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American Dreams, Trafficking Nightmares

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AMERICAN DREAMS, TRAFFICKING NIGHTMARES

Mariana C. Minaya*

Under the H-2 visa scheme, American employers rely on labor recruiters to venture abroad, find prospective employees, and commit them to an employment contract for seasonal or temporary work on American farms, construction sites, hotel staffs, and other businesses. Rogue recruiters, operating in foreign countries far from the view of their American employers or law enforcement, are in effect free to employ a variety of unscrupulous means for enticing and obtaining prospective recruits. They may lie about the nature of the work that awaits the recruits in the United States, charge them illegal fees that leave them in crushing debt, or confiscate their passports. Once the workers arrive to their labor sites, unethical employers can take advantage of their compromised status, conceivably through deliberate ignorance of their recruiter's actions. This Article proposes amending the ambiguous knowledge threshold in the federal anti-trafficking statute in order to prevent employers from flouting liability for a fraudulent recruitment charge merely by asserting they knew nothing about their recruiter's actions—a particularly cynical assertion given the common knowledge that these middlemen service a vulnerable population of impoverished migrant workers.

I.	INTRODUCTION	65
II.	RECRUITMENT AND TRAFFICKING OF H-2 WORKERS.....	69
A.	<i>A Different Kind of “Bait and Switch”</i>	70
B.	<i>Human Trafficking Background</i>	73
1.	Prevalence and Kinds of Trafficking	74
2.	International and Domestic Anti-Trafficking Tools.....	80
3.	Distinguishing Smuggling.....	81
C.	<i>Deceptive Recruitment of Guest Workers</i>	82
III.	BACKGROUND OF THE H-2 PROGRAM.....	86
A.	<i>Background of the H-2 Visa Program</i>	87
1.	The Origins and Legislative History of the H-2 Program....	87
2.	Overview of the H-2 Visa Program.....	91
3.	Common H-2 Program Abuses	97

<i>B. The Failure of Attendant Labor Laws to Adequately Safeguard H-2 Workers from Trafficking</i>	99
1. The Fair Labor Standards Act	100
2. The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”)	102
3. Department of Labor’s Failures to Enforce H-2 Worker Protections	104
IV. THE TRAFFICKING VICTIMS PROTECTION ACT: ORIGINS, AIMS, EVOLUTION, AND PROPOSALS FOR FURTHER IMPROVEMENT	106
<i>A. Legislative History of the TVPA</i>	106
1. The Enactment of the TVPA	106
2. Subsequent Reauthorizations	108
<i>B. Protections Against Deceptive Recruitment Practices in the TVPA</i>	110
<i>C. Proposals to Resolve the Statutory Deficiencies</i>	113
V. CONCLUSION	122

I. INTRODUCTION

Raj, a young man in a rural Nepali village, reads in his local newspaper about an opportunity to work in the United States under a temporary visa program. He contacts the recruiter from the advertisement, who promises him a high-paying job on a Texas cattle ranch. The recruiter guarantees that he will prepare the paperwork and arrange the transportation, as long as Raj pays him a few thousand dollars for his services. Raj, whose destitute condition caused him to seek work abroad in the first place, does not have the money on hand. He scrapes together his life savings and borrows money from his in-laws to pay the recruiter. The recruiter initiates the process of obtaining a work visa in the United States, but informs Raj that he must have several hundred more dollars to finish the proceedings. Knowing Raj does not have the money, he offers Raj a loan at a fifteen percent interest rate. Raj is apprehensive, but he considers the wages he will earn on the ranch, and decides to forge ahead. He accepts the recruiter’s loan offer, and is plunged into significant debt before he has begun work. His passport and paperwork are soon delivered from the consulate’s office directly to the recruiter’s office.

Raj and several other men from his village arrive in the United States and learn they are on a Georgia peach farm. The harsh winter has delayed this year’s crop. The farmer demands that Raj and the

others wait without pay for the peaches to ripen. Raj has not seen his visa, passport, or an employment contract. The men are locked into the camp where they sleep, four men to a mattress in a hot, dilapidated trailer. The farmer charges them for “rent” and meals. Finally, when harvesting season begins, they toil from sun-up to sun-down. The farmer deducts more charges from their wages and, on some occasions, flatly refuses to pay at all.

Raj is a fictional, but prototypical, victim of labor trafficking in the United States. Sadly, the true accounts of workers venturing from abroad who find themselves ensnared in human trafficking schemes are far more harrowing. Hundreds, if not thousands, of men and women from countries across the world—Mexico, Guatemala, Thailand, India, and Peru, just to name a few from the accounts relayed in this Article alone—find themselves at the near complete whim of recruiters. Pushed to desperation by economic conditions at home, these individuals migrate to survive.¹ Once in the hands of recruiters, they may be abused in a myriad of ways at every stage of the process, from the initial offer of employment to the moment they break free.

At the outset, the recruiter may lie about the nature of their work, wages, and immigration status. Lacking knowledge of American immigration policies and employment laws, these individuals must trust the recruiter’s representations. The victims have no means to verify the credibility of their employment offers. Once the recruiter is retained, he often charges the workers additional bogus fees. In order to pay, workers commonly mortgage their properties or borrow heavily from relatives, banks, or from the recruiters themselves—who offer loans at outrageous rates. In any case, recruiters financially trap the workers. They are heavily indebted before they have earned a single penny. As the situation progresses, a recruiter purporting to facilitate the worker’s transportation to the employment site may use a variety of methods to curtail a worker’s freedom of movement. He may confiscate the worker’s passport or

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¹ See generally Janie Chuang, *Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006) (describing how globalization has “created a spate of ‘survival migrants’ who seek employment opportunities abroad as a means of survival as jobs disappear in their countries of origin”).

use threats and physical force. Finally, when the recruitment stage is over, the actual work can begin. Depending on the disposition of their employers, the workers may find themselves in a situation where their employers make them work all day, every day, yet they never see a cent of payment.

This is modern-day slavery in the United States. It is no longer orchestrated by formal traders in human beings who kidnap individuals from their villages and sell them in open-air markets to new owners under the sanction of law. Instead, the conditions of the globalized economy have created a ready body of hundreds of thousands of workers. Desperate for employment, workers must look abroad for their survival, and they are more willing to take advantage of temporary worker programs in the United States and other nations. These men and women are the targets of modern-day traffickers. Traffickers no longer need bludgeons and chains; they simply rely on these market demands to provide ready victims. The United States is far from immune from modern-day slavery. The infamous El Monte Garment case of 1995, where more than seventy Thai workers worked eighteen-hour days for less than one dollar per hour behind barbed wire under armed guard,² ushered in this tragic new era for the United States.³

In 2000, Congress enacted the Trafficking Victims Protection Act (“TVPA”), the country’s first comprehensive law to address human trafficking.⁴ The TVPA was also the first federal anti-slavery provision since the passage of the Thirteenth Amendment following the Civil War.⁵ Finally, as with the other Section 2 based legislation,

² Teresa Watanabe, *Home of the Freed*, LOS ANGELES TIMES (Aug. 14, 2008), <http://articles.latimes.com/2008/aug/14/local/me-thai14>; see also Luis CdeBaca, *El Monte, 15 Years Later: Reflections on a Labor Trafficking Case in California*, DIPNOTE (Aug. 3, 2010), <http://blogs.state.gov/2010/08/article/el-monte-15-years-later-reflections-labor-trafficking-case-california>.

³ Chanchanit Martorel, Executive Director of the Community Development Center refers to it as the “first case of modern day slavery in the U.S.” *Modern Day Slavery*, YOUTH & YOUNG ADULT NETWORK OF THE NAT’L FARM WORKER MINISTRY (May 23, 2013), <http://nfwm-yaya.org/resources/farm-worker-issues/modern-day-slavery/>; see also *Victory for Human Rights*, THAI CMTY. DEV. CTR. (May 23, 2013), <http://thaicdc.org/cms/victory-for-human-rights/>. It certainly at least appears to be the first major modern-day labor trafficking case in the United States.

⁴ 22 U.S.C. 78 §71029B (2013).

⁵ See Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655 (2007). “Finally, as with the other Section 2 based legislation, members of the 2000 Congress invoked the Reconstruction Era as they expanded the concept of slavery addressed by the Congress of that era. For example, Senator Brownback declared that the TVPA was

members of the 2000 Congress invoked the Reconstruction Era as they expanded the concept of slavery addressed by the Congress of that era. For example, Senator Brownback declared that the TVPA was not only a significant human rights bill, but also “the largest anti-slavery bill that the United States has adopted since 1865 and the demise of slavery at the end of the Civil War.”⁶ The TVPA criminalized much of the coercive, yet subtler, behavior that comprised human trafficking in modern times.⁷ But the TVPA falls short in at least one critical aspect. It fails to take into account effectively the freewheeling middle agent at the center of a labor trafficking situation. More specifically, it fails to address adequately a situation where an employer consciously avoids learning about a rogue recruiter’s practices.⁸

The statute does criminalize the coercive or fraudulent recruitment of individuals for the purposes of exploiting their labor. However, it requires that the offender do so “*knowingly*,” while leaving the meaning of knowledge undefined.⁹ This omission is critical. Currently, it is theoretically possible for an employer to disavow knowledge of his recruiters’ practices and escape liability for trafficking charges. If employers can sever the agency relationship, then a trafficking charge falls apart. This Article argues that Congress must provide a more complete definition for the kind of awareness that constitutes criminal knowledge in trafficking violations. This additional information would be an effective way of punishing employers who bury their heads in the sand while relying on third-party actors to do much of the dirty work. Failure to punish the employers effectively means leaving the crime unpunished; recruiters are often freewheeling agents operating informally across borders and are notoriously difficult to pin down.

It is imperative that Congress undertakes these reforms given that hundreds of thousands of newly legalized workers are expected to arrive under the recently proposed visa schemes currently languishing in Congress.¹⁰ Already, there are alarmingly few cases brought on

not only a significant human rights bill, but also “the largest anti-slavery bill that the United States has adopted since 1865 and the demise of slavery at the end of the Civil War.”; see also Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. Rev. 255, 309 (2010).

⁶ Zietlow, *supra* note 5 at 309 (citing 146 Cong. Rec. 22,043, 22,044 (statement of Sen. Brownback)).

⁷ See generally 22 U.S.C. 78 §7101 (2013).

⁸ See 28 U.S.C. 78 §7106, 7108-09 (2013) (showing broad guidelines for actions against traffickers).

⁹ 28 U.S.C. 78 §7106, 7102 (2013).

¹⁰ Richard Cowan, *U.S. Immigration Reform Advocates See New Hope in 2014*, REUTERS (Jan. 17, 2014, 5:25PM), <http://www.reuters.com/article/2014/01/17/us->

labor trafficking charges, even though it is likely that there are a far greater number of victims in this vulnerable population of workers than those who presently come forward. In some instances, charges have fallen apart, almost inexplicably, to the outrage of worker advocates and attorneys who hear distressing accounts of exploitation from their clients.¹¹ Attorneys and advocates must have a sharper tool if they are to battle successfully modern-day traffickers.

Part II will describe the nature of labor trafficking in the guest worker context and provide a more general introduction to the modern-day phenomenon of human trafficking—the broad, complicated, global problem that the TVPA was designed to combat. Part III will elaborate on the need to pay greater attention to the exploitative recruitment of H-2 workers specifically, as well as describe the origins and functioning of the present-day guest worker program under the H-2A and H-2B visas. This part will also describe the attendant labor laws designed to protect guest workers, and detail the kind of abuses that proliferate despite these measures. Part IV will recount the history and aims of the TVPA and analyze where its labor trafficking provisions fall short of its goals to eradicate modern-day slavery. Finally, this Article will propose new statutory language to resolve the shortcomings of the current TVPA, which Congress should adopt when considering the next reauthorization of this Act.

II. RECRUITMENT AND TRAFFICKING OF H-2 WORKERS

“Human trafficking” is an umbrella term for the various illicit means of obtaining, transporting and enslaving human beings.¹² Trafficking schemes have proliferated in almost every nation in the world, taking on many forms and claiming diverse victims.¹³ Men, women, and children are trafficked for the purposes of extracting either sex or forced labor. The TVPA is a far-reaching piece of legislation designed to help trafficked individuals not only in the

usa-congress-immigration-idUSBREA0G1NB20140117 (“The Senate last June passed a sweeping immigration bill that would give millions of undocumented immigrants a pathway to citizenship but the legislation has languished in the House.”).

¹¹ See, e.g., Karen Lee Ziner, *Shipyard Worker’s Arrest Leads to 3-Year Probe*, PROVIDENCE JOURNAL (Apr. 1, 2012), available at <https://advance.lexis.com/GoToContentView?requestid=3c7fc804-6ff-d1d5-1537-9ebadd01bf79,c42f739d-5432-57e7-d227-90867b61cf4&crd=c1c45cc8-dabb-add2-55a8-7c4d6ebbb45>.

¹² U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 29 (2013) [hereinafter TIP REPORT 2012] available at <http://www.state.gov/documents/organization/192587.pdf>

¹³ *Id.* at 8.

United States, but also across the globe. This part will introduce the reader to the modern-day iteration of human trafficking, and further describe how this phenomenon afflicts workers, particularly migrant ones, in the United States. First, this part will describe the “bait-and-switch” at the heart of many labor trafficking cases that have confounded attorneys and advocates.

A. *A Different Kind of “Bait and Switch”*

Federal investigators have bemoaned the “bait-and-switch” at the heart of labor trafficking schemes.¹⁴ Workers abroad are promised fair wages and lawful employment under proper temporary visas.¹⁵ On this premise, they accept the offers of employment brokered not by their American employer, but rather by the middleman who is operating in their home country.¹⁶ Once they arrive in the United States, the fair wages, good work, and legal security they were promised turn out to be a mere illusion.¹⁷ The workers are cheated out of payment, brutalized, held captive, and forced to work against their will.

Yet conceivably the actor who sets the bait need not be the one who operates the switch.¹⁸ The baiter in these cases is the rogue recruiter, who can profit by charging exorbitant fees for his recruitment services, with little regard for whether a “switch” occurs at all, *i.e.*, for whether the conditions or quality of the worker’s eventual employment match with what the baiter has promised, or are instead different and exploitative.¹⁹ The conditions of employment are entirely in the hands of the employer.²⁰ An employer who wants to pull a switch knows someone else has set the bait. If the rogue recruiter successfully extracts from them thousands in bogus fees, then the workers are severely indebted, and effectively trapped. The switch becomes remarkably easy to pull, and the bait-setter can disappear.

¹⁴ Thomas Steinmetz, *Is Slavery and Human Trafficking Legal in the United States?*, ETURBONews, (Aug. 14, 2012, 5:53 PM), <http://www.eturbonews.com/30648/slavery-and-human-trafficking-legal-united-states>.

¹⁵ *Id.*

¹⁶ *See infra* Part II.C.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Recruiters and employers are known to also act in concert to inflict poor conditions. But, theoretically, a recruiter can focus entirely on providing basic living services, while the employer can exclusively control the conditions of the actual employment. *Id.*

The challenge is, then, to hold responsible an employer who knowingly benefits from those illegal recruitment practices without getting his hands dirty in the recruitment or “bait-setting” stages. This question is particularly important to practitioners because, as the reports cited in this Article will demonstrate, the recruiter is often a nebulous target moving across borders. By contrast, an employer is a stable entity in the United States, and there is a greater chance of holding the employer accountable under the law.²¹

The following news articles demonstrate the frustration that advocates, investigators, and attorneys encounter when grappling with allegations of fraud and labor trafficking in the guest worker context. This demonstrates the need for seeking better avenues to achieve justice for this population of victims.

A three-year investigation into an Alabama temp agency that referred workers to a shipyard company in Rhode Island foundered and sputtered to a complete halt, according to a 2012 local newspaper article.²² The U.S. Attorney’s office in Rhode Island declined to pursue a large on-site investigation, citing resource constraints, and closed the case.²³ During the investigation, a government agent discovered that one of the workers in this case was part of a group of hundreds of Indian nationals who had originally arrived at New Orleans in 2002 and 2003 to work for a steel company by the name of Falcon Steel.²⁴ An FBI field office in New Orleans had begun investigations on Falcon Steel for human trafficking and visa fraud, however, the local U.S. Attorney’s Office had declined to pursue the case.²⁵ Keny Felty, a local attorney, filed a civil corruption and racketeering lawsuit in federal court on behalf of 300 workers alleging, among other things, human trafficking and debt bondage.²⁶ These workers had allegedly paid between \$7,000 and \$20,000 in recruitment fees, the product of high-interest rate loans in India, on false promises that they would have full-time manufacturing work in the United States.²⁷

Though a federal district court dismissed the allegations, an appellate court reversed this decision.²⁸ Yet the men, in need of work

²¹ 22 U.S.C. §§ 7106, 7102 (2013).

