



**Migration and Debt Bondage: Manifestations and Policy Recommendations**  
by  
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**Introduction**

In recent years, a heightened awareness of human trafficking has emerged. The extent of the problem has come to light and the plight of 27 million people enslaved worldwide has been recognized. With the increased focus on human trafficking, more information regarding not only the pervasiveness of the problem but its many manifestations are becoming known. In the United States, more cases of forced labor among foreign workers, especially those involved in domestic service and agriculture have surfaced (“Forced Labour”, 2009). According to Janie Chuang, a professor at American University Washington College of Law, these trafficking cases are a result of “labor migration gone horribly wrong in our globalized economy” (Chuang, 2006, p. 138). The increase in movement between nations has led to more opportunities for trafficking and exploitation. Workers, often in great need of employment, can easily fall victim as their desperation leads them to situations of vulnerability. Due to such vulnerability, a power disparity is created between the workers and their employers, which leads to abuse. Many of these abuses result when migrants are stripped of their rights and incur unbearable levels of debt during the recruitment period. If recruitment methods and policy were changed to promote transparency and eliminate debt,

the propensity of workers to be trafficked and engaged in forced labor would be significantly diminished.

**Contract Substitution**

The power disparity experienced by any victim of human trafficking creates the atmosphere of oppression necessary to maintain the abusive relationship. Situations in which migrant guestworkers end up in the agricultural sector under an H-2A visa, or in a non-agricultural sector like forestry or meat-packing under an H-2B visa, are no different. Employers exercise excessive authority over their guestworkers because they not only dictate the conditions of the work arrangement, but they also retain the ability to arbitrarily change the terms of employment previously established and confirmed with the workers. This is more commonly known as *contract substitution* and there are few laws that protect and regulate against this abuse. However, this

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assumes that the guestworker received a contract in the first place. If a contract was negotiated, there is always the possibility that it was not honored by the employer or provided in a language that the guestworker could understand. Farmers also reserve the power to set their own “farm rules” by which to govern their employees and choose whether or not to implement safety regulations or to protect their workers in other ways (Preibisch, n.d.). These choices sustain the oppression necessary to ensure an inexpensive and submissive workforce.

### Labor Recruitment System

The development of this systematic repression begins at the earliest stage of the workers’ employment, during the recruitment process. In order to understand how, it is first necessary to understand the system by which employers obtain the labor their company requires. Frequently, workers are brought in from other countries using work visas. Workers under these types of visas are called “guestworkers” due to their temporary nature in the United States.

While some employers will work through the recruitment and visa processes directly, they “almost universally” make use of labor placement companies for assistance (Bauer, 2007, p.9). These labor placement companies, called *labor brokers*, help process the applications and make arrangements to bring workers to the United States. Overseen by the labor brokers are labor recruitment agencies, often referred to as *labor contractors*, in the sending countries. They are responsible for finding the workers, processing visas, and coordinating transportation. In turn, these recruitment agencies use a network of field agents who identify interested individual workers and sign them up (“Labor Recruitment”, n.d.).



There is a distinct hierarchy in the recruitment process with the guestworkers at the bottom and virtually powerless due to their inability to navigate the application and recruitment process or communicate directly with employers. Each of the steps in this process is largely unregulated and current labor laws do not clearly outline the responsibilities of recruiting agents or the final employers (“The Cost,” 2009, p.27). This deficiency is demonstrated by the fact that under current law, employers are to obtain the necessary guestworker visas; however, contracting companies commonly obtain the visas themselves.

While large employers typically rely on labor recruiters to ensure a steady workforce, small employers – such as houses or small firms – utilize social networking or day-labor pools for their recruitment (Rodriguez, 2004, p.467). Unfortunately, however, this type of recruitment is done under the table and regulation to ensure fair treatment of laborers in small places of employment is also insufficient.

