be reluctant to file complaints, in part, because they do not have access to legal aid through the Legal Services Corporation."²⁸¹ The full range of federally funded legal services should be extended to all H-2 visa workers and restrictions on representing H-2 visa workers should be eliminated.²⁸² Because many federally funded legal services organizations are underfunded and understaffed, additional funding for such organizations is also needed.²⁸³

274. *Know Your Rights Pamphlet*, *supra* note 255.

275. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 36 n.87.

276. *Id.* at 43.

277. *Id.*

278. THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 44; NEWMAN, *supra* note 29, at 25–26; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 43–44 (also noting that it can be difficult to recruit pro bono representation for workers because the cases are complex and the U.S. federal agencies are difficult to navigate).

279. Defined in 22 U.S.C. § 7105(b)(1)(C).

280. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 43; 45 C.F.R. § 1626.11 (2015); 45 C.F.R. § 1626.4(a)(2) (2015). Restrictions for H-2A visa workers include a bar on legal assistance unless they have been "admitted to, or permitted to remain" in the United States on an H-2A visa, and such workers may only receive assistance on the matters of wages, housing, transportation, and "employment rights as provided in the worker's specific contract" under which they were admitted to the United States. 45 C.F.R. § 1626.11(a), (c) (2015). Additionally, LSC grantee organizations cannot litigate class action lawsuits, which undermines efforts to make systemic change. Beltran, *supra* note 44, at 559.

281. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 51.

282. *See* RECRUITMENT REVEALED, *supra* note 61, at 5.

283. *See* THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 44.

The U.S. government cannot rely on worker complaints alone to catch employer exploitation of workers and violations of the H-2 visa program rules. H-2 visa workers face myriad obstacles that serve as a deterrent to raising concerns with their employers or seeking out legal assistance to help with the complaint process, including job-dependent immigration status, heavy recruitment debt, blacklisting, retaliation from recruiters or employers, and the threat of removal.²⁸⁴ The GAO itself has noted that the structure of the H-2 visa program and fear of retaliation may create disincentives to report abuses.²⁸⁵ It is thus “particularly important that laws pertaining to [H-2 visa] workers be enforced effectively and that unnecessary hindrances to their access to justice be eliminated.”²⁸⁶

2. *Immigration Protections*

H-2 visa workers who file complaints or who leave workplaces where they are subjected to forced labor should also be afforded immigration protections. Some immigration protections exist in the trafficking context that could be expanded to include victims of forced labor. Forced labor is an exploitative practice linked to labor trafficking,²⁸⁷ but the two terms are defined differently

284. *See id.* at 38, 43–44; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 51 (noting that a WHD study indicates that “workers in many of the industries with the highest levels of noncompliance with labor laws are often the most reluctant to trigger investigations through complaints due to their immigration status, lack of knowledge of rights, or fears about employment security”).

285. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 37–38.

286. THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 44.

287. *Fact Sheet: Labor Trafficking*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.acf.hhs.gov/archive/otip/fact-sheet/fact-sheet-labor-trafficking-english> [<https://perma.cc/W32A-D23P>].

in the U.S. Code²⁸⁸ and under international law.²⁸⁹ The U.S. Code provision defining a trafficking victim governs eligibility for certain types of immigration relief.²⁹⁰ Victims of “a severe form of trafficking in persons” who cooperate with law enforcement and demonstrate they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States are eligible for T Nonimmigrant Status (T-Visa).²⁹¹ Receiving a T-Visa can lead to permanent residency and citizenship.²⁹²

Some victims of forced labor may currently be eligible for U Nonimmigrant Status (U-Visa), a visa for victims of qualifying criminal activity.²⁹³ While the U-Visa can also lead to permanent residency and citizenship, it requires that applicants obtain a certification from a law enforcement agency and demonstrate

288. Spring Miller & Stacie Jonas, *Using Anti-Trafficking Laws to Advance Workers' Rights*, 2015 CLEARINGHOUSE REV. 1, 1–2 (2015). Labor trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C. § 7102(8); *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Oct. 20, 2021), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/38GH-X9T4>]. “[I]nvoluntary servitude” includes a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.” 22 U.S.C. § 7102(5). The forced labor provision, on the other hand, prohibits knowingly providing or obtaining the labor or services of a person “(1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.” 18 U.S.C. § 1589. Note that parts (2) and (3) of 18 U.S.C. § 1589 are nearly identical to the definition of “involuntary servitude” in 22 U.S.C. § 7102, but the trafficking definition requires that a purpose of the illegal acts is subjection to involuntary servitude, while the forced labor provision prohibits knowingly providing or obtaining the labor of a person in the three specified ways.