²² Ziner, *supra* note 11.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

and frustrated at the slow pace of the proceedings, dispersed.²⁹ Soon after this, the company went bankrupt, and the civil case fell apart. Kent Felty, the attorney representing these workers stated that the root of the problem was the recruiting chain in India. Furthermore, Felty was particularly frustrated at the fact that these workers were not granted T-visas, which are reserved for victims of severe forms of human trafficking.³⁰ He felt that “the government could not see the forest for the trees,” and also stated that, “the government’s position is that this is not a severe form of human trafficking. It comes down to, what is a severe form of trafficking? Like whips and chains and locked doors and rape and murder.”³¹

Attorney Kent Felty is not alone in his frustration. A group of advocates on behalf of thousands of Thai farm laborers who came to the United States under a similar pattern of deception and exploitation expressed outrage when Justice Department dismissed a well-publicized human trafficking case.³² Hundreds of workers alleged they had been charged thousands in fees on false promises of good wages and employment in the United States.³³ These workers claimed various forms of mistreatment, such as passport confiscation and threats.³⁴ Worker advocates were confounded at seemingly conflicting messages that the workers were qualified for T-visas as victims of a severe form of trafficking, but that the criminal case was not strong enough to pursue.³⁵

These reports, though distinct, are disappointing examples of cases falling apart despite the claims of numerous victims. This Article contains other reports of frustrated victims who did not feel the laws adequately addressed their situations. While there are likely many causes for these breakdowns, this Article explores one aspect of the problem: the link between the employer and recruiter. This Article proposes a potential remedy that could make it easier to conceptualize and sustain trafficking charges that involve the fraudulent recruitment of guest workers. The remedy would provide a framework for defining an illicit relationship between an unethical employer and

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Steinmetz, *supra* note 14.

³³ *Id.*; see also Teresa Watanabe, *Thai Workers Describe Being Lured into Slavery in U.S.*, LOS ANGELES TIMES (Sept. 9, 2010), <http://articles.latimes.com/2010/sep/09/local/la-me-0909-slave-labor-20100909>.

³⁴ *Id.*; see also Jennifer Sinco, *Feds Dismiss Largest US Human Trafficking Case*, YAHOO NEWS (July 21, 2012, 10:27PM), <http://news.yahoo.com/feds-dismiss-largest-us-human-trafficking-case-231217178.html>.

³⁵ Steinmetz, *supra* note 14.

recruiter. As such, it would hold unethical employers accountable while putting ethical employers on notice of the laws in this area.

The federal anti-trafficking statute contains two key provisions to criminalize labor trafficking and fraudulent recruitment. Under section 1590, to be convicted of “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor” one must have “knowingly recruit[ed], harbor[ed], transport[ed], provid[ed] or obtain[ed] by any means, any person for labor or services in violation of the Peonage, Slavery and Trafficking in Persons chapter of the criminal code.”³⁶ Under section 1351, a person will be convicted of the offense of “fraud in foreign labor contracting” if he or she,

knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purpose of employment in the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, by means of materially false or fraudulent pretenses, representation or promises regarding that employment.³⁷

Notably, there is a requirement of knowledge in both the criminal offenses for trafficking and fraudulent recruitment that is not further defined in the statute. Providing a workable standard could potentially assist litigators trying to build a case.

B. Human Trafficking Background

Centuries ago, human trafficking meant kidnapped victims were transported in abominable conditions to auctions where they were publicly bought and sold as property. Slave ships carried entire families and villages across the Atlantic to work in plantations in the Southern United States, and the law openly classified humans as chattel.³⁸ Today, examples of human trafficking can be almost as blatant, but are increasingly much more subtle. Human trafficking is a true Chimera, taking on many hideous forms to claim its varied victims. Toddlers in India are forced to bake bricks in kilns, their families lured to factories by deceptive recruiters, while college-bound teenagers in the United States meet pimps posing as doting suitors

³⁶ 18 U.S.C. § 1590 (2008).

³⁷ 18 U.S.C. § 1351 (2008).

³⁸ See ANNETTE GORDON-REED, *THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY* 37-38 (2009).

online.³⁹ In response to modern human trafficking, the international community and foreign national governments have created a vast arsenal of legal tools to define and attack a wide range of criminal behaviors.⁴⁰ By seizing the elements common to the diversity of trafficking schemes, policy-makers have been able to craft several effective criminal provisions. In the United States, lawmakers aimed to craft a statute that would protect this wide swath of victims both at home and abroad.⁴¹

1. Prevalence and Kinds of Trafficking

a. *Global Trafficking Patterns*

On the 150th anniversary of President Lincoln's Emancipation Proclamation, the International Labour Organization (ILO) estimated that in 2012, there were 20.9 million victims of forced labor in the world.⁴² This number is purportedly "twice as many people enslaved in the world as there were in the 350 years of the transatlantic slave trade."⁴³ The vast majority of victims, 18.7 million, are exploited by private individuals or businesses.⁴⁴ The rest, 2.2 million, are exploited by state actors in the armed forces or prison labor programs.⁴⁵

Of the individuals exploited in the private economy, the majority, 14.2 million, is exploited for its labor in industries such as agriculture, construction, domestic work and manufacturing.⁴⁶ The other 4.5 million are victims of sexual exploitation.⁴⁷ Overall, women

³⁹ Leif Coorlim, Mallika Kapur & Sara Sidner, *Toddlers Freed from Brick Kiln Bondage*, CNN (Mar. 20, 2013), <http://thecnnfreedomproject.blogs.cnn.com/2013/03/20/toddlers-freed-from-brick-kiln-bondage/>; Erica Fink & Laurie Segall, *Pimps Hit Social Networks to Recruit Underage Sex Workers*, CNNMONEY (Feb. 27, 2013, 7:30AM), <http://money.cnn.com/2013/02/27/technology/social/pimps-social-networks/index.html>.

⁴⁰ See *infra* Part II.B.2.

⁴¹ 22 U.S.C. § 7101 (2014).

⁴² INT'L LABOUR ORG., GLOBAL ESTIMATE OF FORCED LABOUR 11, 13 (2012) [hereinafter ILO GLOBAL ESTIMATE] available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf.

⁴³ J.J. Gould, *Slavery's Global Comeback*, THE ATLANTIC (Dec. 19, 2012, 7:44AM), <http://www.theatlantic.com/international/archive/2012/12/slaverys-global-comeback/266354/>.

⁴⁴ ILO GLOBAL ESTIMATE, *supra* note 42, at 13.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

and girls represent the majority, fifty-five percent, of victims.⁴⁸ However, when it comes to private economy labor exploitation, men represent sixty percent of victims.⁴⁹ In general, adults are more commonly victimized than children.⁵⁰ Only twenty-seven percent of the victims of labor exploitation by private individuals or businesses are children.⁵¹ As for geography, the regions with the greatest number of victims are in the Asia-Pacific, Africa, and Latin America areas, though no major region of the world is immune.⁵² Finally, despite significant variation across regions and industries, the average length of time spent in captivity is eighteen months.⁵³

Victims' stories from the year 2012, collected by the State Department, illustrate the wide variety of human trafficking schemes.⁵⁴ In Uzbekistan, schoolchildren forced to pick cotton were threatened with expulsion for failing to meet their production quotas.⁵⁵ In Mexico, traffickers deceived, gang-raped, and brutalized a 13-year-old girl, and forced her to prostitute herself to thirty clients per day.⁵⁶ In Pakistan, traffickers abducted disabled men from neighboring countries and deposited them on the streets to beg.⁵⁷ Private employers in the United Kingdom and other countries confined, molested, and tortured domestic workers, women and men alike.⁵⁸ In India, textile factory owners branded and enslaved teenagers for years.⁵⁹ In neighboring Bangladesh, brothel owners give young girls cattle steroids to appear older and entice johns.⁶⁰ In parts of Africa, paramilitary groups use children as combatants, cooks, spies, or for sex.⁶¹ On the open ocean, men spend 18-hour workdays confined on fishing boats in cramped conditions, subject to physical and sexual abuse.⁶²

b. Trafficking Patterns in the United States

⁴⁸ *Id.* at 14.

⁴⁹ *Id.*

⁵⁰ *Id.* Seventy-four percent, or 15.3 million victims, are 18 or older.

⁵¹ *Id.* at 15.

⁵² *Id.* at 16.

⁵³ *Id.* at 17.

⁵⁴ See generally TIP REPORT 2012, *supra* note 12.

⁵⁵ *Id.* at 40.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 17, 11.

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 32.

⁶¹ *Id.* at 36.

⁶² *Id.* at 38.

Trafficking in the United States is no less varied or ubiquitous. The State Department ranks the United States as a Tier 1 country, which means its government fully complies with the TVPA's minimum standards regarding appropriate criminal prohibitions and punishments.⁶³ The Tier 1 ranking also signifies that the federal government does not sponsor or condone trafficking.⁶⁴ Rather, trafficking is private and hidden—presenting significant challenges for investigators, law enforcement, and policy makers. As a result, estimates of the number of human trafficking victims currently in the United States are widely disputed.⁶⁵ To provide some point of reference, however, the Congressional Research Service reported in 2013 that “[a]s many as 17,500 people are trafficked into the United States each year.”⁶⁶

For reporting and law enforcement purposes, human trafficking is typically divided into two types: labor and sex trafficking.⁶⁷ A variety of distinct crimes fall under the term “labor trafficking.” Labor trafficking includes schemes to extract forced labor, involuntary

⁶³ U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 555* (2013) [hereinafter *TIP REPORT 2013*] available at <http://www.state.gov/j/tip/rls/tiprpt/2013/>. The minimum standards are codified at 22 U.S.C. § 7106 (2012) (“(1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault. (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense. (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.”).

⁶⁴ *Id.* at 41 (“While Tier 1 is the highest ranking, it does not mean that a country has no human trafficking problem. Rather, a Tier 1 ranking indicates that a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards. Each year, governments need to demonstrate appreciable progress in combating trafficking to maintain a Tier 1 ranking. Indeed, Tier 1 represents a responsibility rather than a reprieve. A country is never finished with the job of fighting trafficking.”).

⁶⁵ *Id.* at 12.

⁶⁶ ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., *TRAFFICKING IN PERSONS: U.S. POLICY ISSUES FOR CONGRESS 15* (2013).

⁶⁷ *Id.* at 8. Note, however, that advocates who maintain that sexual services are labor contest this dichotomy. Furthermore, victims exposed to one kind of abuse are frequently exposed to other kinds. Consider the Filipino fishermen, noted in the State Department's 2012 report, who are forced to labor on ships, but also subject to sexual abuse. Nonetheless, for the purposes of conceptualizing the problem, it is helpful to note that law enforcement divides them into two categories.

servitude, or debt bondage. Forced labor occurs when someone uses coercive methods to compel someone to work.⁶⁸ Involuntary servitude is defined by federal law as servitude induced by either abuse or threatened abuse of the legal process, or a scheme or plan intended to cause a person to believe that he or she would suffer serious harm if he or she refused.⁶⁹ Debt bondage occurs when a person promises his or her labor as a security for a debt, if the value of those services is not applied toward liquidating the debt, or the nature of the services is unlimited or undefined.⁷⁰ It is illegal to use threats of financial harm or debt to force someone to work.⁷¹

Statistics for labor trafficking are scarce and often contradictory. Estimates have fluctuated widely throughout the years depending on the counting methodology employed.⁷² Language barriers, the temporary nature of guest worker visas, and fear of deportation also combine to discourage victims from reporting offenses to law enforcement.⁷³ What is clear, however, is that migrant workers are particularly vulnerable to this form of trafficking.⁷⁴ A migrant worker is anyone who travels abroad to find work,⁷⁵ regardless of his or her immigration status.⁷⁶ Guest workers are only a small subset of this population.⁷⁷ A number of factors contribute to the

⁶⁸ TIP REPORT 2013, *supra* note 63, at 31.

⁶⁹ 22 U.S.C. § 7102(6) (2012).

⁷⁰ 22 U.S.C. § 7102(5) (2012).

⁷¹ TIP REPORT 2012, *supra* note 12, at 33.

⁷² Johnny E. McGaha & Amanda Evans, *Where are the Victims? The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239, 243 (2009). The GAO has openly doubted the accuracy of State Department figures due to questionable methodology and incomplete statistics. *Id.* at 251.

⁷³ *Id.* at 244.

⁷⁴ TIP REPORT 2012, *supra* note 12, at 23.

⁷⁵ The United Nations defines a “migrant worker” as a “person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/148, art. 2, U.N. GAOR, 45th Sess., Supp. No. 49A, at 266, U.N. Doc. A/45/49 (Dec. 18, 1990), available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>. The term generally refers to anyone who works in a different country, excluding individuals who are employees of international organizations, government officials, investors, students, and refugees, among others. Note that in the United States, the term “migrant worker” is defined differently by statute. The overlap between the legal definitions of migrant worker and guest worker will be discussed later.

⁷⁶ See generally Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 135-39 (2009).

⁷⁷ In the United States, undocumented workers far outnumber the documented workers who arrive under a host of visa schemes. See *id.* This scheme includes the

susceptibility of migrant workers such as:⁷⁸ crushing poverty in their home countries,⁷⁹ pressure them to find work abroad, and the need provide remittances to their families.⁸⁰

Investigators opened 350 incidents of labor trafficking between January 2008 and June 2010.⁸¹ Twenty-eight percent of the victims were qualified aliens, according to the Bureau of Justice Statistics.⁸² In the 2010 fiscal year, the State Department counted 32 labor-trafficking convictions, including those of ten defendants in a multinational organized criminal conspiracy that had exploited guest workers across fourteen states.⁸³ At least three states prosecuted forced labor incidents under their own statutes during that time and there is some indication that these may have involved guest workers as well.⁸⁴

Labor trafficking schemes have ensnared hundreds of victims on the H-2 visas.⁸⁵ For example, in 2008, more than 500 Indian shipyard workers filed trafficking claims against their employer, Signal International, LLC., and its recruiters.⁸⁶ In 2010, more than 400 Thai farmworkers filed a similar lawsuit against a recruitment

“major category” of H visas, such as H-1 (specialty occupations) and H-2 visas (agricultural and non-agricultural). It also includes the O-1 visa (extraordinary achievement); P-1 (internationally recognized entertainers and athletes). *Id.* The government also issues A-3 and G-5 visas to domestic workers of diplomatic personnel and foreign officials. See Janie Chuang, *Marketization and Families, Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627 (2010).

⁷⁸ *Id.* at 23.

⁷⁹ Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 138 (2006) (describing how globalization has “created a spate of ‘survival migrants’ who seek employment opportunities abroad as a means of survival as jobs disappear in their countries of origin”).

⁸⁰ LATINO FARMWORKERS IN THE EASTERN UNITED STATES: HEALTH, SAFETY & JUSTICE 28 (Thomas A. Arcury & Sara A. Quandt eds., 2009).

⁸¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 3 (2011) [hereinafter BJS, TRAFFICKING INCIDENTS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf>.

⁸² *Id.* at 1 (“67% were undocumented aliens”).

⁸³ U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 373 (2011) [hereinafter TIP REPORT 2011], available at <http://www.state.gov/documents/organization/164458.pdf>.

⁸⁴ *Id.*

⁸⁵ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 338 (2010), [hereinafter TIP REPORT 2010] available at <http://state.gov/documents/organization/142979.pdf>.