Because the system is not sufficiently regulated, in each step of the process brokers, recruiters, and field agents can and often choose to manipulate the system to cater to their own self-interest. For

the members of these tiers, securing the maximum number of workers possible is their primary motivation. In order to secure the employment of laborers, recruiters often deceive them and use fraudulent information to lure them into committing to the job. Because the workers are so far removed from the site of their future employment, they have no means by which to verify the veracity of the recruiter's word or determine if they are being misled. They are often presented with unrealistic explanations of the nature of the work they are to perform or with unclear terms for their future employment. In other words, guestworkers cannot make informed decisions about the situation before agreeing and committing to it.

The lack of transparency in the recruitment process necessitates that workers put their trust in the recruiters and brokers, which is often exploited. The result is that guestworkers become trapped in a cycle of mistreatment. The United Nations'

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International Labour Organization (ILO) confirms that this sort of deceit more than likely leads to abuse at the destination.

According to the ILO's report, "The Cost of Coercion" (2009), it is

"widely accepted that workers who migrate through unlawful intermediaries, often finding only clandestine employment in destination countries, are at particular risk of forced labor" (p. 22). Exploitation during recruitment is just the beginning.

The incentive to deceive guestworkers on the part of labor brokers and recruiters – or *contractors* collectively – is a result of the monetary incentives that

can be obtained through over-recruiting. The contractor receives revenue from the employer for each guestworker they sign up, as well as fees wrongfully charged to the guestworkers. Each tier of the system charges fees to the workers. Some are legitimate, like transportation fees, and others are not, like fictitious "recruitment" fees. It is easy to demand bribes from people desperate for work. Frequently, labor recruiters will charge the guestworker a fee just to add their name to the list of potential candidates, or they may frequently charge workers exorbitant amounts to acquire visas and other necessary paperwork (Bauer, 2007, p.9). Their superior knowledge of the process allows contractors to financially exploit workers attempting to gain admittance to the U.S. and in so doing, creates a mockery of the visa process itself. If the system continues to "[rely] on a series of unregulated foreign recruiters, it [will be] subject to this sort of wanton selling of visas," harming the credibility of the employers and the dignity of workers (Bauer, 2007, p.13). Without adequate regulation, visas will be traded and money will continue to unlawfully change hands so as to meet the desires of predatory employers and labor placement organizations.

### **Debt Bondage**

Though all forms of deception during the recruitment process have a proven propensity to lead to trafficking or forced labor, the greatest indication that a guestworker will be subject to unfair employment is the amount of debt incurred during the recruitment process. The more the guestworker is charged, the more likely s/he is to find him or herself in a situation of involuntary labor. In the report entitled "Forced Labor Costs Considerable: A View from the ILO" (2009), the U.S. Department

of State summarizes the International Labour Organization’s (ILO) findings by stating that “excessive and often unlawful recruitment fees are often a key contributing factor to forced labor” (“Forced Labor”). Burdened with debt from having to pay so much at the onset, the guestworker becomes particularly vulnerable. With debt ranging from hundreds to thousands of dollars, his or her need to secure steady employment increases dramatically and s/he becomes beholden to the employer and even more desperate to obtain work (Bauer, 2007, p.9). With large sums of money due to recruiters or directly to the employer, s/he has little choice but to remain working at this place of employment regardless of the working conditions and how well s/he is treated. This is debt bondage.

Because this employment opportunity is often a last resort for guestworkers due to economic desperation, their vulnerability becomes more severe and some may even choose to obtain high-interest loans to pay the recruitment fees (Bauer, 2007, p.9). These loans can have interest rates as high as 60% and can take up to several years to pay back. The chance that these guestworkers will never break even is a realistic, looming fear. In some even more severe cases, more collateral – say a property deed – is taken by a field agent to ensure that the worker will “comply” with the terms of his or her contract. The chance that a guestworker will speak out against the recruiter is unlikely given that the agent now has the deed to his or her family’s home (Bauer, 2007, p.11).

The limited recourse available to guestworkers trapped in this situation is largely due to the visa condition which ties them to a single employer. Once the employer has secured the visa through the government, then the worker must remain at this place of employment if s/he intends to continue working in the United States.