289. “Trafficking in persons” is defined under international law as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” U.N. Convention Against Transnational Organized Crime, art. 3(a), Nov. 15, 2000, 2225 U.N.T.S. 209. The United States ratified this Convention on November 3, 2005.

290. Miller & Jonas, *supra* note 288, at 1.

291. *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 288.

292. *Id.*

293. Miller & Jonas, *supra* note 288, at 4–5; *Victims of Criminal Activity: U Nonimmigrant Status, Qualifying Criminal Activities*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Feb. 28, 2022), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/6ZLM-MLSW>]. Forced labor is not listed as a form of qualifying criminal activity, but involuntary servitude, fraud in foreign labor contracting, and trafficking, which could be associated with forced labor, are. *See id.* Additionally, crimes related to the enumerated qualifying criminal activities may themselves be qualifying criminal activities. *Id.* Note that under 18 U.S.C. § 1589, forced labor is a federal crime.

they have “suffered substantial physical or mental abuse” as a result of the criminal activity, which is a high threshold.²⁹⁴ Additionally, the number of T-Visa applications has never reached the annual cap of 5,000 and these visas are generally processed faster, while the U-Visa cap of 10,000 is insufficient for the demand, resulting in a waiting time of about five years.²⁹⁵ T-Visa applicants are also eligible for additional social services and federal benefits.²⁹⁶ The T-Visa has its limitations,²⁹⁷ nonetheless, eligibility for the T-Visa should be expanded to include victims of forced labor who are not also trafficking victims.

Trafficking victims are also eligible for Continued Presence status, “a temporary immigration designation provided to noncitizens identified by law enforcement as victims of a ‘severe form of trafficking in persons’ who may be potential witnesses.”²⁹⁸ Continued Presence status allows trafficking victims to lawfully remain and work in the United States during the investigation of trafficking-related crimes committed against them and during civil actions under 18 U.S.C. § 1595 filed against their traffickers.²⁹⁹ Continued Presence is initially granted for two years and can be renewed in up to two-year increments.³⁰⁰ Recipients also receive federal benefits and services.³⁰¹ Continued Presence status should be extended to H-2 visa workers who leave workplaces with documented labor or H-2 visa program violations and to all H-2 visa workers with pending legal cases to allow workers to find a new job and see their cases through to completion.³⁰² Workers and their advocates should be able to request Continued Presence status directly; currently, only law enforcement officials are

294. *Victims of Criminal Activity: U Nonimmigrant Status*, *supra* note 293; Miller & Jonas, *supra* note 288, at 5.

295. Miller & Jonas, *supra* note 288, at 5. Currently, 80 percent of U-Visa cases are completed within sixty months, while 80 percent of T-Visa cases are completed within sixteen and a half months. *Case Processing Times*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/EZ92-4HLY>]. The U-Visa form for checking case status is I-918 and the T-Visa form is I-914.

296. Miller & Jonas, *supra* note 288, at 5; *Victims of Human Trafficking: T Nonimmigrant Status*, *supra* note 288.

297. Limitations include that the filing of a T-Visa application does not confer work authorization, applicants are not allowed to leave the United States prior to filing or while their application is pending, and the DHS excludes economic hardship in its regulatory definition of the “extreme hardship” T-Visa requirement. Miller & Jonas, *supra* note 288, at 6.

298. *Continued Presence Resource Guide*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, CENTER FOR COUNTERING HUMAN TRAFFICKING 6 (July 2021), <https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf> [<https://perma.cc/8YDJ-F3PK>].

299. *Id.*; Miller & Jonas, *supra* note 288, at 2–3; 22 U.S.C. § 7105(3)(A)(iii).

300. *Continued Presence Resource Guide*, *supra* note 298, at 6.