⁸⁶ *David v. Signal Int’l, LLC*, 257 F.R.D. 114, 117 (E.D. La. 2009); see also *Case Docket: David, et al. v. Signal International LLC*, Southern Poverty Law Center (Feb. 18, 2013), <http://www.splcenter.org/get-informed/case-docket/david-et-al-v-signal-international-llc>.

company, Global Horizons Manpower, Inc.⁸⁷ From late 2010 to early 2011,⁸⁸ the Departments of Justice and Homeland Security investigated and prosecuted several more instances of trafficking involving H-2 workers.⁸⁹ The national worker exploitation hotline received 11,381 phone calls during that same period.⁹⁰ Of the legally documented foreign nationals that called in, the greatest number of calls came from temporary workers such as H-2s.⁹¹ The 2013 State Department report also highlights that “there were reports of abuses, including allegations of human trafficking, of workers in the United States on work-based or other nonimmigrant visas,” by recruiters charging illicit fees.⁹² The court cases, law enforcement indicators, and anecdotal evidence seem to indicate that the scale of trafficking of this population is significant.

c. The Essence of Trafficking

The common theme to these diverse schemes is exploitation and deprivation of liberty.⁹³ The ILO describes forced labor as having three elements: service, extracted involuntarily, under threat.⁹⁴ Of course, the threat or coercion may be very subtle.⁹⁵ Common methods

⁸⁷ United States v. Orian, Indictment No. 10-00576, 3 (U.S.D.C. D. Haw. 2010), available at <http://files.disappearednews.com/docs/Indictment-Forced%20Labor%20Conspiracy%2020100901.pdf>; see also Farmworker Justice, No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers 23 [hereinafter FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST], available at <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf>.

⁸⁸ TIP REPORT 2011, *supra* note 83, at 378. The reporting period of the 2011 report begins March 1, 2010 and ends February 28, 2011.

⁸⁹ *Id.* at 377.

⁹⁰ *Id.* at 378.

⁹¹ *Id.* The national hotline is for all exploited workers, not just those subjected to trafficking. Given the substantial overlap between worker abuse and trafficking; however, the number of calls is a reasonably good indicator of potential trafficking-related abuses.

⁹² TIP REPORT 2013, *supra* note 63, at 385.

⁹³ TIP REPORT 2012, *supra* note 12, at 9, 29; ILO GLOBAL ESTIMATE, *supra* note 42, at 13.

⁹⁴ ILO GLOBAL ESTIMATE, *supra* note 42, at 19.

⁹⁵ *Id.* There is an alternative three-element definition for human trafficking: the (1) recruitment, harboring, moving or obtaining of individuals (2) through forceful or coercive means (3) to obtain involuntary servitude, debt bondage, slavery or sex. Meredith Rapkin, Executive Director, Friends of Farmworkers, Presentation at the American Bar Association Labor & Employment Law C.L.E. Conference: The Real

of exerting control include: threats of deportation, restriction of movement, confiscation of passports, constant vigilance over the victim, isolation, and harmful living or working conditions.⁹⁶ Victims “have typically been tricked, lied to, threatened, assaulted, raped or confined.”⁹⁷ Therefore, the defining characteristic of trafficking is “the relationship between the persons performing the work and the persons extracting it.”⁹⁸ While movement, or transporting the victim from one location to another, is often present in trafficking schemes, the victim need not be taken across national borders in order to be considered trafficked.⁹⁹

2. International and Domestic Anti-Trafficking Tools

In response, the common goal of domestic and international law enforcement is to restore freedom.¹⁰⁰ To this end, international bodies have created a multitude of instruments. The United Nations Convention against Transnational Organized Crime and its two related protocols: the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children and the United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air, are among the key legal instruments in the international fight against trafficking.¹⁰¹ Moreover, “the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights, the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, and the Convention on the Elimination of all Forms of Discrimination Against Women” have also been used to

Cost of Human Trafficking—What it is and How U.S. Immigration Law Can Help (Nov. 3, 2012), available at http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/administrative/labor_law/meetings/2012/acpapers/43E.pdf.

⁹⁶ TIP REPORT 2012, *supra* note 12, at 27-28; ILO GLOBAL ESTIMATE, *supra* note 42, at 19.

⁹⁷ TIP REPORT 2012, *supra* note 12, at 11.

⁹⁸ ILO GLOBAL ESTIMATE, *supra* note 42, at 19.

⁹⁹ TIP REPORT 2012, *supra* note 12, at 13, 33 (“Human trafficking can include but does not require movement. . . . At the heart of this phenomenon is the traffickers’ goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so.”).

¹⁰⁰ *Id.* at 7 (“The work that remains in combating this crime is the work of fulfilling the promise of freedom—freedom from slavery for those exploited and the freedom for survivors to carry on with their lives.”).

¹⁰¹ Lindsey King, *International Law and Human Trafficking*, 8 TOPICAL RESEARCH DIGEST: HUMAN RIGHTS AND HUMAN TRAFFICKING 88 (2008), available at <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

combat trafficking.¹⁰² In the United States, Lincoln’s Executive Order, the Thirteenth Amendment to the Constitution, the post-emancipation statutes, and the Trafficking Victims Protection Act (“TVPA”) all specifically target slavery and slavery-related offenses.

Under the TVPA, trafficking is defined as an umbrella term for the recruitment, harboring, transportation, provision, and obtaining of persons for labor or sex through the use of force, fraud or coercion.¹⁰³ To clarify further, under domestic federal law, trafficking is a crime that is comprised of two parts: first, the *obtaining* or procurement of persons through coercive means, and second, the *actual labor or services extracted* from the person.¹⁰⁴ The State Department, which tracks global human trafficking data annually under the information-gathering mandate of the TVPA, classifies the major forms of human trafficking as: forced labor or involuntary servitude, sex trafficking, debt bondage, debt bondage among migrant laborers, involuntary domestic servitude, forced child labor, child soldiering, and child sex trafficking.¹⁰⁵ Any of these forms are comprised of two elements: the obtaining of the person and the labor or service—be it farm work, sex act, or soldiering—extracted from him or her under force or threat of force.¹⁰⁶

3. Distinguishing Smuggling

¹⁰² *Id.*

¹⁰³ TIP REPORT 2012, *supra* note 12, at 7-8.

¹⁰⁴ It also helps to remember the tri-partite definition: the actions (recruiting, harboring, moving, or obtaining) via the means (force or coercion) to obtain the ends (involuntary servitude, debt bondage, slavery or the sex trade).

¹⁰⁵ TIP REPORT 2010, *supra* note 85, at 8-12.

¹⁰⁶ By way of example, a farm owner who keeps laborers working against their will might be found guilty of crimes under the separate forced labor or peonage statutes enacted after the passage of the 13th Amendment. But the farm owner would not be guilty of trafficking unless he or she also somehow obtained or recruited those workers. Similarly, someone engaging a prostitute is not committing a trafficking offense—not unless that person obtained or recruited the victim in order to exploit the victim’s sexual services. The term trafficking embraces the entire scheme, rather than merely the extraction of labor or services alone. If the farm owner did satisfy the obtaining element of the crime by having recruited the workers using advertisements, he could be convicted of both a peonage offense and trafficking offense as well. However, it does not follow that he will be convicted of trafficking simply by virtue of having held people in bondage. CALIFORNIA ATTORNEY GENERAL’S OFFICE, HUMAN TRAFFICKING IN CALIFORNIA: FINAL REPORT OF THE CALIFORNIA ALLIANCE TO COMBAT TRAFFICKING AND SLAVERY TASK FORCE 17-18 (2007) [hereinafter CALIFORNIA FINAL REPORT], *available at* http://oag.ca.gov/sites/all/files/pdfs/publications/Human_Trafficking_Final_Report.pdf.

Trafficking should not be confused with smuggling, a different crime entirely. The key distinction lies with the person's freedom of choice.¹⁰⁷ A person freely chooses to employ a smuggler to take him or her across national borders, and can freely leave the smuggler's custody once he or she pays the smuggling fee.¹⁰⁸ A trafficking victim, by contrast, is transported across borders through force or deception to provide labor or sex acts in the destination country.¹⁰⁹ In some instances, smuggling may become trafficking if the smuggled individuals lose their freedom of choice. However, they begin as two wholly separate offenses. Smuggling is considered a "crime against borders" that violates immigration laws, whereas trafficking is a criminal offense against persons that violates human rights.¹¹⁰

C. Deceptive Recruitment of Guest Workers

Deceptive recruitment practices are globally recurring problems that plague migrant workers internationally. The ILO has exhaustively catalogued the operation of the recruitment process, and its various abuses. These global trends mirror the patterns found among labor recruiters who locate workers for American employers under the H-2 program.

The international trafficking protocol divides trafficking into three stages: recruitment, transfer, and receipt or harboring in exploitive conditions.¹¹¹ Though lawful recruitment (via job advertising and candidate selection) is perfectly innocuous, within the context of trafficking, recruitment means "advertising and offering to prospective migrants job opportunities in another location or country, selecting applicants and transferring the selected applicants to the jobs abroad by using force, coercion, deception or fraud."¹¹² Rogue recruiters may use brute force or coercion at the onset of the trafficker-victim relationship, or may elicit willing volunteers under false pretenses.¹¹³ The use of deception is critical in any illegal recruitment

¹⁰⁷ *Task Force FAQs*, ORANGE COUNTY HUMAN TRAFFICKING TASK FORCE (last visited Feb. 18, 2013) <http://www.egovlink.com/ochumantrafficking/faq.asp>.

¹⁰⁸ CALIFORNIA FINAL REPORT, *supra* note 106, at 17-18.

¹⁰⁹ *Task Force FAQs*, ORANGE COUNTY HUMAN TRAFFICKING TASK FORCE (last visited Feb. 18, 2013) <http://www.egovlink.com/ochumantrafficking/faq.asp>

¹¹⁰ *Id.*

¹¹¹ INTERNATIONAL LABOUR OFFICE, *TRAFFICKING FOR FORCED LABOUR: HOW TO MONITOR THE RECRUITMENT OF MIGRANT WORKERS TRAINING MANUAL 10* (2005), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_wp_24_en.pdf.

¹¹² *Id.* at 15.

¹¹³ *Id.* at 11.

scheme.¹¹⁴ Deception may take place at any time during the scheme to attract a potential recruit, during the transportation, and at the initiation or duration of the work period.¹¹⁵ Rogue recruiters may demand bribes, overcharge for travel documents or other service fees, fail to properly process travel documents, lie to workers about their immigration status, recruit for non-existent jobs, misrepresent the job and work conditions and provide loans at excessive interest rates that are impossible to pay back.¹¹⁶

Sometimes, the employer-recruiter and worker have a direct contractual relationship.¹¹⁷ Other times, a recruiter is merely a broker and no written contract exists.¹¹⁸ Both individuals and private agencies operate as recruiters. However, individuals rarely act alone.¹¹⁹ Usually he or she operates in a network that involves several accomplices, such as signalers at local villages who identify potential recruits, people who aid in supplying false documentation, people who supply transportation, corrupt officials, and employers and their clients.¹²⁰ These practices tend to proliferate in “environments characterized by social, legal, and administrative failures,” with minimal respect for human rights and lax enforcement of migration and labor laws.¹²¹

The H-2 visa program is plagued with incidents of deceptive recruitment, ranging from simple violations of the regulations such as placing the costs of recruitment from workers to employers to the more severe kinds of fraud and exploitation that constitutes trafficking.¹²² Employers with no direct links to foreign countries generally rely on recruiters.¹²³ These recruiters are the first contact

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.* at 21.

¹¹⁶ *Id.* at 21, 38.

¹¹⁷ *Id.* at 38.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 20.

¹²⁰ *Id.*

¹²¹ *Id.* at 19.

¹²² CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 11 [hereinafter CDM, RECRUITMENT REVEALED], available at http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf.

¹²³ THE INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 9 (2013) [hereinafter ILRWG, AMERICAN DREAM], available at <http://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf> (“Workers typically are recruited for temporary worker programs in the United States through a network of private labor recruiters.”).

point for foreign workers, who are unfamiliar with American labor laws, practices, and protections¹²⁴. As the gateway to American employment, recruiters are poised to exploit this power imbalance.¹²⁵ They may use a combination of deception, fraud, psychological pressure, linguistic and geographic isolation, document confiscation, financial exploitation, and brute force to achieve their means.¹²⁶

There is no typical model for recruitment; rather it is a “non-uniform, complex and often informal process.”¹²⁷ Most employers usually contract with either Mexican or American-based agencies, which often use one or more subcontractors to find and recruit workers.¹²⁸ This process often confuses recruits as to who is actually sponsoring them; at the very onset of the employment relationship, they may have difficulty understanding of their rights.¹²⁹ The recruitment process typically advances like this:

- (1) A local recruiter makes contact in a worker’s home community to present a job opportunity in the United States. Interested workers pay a lump-sum fee to the recruiter to be considered as candidates. The lump sum rarely is itemized, but may include a recruiter’s fee and visa and travel expenses. Most workers must borrow this money from family and friends or from private lenders who often are associated with the recruiter and who usually charge exorbitant interest rates.
- (2) The local recruiter directs workers to a larger recruitment agency . . . to complete the necessary paperwork and receive a formal job offer. Workers may be charged fees again at this point.
- (3) Workers travel to the nearest U.S. consulate to attend the visa interview and

¹²⁴ See AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 30 [hereinafter AMERICAN UNIVERSITY, PICKED APART], available at http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrhc_picked_apart.pdf?rd=1.

¹²⁵ See AMERICAN UNIVERSITY, PICKED APART, *supra* note 124, at 14-15 (“As the primary link between migrant-sending communities and U.S. employers, recruiters wield significant power over guest workers.” “For Mexican women seeking to work in the Maryland crab industry dealing with the imbalance of power between recruiters and themselves is commonplace. Local recruiters are typically the sole representatives of U.S. employment opportunities.”).

¹²⁶ CDM, RECRUITMENT REVEALED, *supra* note 122, at 21, 23.

¹²⁷ CDM, RECRUITMENT REVEALED, *supra* note 122, at 11.

¹²⁸ *Id.*

¹²⁹ *Id.* at 12.

obtain the work visa. (4) Workers travel to the job site in the United States.¹³⁰

Workers have no way to verify the legitimacy of the individuals posing as recruiters, the employers they claim to represent, or the nature of the job opportunity they are offering.¹³¹ If the recruiter does not provide a truthful and accurate employment contract in the workers' native language, they have no recourse to verify the information.¹³²

Mexican women in Maryland's crab-picking industry have described the elements of economic coercion that color the relationship with a recruiter. In their native village, the recruiter represented the sole source of employment¹³³ and possessed complete discretion over hiring.¹³⁴ Blacklisting was not uncommon¹³⁵ and the women feared a single complaint would cost them any hope of earning a living.¹³⁶ Furthermore, the recruiter imposed thousands of dollars in arbitrary, unexplained fees, forcing the women to borrow money from the recruiter when their meager life savings were not enough.¹³⁷ One woman reported taking out a loan at a fifteen percent interest rate, leaving her in debt before she began working.¹³⁸

Daniel Castellanos Contreras, one of the plaintiffs in the Decatur Hotels case,¹³⁹ responded to a Peruvian newspaper advertisement from a New Orleans employer seeking workers in the aftermath of Hurricane Katrina.¹⁴⁰ "Recruiters for Patrick Quinn III, New Orleans hotel giant, promised us good jobs, fair pay, and comfortable accommodations."¹⁴¹ In return, they demanded massive

¹³⁰ ILRWG, AMERICAN DREAM, *supra* note 123.

¹³¹ CDM, RECRUITMENT REVEALED, *supra* note 122, at 21.

¹³² *Id.*

¹³³ AMERICAN UNIVERSITY, PICKED APART, *supra* note 124, at 15.

¹³⁴ *Id.*

¹³⁵ ILRWG, AMERICAN DREAM, *supra* note 123, at 14, 43 ("The highly publicized North Carolina Growers Association blacklist, called the NCGA Ineligible for Rehire List, contained more than 1,000 names in 1997 for a single industry in a single state").

¹³⁶ *Id.*

¹³⁷ AMERICAN UNIVERSITY, PICKED APART, *supra* note 124, at 15.

¹³⁸ *Id.*

¹³⁹ NATIONAL GUESTWORKER ALLIANCE & PENN STATE DICKINSON SCHOOL OF LAW, LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS 9, *available at* <http://www.guestworkeralliance.org/wp-content/uploads/2012/06/Leveling-the-Playing-Field-final.pdf>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

payments.¹⁴² Feeling pressure to escape the economic hardships he confronted in Peru, Contreras sold household goods, obtained a bank loan, and incurred significant debt in order to pay the fees.¹⁴³ He arrived in New Orleans on the H-2B visa with about 300 other workers to a work environment very different than the one promised.¹⁴⁴ The housing conditions were “atrocious,” and the workers were subjected to humiliating treatment and constantly threatened with deportation. Contreras was fired once he filed a complaint with the National Labor Relations Board.¹⁴⁵ Eventually, the workers’ claims prevailed.