Should a worker express dissatisfaction or somehow upset the employer, the employer can fire him or her, leading to the guestworker’s repatriation due to lack of proper work authorization. The guestworker’s predicament is only exacerbated by another repressive practice in which employers withhold payments in an effort to incentivize the guestworkers to stay until they receive their due compensation. The employer may also take a more direct approach and simply withhold travel documents. Workers have also been known to be coerced using confinement or threats of physical force (“The Cost,” 2009, p.23).

The economic burden placed on the guestworker due to fees and withheld wages is significant. The *Global Report* produced in 2005 by the ILO presented a quantitative estimate of this burden. It approximated that 8.1 million people are currently in situations of forced labor in economically exploitative situations. Of these, nearly one million are natives of Latin America or the Caribbean, the primary source countries for the US (“The Cost”, 2009, p.32). While data are scarce, it is possible to estimate that the unpaid wages owed to workers is around \$19.6 billion. With recruitment fees ranging from \$150 to \$5,000, guestworkers have contributed a global sum of more than \$1.4 billion to the industry. Together, this means that workers coerced into labor have been cheated out of \$21 billion (“The Cost”, 2009, p.32).



### **Current Regulation of Guestworker Programs and Migrant Labor Classifications**

In order to gain a clearer understanding of the root cause of the problems associated with recruitment, debt accumulation, and exploitation within guestworker programs, it is important to understand the current lack of protections afforded to guestworkers. In 1983, the Migrant and Seasonal Worker Protection Act (MSPA) was passed in the United States. The intent of this document was to “protect migrant and seasonal workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping” (“Fact Sheet #49,” 2008).

However, the law specifically excludes laborers in guestworker programs. The amount and types of information that must be disclosed prior to employment are more comprehensive under the MSPA than those required under guestworker programs. These disclosure protections must be

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provided upon hiring the worker, a luxury not afforded to guestworkers. Workers governed under the MSPA also must be paid in a consistent fashion and their hours must be

logged and carefully recorded by their employer to ensure that they are being compensated fairly and appropriately (“Fact Sheet #49,” 2008). Such provisions help to eliminate deceit in recruitment and financial exploitation.

The exclusion of guestworkers from this law protecting seasonal workers could shed some light on the recent findings by the ILO that guestworkers are at particular risk for human trafficking. Under the current system, there are two different programs

outlining how, and for what purpose, guestworkers can be brought to work in the United States and the rights granted to them. The two guestworker options are either the H-2A or H-2B visa, which correspond to agricultural or non-agricultural workers respectively. The guidelines for the H-2A visa are outlined in the Immigration and Nationality Act (INA) initially passed in 1952. The INA defines both the guidelines for obtaining visas for, and employing H-2A agricultural workers, as well as requirements to protect guestworkers from deceit.

While these safeguards are significantly less substantial than those in place in the MSPA for non-guestworker seasonal and migrant workers, those in place for H-2B non-agricultural workers as outlined by the INA are even less generous. The H-2B visa, established by the Immigration Reform and Control Act (IRCA) of 1986, contains regulations which mostly protect U.S. workers from losing their jobs to immigrants, rather than regulations which protect migrant guestworkers from exploitation by the employer.

Despite the fact that H-2A visa guidelines require employers to disclose the terms of employment to the potential guestworker – including the nature of the work, the wage rate, the period of employment, the location, the hours, the provision of insurance, and any paycheck deductions – the guestworker remains susceptible to contract substitution because the employer is not obligated to provide this information until the first day of work in the United States. As such, H-2A guestworkers fall victim to the power disparity between the employer and employee due to their inability to challenge unfair working conditions because of the threat of repatriation. The vulnerability of H-2B guestworkers is even more acute, as the

employer is at no point required to spell out the details of employment to the worker.