301. *Id.*

302. *See* RECRUITMENT REVEALED, *supra* note 61, at 27 (recommending that immigration relief be granted to H-2 “whistleblowers” so they can stay in the United States “to aid in the investigation and prosecution of their employers”); RIPE FOR REFORM, *supra* note 24, at 34 (recommending that immigration relief be available to permit workers to remain in the United States with work authorization while their legal cases are pending).

authorized to submit Continued Presence applications on behalf of trafficking victims.³⁰³

Lastly, given the temporary nature of H-2 visas, H-2 visa workers who file complaints face immigration-related barriers to seeing claims and litigation through to completion. U.S. courts and commissions often require the worker to be present to bring a claim or deliver testimony.³⁰⁴ If the worker has left the United States, they must obtain either a tourist visa or humanitarian visa to reenter the United States for a deposition, trial, or hearing, and these visas are difficult and costly to obtain and are not consistently issued.³⁰⁵ Workers who are no longer in the United States should be automatically granted a visa at no cost to return to the United States to pursue legal action against their U.S.-based employers or recruiters.³⁰⁶

*C. Holding Employers, Their Agents, and the U.S. Government
Accountable When Forced Labor Occurs in the H-2 Visa Program*

1. Debarment

Robust enforcement of H-2 visa program rules and regulations would aid in holding violators accountable while also preventing further abuses. In addition to the enforcement measures discussed around prevention, U.S. agencies should regularly debar employers who violate H-2 visa program rules and regulations or employment and labor laws, both to punish violators and to prevent exploitative employers from continuing to hire H-2 visa workers. The DOL should investigate all H-2 visa program violations promptly and should share information about debarred employers among state and federal agencies.³⁰⁷ The period of debarment should be increased to serve as a meaningful deterrent, and for serious violations, employers should be permanently expelled from the H-2 visa program.³⁰⁸ Debarment requires the DOL to know about violations in the first instance, highlighting the importance of effective oversight and adequate complaint processes.

2. Claims Under the Trafficking Victims Protection Act

Bringing legal claims before U.S. agencies and courts may further hold employers accountable. I focus here on the forced labor provision of the U.S. Code, 18 U.S.C. § 1589, added as part of the Trafficking Victims Protection Act

303. See *Continued Presence Resource Guide*, *supra* note 299, at 7.

304. THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, *supra* note 80, at 43.

305. *Id.*

306. See RECRUITMENT REVEALED, *supra* note 61, at 27 (recommending the issuance of short-term visas to workers who have already left the United States, so they can return to participate in legal proceedings).

307. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 41–42, 52–53.

308. See FAKE JOBS FOR SALE, *supra* note 61, at 38.

(TVPA).³⁰⁹ The TVPA “prohibits certain forms of coercive labor relationships, seeks to deter and punish those who benefit from those relationships, and establishes mechanisms to protect and compensate victims.”³¹⁰ These mechanisms include a private right of action, criminal penalties, and, as mentioned above, immigration protections for trafficking victims.³¹¹

The TVPA’s definition of forced labor is more limited than the definition under international law. Forced labor under U.S. law focuses on an entity or individual knowingly obtaining labor or services of a person under specified exploitative conditions, while the ILO definition focuses on work or service performed under the menace of any penalty for which a person has not offered themselves voluntarily. The ILO definition focuses more on the worker’s experience, while the TVPA definition focuses more on what the bad actor does to the worker. This difference is significant because the TVPA prohibits a particular kind of coerced labor, but the most vulnerable workers may be unable to articulate that an employer’s coercive actions or scheme, as opposed to impoverished circumstances or lack of options, caused them to remain in an exploitative employment relationship.³¹² The ILO definition leaves room for the recognition that the lack of economic opportunities at home combined with the structure of the H-2 visa program can result in a worker not accepting a job voluntarily.³¹³ Advocates and workers could invoke international labor law to argue for expansive interpretations of terms in the U.S. Code’s forced labor provision, given that courts have interpreted the U.S. Code forced labor provision broadly.³¹⁴

Despite its limitations, scholars and advocates have noted that the ability to bring civil claims under the TVPA has been a useful vehicle for advocates who represent guestworkers (such as H-2 visa workers).³¹⁵ This is partly because TVPA claims have advantages over, or complement, traditional employment claims.³¹⁶ There is a ten-year statute of limitations for TVPA claims, which is far

309. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The TVPA, through its 2008 amendments, also includes a criminal prohibition against fraud in foreign labor contracting, which is not the focus of this Comment, but is relevant given widespread recruitment fraud in the H-2 visa program. 18 U.S.C. § 1351; Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 255, at 5071. The TVPA has been subsequently reauthorized and amended; I use “TVPA” to refer to both the original legislation and its reauthorizations.