In 2010 in Florida¹⁴⁶ three Haitian defendants were charged with conspiring to lure thirty-four Haitian farm workers with “false promises of lucrative jobs that would lead to permanent residence.”¹⁴⁷ They charged the workers substantial fees, arranged for victims to obtain funds from loan sharks, and offered their own property as collateral.¹⁴⁸ Once the workers arrived in the United States on H-2A visas, “the defendants confiscated the victims’ passports, and threatened to either report them to immigration authorities or deport them back to Haiti, where they were heavily indebted.”¹⁴⁹ A grand jury in June 2010 indicted three Haitians “on charges of human trafficking, forced labor and conspiracy, visa fraud, and document servitude.”¹⁵⁰ These charges stemmed from unscrupulous recruitment practices.

III. BACKGROUND OF THE H-2 PROGRAM

Every year thousands of guest workers under the H-2 visa program arrive in the United States to harvest vegetables, pack fruit, construct farm equipment, shell crabs, staff restaurants, clean homes, manage households, keep grounds, and more.¹⁵¹ They are a boon to

¹⁴² *Id.* at 9, 18.

¹⁴³ *Id.* at 19.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ FLORIDA STATE UNIVERSITY CENTER FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA STRATEGIC PLAN ON HUMAN TRAFFICKING 20 (2010) [hereinafter FSU STRATEGIC PLAN], *available at* <http://www.dcf.state.fl.us/initiatives/humantrafficking/docs/FSUStrategicPlan2010.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 19-20.

¹⁵¹ Eduardo Gonzales, Jr., *Migrant Farm Workers: Our Nation’s Invisible Population*, EXTENSION (Mar. 2008), *available at*

domestic employers who cannot find enough American employees to perform the heavy labor necessary for their businesses and they are the lifeblood of American agriculture. Invited to the United States by their employers as guest workers under temporary and seasonal work visas, these men and women are the benefactors of a complicated legal regime that exists at the intersection of labor, employment, and immigration laws. Together, the dozens of statutes, regulations, and court decisions are designed to protect them from the abhorrent abuses that the domestic labor force cast off at the turn of the last century such as wage and hour abuse, contract fraud, and workplace safety violations. Yet, this extensive web of protections leaves them vulnerable to the worst and oldest abuse of all—functional slavery. This section will outline the history, describe the regulatory framework, and relate the dysfunction of the H-2 programs.

A. *Background of the H-2 Visa Program*

1. The Origins and Legislative History of the H-2 Program

The H-2 visa program is the eventual outgrowth of older guest worker programs designed to bolster the domestic labor market.¹⁵² Historically, the United States relied on large-scale temporary worker programs in times of wartime manpower shortages.¹⁵³ In 1917, the federal government began the first temporary guest worker program.¹⁵⁴ Under that program, an estimated 80,000 Mexicans entered the country, primarily to labor in the sugar beet and cotton fields of

<http://www.extension.org/pages/9960/migrant-farm-workers:-our-nations-invisible-population/print/>.

¹⁵² Charles C. Mathes, Note, *The Department of Labor's Changing Policies Toward the H-2B Temporary Worker Program: Primarily for the Benefit of Nobody*, 80 *FORDHAM L. REV.* 1801, 1806-07 (2012).

¹⁵³ CONGRESSIONAL RESEARCH SERVICE, *TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES* 6 (1980) [hereinafter *CRS, TEMPORARY WORKER PROGRAMS*]. Southwestern farms and railroad companies had already come to rely on Mexican nationals to fill their manual labor needs by the nineteenth century. Mexican nationals would become the principal workforce in these areas in response to the demands of World War I. *Id.*

¹⁵⁴ Mathes, *supra* note 152 at 1806 (citing Immigration Act of 1917, Pub. L. No. 64-301, Ch. 29, 39 Stat. 874 (codified as amended at 8 U.S.C. § 1181 (2006))); *see also* *CRS, TEMPORARY WORKER PROGRAMS*, *supra* note 153, at 7 (“The workers were admitted under the authority of the ninth provision to section 3 of the Immigration Act of 1917”).

several Southwestern states.¹⁵⁵ However, “the boom of the 1920s was followed by the bust of the 1930s” and Mexicans returned home in droves.¹⁵⁶ This massive and humiliating repatriation prompted the Mexican government to request “detailed guarantees” in the set of agreements that formed the basis of the next temporary worker program.¹⁵⁷

Following the labor shortages of World War II, Congress enacted a series of bilateral agreements with Mexico beginning in 1942.¹⁵⁸ The Bracero (or “strong-arm”¹⁵⁹) program, as it was commonly known, began as a wartime program and was expanded twice more before tapering to an end in 1964.¹⁶⁰ Over the course of twenty-two years, four to five million Mexican agricultural workers arrived in the United States, making the Bracero program “the largest single temporary alien worker program” in this country’s history.¹⁶¹ Despite having significant legal protections, including government-supervised employment contracts, minimum wage, housing and transportation accommodations, the program was plagued with widespread abuse.¹⁶² Mexican workers were cheated out of millions in wages and subjected to deception and ill-treatment to such a severe

¹⁵⁵ CRS, TEMPORARY WORKER PROGRAMS, *supra* note 153, at 6. Though the majority labored in agriculture, a small number worked on railroads. The railroad component of the program was shuttered in 1981 due to pressure from organized labor, while the agricultural program continued until 1921. *Id.*

¹⁵⁶ *Id.* at 15.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 7 (also noting that the ninth provision of section three of the Immigration Act was again used as the basis for admitting temporary workers from 1942 to 1964); see also, Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT’L L. 1121, 1126 (2010).

¹⁵⁹ FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST, *supra* note 87, at 12.

¹⁶⁰ CRS, TEMPORARY WORKER PROGRAMS, *supra* note 153, at 15. (“The bracero program falls into three distinct phases: the wartime period, which extended 2 years beyond the end of World War II, until the expiration of the special authorizing legislation in 1947; the post-war transition period from 1948 until the enactment of new authorizing legislation, Public Law 78, in 1951; and the Public Law 78 period, during which the program expanded until 1960, followed by a phase-down until its termination at the end of 1964”).

¹⁶¹ *Id.*; see also Bryce W. Ashby, Note, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 899 (2008).

¹⁶² SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKERS PROGRAMS IN THE UNITED STATES 4, [hereinafter CLOSE TO SLAVERY] available at <http://www.splcenter.org/sites/default/files/legacy/pdf/static/SPLCguestworker.pdf>; see also Ashby, *supra* note 161, at 899; Johnston, *supra* note 158, at 1125.

degree that the Labor Department officer in charge of the program called it “legalized slavery.”¹⁶³ The Bracero legacy is one of infamy.

In 1952, Congress created the H-2 temporary work visa when it enacted the Immigration and Naturalization Act.¹⁶⁴ Employers were allowed to participate subject to the Department of Labor certification that no qualified American employees were available to perform the job, and that wages and working conditions of domestic workers would not be affected.¹⁶⁵ The program also required employers to pay workers the Adverse Effect Wage Rate, and to supply the workers with housing.¹⁶⁶ The majority of these visas went to Canadian and Caribbean workers at first, as Mexicans continued to come in under Bracero.¹⁶⁷

Congress significantly altered the program in 1986 with the passage of the Immigration Reform and Control Act.¹⁶⁸ The Act created two separate visa categories for temporary or seasonal workers.¹⁶⁹ The H-2A visa covers agricultural workers and the H-2B visa covers non-agricultural workers. The requirements that domestic workers should be unavailable to perform the work, and that the wages and working conditions of domestic workers be unaffected, remained in place.¹⁷⁰

Despite various calls for reform through the years, Congress took no action and the program remained largely unchanged until 2013.¹⁷¹ In January of 2013, a bipartisan group of senators referred to

¹⁶³ CLOSE TO SLAVERY, *supra* note 162, at 4. In 1956, a book by labor organizer Ernesto Galarza called *Stranger in Our Fields* drew attention to the widespread mistreatment.

¹⁶⁴ Ashby, *supra* note 161, at 899; Mathes, *supra* note 152, at 1807 n.30, citing 8 U.S.C. § 1181 (2006) *see also* CRS, TEMPORARY WORKER PROGRAMS, *supra* note 153, at 54

¹⁶⁵ Mathes, *supra* note 152, at 1807; *see also* Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL’Y 79, 85-87 (2004) (citing Pub. L. No. 82-141, 66 Stat. 163 (codified at 8 U.S.C. § 101(a)(15)(H)(ii) (2004)).

¹⁶⁶ Ashby, *supra* note 161, at 900 (citing Baker).

¹⁶⁷ Baker, *supra* note 165, at 86.

¹⁶⁸ Ashby, *supra* note 161, at 900.

¹⁶⁹ Ashby, *supra* note 161, at 900 n.34-35; *see also* Immigration Reform and Control Act, Pub. L. No. 99-603, sec. 301(a) 100 Stat 3359 (codified as amended at 8 U.S.C. § 1101(a)(15)(H)(ii)(A) and (B)).

¹⁷⁰ Mathes, *supra* note 152, at 1807 (citing H.R. Rep. No. 99-682, pt. 1, at 50-51 (1986)).

¹⁷¹ Through the decades, there have been numerous calls for legislative reform though most floundered and the programs remained the same. A number of agricultural bills, such as AgJobs, the Harvest Act, the Barn Act, and more, were floated in Congress. In 2009, Representative Zoe Lofgren introduced a targeted H-2B reform bill. Talk of reform never quite disappeared, however, as it remained

as “the group of eight,” headed by Senators Charles Schumer, John McCain and Marco Rubio, included a call to “allow more lower-skilled immigrants to come here when our economy is creating jobs, and fewer when our economy is not creating jobs” as part of their broader immigration reform package.¹⁷² The reform legislation would sunset the H-2A visa in favor of a W-visa that would be administered by the Department of Agriculture, rather than the Department of Labor. Among other reforms, the Senate’s package contains a number of proposals to protect workers from fraud in foreign labor recruitment, including disclosure requirements for employers and the creation of a civil action for victims. The proposal is currently stalled in the House of Representatives.¹⁷³

Presently, hundreds of thousands of workers enter the United States under the H-2 visas and end up scattered across many states in a variety of different industries. In 2011, the State Department issued 55,384 H-2A visas, according to preliminary counts.¹⁷⁴ The top destination states for H-2A workers are North Carolina, Louisiana, Georgia, Florida, and Kentucky.¹⁷⁵ The program has grown from its inception, though it remains small when compared to the greater agricultural workforce.¹⁷⁶ The number of visas issued remained at around 30,000 until 2005 when the numbers steadily increased.¹⁷⁷ Unlike the H-2A program, the H-2B program is capped by statute at 66,000 annual visas, though the cap does not apply to petitions for

controversial whether guest workers programs are even necessary in times of recession when American workers are seeking employment, and if so, how to balance the twin aims of supplying employers with labor while protecting the rights of foreign workers. See AGRICULTURAL WORKFORCE COALITION (2013) [hereinafter AWC REPORT], available at http://www.agworkforcecoalition.org/wp-content/uploads/2013/01/FINAL_AWC_Website_Issue_One-pager_1-25-13.pdf; Mathes, *supra* note 152, at 1808 (citing H-2B Program Reform Act of 2009, H.R. 4381(o)(11), 111th Cong. (2009)); Andorra Bruno, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, CONGRESSIONAL RESEARCH SERVICE 2 (2012) [hereinafter BRUNO REPORT].

¹⁷² David Grant, *Immigration Reform 101: Is a Sensible Immigration Reform Possible?* CHRISTIAN SCI. MONITOR, (Feb. 8, 2013) available at [http://www.csmonitor.com/USA/DC-Decoder/2013/0208/Immigration-reform-101-Is-a-sensible-guest-worker-program-possible/\(page\)/1](http://www.csmonitor.com/USA/DC-Decoder/2013/0208/Immigration-reform-101-Is-a-sensible-guest-worker-program-possible/(page)/1).

¹⁷³ David Nakamura and Ed O’Keefe, *Boehner: Immigration reform stalls because GOP has ‘widespread doubt’ about Obama*, Wash. Post (Feb. 6, 2014), available at http://www.washingtonpost.com/politics/boehner-immigration-reform-stalls-because-gop-has-widespread-doubt-about-obama/2014/02/06/233b497a-8f55-11e3-b46a-5a3d0d2130da_story.html.

¹⁷⁴ BRUNO REPORT, *supra* note 172, at 30.

¹⁷⁵ *Id.* at 28.

¹⁷⁶ *Id.* at 5-6.

¹⁷⁷ *Id.* at 5.

extensions or to change employers.¹⁷⁸ According to the most recent preliminary data, in 2011 the State Department issued 50,817 visas.¹⁷⁹ The top destination states for H-2B workers are Texas, Florida, Colorado, Virginia, and Louisiana.¹⁸⁰ The top occupations are landscape laborer, amusement park worker, forest worker, housekeeper, and industrial commercial groundskeeper.¹⁸¹

2. Overview of the H-2 Visa Program

This part will describe how the ordinary process of certification, recruitment, sponsorship, and employment of H-2 workers operates under the statute and regulations. The two visa categories, H-2A and H-2B, function differently. Congress sought to afford greater protection to farmworkers during the 1986 reform,¹⁸² and as a result, the H-2A program was much more regulated. This was until 2012, when the Department of Labor granted H-2B workers additional protections, such as transportation reimbursement and guaranteed employment for three-quarters of the work contract, protections that H-2A workers had already possessed for years.¹⁸³

The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) and the Department of Labor's Employment and Training Administration (ETA) administer the H-2 visa program jointly.¹⁸⁴ The ETA is responsible for administering the certification process under both programs.¹⁸⁵ The process is slightly different for each visa.

The H-2A certification process is codified in 8 U.S.C. § 1188.¹⁸⁶ Under the statute, an employer must apply for and receive certification from the Secretary of Labor that there are not enough available qualified workers to perform the necessary labor or services and that employing foreign workers would not adversely affect the wages and working conditions of similarly-situated domestic workers

¹⁷⁸ *Id.* at 9 (citing 8 U.S.C. § 1184(g)(1)(B)).

¹⁷⁹ BRUNO REPORT, *supra* note 172, at 10.

¹⁸⁰ *Id.* at 28.

¹⁸¹ *Id.* at 29.

¹⁸² Mathes, *supra* note 152, at 1811 & n.76 (citing H.R. Rep. No. 99-682(I), at 50-51 (1986)).

¹⁸³ *Id.* at 1811 & n.76-77 (citing H.R. Rep. No. 99-682(I), at 50-51 (1986)).

¹⁸⁴ BRUNO REPORT, *supra* note 172, at 2.

¹⁸⁵ *Id.* at 3.

¹⁸⁶ 8 U.S.C. § 1888 (2012).

in the United States.¹⁸⁷ The Labor Secretary may deny certification if an employer satisfies any of the denial criteria.¹⁸⁸

By contrast, the H-2B certification process is codified in the Department of Homeland Security's regulations.¹⁸⁹ Nonetheless, employers must still seek certification through the Department of Labor.¹⁹⁰ The H-2B program has a similar requirement that there should be no qualified domestic workers to perform the job before employers can import foreign workers.¹⁹¹ The employer's need for the workers' assistance must be temporary, even if the nature of the work is not temporary.¹⁹²

Once an employer has received certification, he must apply to the Department of Homeland Security for permission to bring in foreign workers.¹⁹³ Once the application is approved, the process of linking employers with foreign workers can begin.¹⁹⁴ At this point in the employment cycle, recruitment companies enter the fray to help link domestic employers with their foreign workforce.

In order to complete the process, foreign workers must go to a U.S. Embassy or Consulate to apply for a non-immigrant H-2A or H-2B visa from the Department of State.¹⁹⁵ Once the visa is approved, the worker may present it for admission at a port of entry.¹⁹⁶ Up to this point, the process is similar under both visa schemes.¹⁹⁷ The programs diverge however, when it comes to rights afforded under the respective visas.¹⁹⁸

a. H-2A Visa Program Protections

¹⁸⁷ 8 U.S.C. § 1188(a)(2012).

¹⁸⁸ 8 U.S.C. § 1188(b).

¹⁸⁹ BRUNO REPORT, *supra* note 172, at 3 (citing 8 C.F.R. § 214.2(h)(6)(iii)(C)).

¹⁹⁰ *H-2B Certification for Temporary Non-Agricultural Work*, U.S. DEP'T OF LABOR (Oct. 22, 2009), <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

¹⁹¹ BRUNO REPORT, *supra* note 142, at 3 (citing the Immigration and Nationality Act § 101(a)(15)(H)(ii)(b)).