Although the INA provisions require that the employer offer the guestworker a wage rate that is at least the highest of the adverse effect wage rate (AEWR), the applicable prevailing wage, or the Federal or State statutory minimum wage, employers are required to maintain payroll records only under the H-2A visa system. This log must record not only how many hours the guestworker has worked, but also the number of hours s/he was promised for this period, thereby lessening the employer’s inclination to not live up to his or her end of the bargain. Furthermore, the “three-quarters guarantee” under the H-2A visa demands that the worker be given at least 75% of the hours promised in his or her contract. Such a provision allows the guestworker to earn a relatively consistent income, which allows him or her to pay off debts and support his or her family. Non-agricultural workers with H-2B visas, however, do not enjoy the protections offered through mandatory payroll records and the “three-quarters guarantee”, meaning that they are more likely to be underworked and/or cheated out of wages.

### Lack of Enforcement

While some provisions regarding disclosure, wage rates, and payroll logs have been established to address the shortcomings and lack of protections under the H-2A and H-2B guestworker programs, they lack substance because they are not enforced. Current enforcement of these laws is divided among a number of governmental departments and organizations, including the Wage and Hour Division of the U.S. Department of Labor, which is tasked with investigating complaints of labor law violations and identifying victims of trafficking (“Overview”, 2009). Statistics surrounding the enforcement of these laws seem particularly grim. For example, between the years 1974 and 2004 the number of Wage and Hour investigators (who oversee workers under the H-2A visa as well as non-guestworker laborers) under the U.S. Department of Labor declined by 14% (Bauer, 2007, p.28). This is disturbing given that “the number of U.S. workers covered by the Fair Labor Standards Act [FLSA] increased” from 56.6 million to approximately 87.7 million (Bauer, 2007, p.28). From these statistics, the conclusion drawn by the Brennan Center for Justice was that “these two trends indicate a significant reduction in the government’s capacity to ensure that employers are complying with the most basic workplace laws” (Bauer, 2007, p.28). While those laborers under the jurisdiction of the FLSA include more than just H-2A guestworkers, the heightened vulnerability of guestworkers makes these trends particularly troublesome (Bauer, 2007, p.28).

Furthermore, the low number of investigations actually conducted by the

Safety Provisions Under The Guestworker System			
	MSPA	H-2A	H-2B
Clear Outline of terms of employment	✓	✓	
Terms presented on signing for job	✓		
Fair wage required	✓	✓	✓
Maintain payroll log	✓	✓	
75% work guarantee	N/A	✓	
Protection from being charged for visa	N/A	✓	✓
Reimbursement for travel costs	N/A	✓	



DOL is also quite alarming. In 2004, for example, the DOL conducted just 89 investigations of 6,700 businesses certified to employ H-2A workers. Due to the lack of data, it is uncertain how many investigations were conducted of the 8,900 employers of H-2B workers (Bauer, 2007, p.29). Given this information, it appears that the DOL is insufficiently monitoring whether these employers are complying with the mandates in place for the workers. Without enforcement, these laws become meaningless.

### **Lack of Sufficient Data**

In addition to the lack of enforcement, a lack of data collection and dissemination impedes progress in decreasing forced labor. As summarized by the U.S. Department of State, the ILO's view is that "little progress has been made since 2001 in improving data collection on forced labor; the process of estimating the problem 'has hardly begun in most countries'" ("Forced Labor," 2009). The U.S. does not stand as an exception to this problem, as acknowledged by the Attorney General when he urged that the United States "continue to expand trafficking research and data collection" ("Assessment," 2009). Faith in the efforts of the DOL's Wage and Hour Division appears to be particularly low and some note the "lack of committed participation on the part of the DOL," as well as a "failure to record vital data" on human trafficking (Morehouse, 2009, p.120).

### **Current Policy On Human Trafficking and Forced Labor**

Despite the prevalence of these social ills, the United States still stands as a world leader in the fight against human trafficking and forced labor. It has made