310. Miller & Jonas, *supra* note 288, at 1.

311. *Id.*

312. *Id.* at 5–6.

313. *See supra* Part III.

314. *See* Miller & Jonas, *supra* note 288, at 2.

315. *Id.* at 1, 7; Beltran, *supra* note 23, at 231, 268. Note that the Four Star workers in the case study asserted claims under 18 U.S.C. § 1589 that were dismissed because the plaintiffs failed to provide sufficient factual support for their assertions that the defendants knew or should have known of abuses by the workers’ farm labor contractor. *Reyes-Trujillo*, 513 F. Supp. 3d 761, 794–96 (E.D. Mich. 2021). An analysis of cases brought on behalf of H-2 visa workers under the TVPA is outside of the scope of this Comment but deserves further research.

316. Miller & Jonas, *supra* note 288, at 4; Beltran, *supra* note 23, at 268.

longer than the statute of limitations under the Fair Labor Standards Act and Title VII, for example.³¹⁷ Additionally, plaintiffs invoking the TVPA need not surmount various other common hurdles, including proving an employment relationship or proving that various exceptions to coverage under wage-and-hour laws do not apply.³¹⁸ The types of recoverable damages under the TVPA are broader; for example, damages beyond unpaid wages and punitive damages may be available.³¹⁹ Notably, the 2008 amendments to the TVPA also allow victims to bring suit against not only those who victimize them directly, but also against third parties who knowingly benefits from labor obtained in violation of the forced labor provision.³²⁰ Lastly, many H-2 visa workers are excluded from traditional labor-based legal protections due to the industries in which they labor, such as agricultural and domestic work, but can bring claims under the TVPA.³²¹ Expanding the definition of forced labor under the U.S. Code to encompass the ILO definition and align more closely with international law on forced labor could increase the usefulness of this provision for H-2 visa workers.

3. Use of ILO Procedures

On the international stage, ILO procedures could be used to attempt to bring international attention to forced labor conditions within the H-2 visa program. It is important to keep in mind that the impact of international enforcement mechanisms are weak in the United States, and the ILO's accountability mechanisms are limited. Nevertheless, advocates could consider pressuring the United States to report on H-2 visa working conditions in its required reporting under the Abolition of Forced Labour Convention, since the United States has ratified this Convention.³²² There is no enforcement mechanism should the United States decline to report on the H-2 visa program or to submit an annual report altogether, but the ILO CEACR examines cases of failure to comply with reporting obligations and has implemented a practice of "urgent appeals" when reports are not sent for a number of years.³²³

Additionally, although the United States has not ratified the Forced Labour Convention (the fundamental ILO convention ratified by the highest number of

317. Miller & Jonas, *supra* note 288, at 4; Beltran, *supra* note 23, at 268–69.

318. Beltran, *supra* note 23, at 269; Miller & Jonas, *supra* note 288, at 4.

319. Beltran, *supra* note 23, at 269; Miller & Jonas, *supra* note 288, at 4.

320. Miller & Jonas, *supra* note 288, at 2; 18 U.S.C. § 1589(b); Trafficking Victims Protection Reauthorization Act of 2008, *supra* note 255, at 5067.

321. Beltran, *supra* note 23, at 247.

322. The United States is required to report on measures taken to give effect to the provisions of the Abolition of Forced Labour Convention every three years. Int'l Lab. Org. [ILO], *Handbook of Procedures Relating to International Labour Conventions and Recommendations* ¶¶ 35, 36(b)(i) (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_697949.pdf [<https://perma.cc/X7YM-PLQE>]. Reports on the application of conventions may be requested at shorter intervals, and governments are required to submit copies of their reports to workers' (and employers') organizations. *Id.* ¶¶ 36(b)(iii), 67.