¹⁹² *H-2B Certification for Temporary Non-Agricultural Work*, U.S. DEP'T OF LABOR (Oct. 22, 2009), <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>. Temporary generally means ten months, unless it is one-time need, which can last up to three years. *Id.*

¹⁹³ BRUNO REPORT, note 172, at 2.

¹⁹⁴ *Id.*

¹⁹⁵ BRUNO REPORT, *supra* note 172, at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Once the certification and visa application process is complete, H-2A workers are initially permitted to stay in the United States for up to one year.¹⁹⁹ Once workers arrive, several regulations govern their rights. Part 655 of Title 20 in the Code of Federal Regulations governs the temporary employment of foreign workers in the United States, and Subpart B governs the labor certification process for H-2A workers.²⁰⁰

The regulations mandate that employers attest in their applications that they will abide by the conditions listed.²⁰¹ Employers and their agents must attest that they have not sought or received payment of any kind (including payment of attorney's fees, application fees, or recruitment costs) from the employee for any activity related to obtaining labor certification.²⁰² However, employers are permitted to receive reimbursement for costs that are the responsibility of the worker, such as government-required visas or passport fees.²⁰³ Employers must also forbid any foreign labor contractor or recruiter conducting international labor recruitment on the employer's behalf from seeking or receiving payments from prospective employees.²⁰⁴

Once the employers have secured their prospective employees, the law imposes more restrictions. An employer must offer, advertise, and pay a wage that is "the highest of the AEWR [(Adverse Effect Wage Rates)], the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage."²⁰⁵ Employers must also provide housing at no cost to the workers,²⁰⁶ as well as other provisions.²⁰⁷

¹⁹⁹ *Id.* at 4. Employment is designed to be "of a temporary or seasonal nature," such as "where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle." EMP. & TRAINING ADMIN., U.S. DEP'T OF LABOR, *H-2A Temporary Agricultural Program*, last updated Apr. 11, 2013 <http://www.foreignlaborcert.doleta.gov/h-2a.cfm>. An employer may apply to extend a worker's stay, but overall, a worker cannot remain in the United States for more than three consecutive years.

²⁰⁰ 20 C.F.R. § 655.202.

²⁰¹ 20 C.F.R. § 655.135.

²⁰² 20 C.F.R. § 655.135(j) (Payment includes, but is not limited to, monetary payments, wage concessions, such as deductions from wages or benefits, kickbacks, bribes, tributes and free labor).

²⁰³ 20 C.F.R. § 655.135(j).

²⁰⁴ 20 C.F.R. § 655.135(k).

²⁰⁵ 20 C.F.R. § 655.120(a).

²⁰⁶ 8 U.S.C. § 1188(c)(4); 20 C.F.R. § 655.122(d)(1)-(6).

²⁰⁷ Employers must provide workers' compensation insurance coverage; all necessary tools, supplies and equipment at no charge; and three meals a day or kitchen facilities, with additional regulations governing any charges for meals. 20 C.F.R. § 655.122(e), (f).

Several provisions govern transportation arrangements and costs. If the employer has not advanced the costs or directly provided transportation to the place of employment, and if the worker completes fifty percent of the work contract period, the employer must pay the worker for the reasonable costs incurred for transportation and daily subsistence to the employment site.²⁰⁸ Employers must also provide the worker's return trip if the worker completes the contract period or is terminated without cause and with no subsequent H-2A employment.²⁰⁹ In addition, the employer must also provide transportation between the workers living quarters and worksite.²¹⁰

There is also a "three-fourths guarantee," where employers must guarantee to offer the worker "employment for a total number of work hours equal to at least three-fourths of the workdays...." of the contracted work period.²¹¹ There are a number of record-keeping provisions as well.²¹²

Additionally, the regulations govern deductions. The employer is permitted to deduct the cost of the worker's transportation and subsistence expenses to the place of employment, so long as the offer states that the worker will be reimbursed upon completion of fifty percent of the work contract.²¹³ Deductions must be reasonable,²¹⁴ and any deduction that benefits or is primarily for the convenience of the employer is unreasonable.²¹⁵

²⁰⁸ 20 C.F.R. § 655.122(h)(1).

²⁰⁹ 20 C.F.R. § 655.122(h)(2).

²¹⁰ 20 C.F.R. § 655.122(h)(3).

²¹¹ 20 C.F.R. § 655.122(i).

²¹² Employers must keep accurate earnings records, including the amount and reasons for any deductions. 20 C.F.R. § 655.122(j). Employers must also provide hours and earnings statements to workers, and the initial job offer must state the frequency of pay. 20 C.F.R. § 655.122(j),(m). Employers must also provide workers with a copy of their work contracts in a language understood by the worker as necessary or reasonable. 20 C.F.R. § 655.122(q). The work contract must contain at least the regulatory provisions, or in absence of a separate work contract, the job order and certification application will serve as the contract. 20 C.F.R. § 655.122(q).

²¹³ 20 C.F.R. § 655.122(p)(1). Furthermore, the job offer must specify all deductions not required by law. *Id.*

²¹⁴ *Id.*

²¹⁵ 20 C.F.R. § 655.122(p)(2). In addition, the wage requirements "will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." *Id.*

Employers must also make a series of assurances in their application that they will not discriminate in hiring or violate any applicable federal and state laws.²¹⁶ H-2A employers may be subject to the Fair Labor Standards Act (FLSA).²¹⁷ They must also comply with the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 by not confiscating workers' passports, visas, or other immigration documents.²¹⁸ Finally, there are a number of enforcement and integrity measures, such as suspension and debarment from the program, and sanction of noncompliant employers.²¹⁹ The Department's Wage and Hour Division is tasked with investigating and enforcing compliance with worker contracts.²²⁰

b. The H-2B Certification and Regulatory Structure

Part 655 also covers the labor certification process and enforcement of attestations for H-2B workers.²²¹ As with the H-2A program, the employer must certify that there are not sufficient qualified workers available to perform the work, and that the employment of foreign temporary workers will not adversely affect the wages and working conditions of similarly-situated domestic workers.²²² Moreover, an employer's need for workers must be temporary.²²³

Employers must disclose any foreign worker recruitment and reveal any agreements with recruiters under the application.²²⁴ These agreements should contain the prohibition against recruiters charging the workers with any fees.²²⁵ To recruit foreign workers the employer must also provide the identity and location of the recruiter's employees, as well as their agents and employees.²²⁶ Additionally,

²¹⁶ 20 C.F.R. § 655.135(a), (e). In addition, employers must conspicuously post a workers' rights poster setting out their rights in a language common to most of the workers. 20 C.F.R. § 655.135(l).

²¹⁷ 20 C.F.R. § 655.135(e).

²¹⁸ *Id.*

²¹⁹ 20 C.F.R. § 655.180-185.

²²⁰ EMP. & TRAINING ADMIN., U.S. DEP'T OF LABOR, *H-2A Temporary Agricultural Program Details*, last updated Mar. 28, 2013, http://www.foreignlaborcert.doleta.gov/h_2a_details.cfm.

²²¹ 20 C.F.R. §§ 655.1 to 655.81.

²²² 20 C.F.R. § 655.1(a).

²²³ 20 C.F.R. § 655.6(a) It must be a one-time occurrence, a seasonal, peak load, or intermittent need. 20 C.F.R. § 655.6(b).

²²⁴ 20 C.F.R. § 655.9(a).

²²⁵ *Id.* (referring to 20 C.F.R. § 655.20(p)).

²²⁶ 20 C.F.R. § 655.9(b).

employers must disclose in their job orders pertinent information such as employment duties; wage and hour information; any employer-provided transportation; and reimbursement schemes for transportation to the employer site (provided the worker completes more than fifty percent of the contract) and for the return trip.²²⁷

Employers must pay the highest of the prevailing wage rate, either state or federal minimum wage, and abide by several other wage-related conditions.²²⁸ Payments should be made “free and clear,” finally and unconditionally,²²⁹ without unauthorized deductions, rebates, refunds or kickbacks that drop the wage below the minimum.²³⁰ Employers must make all deductions required by law, and the job order must specify all other deductions not required by law.²³¹ Any deductions not disclosed are prohibited.²³² Employers must also state in the job order the frequency of paydays,²³³ keep accurate earnings statements, and provide such information to the worker on or before each payday.²³⁴

Furthermore, employers and their agents are prohibited from seeking or receiving payment of any kind for activities related to obtaining certification, including payment of any application fees or recruitment costs.²³⁵ However, employers are not prohibited “from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.”²³⁶ Employers must contractually prohibit their agents or recruiters (and agents and employees of the agents and recruiters) that recruit internationally from seeking or receiving payments from workers directly or indirectly.²³⁷

²²⁷ 20 C.F.R. § 655.18(b)(1)-(14). Employers must also state they will reimburse the H-2B worker in the first workweek for all visa costs; provide the necessary tools; and disclose the three-quarters guarantee. 20 C.F.R. § 655.18(b)(15)-(17).

²²⁸ 20 C.F.R. § 655.20(a),(b).

²²⁹ 20 C.F.R. § 655.20(b).

²³⁰ 20 C.F.R. § 655.20(c).

²³¹ *Id.* Authorized deductions are limited to those required by law, such as taxes; deductions for the reasonable cost of lodging and facilities; any payments to third persons of his or her voluntary assignment or which are authorized by a collective bargaining agreement. *Id.* Payments to the employers’ agents or recruiters, or their agents, cannot be made if they reduce the wage rate below the minimum. *Id.*

²³² 20 C.F.R. § 655.20(c).

²³³ 20 C.F.R. § 655.20(h).

²³⁴ 20 C.F.R. § 655.20(i).

²³⁵ 20 C.F.R. § 655.20(o). Forms of payment include “monetary payments, wage concessions...kickbacks, bribes, tributes, in kind payments, and free labor.” *Id.*

²³⁶ *Id.*

²³⁷ 20 C.F.R. § 655.20(p). This prohibition extends to application, attorneys’, job placement, processing, agent or petition fees. *Id.*

Finally, the regulations also mandate that the employer abide by a three-fourths guarantee.²³⁸ Unfair treatment, including threats, blacklisting and retaliation, are banned.²³⁹ Employers must also “comply with all applicable Federal, State and local employment-related laws and regulations,” including the 2008 TVPRA.²⁴⁰ With its application, the employer must provide a copy of all agreements with recruiters whom it engages for all foreign recruitment, as well as the identity of its agents or employees.²⁴¹ As with the H-2A program, there is a system of integrity measures to enforce the regulations and sanction noncompliant employers.²⁴²

3. Common H-2 Program Abuses

The H-2 program has come under fire from a variety of worker advocate groups for systemic abuses, such as wage theft, fraud, workplace and housing safety violations, hiring discrimination, and employment contract breaches.²⁴³ Federal agencies and farm or migrant labor advocates have documented countless abuses, and guest workers in both programs have filed hundreds of complaints and lawsuits.²⁴⁴ It is worth noting, however, that instances of wage and hour abuse do not necessarily constitute a criminal trafficking offense, which depends on the presence of several other factors.²⁴⁵ It is best to envision a spectrum of labor exploitation, where one end represents

²³⁸ 20 C.F.R. § 655.20(f). The employer must provide without charge all necessary tools and supplies. 20 C.F.R. § 655.20(k). The employer must provide out-of-the-country H-2B workers with a copy of the job order no later than the time the worker applies for the visa. 20 C.F.R. § 655.20(l). The employer must conspicuously post a listing of the workers’ rights in whatever language common to the workers, as necessary. 20 C.F.R. § 655.20(m).

²³⁹ 20 C.F.R. § 655.20(n).

²⁴⁰ 20 C.F.R. § 655.20(z). Employers and their agents must not “hold or confiscate workers’ passports, visas or other immigration documents.” *Id.*

²⁴¹ 20 C.F.R. § 655.20(aa), (z). Furthermore, in compliance with the 2008 TVPRA, employers and their agents must not “hold or confiscate workers’ passports, visas, or other immigration documents.” 20 C.F.R. § 655.20(z).

²⁴² 20 C.F.R. § 655.70-81.

²⁴³ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1053, H-2B VISA PROGRAM: CLOSED CIVIL AND CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD AND ABUSE 4-10 (2010), *available at* <http://www.gao.gov/assets/320/310640.pdf>.

²⁴⁴ *Id.*

²⁴⁵ See James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1855 (2010).

violations of employment laws, and the other represents the most severe actions that deprive individuals of their liberty.²⁴⁶

The Southern Poverty Law Center, which has represented thousands of guest workers in litigation, reports that wage theft, as well as breaches of employment contract, are routine.²⁴⁷ In the forestry and seafood processing industries for example, wage theft appears to be the norm rather than the exception.²⁴⁸ Guest workers in these industries have reportedly received as little as two dollars per hour.²⁴⁹ Further breaches of contract are also common. Workers routinely reported having been deceived by recruiters; workers may be promised a specific job in one state, only to arrive in a different state and asked to perform a wholly different job.²⁵⁰ In many other cases, workers arrived weeks or even months before the work was contractually promised to begin.²⁵¹

In September 2010, the Government Accountability Office (“GAO”) released a review of ten closed civil and criminal cases targeting H-2B workers.²⁵² The GAO found that in six of the ten cases, employers allegedly had failed to pay their workers the requisite hourly wage, overtime, or both.²⁵³ Moreover, employers charged their H-2B workers illegal or excessive fees that brought their wages below the legally required minimum.²⁵⁴ “These charges included visa processing fees far above actual costs, rent in overcrowded apartments that drastically exceeded market value, and transportation subject to ‘arbitrary late fees.’ Workers left the United States in greater debt than when they arrived. In one case, these fees reduced employee’s paychecks to as little as forty-eight dollars for a two-week period.”²⁵⁵

²⁴⁶ *Id.*

²⁴⁷ *The H-2B Guestworker Program and Improving the Department of Labor’s Enforcement of the Rights of Guestworkers: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 61 (2009) [hereinafter *H-2B Hearing*] (statement of Mary Bauer, Southern Poverty Law Center).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT NO. 10-1053, H-2B VISA PROGRAM CLOSED CIVIL AND CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD AND ABUSE 4 (2010), available at <http://www.gao.gov/assets/320/310640.pdf>.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

Employers had also misclassified employee duties on their applications in order to pay lower prevailing wages.²⁵⁶

Instances described in the GAO and other reports demonstrate the spectrum of abuse. On one end, there are situations such as that of a carnival operator company accused not only of shortchanging its Mexican H-2B workers of their wages, but also of housing them in “overcrowded, cockroach and bedbug-infested trailers” and of denying them the proper safety equipment.²⁵⁷ Another example is that of an Arkansas forestry company, held in contempt of court three times for intimidating workers interested in joining a class action lawsuit alleging forced seven-day workweeks, wage theft, and exploitation.²⁵⁸ The company settled without admitting liability and continues to receive Labor Department certifications.²⁵⁹

Approaching the other end of the spectrum of extreme abuse is an example from Florida. A group of Mexican women on H-2A visas filed a class action lawsuit against their employer, a gourmet hydroponic tomato farm, for breach of contract and false imprisonment. They claimed their employer locked them in a trailer camp at night and rarely allowed them to leave.²⁶⁰

Another example involves criminal prosecution, a couple who owned a South Dakota hotel was found guilty of placing nine employees in servitude by confiscating their passports, charging each individual \$1,200 in visa processing fees when that was the total cost for the group, paying them only half of their promised six dollar wages, denying them overtime, charging seven employees \$1,050 a month for a shared apartment valued at \$375, and threatening “deportation in a box” for disobedience.²⁶¹

B. The Failure of Attendant Labor Laws to Adequately Safeguard H-2 Workers from Trafficking

There are a number of laws designed to protect workers from a wide range of abuses. The Department of Labor (“DOL”) has authority to enforce two federal statutes that at least partially cover this population of workers: the Fair Labor Standards Act and the Migrant

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 6.

²⁵⁸ *Id.* at 7.

²⁵⁹ *Id.*

²⁶⁰ See Christine Evans, *Cocoa Farm Imprisoned Us, Women Say*, PALM BEACH POST, Dec. 7, 2003,

<http://www2.palmbeachpost.com/moderndayslavery/reports/tomatowomen1207.html>.

²⁶¹ U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. 10-1053.