great strides in recent years in prosecuting traffickers, increasing funding, and passing legislation ("Forced Labour", 2009). Both the Trafficking Victims Protection Act (TVPA) in 2000 and the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 have helped to bring the problem to light and to dismantle the enormous problem of human trafficking piece by piece. The TVPRA in particular brought a much stronger stance against the forced labor aspect of human trafficking. For example, the TVPRA strengthened the criminal statutes against forced labor and clarified the types of nonphysical forms of coercion. Since its passage, there is now an explanation of "abuse or threatened abuse of law and legal power," which can be interpreted to mean employers who threaten to have workers deported or arrested should they refuse to continue their work and stand up for their rights ("Trafficking," 2009, p.26). Additionally, the statute explains that "serious harm" can refer to financial coercion or threatening to hurt someone financially in a serious enough way to compel him or her to begin or continue working, or to provide services ("Trafficking," 2009, p.26). These new definitions solidify the beliefs that the current work and visa system are unjust. Should a meaningful way to *enforce* against "abuse of law and legal power" and financial coercion be developed, it could be key in helping to stop this form of trafficking.

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In addition to expanding definitions that will eventually help to identify and reduce forced labor, the TVPRA addresses

deceitful recruitment specifically. For example, in section 1351, it creates a new criminal statute which prohibits fraud in labor contracting. Those who deceive workers will now be held criminally liable. Title 18 U.S. Code, Section 1351 – Fraud in Foreign Labor Contracting reads, “[w]hoever knowingly and with intent to defraud recruits, solicits, or hires a person outside of the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations, or promises regarding that employment, shall be fined under this title or imprisoned for not more than 5 years, or both.” Should this be enforced, transparency in recruitment would increase significantly. Workers would enter their new job with a clear understanding of what their work would entail.

### **Recommendations for Policy Reform**

While the existing laws that address injustices and abuse in the workplace certainly offer a solid foundation for formulating a solution to the prevalence of forced labor, two key areas must be addressed before all else: 1.) deceitful, under-regulated recruitment and 2.) debt upon arrival to the workplace. Should these sources of power disparity be eliminated, the employer would not have such an upper hand in the process. These changes are suggested for all guestworkers in the labor force, including those holding either an H-2A or H-2B visa. First and foremost, however, all provisions of the H-2A visa should be given to the H-2B visa as well. Simply because a worker is employed in a non-agricultural sector of the economy is no reason his or her rights should be limited.

To begin reformation, it is critical that an honest, transparent practice be instated at the onset. Workers should be entitled to full-disclosure of all the details of their employment during the recruitment

process, allowing them to make an informed decision about whether they would like to take the job. Though Congressman George Miller’s proposed legislation, “Indentured Servitude Abolition Act of 2007” never became law, it was cited in the recommendation section of the ILO’s “The Cost of Coercion” report. According to Congressman Miller’s proposed legislation, the contract given to a potential employee should state the following: place and period of employment, description of employment, compensation, transportation, housing, benefits, and the costs incurred for each of these. Additionally, the proposed legislation stated that the following should be made known to the employee: the existence of any organized labor, the availability of worker’s compensation, education and training opportunities, as well as a statement from the Secretary of Labor describing the protections s/he is afforded. All of this would be communicated in both English and a language understood by the potential worker. Not only would this contract eliminate deceit in recruiting, it would also serve to diminish the power disparity between worker and employer from the beginning.

While labor contractors operating under the H-2A visa system must conform to the MSPA by registering with the Department of Labor and providing the names of agricultural businesses to which they expect to supply guestworkers, the guestworkers themselves do not currently receive any meaningful benefit from this regulation (“Fact Sheet #49,” 2008). However, the process of registering labor contractors with the Department of Labor could be conceived as a potential first step in achieving transparency by linking employers with the contractors they use. Accountability for responsible behavior and practice by the labor contractors should rest with the employers, which would ultimately provide



the employer with a vested interest in ensuring that the contractor is being honest and fair (SPLC, 2008). Employer accountability could then be instituted by making the employer legally liable for any misconduct on the part of the contractor. Employers would assume legal responsibility for the actions of their hired contractors upon requesting guestworker visas from the Department of Labor, at which time the employer would also provide the names of their contractors to the federal government. The ramifications to the employer for contractor misconduct should be serious enough to persuade employers to closely and diligently monitor the actions of their contractors.

