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Guest Worker Programs are No Fix for Our Broken Immigration System: Evidence from the Northern Mariana Islands

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GUEST WORKER PROGRAMS ARE NO FIX FOR OUR BROKEN IMMIGRATION SYSTEM: EVIDENCE FROM THE NORTHERN MARIANA ISLANDS

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> "Never under any condition should this Nation look at an immigrant as primarily a labor unit. He should always be looked at primarily as a future citizen . . . ."
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> —Theodore Roosevelt, 1917[1]

I. INTRODUCTION

The Obama administration has promised to take on immigration reform in 2010.[2] What is fueling this latest reform effort, and all other recent efforts, is the formidable problem of the 10.8 million undocumented immigrants who currently reside in this country as of January 2009, and the countless undocumented immigrants likely to come.[3] The principal ills

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1. Theodore Roosevelt, *Mobilize Our Man Power*, KAN. CITY STAR, Dec. 17, 1917, *reprinted in* ROOSEVELT IN THE KANSAS CITY STAR, WAR-TIME EDITORIALS BY THEODORE ROOSEVELT 58 (Houghton Mifflin Co. 1921).

2. Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, at A10. The immigration system is widely considered to be broken. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS22574, IMMIGRATION REFORM: BRIEF SYNTHESIS OF ISSUES 1 (2007) ("There is a broad-based consensus that the U.S. immigration system, based upon the Immigration and Nationality Act (INA), is broken.").

3. *See* Michael Hoefer, NANCY RYTINE & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 1 (2010).

cited as justifying reform include the national security threat presented by an unsecure border that is breached by thousands of unauthorized immigrants each year,[4] the violence associated with human smuggling, and the widespread mistreatment of unauthorized immigrants.[5] The extraordinary legislation recently passed by the State of Arizona that criminalizes moving about the state without citizenship documents adds to the urgency for reform.[6] There is also the specter of an increasingly militarized southern border, which is already patrolled by more than 20,000 Border Patrol agents and fortified by more than 600 miles of fence.[7] The tightened bor-

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4. *See Remarks by the President on Comprehensive Immigration Reform*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 1, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform (stating that immigration reform is essential to achieving the goal of securing U.S. borders). In addition, while debating the Comprehensive Immigration Reform Act [hereinafter CIRA] of 2006, senators repeatedly cited the need for a "secure border" as one justification for reform. *See* 152 CONG REC. S4530 (daily ed. May 15, 2006) (statement of Sen. Reid) (noting that this proposed legislation would ensure "good, sound long-term border security"); *id.* at S4536 (statement of Sen. Leahy) (referring to piecemeal enforcement efforts to secure the nation's borders as "little more than political posturing" and pointing to comprehensive immigration reform as essential to achieving border security).

5. *See Remarks by the President on Comprehensive Immigration Reform*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 1, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform (citing the vulnerability of unauthorized immigrants to "unscrupulous businesses who pay them less than the minimum wage or violate worker safety rules" and that such businesses will unfairly compete with law-abiding businesses, as one reason for pursuing immigration reform); *Evaluating a Temporary Guest Worker Program: Hearing Before the Subcomm. on Immigration, Border Sec. & Citizenship on S. Comm. on the Judiciary*, 108th Cong. 1–3 (2004) (statement of Sen. John McCain) [hereinafter *Hearing Evaluating a Temporary Guest Worker Program*] (recounting a recent apprehension of 158 undocumented immigrants who had been held by smugglers in wretched conditions in an Arizona house without proper plumbing or access to food as an illustration of the need for comprehensive immigration reform); *see also id.* at 31 (statement of Sen. Jon Kyl) (referring to this same incident but adding that "assault, battery, [and] rape . . . that frequently occurs with regard to the people who are being held").

6. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1. However, on July 28, 2010, a federal judge granted an injunction preventing the enforcement of many provisions of the law. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010). The 9th Circuit recently affirmed the district court's decision to block the bill from taking effect. United States v. Arizona, No. 10-16645, 2011 U.S. App. LEXIS 7413 (9th Cir. Apr. 11, 2011).

7. *See* CHAD C. HADDAL, CONG. RESEARCH SERV., RL 32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 13 (2010) (reporting that the number of Border Patrol agents assigned to the southern border increased from 3,555 in 1992 to 20,119 at the end of fiscal year 2009); Randal C. Archibold, *National Guard*

der controls have led to a surge in migrant deaths as border-crossers are forced deeper into the desert to circumvent the fence and to dodge agents and troops.[8] Any comprehensive immigration reform package attempting to solve these problems will likely include a large-scale unskilled guest worker program.[9] Indeed, the introduction of such a program was cited as one of "four pillars" of reform by Senators Charles Schumer and Lindsey Graham when they announced a "blueprint" for comprehensive immigration reform in March 2010.[10] In July 2010, this plan was endorsed by President Obama.[11]

Generally, guest worker programs allow aliens to enter the host country for a defined period to work, but not to settle.[12] The world over, unskilled guest workers typically perform the "3-D jobs: dirty, dangerous,

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Will Be Deployed to Aid at Border, N.Y. TIMES, May 26, 2010, at A1 (reporting that President Obama planned to send an additional 1,200 National Guard troops to the southwestern border to assist with border security); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO- 10-877R, BRIEFING ON U.S. CUSTOMS AND BORDER PROTECTION'S BORDER SECURITY FENCING, INFRASTRUCTURE AND TECHNOLOGY 25 (2010), *available at* http://www.gao.gov/new.items/d10877r.pdf. It has been recognized by many that enforcement alone cannot resolve the problem of unauthorized immigration. *See, e.g.*, *Remarks by the President on Comprehensive Immigration Reform*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president comprehensive-immigration-reform (asserting that while his administration had devoted significant resources to putting "boots on the ground" at the nation's borders, "our borders are just too vast for us to be able to solve the problem only with fences and border patrols. It won't work.").