Workers Protection Act.²⁶² Further, the DOL has its own regulations for the H-2 program.²⁶³ However, this scheme of attendant protections has several shortcomings. First, these statutes either explicitly exclude certain categories of workers, or courts have differed in their interpretations of the offered protections, further limiting their coverage. Second, the DOL has a poor track record of performing oversight. This lack of enforcement has likely enabled the kinds of abuses described in the previous parts. Furthermore, at best, these statutes and regulations can only offer assistance against wage fraud or forms of labor exploitation less severe than trafficking. None of these protections explicitly criminalizes nefarious recruitment and trafficking schemes, a job left to the TVPA. The limited scope of these protections, the exclusion of many workers, and the DOL's poor enforcement history demonstrate why the TVPA is the best instrument of attack.²⁶⁴

1. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") of 1938²⁶⁵ established a number of protections for all employees, such as minimum wage, workweek, and overtime requirements, and also grants employees a

²⁶² 29 U.S.C. Chs. 20 and 8.

²⁶³ 20 C.F.R. 655 and 501.

²⁶⁴ There are a number of other potential tools at the disposal of modern-day abolitionists in the United States that this Article will discuss because they are largely outside the scope. This Article will not discuss the Mann Act, which is used for the sex trafficking of minors, as that does not necessarily apply to the labor trafficking of H-2 guest workers. *See* 18 U.S.C. §§ 2421-2424 (2006) (defining coercion and enticement and transportation of minors for sexual activity); *see generally* Kristina Day, *Addressing the Sex Trafficking Crisis: How Prostitution Laws Can Help*, 2 CREIGHTON INT'L & COMP. L.J. 149 (2012). Nor will it discuss the Civil Rights Act of 1964, due to its focus on gender and race discrimination, which is not the focus of this paper. The Racketeering Influenced and Corrupt Organizations Act has only been used once to prosecute labor traffickers. *See* Kendal Nicole Smith, Comment: *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 777 (2011) (citing 18 U.S.C. §§ 1961, 1962). The possible constitutional arguments as to how the abuse of workers may constitute legalized slavery are also outside the scope of this Article. State trafficking statutes and common law tort claims are also outside the focus of this paper, which seeks to focus on remedies and solutions available within the federal law framework.

²⁶⁵ The FLSA is codified at Chapter 8 of the Labor Title in the U.S. Code at 29 U.S.C. §§ 201-19.

private right of action.²⁶⁶ Citizenship and immigration statuses are irrelevant for purposes of coverage under the Act.²⁶⁷ For H-2 workers, the FLSA may offer protection if employers make deductions or charges for certain costs that would impermissibly bring their wages below the minimum standards.²⁶⁸ These protections are not all explicit in the statute, however.²⁶⁹ H-2 workers must fall within the interpretive guidelines and court decisions that together govern the meaning of these key FLSA provisions in order to invoke its protection.

FLSA includes under its definition of wage the “reasonable cost” to an employer of board, lodging and similar “other facilities” provided to workers, as long as that the cost is indeed reasonable and not designed to make a profit at the expense of the employees.²⁷⁰ These “other facilities” include transportation between their homes and work, provided that the transportation is not “incident of or necessary to” employment.²⁷¹ Therefore, the rule is that employers may generally charge for transportation. However, if transportation is an “incident of or necessary to” employment, then employers may not deduct these costs from employee wages.²⁷² Furthermore, if the facilities furnished are provided primarily for the benefit of the employer, employers may not charge for them.²⁷³ Whether H-2 employees’ recruitment, transportation, and visa expenses are primarily for the benefit or convenience of the employer is a decision left up to the courts, which have arrived at opposite conclusions.²⁷⁴ Of course, if these expenses are indeed for the primary benefit of the employer, and the employer either fails to reimburse the worker or deducts those costs the employer paid from the employees’ wages, the employer will be in

²⁶⁶ 29 U.S.C. §§ 206, 207, 216. Minimum wage is set at \$7.25. Employers must pay one and one-half times the employee’s regular rate for hours worked beyond forty each week.

²⁶⁷ Shane Dizon & Nadine K. Wettstein, *Fair Labor Standards Act*, 3 IMMIGRATION LAW SERVICE 2D § 16:92; see also Mathes, *supra* note 152, at 1821 (citing Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988) and Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) for the proposition that the FLSA covers alien workers, regardless of their documentation status).

²⁶⁸ Griffith, *supra* note 76, at 146.

²⁶⁹ Mathes, *supra* note 152, at 1821.

²⁷⁰ *Id.* (citing 29 U.S.C. § 203(m)).

²⁷¹ *Id.* at 1822 (citing 29 C.F.R. § 531.32(a)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 1823; see also Shane Dizon & Nadine K. Wettstein, *Employer Liability for other Employee Costs*, 1 IMMIGRATION LAW SERVICE 2D § 4:462.50 (discussing conflicting court decisions for H-2B workers).

violation of the FLSA if the wages fall below the statutory minimum.²⁷⁵

The Eleventh Circuit in *Arriaga v. Florida Pacific Farms, LLC* held that the H-2A workers' visa costs and transportation expenses from their homes to the recruitment site, though not their recruitment fees, were primarily for the benefit of the employer.²⁷⁶ In 2010, the Fifth Circuit held in *Castellanos-Contreras v. Decatur Hotels* that the FLSA did not require an employer to bear the costs of "recruitment, visa, or transportation expenses incurred prior to relocating to the United States" for its H-2B workers.²⁷⁷ In the years since these rulings, federal district courts have drawn from either *Arriaga* or *Decatur* for support of either position in both the H-2A and H-2B programs.²⁷⁸ The Department of Labor has also periodically stepped in to interpret its regulations, and recently the Obama Administration granted the H-2B program some pre-employment visa expenses and some transportation costs, including the return trip, albeit with some caveats.²⁷⁹

Arriaga and *Decatur* demonstrate one of the key legal challenges in using the FLSA. Employers often try to skirt responsibility under an agency theory by attempting to prove that they never authorized their recruiters to charge the workers fees, or that the recruiters were acting so far out of the scope of their employment that they were effectively not acting as agents of the employer when they charged fees.²⁸⁰ Examples of this are not uncommon, according to the Southern Poverty Law Center.²⁸¹ Employers will sometimes produce a letter to their recruiters explicitly prohibiting their charging of fees, in an effort to sever the agency relationship and keep employers off the hook. An employer's use of the agency theory can limit the FLSA's ability to address recruitment schemes and vindicate workers.

2. The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA")

²⁷⁵ Mathes, *supra* note 152, at 1822.

²⁷⁶ Mathes, *supra* note 152, at 1824-25.

²⁷⁷ *Id.* at 1831-32.

²⁷⁸ *Id.* at 1840.

²⁷⁹ *Id.* at 1829-30.

²⁸⁰ *Id.*

²⁸¹ Telephone Interview with Jim Knoepp, Deputy Legal Director, Southern Poverty Law Center (Jan. 22, 2013).

The Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”)²⁸² was enacted by Congress to “assure necessary protections for migrant and seasonal agricultural workers” and “require farm labor contractors to register” and meet certain conditions under the Act.²⁸³ It provides housing, transportation, wage, disclosure, recordkeeping, and registration protections that extend beyond the minimum wage and overtime requirements of the FLSA.²⁸⁴ It also creates a private right of action,²⁸⁵ and other enforcement mechanisms.²⁸⁶

However, the protections of the AWPA extend only to a subset of H-2 workers that qualify as “migrant” or “seasonal” workers under its auspices.²⁸⁷ The statute’s definitions specifically exclude nonimmigrant aliens admitted to the United States under the H-2A visa.²⁸⁸ However, some H-2B workers qualify as agricultural workers under the more expansive agriculture definition of the statute, and are therefore covered under AWPA.²⁸⁹ H-2B forestry workers, for example, are covered under AWPA.²⁹⁰

Nonetheless, this leaves most H-2 workers without the private right of action afforded by AWPA²⁹¹ and unable “to sue in federal court for lost wages, housing benefits, transportation reimbursement, housing benefits, and other requirements of the H-2A contract” under the AWPA framework.²⁹² It also means that farm labor contractors recruiting and transporting H-2A workers, and most H-2B workers, do

²⁸² The Act is codified as Chapter 20 of the Labor Title in the U.S. Federal Code.

²⁸³ 29 U.S.C. § 1801 (2013). The Act defines farm labor contractors as any individuals who perform services for employers such as “recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.” 29 U.S.C. § 1802(6) (2013). These individuals are prohibited from engaging in any such activities without prior certification from the Department of Labor. 29 U.S.C. § 1811 (2013). The other provisions are codified 29 U.S.C. §§ 1812-1815.

²⁸⁴ Griffith, *supra* note 76, at 148 (citing 29 U.S.C. §§ 1811-15, 1821-23, 1831-32, 1841-44).

²⁸⁵ 29 U.S.C. § 1854 (2013).

²⁸⁶ 29 U.S.C. §§ 1851-1856 (2013).

²⁸⁷ 29 U.S.C. § 1802(8)(B) and (10)(B) (2013).

²⁸⁸ 29 U.S.C. § 1802(8)(B) and (10)(B) (2013). Apparently, members of Congress believed immigration regulations were the more appropriate place to treat foreign workers and ensure their protection; see Christopher Ryon, Comment: *H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Worker Protection Act*, 2 MARGINS 137, 149 (2002) (citing a hearing of the House Subcommittee on Education and Labor).

²⁸⁹ Griffith, *supra* note 76, at 149 (citing U.S.C. § 1802(3)).

²⁹⁰ *Id.*

²⁹¹ *Id.* at 149.

²⁹² FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST, *supra* note 87, at 25.

not have to meet its requirements for registering with the Labor Department under the statute.²⁹³ For the purposes of H-2 worker vulnerability during the recruitment stage of employment, these are critical omissions.²⁹⁴

3. Department of Labor's Failures to Enforce H-2 Worker Protections

The Department of Labor has afforded varying degrees of protection for H-2 workers through the decades. Regardless of the strength and status of the regulations, the Department of Labor has historically only weakly enforced the H-2 protections, drawing significant ire from workers, labor advocates and policy makers.

For years, the DOL denied that it had the authority to enforce the H-2B requirements due to a statutory ambiguity.²⁹⁵ Yet, even when the DOL acknowledged its authority to enforce the terms of the FLSA and AWPAA over guest worker contracts, enforcement of these laws has been poor. A 2009 GAO report describes how the slow intake and inefficient processing of complaints from migrant workers left them vulnerable to wage and other labor law violations.²⁹⁶ Undercover investigators posing as low-wage workers reported complaints to the Wage and Hour Division ("WHD"). The DOL staff directed investigators to resolve the issues themselves, simply rerouted them to voicemail and never returned calls, or gave them misleading and contradictory information.²⁹⁷ GAO's investigation of genuine complaints uncovered that the WHD prematurely closed five investigations based on false employer reporting, rather than attempting to determine whether the employers might be lying.²⁹⁸ Furthermore, investigators were delayed by months or even years due to agency backlogs and a purported lack of investigatory resources.²⁹⁹

²⁹³ Christopher Ryon, *Comment: H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Worker Protection Act*, 2 MARGINS 137, 138 (2002).

²⁹⁴ See generally *Id.* for a summary of legislators and commentators who have criticized the Act's exclusion of H-2A workers.

²⁹⁵ *H-2B Hearing, supra* note 247, at 6, 7 (statement of Mary Bauer).

²⁹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. 09-629, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT (March 2009), available at <http://www.gao.gov/new.items/d09629.pdf>.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

Workers' personal experiences with the DOL further illustrate its poor enforcement track record. Aby Karickathara Raju, an Indian welder and former H-2B guest worker living in a guarded and overcrowded labor camp, testified that he felt the DOL did not take the workers' complaints seriously. He stated that DOL never made contact with him or conducted an inspection. His employer claimed the DOL investigated and approved of the conditions while he and fellow employees leveled their allegations of abuse against Signal International.³⁰⁰ Miguel Angel Jovel Lopez, another former H-2B worker from El Salvador, waited futilely for months to hear from the Department regarding a complaint of breach of contract, illegal retaliation, and excessive fees against his employer.³⁰¹

The Southern Poverty Law Center reports that where the DOL did pursue a lead and find evidence of abuse, it merely slapped the employer on the wrist, leveling minimal fines and dropping those fines once the employer promised future compliance.³⁰² In one instance, the DOL provided no redress for workers against the employer, though experts concluded they were collectively defrauded out of fifteen to twenty-five million dollars in unpaid wages.³⁰³ Moreover, the Department continued granting certification to noncompliant employers.³⁰⁴

This litany of failures prompted the Obama Administration to restore and extend several oversight measures in its newly promulgated regulations under both programs. First, the supervised certification process was restored, replacing the Bush Administration's self-attestation process where employers promised that they were complying with standards sans any kind of federal supervision.³⁰⁵ Furthermore, the regulations expanded the agency's auditing, suspension and debarment authority to identify and punish noncompliant employers.³⁰⁶ However, in the case of H-2Bs, the regulations have been enjoined and the Department is still operating under the 2008 rules.³⁰⁷ The ambiguities surrounding the Department

³⁰⁰ *H-2B Hearing*, *supra* note 247, at 2 (statement of Aby Karickathara Raju).

³⁰¹ *The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 61 (2009) [hereinafter *H-2B Hearing*] (statement of Miguel Lopez, New Orleans Workers' Center for Racial Justice).

³⁰² *H-2B Hearing*, *supra* note 247, at 7, 8 (statement of Mary Bauer).

³⁰³ *Id.* at 9.

³⁰⁴ *Id.* at 7, 9.

³⁰⁵ BRUNO REPORT, *supra* note 172, at 7, 11.

³⁰⁶ BRUNO REPORT, *supra* note 172, at 12.

³⁰⁷ BRUNO REPORT, *supra* note 172, at 10.

of Labor's enforcement authority and the agency's weak enforcement record are not sources of optimism.

IV. THE TRAFFICKING VICTIMS PROTECTION ACT: ORIGINS, AIMS, EVOLUTION, AND PROPOSALS FOR FURTHER IMPROVEMENT

The Trafficking Victims Protection Act has proven to be a vital tool for protecting H-2 guest workers exploited for their labor. However, H-2 guest workers are not the only population the TVPA was designed to serve. After intense lobbying from advocates on behalf of many different victim populations, and several failed attempts, Congress finally managed to enact an ambitious law designed to combat all the varied victims of trafficking—exploited children, sex workers, and laborers—not only within our borders, but around the world. Congress elected to employ all the tools in its vast arsenal: information-gathering mandates, international jurisdiction, financial appropriations, domestic criminal and civil sanctions, and immigration relief for potential victims. This part will describe the legislative history of the Act and propose amendments to improve its coverage of trafficked H-2 workers.

A. Legislative History of the TVPA

1. The Enactment of the TVPA

While many domestic laws covered components of the trafficking scheme, such as involuntary servitude, slave trade offenses, peonage, transportation for sexual activities, and immigration violations, none had addressed the trafficking scheme as a whole.³⁰⁸ For years, advocates on behalf of sex workers, children, and laborers sought to create a comprehensive new law that would help punish and deter trafficking in human beings, a fast-growing global industry that is the third largest source of profits for criminal enterprises.³⁰⁹ Trafficking affected people regardless of age, gender, or socioeconomic status in nearly every country in the world. Advocates and legislators in the United States saw it as a duty for the world's first modern and leading democracy, which had fought a bloody civil war

³⁰⁸ H.R. REP. NO. 106-487(I) (1999).

³⁰⁹ *Id.*

to end slavery on its own soil, to fight trafficking and enslavement abroad.³¹⁰

Yet reaching a consensus on how to help the broad swath of victims across the globe proved difficult. Among the roadblocks was fear that including labor trafficking would dilute protections for the thousands of women and children ensnared in the commercial sex trade.³¹¹ Various forms of legislation were introduced and then floundered in the two years preceding the enactment of the current law, which eventually borrowed the best of the discarded proposals³¹² to reach labor, sex, and child victims alike.³¹³ Hailed as a bipartisan effort³¹⁴ that passed in the waning days of the Clinton administration,³¹⁵ the Act became the United States' first centralized federal law criminalizing human trafficking since the passage of the Thirteenth Amendment.³¹⁶

Legislators crafted a bold law with a three-fold aim: prevention, prosecution, and punishment.³¹⁷ The Act targeted traffickers both at home and abroad, and the weapons were varied. First, the Act defined "severe forms of trafficking in persons" as either

³¹⁰ Press Release, U.S. House of Representatives, Arney Hails Passage of Sex Trafficking Bill (May 10, 2000).