323. *Id.* ¶¶ 40, 41.

countries), the ILO has an optional procedure for yearly review of efforts made by States that have not ratified fundamental ILO conventions.³²⁴ The ILO can request reports from members on any changes that have taken place in a given State's law and practice pertaining to unratified fundamental conventions.³²⁵ The ILO Governing Body reviews the reports.³²⁶ The ILO could request reporting from the United States regarding the H-2 visa program through this mechanism when, for example, the DOL issues updated Final Rules for the program.³²⁷ Regular reporting could provide more international visibility about the presence of forced labor in the H-2 visa program, and, hopefully, greater accountability.

Lastly, the ILO CEACR has commented on some labor issues within the United States in association with reports submitted by the United States as part of its reporting obligations.³²⁸ The CEACR has not yet commented on U.S. temporary worker visa programs. Advocates could try to work with ILO workers' organizations to send observations regarding the H-2 visa program directly to the ILO for submission to the CEACR.³²⁹ The CEACR may consider observations from workers' organizations in its comments on reports submitted by member States.³³⁰ This could help elevate international awareness about forced labor conditions that the United States bears international responsibility for eliminating.

CONCLUSION

The number of H-2 visa workers in the United States has increased in recent years, and guestworker programs are likely to persist and expand.³³¹ For over a

324. ILO, *Declaration on Fundamental Principles and Rights at Work*, *supra* note 157, at Annex ¶¶ I, II(A)(1).

325. *Id.* at Annex ¶ II(B)(1); ILO *Constitution*, *supra* note 156, at art. 19(e).

326. ILO, *Declaration on Fundamental Principles and Rights at Work*, *supra* note 157, at Annex ¶ II(B)(2).

327. The DOL recently issued an updated Final Rule for the H-2A visa program. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660 (Oct. 12, 2022) (to be codified at 20 C.F.R. pts. 653, 655; 29 C.F.R. pt. 501).

328. For example, the ILO has commented on hazardous agricultural work by children and prison labor. See Int'l Lab. Org. [ILO], *Observation (CEACR) – adopted 2020, published 109th ILC session Worst Forms of Child Labour Convention, 1999 (No. 182) – United States of America*, ILO (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID:4049525 [<https://perma.cc/W3BE-R973>]; Int'l Lab. Org. [ILO], *Direct Request (CEACR) – adopted 2020, published 109th ILC session Abolition of Forced Labour Convention, 1957 (No. 105) – United States of America* (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:NO:13100:P13100_COMMENT_ID:4046585 [<https://perma.cc/5VCC-DGBH>].

329. See ILO *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, *supra* note 322, at ¶ 44.

330. Int'l Lab. Org. [ILO], *Application of International Labour Standards, Report of the Committee of Experts on the Application of Conventions and Recommendations 29* ¶ 94 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_670146.pdf [<https://perma.cc/JC5X-B8Q9>].

331. Smith, *supra* note 30, at 385.

decade, the U.S. government has indicated interest in increasing the size and scope of guestworker programs, and serious proposals for comprehensive immigration reform have included an expansion of guestworker programs.³³² Hence, it imperative that the United States reform or reimagine the H-2 visa program to comply with its international obligation to ensure that no H-2 visa workers are subjected to forced labor (as defined under international law) at their places of employment in the United States. Ending forced labor to comply with this obligation requires recognizing that this group of lawfully admitted workers is constantly at risk. It further requires targeting governmental action to change laws, engaging all the protections currently in domestic law through agency action, and bringing offending employers and recruiters before relevant administrative agencies and the courts.³³³

332. *Id.* For example, a 2016 appropriations bill that limited protections for H-2B visa workers also dramatically expanded the size of the program. *Id.* at 385 n.51. *See also* RECRUITMENT REVEALED, *supra* note 61, at 8 (noting that “many politicians and employers see temporary work programs as a crucial component of immigration reform and a potential solution to unauthorized migration”).

333. *See* Beate Andrees, *Why Definitions Matter*, ILO (Feb. 3, 2014), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_234854/lang-en/index.htm [<https://perma.cc/Z9W8-UY6V>].