Along with being misled during recruitment, arriving at the workplace strapped with debt is another key reason workers fall into exploitative jobs. To eliminate the accumulation of debt, it is critical that the worker not incur costs associated with the recruitment process, including – but not limited to – the cost of the visa and transportation. Rather, all

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recruitment costs should fall solely on the employer who seeks to bring the worker into the United States. Once again, the link between employer and recruiter is critical in this regard, as the employer must ensure that recruiters are not demanding bribes from workers or instating any type of recruitment fee. This would also serve to eliminate another fundamental problem within this complex system of recruitment, as employers “would recruit only the number of workers needed” if the employers assumed the burden of all recruitment fees

and costs (Bauer, 2007, p.14). Without an over-abundance of workers, employers would not have the same flexibility to fire a worker for standing up to unjust treatment or for demanding just compensation. Moreover, in an effort to reduce workers’ vulnerability to debt bondage the U.S. should adopt and incorporate the ILO’s Private Employment Agencies Convention (No. 181), which mandates that private employment agencies should not charge fees either directly or indirectly (“The Cost,” 2009, p.24).

Other methods to ensure the protection of workers have also been suggested. For example, at the expiration of the visa period, employers should be required to submit payroll records (as well as other documentation verifying that the worker’s contract was respected) to the Department of Labor. Currently, under the H-2A visa system, employers are only required to maintain payroll records, not submit them to the federal government.

Another effective way to advance compliance would be to inspect places of employment with more regularity and frequency. These inspections, presumably performed by the Wage and Hour division of the DOL (which currently conducts inspections under the MSPA) would help ensure that workers were paid for all hours worked at the rate initially promised to them (Bauer, 2006). Consequently, this would require significantly more manpower allotted by the DOL for this purpose.

In an effort to empower employees who found themselves in a situation of indentured servitude or other form of abuse, a dispute mechanism could be introduced that workers could utilize should their contract not be upheld. An effective dispute mechanism would afford workers the privilege to bring their objections to federal agencies and to file federal lawsuits when necessary (Bauer, 2006). Such a dispute

mechanism would allow workers to file a complaint against both a recruiter or an employer. Though the employee may not be free to change employers, s/he should at least be able to air his or her grievances and should be able to do so without fear of reprisal.

Ultimately, neither current regulations nor any of the proposed policy reforms will have any bearing unless the federal government achieves a meaningful level of enforcement. The federal government and the Department of Labor must not only dedicate the necessary resources to identify and recognize violations, but also to impose penalties for non-compliance.

### **Corporate Involvement**

While the suggested policy reforms focus on government regulation, concerned companies and employers can take certain measures to ensure that they are conducting non-exploitative practices prior to implementation of federal regulation. Most importantly, it is critical that foreign recruiters be adequately trained by the organizations they represent. Currently, recruiters do not receive any formal training or certification for the companies for which they recruit. Certification and training of recruiters would establish clear expectations for the recruiter and provide a structured environment within which they would operate, thereby reinforcing responsible recruitment practices.

### **Conclusion**

The situation facing the U.S. today is best summarized by Rene Ofreneo, Director of the Center for Labour Justice at the University of the Philippines, who states that:

The old way of slavery was that the boss really owned you, but now, legal

recruiters and employers work in tandem to deceive workers who, vulnerable and isolated in a strange culture, are forced to accept harsh terms. It is in that context that you have endemic forced labour today (Bauer, 2007, p.23).

Forced labor is fundamentally the result of a significant power disparity that exists between employers and their workers. This power disparity derives primarily from two sources: deceitful recruitment practices by labor recruiters in the countries of origin and the accumulation of debt by the workers themselves prior to arrival in the United States. On the positive side, current legislation and policy have recognized the existence of modern day slavery and have established a foundation to eliminate forced labor. However, despite the importance and significance of these advances, much work remains to be done. Among other reforms, making employers responsible and accountable for the actions of their recruiters, as well as assuming the burden of recruitment fees and other expenses would most meaningfully contribute to the eradication of forced labor. Advancing these reforms would substantially decrease the prevalence of oppression within the migrant labor system and give dignity back to these victims of human trafficking.

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