³¹¹ Rebecca L. Wharton, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 768-69 (2010) ("Many abolitionists felt that all prostitutes were slaves, and that by giving equal attention to non-sex forms of trafficking attention would be drawn from the main issue of sex slavery, the one issue that 'galvanizes everybody.'").

³¹² H.R. REP. NO. 106-487(I), at 16-18 (1999).

³¹³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §102, 114 Stat. 1464 (2000) ("An Act to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims.").

³¹⁴ H.R. REP. NO. 106-487 (I).

³¹⁵ "Enacted in the final months of the Clinton Administration, the TVPA introduced a comprehensive approach to combating human trafficking that was without parallel anywhere in the world." Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 100 (2006).

³¹⁶ McGaha & Evans, *supra* note 72, at 240-41 ("However, prior to 2000 there was no comprehensive law on the federal level, other than the 13th Amendment to the U.S. Constitution, that protected victims of trafficking or enabled the prosecution of their traffickers.").

³¹⁷ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); *see also* 22 U.S.C. § 7101(24)(2012) (stating that to deter international trafficking in persons, the United States must "prescrib[e] appropriate punishment, giv[e] priority to the prosecution of trafficking offenses, and protect[] rather than punish[] the victims of such offenses").

sex trafficking in minors or 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,”³¹⁸ and protected victims of such severe forms of trafficking from deportation with a newly minted T visa.³¹⁹ The Act also defined “coercion,” “debt bondage,” and “involuntary servitude.”³²⁰

The Act also rolled out several prevention mechanisms for deterring trafficking domestically and abroad, including financial assistance for foreign governments, public awareness initiatives, extraterritorial jurisdiction, a national task force, and victim eligibility for federal and state benefits. To punish and prosecute traffickers, the Act imposed harsher sanctions for existing crimes and added several new sections to the federal criminal code. It added new sections for “forced labor,” punishing anyone who knowingly provides or obtains labor by threats of serious harm or abuse of the legal process;³²¹ “trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,” which is to knowingly recruit, harbor, provide or obtain labor for purposes of exploitation;³²² “unlawful conduct” such as destruction, concealment, or confiscation with respect to documents “in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.”³²³

2. Subsequent Reauthorizations

The subsequent reauthorizations in 2003, 2005, 2008, and 2013 sought to correct some of the problems encountered with implementing and enforcing the Act. Unfortunately, the first two reauthorizations had limited impact on the problem of labor trafficking within the United States. In 2003 Congress added a civil remedy for the offenses of “forced labor” and “trafficking with respect to peonage,

³¹⁸ 22 U.S.C. § 7102 (2012).

³¹⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

³²⁰ *Id.*

³²¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (2000) (creating 18 U.S.C. § 1589).

³²² Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (2000) (creating 18 U.S.C. § 1590).

³²³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (2000) (creating 18 U.S.C. § 1592).

slavery, involuntary servitude, or forced labor.”³²⁴ Congress also classified “forced labor” and “trafficking with respect to peonage, slavery, involuntary servitude or forced labor” as predicate offenses under RICO.³²⁵ The subsequent 2005 reauthorization largely ignored domestic labor trafficking.³²⁶

By contrast, in 2008 Congress added several labor-related amendments. Critically, Congress created the new offense of foreign labor contracting.³²⁷ The legislative history of this provision will be discussed in the following section. Congress also expanded the availability of the civil action to all the crimes under the peonage and trafficking chapter of the code and lowered the liability threshold to include knowing financial beneficiaries. It also criminalized obstruction, bolstered conspiracy punishments, enacted anti-profiteering measures, and provided definitions for undefined terms in the “forced labor” crime.

In 2013, Congress significantly enhanced the fraud in foreign labor contracting provision.³²⁸ First, Congress included “fraud in foreign labor contracting” as a predicate RICO offense.³²⁹ Congress also added a new section related to “unlawful conduct with respect to immigration documents,” which criminalizes the knowing destruction, concealment, removal, confiscation, or possession of an actual or purported passport or other immigration document belonging to another person in the course of violating, or with the intent to violate, the “fraud in foreign labor contracting” provision or the Immigration

³²⁴ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875 (2003) (creating 18 U.S.C. § 1595 which permits victims to sue in federal district court for damages and attorney’s fees).

³²⁵ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5, 117 Stat. 2875, (amending 18 U.S.C. § 1961(1)(A)).

³²⁶ See Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

³²⁷ William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5067-71 (2008) (creating 18 U.S.C. § 1351).

³²⁸ Eyder Peralta, *House Reauthorizes Violence Against Women Act*, NPR (Feb. 28, 2013), <http://www.npr.org/blogs/thetwo-way/2013/02/28/173150486/house-reauthorizes-violence-against-women-act>. President Obama signed the bill into law on March 7, 2013. Josh Lederman, *President Signs Expanded Domestic Violence Legislation*, THE BOSTON GLOBE (Mar. 8, 2013), <http://www.bostonglobe.com/news/politics/2013/03/08/obama-signs-expanded-violence-against-women-act/NJVwvKjgdgCeES5C5rHiPP/story.html>.

³²⁹ Violence Against Women Reauthorization Act of 2013, Public L. No. 113-4 § 1211(a), 127 Stat. 54 (2013).

and Nationality Act.³³⁰ The Act also commissions a GAO report on the use of foreign labor contractors to examine the use of recruiters by U.S. employers, an analysis of the surrounding laws and oversight measures.³³¹

B. Protections Against Deceptive Recruitment Practices in the TVPA

There two major provisions in the TVPA that target recruitment: sections 1351 and 1590. Both of these provisions contain a knowledge requirement that is ambiguous and, therefore, problematic.

Section 1351 has failed to generate substantial litigation since its enactment in 2008. By criminalizing fraudulent recruitment, Congress intended to target the recruiters whose unscrupulous practices were misleading and exploitative, but not quite coercive enough to sustain a trafficking conviction in the then-existing version of the code.³³² In the hearings prior to enactment, legislators highlighted incidents where recruiters used deception and fees to lure and confine the workers, but not the kind of brute force or threats of harm necessary to meet the level of coercion then required by the Act. However, a recent survey of a legal database revealed that section 1351 has been used in seventeen cases.³³³ Only one case is related to charges of forced labor trafficking of guest workers.³³⁴

The knowledge requirement of section 1351 is worded as such:

³³⁰ Violence Against Women Reauthorization Act of 2013, Public L. No. 113-4 § 1211(c), 127 Stat. 54 (2013). The punishment is a fine, imprisonment for no more than one year, or both. The Act also criminalizes obstruction of enforcement of this section, and penalizes it identically to the underlying offense.

³³¹ Violence Against Women Reauthorization Act of 2013 § 1235 127 Stat. 54 (2013). The Act also makes victims of fraud in foreign labor contracting eligible for the U visa and mandates that the Department of Labor be included among the federal agencies receiving training for identifying and protecting victims of severe forms of trafficking. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1122, 1234, 127 Stat. 54 (2013).

³³² 154 CONG. REC. H10190 (daily ed. Dec. 10, 2008); CHARLES DOYLE, CONG. RESEARCH SERV., R40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-457): CRIMINAL LAW PROVISIONS (2009).

³³³ There were only seventeen case citing references in Westlaw on September 27, 2013.

³³⁴ Appellant's Brief, *United States v. Askarkhodjaev*, 444 F. App'x 105 (8th Cir. 2011).

[w]hoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment

will be punished with a fine or imprisonment of up to five years.³³⁵

A similar knowledge requirement also exists for the trafficking offense under section 1590, which criminalizes the “knowing” recruitment of persons by any means for labor or services in violation of the peonage, slavery, and trafficking chapter.³³⁶ While section 1351 merely requires that the knowing and intentional fraudulent recruitment be for purposes of any employment in the United States, section 1590 requires the knowing recruitment for purposes of the more severe kinds of labor exploitation.

Thus, sections 1351 and 1590 address the “bait and switch” in different ways. Section 1351 criminalizes the fraud at the heart of these schemes. Section 1590 adds the forced labor element.

In seeking to prove that an employer has violated the statute, one must prove how he or she participated in the bait and switch. That an employer has pulled the switch is very obvious when he has constructed barbed wire fences or hired armed guards. His role is harder to prove in a more subtle situation, such as that of debt bondage, where he has not affirmatively laid the bait (i.e. neither told the false promise of fair wages or actually charged them the bogus fees that left the worker indebted), but he is benefitting from the fact that the workers are locked in to working for him. One could prove he stole wages, or confiscated passports, or committed physical abuse, but to prove his role in the baiting is more difficult.

When it comes to baiting, a recruiter performs all the necessary affirmative actions, such as lying and charging fees abroad, and an employer need not actually *do* anything—except purposefully avoid knowing anything about his recruiter’s actions. While avoidance may be easy to accomplish, by not inquiring about recruitment practices or venturing to Mexico, it may well not be genuine. The nature of transnational recruitment is well known; several recruiters have been implicated in well-publicized cases. Unsavory recruitment practices may not be a high-profile issue, but they are not completely foreign to

³³⁵ 18 U.S.C. § 1351 (2012 8 Supp. 2013).

³³⁶ 18 U.S.C. § 1590 (2012).

industry players. Furthermore, the desperate economic conditions of the individuals hired on the H-2 visas may be enough to alert employers to their vulnerability. Certainly, this does not make every employer a guilty party, yet it demonstrates that there are types of evidence available that could be used in a prosecution if Congress were to elucidate a stronger knowledge standard in these sections.

Perhaps Congress did not provide one earlier because proving knowledgeable recruitment circumstantially in other trafficking contexts is potentially less problematic. The bait and switch in a sex trafficking case, for example, may be easier to conceptualize for a lay person serving on a jury.³³⁷ Consider this fictional example based in fact: fifteen-year old Jennifer is browsing stores at the shopping mall when she is approached by a woman offering her a modeling job.³³⁸ Jennifer willingly follows the woman outside where she expects she will meet the woman's business partner. Instead, she is bludgeoned and forced into a car, then driven miles away to a hotel room where she is forced to service a john. It is not difficult to presume the perpetrator's degree of knowledge in this scenario. The woman who kidnapped Jennifer offered her a legitimate modeling job in the entertainment industry. On this premise alone, Jennifer followed her outside the shopping mall. But instead of a modeling agency, Jennifer ended up in a hotel room. She was promised the entertainment industry, but ended up in the commercial sex business. There is no confusing one with the other, and the knowledgeable bait setting is proven circumstantially.

By contrast, an H-2 worker is promised a visa and employment. In most instances, he receives a visa and employment. On paper, at least, a worker has everything he was promised. An employer pleading innocence could prove that he or she provided a job. He or she could produce a paper trail of communications to the recruiter forbidding him from contravening the law and exploiting the recruits. So far, his testimony and documentary evidence may appear convincing to a jury. What can a prosecutor produce to refute this?

³³⁷ Sex trafficking is a vast and complex phenomenon that contains many subtleties of its own. The fictional example is not held up as a prototype or representation of all sex trafficking cases. Rather, it is merely to illustrate how the basic anatomy of how many but not all forced prostitution cases contains a bait and switch that is easier to conceptualize for lay people than a case of fraudulent recruitment and labor trafficking. For Jennifer, what she was promised is starkly different from what was delivered. For Raj, what she was promised bears similarity to what was delivered.

³³⁸ *Teen Girls' Stories of Sex Trafficking in U.S.*, ABC NEWS (Feb. 9, 2006), <http://abcnews.go.com/Primetime/story?id=1596778&page=1&singlePage=true#.UaYsD1EoorV>.

Certainly, there is the testimony of the recruits. But this kind of testimony is difficult to obtain because victims are often so traumatized,³³⁹ and there may be little else by the way of corroborating evidence.

Given the minimal contact workers have with the consular office at the initial interview stage, the paper trail may reflect perfect compliance and official ignorance of a recruiter's illegal practices. Assuming an employer presents a credible case and a group of workers presents their testimony and little else, a jury may be inclined to believe the employer. In that case, the employer is viewed as having clean hands by having provided exactly what he offered, valid employment. Therefore, proving an employer had knowledge of the abusive practices in the recruitment industry and purposefully buried his head in the sand becomes imperative.

C. Proposals to Resolve the Statutory Deficiencies

The knowledge requirement in sections 1351 and 1590 should be amended to criminalize deliberate ignorance of a recruiter's actions explicitly. The existing statute criminalizing the receipt of foreign property or fraud in foreign commerce, as well as the Model Penal Code (MPC) provisions for receipt of stolen property already contain analogous provisions on deliberate ignorance.³⁴⁰ These statutes provide a set of factors that enable one to presume knowledge on the part of the criminal actors and criminalize a decision to ignore incriminating evidence on a part of a recruiter. These standards are clear, fair, and time-tested in similar contexts. They provide adequate notice to employers seeking to abide by the law. A law adopting these standards would not demand that ethical employers, who are in the business of running companies rather than international recruitment, undertake costly investigations of their agents.

The new sections 1351 and 1590 would borrow language from the Foreign Corrupt Practices Act ("FCPA").³⁴¹ The FCPA targets "prohibited foreign trade practices by issuers" under section 78dd-1 of

³³⁹ See TIP 2013 at 21 (The physical and emotional injuries that many trafficking victims endure are likely to affect their ability to concentrate, to make sound decisions, to recall events, and to respond to questions about their experiences.").

The State Department recommends building cases on "on a variety of sources of evidence to take some of the pressure off victims" who are often so traumatized that their ability to process information and make choices may be impaired. *Id.* at 24, 26.

³⁴⁰ 18 U.S.C. §1351 (2012); 18 U.S.C. §1590 (2012); MODEL PENAL CODE §223.6 (2012).

³⁴¹ 15 U.S.C. § 78dd-1 (2012).

the Commerce and Trade Title in the federal code.³⁴² It makes unlawful the corrupt use of instruments of interstate commerce in furtherance of an offer of money or anything of value to any person “while knowing” that the money or valuable object will be offered to foreign officials for the purpose of influencing their official acts or decisions.³⁴³ Furthermore, it defines,

[a] person’s state of mind [a]s ‘knowing’ with respect to conduct, a circumstance, or a result if:

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.³⁴⁴

In addition to these awareness and firm belief factors, the statute also adds, “[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”³⁴⁵ The Southern District of New York in *United States v. Kozeny* elaborated this conscious avoidance, or willful blindness standard.³⁴⁶

“A court can properly find willful blindness [i.e. conscious avoidance] only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness.”³⁴⁷

The court further characterizes it as a decision not to learn a “key fact,” not merely the failure to learn it through negligence.³⁴⁸

³⁴² *Id.*

³⁴³ 15 U.S.C. § 78dd-1(a)(3) (2012).

³⁴⁴ 15 U.S.C. § 78dd-1(f)(A) (2012).

³⁴⁵ 15 U.S.C. § 78dd-1(f)(B) (2012).

³⁴⁶ *United States v. Kozeny*, 643 F.Supp.2d 415 (S.D.N.Y. 2009).

³⁴⁷ *Id.* at 418 (quoting *United States v. Nektalov*, 461 F.3d 309, 315 (2d Cir. 2006)).

³⁴⁸ *Id.* (quoting *Nektalov*, 461 F.3d at 315).

The Supreme Court elaborated on what separates willful blindness from mere negligence or recklessness in a patent case from 2011.³⁴⁹ The dual requirements that the defendant “subjectively believe that there is a high probability that a fact exists,” and also “take deliberate action [] to avoid learning” the fact limit the scope of the doctrine.³⁵⁰

Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, and a negligent defendant is one who should have known of a similar risk but, in fact, did not.³⁵¹

Cases under section 78dd-1 illustrate the kinds of evidence that could be used to prove the requisite level of knowledge. In *Kozeny*, for example, the accused had created shell corporations, told investors of worries that his associate was making bribes, and received advice from his attorney to “look the other way” if he suspected any bribery.³⁵² In a civil action between the Securities and Exchange Commission and a business called the El Paso Corporation, a third-party competitor informed the corporation of the foreign authorities’ demands for a bribe, and national press and trade publications had released articles discussing this type of bribe.³⁵³ Thus, information from third parties or the media can be used to prove knowledge. An email between a company and its foreign affiliate contained veiled language such as “do what you have to do” and “let’s make sure we are discrete” and “the reality of doing business in Asia” and

³⁴⁹ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070-71 (2011).

³⁵⁰ *Id.*

³⁵¹ *Id.* (induced infringement of a patent), *declined to extend* by *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Florida Priory of Knights Hospitallers of Sovereign Order of Saint John of Jerusalem, Knights of Malta, Ecumenical Order*, 702 F.3d 1279 (11th Cir. 2012) (warning not to transfer the willful blindness standard from one area of patent law to another).

³⁵² H. Lowell Brown, *BRIBERY IN INTERNATIONAL COMMERCE* § 2:10 (2013) (citing *Kozeny*, 541 F.3d at 166).

³⁵³ *Id.* (citing *Sec. & Exch. Comm’n v. El Paso Corp.*, NO. 07CV00899 (S.D.N.Y. Feb. 7, 2007)).

“cover[ing] our friends inside.”³⁵⁴ Communications from another case include statements such as it is “none of the employee’s business how” customs processes were expedited and the person “did not want to know.”³⁵⁵ In another civil action involving the Securities and Exchange Commission and a company called Daimler AG, it was alleged that bribes were paid through seventy-one intermediaries, many of which did not operate a business at all.³⁵⁶

In enacting the present knowledge requirement in the FCPA, Congress had considered the example of a Ninth Circuit case affirming the conviction of a defendant who admitted he was paid \$100 to drive a car that he knew contained a secret compartment across the Mexican border, but denied knowing that the compartment contained 110 pounds of marijuana.³⁵⁷ Congress also cited a criminal law treatise that refers to willful blindness as instances “where it can almost be said that the defendant actually knew.”³⁵⁸ As an example of “conscious disregard,” Congress cited the case of the driver of a truck filled with 31 undocumented immigrants who denied knowledge of their presence, claiming only that he was paid \$25 to drive the truck from one city to another. The court instructed the jury that it should be convinced beyond a reasonable doubt that the defendant “willfully blinded himself to what he had every reason to believe were the facts.”³⁵⁹

The authors of an article designed to assist domestic businesses expanding into international markets with understanding the Act crafted a hypothetical involving an agent who charges an exorbitant commission and tells the business owner the money is not entirely for him, but rather to “soften[]” the market in the “right places.”³⁶⁰ The agent far outsells most of his competitors. In the meantime, the business owner learns from others that bribes are a common practice in the country where his agent is operating. The authors point out that the fees, comments, and sales record could demonstrate the requisite awareness. They also point out inexperience with foreign markets could exculpate the business owner.³⁶¹

³⁵⁴ *Id.* (citing U.S. v. Data Systems & Solutions LLC, Criminal No. 1:12-cr-262 (E.D. Va. June 18, 2012)).

³⁵⁵ *Id.* (citing U.S. v. Aibel Group Limited, CR. No. H-07-05-S (S.D. TX, 2008)).

³⁵⁶ *Id.* (citing Sec. & Exch. Comm’n v. Daimler AG, Civ. Action No. 1:10-cv-00473 (RIL) (D.D.C., April 1, 2010)).

³⁵⁷ *Id.* (citing H.R. REP. No. 100–576 (1988)).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ Stephen J. DeCosse & Susan S. Katcher, *Newly Amended Foreign Corrupt Practices Act*, 63 WIS. LAW. 23, 60-61 (1990).

³⁶¹ *Id.*

These examples have some analogues in the fraudulent recruitment and labor trafficking cases. Conversations that acknowledge in a suspicious manner the risks of illegality in transnational recruitment; refusals to learn a recruiter's methods; information from third parties or articles published in the media regarding a particular individual or agency; an extensive and disorganized network of illegitimate subcontractors or agents; knowledge that the workers are burdened with debt; or an inkling that the recruiter may have undercharged him may all be factors that demonstrate awareness of a recruiter's abusive practices. Finally, the materialization of workers severely indebted and without documentation papers on an employer's worksite could be enough to suggest some level of awareness. Certainly, other factors should be present, but this is a starting point nonetheless.

The objective is to assist a plaintiff who needs to prove an employer had some awareness or firm belief of the kinds of circumstances that recruiters typically use to perpetuate fraud, such as misinformation about the nature or duration of employment; misinformation about the nature or duration of the visa term or legal status; the charging of any type of prohibited recruitment fee; misinformation about the total amount of fees; or the prohibited confiscation of passports or identification documents. These indicators are the touchstones of the bait (deception) and switch (deprivation of liberty).

One author writing on the FCPA suggested that the Department of Justice provide guidelines and models for structuring international business transactions.³⁶² Currently, it would be difficult to issue such guidelines regarding the TVPA because little is known about the nature of trans-border recruitment in the United States. Government authorities and advocacy groups may finally gain more insight when cases under section 1351 work their way through the court system and when the GAO publishes its report on the use of international recruiters, commissioned by Congress in 2013. This kind of information would be critical for the Department to issue warning signs or best practices for employers to use when seeking contractors to conduct their recruitment for them.

Furthermore, the MPC section for "receiving stolen property" lists a set of presumptive knowledge factors for "dealers . . . in the business of buying or selling goods."³⁶³ These factors include being

³⁶² Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 881 (2001).

³⁶³ MODEL PENAL CODE § 223.6 (2012).

“found in possession or control of property stolen from two or more persons on separate occasions,” having received “stolen property in another transaction within the year preceding the transaction charged,” or acquiring goods of the type which he buys or sells “for a consideration which he knows is far below its reasonable value.”³⁶⁴

Employers who regularly employ workers on the H-2 visas are comparable to dealers in goods, such as pawnbrokers. The presence of one or more factors could then be used to presume an employer’s knowledge. If an employer is found to have grossly underpaid for his recruitment services; employed a previously convicted recruiter; or formerly employed fraudulently recruited or trafficked workers, then a court may use these as indicators that an employer had some knowledge of their recruiter’s wrongdoing.

Incorporating these standards into the trafficking and fraudulent recruitment offenses would provide a functional definition for “knowledge.” The awareness, firm belief, and conscious avoidance standards of the FCPA would punish offenders who have a high likelihood of awareness that circumstances of fraudulent recruitment exist. It would further punish those who, while believing a fact exists, decide not to learn it. Yet it would not penalize those who merely “should have known,” or were negligent. This standard does not demand that employers who are primarily in the business of running hotels or operating farms to investigate the circumstances of trans-border labor recruitment. They would not be expected to cultivate knowledge in an area far outside their expertise. Furthermore, adding a subsection to list presumptive factors such as the Model Penal Code contains would mean that employers who have been caught with fraudulently recruited workers more than once, who were previously convicted of fraudulent recruitment or trafficking offenses, or who are charged very little by a recruiter when they know it would cost more to reasonably transfer the workers from abroad, would be presumed to have the requisite knowledge.

Though there are not many cases charged under section 1351, other cases illustrate the levels of collusion present (or not) between employers and their recruiters. On one end of the spectrum, a recruiter may act completely alone; while on the other, the recruiter and employer may work together in concert.³⁶⁵ Of course, the middle of the spectrum is where the knowledge inquiry is most relevant.

³⁶⁴ *Id.*

³⁶⁵ Compare *Nunag-Tanedo v. East Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011) (Filipino school-teachers on the H-1B visa accused placement and recruitment agencies of altering the terms of recruitment by hiking up fees mid-stream and threatening to deport them back to the Philippines in order to

In the case of *Camayo v. John Peroulis & Sons Sheep, Inc.*,³⁶⁶ two Peruvian men “were recruited in Peru by associates of the Defendants,” the Peroulis company, to work on the company’s Colorado ranches under the H-2A visa.³⁶⁷ The men were told they would be hired for a three-year term when in fact the visa would expire later that year in 2009.³⁶⁸ The men were charged significant fees during this recruitment stage. The plaintiffs argued that their supervisors “were cognizant of the difficult financial circumstances the employees found themselves in” and that the employers, armed with this knowledge, “threatened . . . to terminate this employment and send [them] back to Peru.”³⁶⁹ The supervisor—at minimal prompting when he found the men chatting, making dinner, or could not immediately locate one of them—would verbally warn them that they would be returned to Peru. The fear of being unable to provide for their families kept the men in the company’s employ.

In a hypothetical case, the facts as alleged by the plaintiffs, if proven true, could show that an employer used his knowledge of their financial status – caused or greatly affected by the recruitment fees – to manipulate the workers via improper threats.³⁷⁰ An employer would have not only possessed this knowledge, but would have used it to coerce the workers further to remain in his employ rather than encounter financial devastation in Peru.³⁷¹

In this case, the employer was accused of further acts of wrongdoing; he was charged under section 1589, the forced labor provision, for enforcing seventeen-hour workdays, providing little

“intentionally manipulate the situation so that plaintiffs would feel compelled to remain and would obey” all demands) and *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217 (S.D. Fla. 2011) (Filipino citizens accuse their staffing agency of using false promises and fraudulent visa applications, coupled with threats and additional financial charges, to force them to work in country clubs and hotels) with *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985) (American citizens allege their recruiter offered them a day of local work and instead drove them across state lines to a farm labor camp where he assisted the employer in holding them in involuntary servitude by retrieving escaped workers).

³⁶⁶ *Camayo v. John Peroulis & Sons Sheep, Inc.*, No. 10-CV-00772-MSK-MJW, 2012 WL 4359086 (D. Colo. Sept. 24, 2012) *adhered to on reconsideration*, 10-CV-00772-MSK-MJW, 2013 WL 3927677 (D. Colo. July 30, 2013).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at *2.

³⁶⁹ *Id.*

³⁷⁰ Merely informing someone he can be deported is not, by itself, a misuse of the legal process. The court notes such threats should be viewed in light of all surrounding circumstances. The workers here alleged the threats were to instill fear.

³⁷¹ *Id.*

food, and abusing the workers.³⁷² The court denied the employer's motion to dismiss, finding that in the light most favorable to the plaintiffs, his threats could constitute the abuse of legal process.³⁷³ Though the employer denied possessing the requisite scienter, the court did not undertake an analysis of his level of cognizance.³⁷⁴ The complaint had also alleged a violation of section 1590 by "recruiting or harboring [one of the plaintiffs] for labor or services," though the court noted that "[i]t was unclear if [the plaintiff] believed these to be separately-actionable claims, or simply additional aspects of his" claim regarding section 1589, the forced labor provision. Lacking clarity, the court did not undertake this analysis.³⁷⁵

The *Camayo* court does not provide much information on the nature of the employer-recruiter relationship. However, if a hypothetical plaintiff in a similar situation were to plead a separate claim under an amended section 1590 or an amended section 1351, the court would look for conduct that demonstrates some intentional manipulation of these circumstances, such as in the *Camayo* case. An employer may further the deprivation of liberty—which could demonstrate he or she has knowledge of its existence—by engaging in improper threats of deportation or termination of employment; extracting prohibited wage reductions; keeping workers in the dark regarding their legal status; or any related behavior that has the effect of exploiting a worker's indebtedness or tenuous legal status. Of course, this conduct should be viewed in light of the surrounding circumstances, as the *Camayo* court did during the analysis for abuse of the legal process under section 1589, where a mere threat of deportation or law enforcement alone is insufficient without more evidence. For the knowledge inquiry, minor misstatements or clerical errors would be insufficient.

It is difficult to predict exactly how a hypothetical plaintiff would fare under an amended version of the law due to the lack of scientific information about transnational recruitment in the United States. It would be helpful to know more specifics about the business practices employers use, such as, how employers select recruiters, the kinds of contracts, if any, they sign, and the level of involvement employers have or can have in the recruitment process. No doubt each employer-recruiter relationship is different, but there are likely generally patterns. One could learn about the model practices of

³⁷² *Id.* at *4.

³⁷³ *Id.* at *6.

³⁷⁴ *Id.* at *3.

³⁷⁵ *Id.* at n.3.

ethical employers as well as the practices that bad actors use during the recruitment process. This information would be helpful for illustrating the kinds of scenarios where an amended knowledge statute would be the most effective. We may gain that information once the GAO produces its report or as the advocacy community continues to explore the problem.

The statute, as amended, would only target the actors who had awareness or a firm belief that the circumstances constituting fraudulent recruitment and trafficking exist among their recruiters or employees, thereby protecting law-abiding employers from overzealous prosecutors. It would punish only those who ignore the obvious conditions of their employees once they are in the employer's presence. This should serve to alleviate the concerns of employer groups who are already reticent to use the guest worker visa program.³⁷⁶

Taking action is imperative as the trafficking problem along the U.S.-Mexico border is already affecting the flow of workers and the agricultural production of American employers. The recent crackdown on illegal immigration increased the costs of smugglers' services, which in turn forced Mexican workers to stay home, causing significant labor shortages across several states.³⁷⁷ A farm workers' representative cited trafficking as the migrant workers' greatest concern.³⁷⁸ These workers either do not come at all or alternatively do not return home for fear of being victimized by traffickers.³⁷⁹ Farmers who do not have sufficient workers cannot harvest their entire yield and are choosing less labor-intensive crops, such as soybeans and cotton.³⁸⁰ In turn, the "shortage affects not only farmers but their communities, as convenience stores, gas stations and restaurants that cater to farmworkers begin to close or to shed employees," and local charitable organizations who relied on donations cannot count on contributions from agricultural employers.³⁸¹

³⁷⁶ Beth Summers, *Farmer: U.S. Guest Worker Program Still 'Riddled With Bureaucratic Procedures'*, PBS NEWS HOUR (Apr. 16, 2013), <http://www.pbs.org/newshour/rundown/2013/04/the-evolving-immigration-debate---on-farming.html>; see also Tony Pugh, *Labor Shortages Plague Farms; Immigrant Stream Slows, so Produce May Go Unpicked*, BALTIMORE SUN, July 7, 2012.

³⁷⁷ Tony Pugh, *Labor Shortages Plague Farms; Immigrant Stream Slows, so Produce May Go Unpicked*, BALTIMORE SUN, July 7, 2012; see also David Castellon, *Ag Leaders React to Immigration Reform*, DESERT SUN, Jan. 31, 2013.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*; see also David Castellon, *Ag Leaders React to Immigration Reform*, DESERT SUN, Jan. 31, 2013.

³⁸¹ *Id.*

Calls for immigration reform are helpful, but do not solve the problem. As described in the sections above, some proposals call for disclosure requirements of recruiters and even add civil beneficiary liability for victimized workers. However, these reforms will not go far enough unless prosecutors and private attorneys have a workable knowledge standard in an area of the practice where employers can easily avoid knowledge of the truth while relying on the blanket protection of paperwork to save them from criminal liability. Even if the Senate's proposal to create a civil cause of action for fraudulent labor recruitment were to be enacted, for all practical purposes, there must be a way to target the final user of the services. This is because recruiters are effectively judgment-proof. They likely do not have assets in the United States, which makes the recovery of damages or attorney's fees practically impossible. Without a clear knowledge standard, establishing a chain of liability will prove very difficult.

Furthermore, the criminal law is the most appropriate place to start. Freedom is a fundamental tenet of American jurisprudence, and deprivation of liberty is the defining feature of contemporary trafficking in persons. Slavery was condemned in the 1860s, and its modern incarnation was condemned again in the 2000s. When the forces of deception, debt, and document confiscation combine, workers have effectively been denied their freedom. And once subjugated, they are abused for their labor in unfathomable ways that were long ago criminalized. The statutes should reflect the true nature of the bait and switch at the heart of labor trafficking crimes. It should be easier for prosecutors to prove the statutes' components in the cases where employers truly have high levels of awareness or have decided to ignore the kind of fraud and abuse already condemned by Congress and criminalized through the TVPA.

V. CONCLUSION

The trafficking of migrants for labor exploitation in the United States is a severe problem that is affecting workers, employers, the agricultural industry, and the nation's economic landscape. The scourge of trafficking is plaguing hundreds, if not thousands, of victims on the H-2 visas. The abuses they endure are quite obviously a deprivation of freedom—a deprivation that was criminalized more than a decade ago. Yet advocates bemoan the difficulty of successfully pursuing charges. The multitude of reports from abused workers contrasts horribly with the paucity of cases. Closer scrutiny of the trafficking statute suggests that by omitting the definition of "knowledge," it leaves open the possibility that employers can willfully ignore the fraudulent recruitment of their workers. It is

critically important to repair this omission, so that prosecutors can effectively target the end users of trafficked labor. It is imperative to do so now, given that thousands of new workers will flood the labor market under the reformed visa schemes. Regardless of what shape immigration reform finally takes, the workers will come. And the same actors who already operate in the shadows of this program will bring them here: labor recruiters. Until some action is taken, policy makers are unlikely to see the kinds of results they intended when they enacted the TVPA. Instead, there will remain a group of workers treated as slaves in the land of the free.