8. *See* Haddal, *supra* note 6, at 25–26 (noting that approximately 300 to 400 migrants died each year between 2000 to 2004 and approximately 400 to 500 died between 2005 to 2009 with deaths declining to 423 in 2009); James C. McKinley, Jr., *An Arizona Morgue Grows Crowded*, N.Y. TIMES, July 29, 2010, at A14 (reporting that as of July 2010 there were a record number of bodies of suspected unauthorized immigrants found in and around Tucson, Arizona, and suggesting that tougher enforcement measures "pushed smugglers and illegal immigrants to take their chances on isolated trails through the deserts and mountains of southern Arizona, where they must sometimes walk for three or four days before reaching a road").

9. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 33–35 (2007) (outlining the Bush administration's temporary worker program under its reform proposals, the primary focus being its temporary worker program).

10. Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23.

11. Peter Baker, *Obama Exhorts Congress to Back Immigration Overhaul*, N.Y. TIMES, July 2, 2010, at A12.

12. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 1–2 (2010) [hereinafter 2010 CRS GUEST WORKER REPORT]. The term "guest worker" is a term used in many countries to refer to unskilled temporary workers. *Id.* at 1.

and difficult."[13] To date, guest worker programs in the United States have been small in scale and designed to fill temporary gaps in the country's labor force, not to serve as a significant component of the nation's immigration policy.[14] To meet these specific labor goals, all of these programs have tied guest workers' visa status to their continued employment with a single employer, and have provided no path to citizenship.[15] Additionally, they have all lacked effective government oversight and accessible and meaningful avenues to enforce guest worker rights.[16] These and other factors have led to widespread abuses of guest workers, including wage theft, dangerous working conditions, and substandard housing.[17] Program after program has been compared to the institution of slavery.[18]

Nevertheless, many politicians and business interests—including the U.S. Chamber of Commerce, and even the World Bank—have made the inclusion of a guest worker program a centerpiece of their immigration reform agenda.[19] Even some immigrant advocacy and labor rights groups—long harsh critics of guest worker programs—have softened

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13. PHILIP MARTIN, ET AL., MANAGING LABOR MIGRATION IN THE TWENTY FIRST CENTURY 83 (2006) [hereinafter MARTIN, MANAGING LABOR MIGRATION]; *see also* News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries (Aug. 20, 2009), *available at* http://www.bls.gov/news.release/cfoi.htm.

14. *See* MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 83–85, 94–97, 105–10. Under the Immigration and Nationality Act, guest (or temporary) workers in the United States are referred to as "nonimmigrants." 8 U.S.C. § 1101(a)(15)(F)-(L) (2006). Existing guest worker programs are administered by the U.S. Department of Labor, not the U.S. Citizens & Immigration Services (USCIS). *See* 8 U.S.C. § 1184(c)(1) (2006).

15. *See* discussion *infra* Part III.

16. *Id.*

17. *See generally* MARY BAUER, SOUTHERN POVERTY LAW CTR., CLOSE TO SLAVERY: GUEST WORKER PROGRAMS IN THE UNITED STATES (2007) [hereinafter SPLC REPORT].

18. *See*, *e.g.*, *Lou Dobbs Tonight* (CNN new television program Jan. 23, 2007) (interview with Rep. Charles Rangel describing the H-2 guest worker programs as "the closest thing I've ever seen to slavery").

19. *See* Press Release, World Bank, *Migration Can Deliver Welfare Gains, Reduce Poverty, Says Global Economic Prospects 2006* (Nov. 16, 2005), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20724214~pagePK:64257043~piPK:437376~theSitePK:4607,00.html); *Immigration Issues*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/issues/index/immigration/default (last visited May 24, 2011). Indeed, leading Republicans, including John McCain, announced in 2008 that they would support immigration reform legislation only if it expanded the nation's guest worker programs. *See* Jeff Zaleny & Ginger Thompson, *Republicans Focus on Guest Workers in Immigration Debate*, N.Y. TIMES, June 26, 2009, at A12; *see also* Daniel Griswold, Economic Watch: *Will Democrats repeat mistakes in the name of immigration reform?* WASH. TIMES, Nov. 17, 2009, at A4 (Daniel Griswold,

their opposition to including a guest worker program as part of a comprehensive immigration reform package.[20] For many in the immigrant and labor communities, this shift is seen as a reasonable and necessary compromise, far superior to the military-style, enforcement-only approach to reform that has gained favor in recent years,[21] and the only reasonable means to accommodate the future flow of migrants after those unauthorized immigrants who are already in the country are granted the right to adjust their status, or are deported.[22] For some others, a guest worker program represents a modern evolution from a nationalist to a cosmopolitan perspective that shows "equal concern to all" across borders by providing impoverished people from other countries a legal means to access the relative plenty in the United States.[23] Still others, including many immigrants themselves, have come to support a large-scale guest worker program because of the possibility it presents for accommodating the increasingly transnational character of many immigrant lives; specifically, new immigrants tend to support more circular patterns of migration, and seek to retain deeper connections to their country of origin than in the past.[24]

The emerging support among the immigrant and labor communities is conditioned upon an assumption of a reformed guest worker program.[25]

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the Director for Trade Policy Studies at the Cato Institute, calling a guest worker program "the missing ingredient in the ongoing effort to curb illegal immigration").

20. *See, e.g.*, Janet Murguia, *A Change of Heart on Guest Workers*, WASH. POST, Feb. 11, 2007, at B7 (article by then-president of the National Council of La Raza explaining the organization's cautious shift to supporting guest worker programs as a means of dealing with the future flow of immigrants in an orderly humane way).

21. *See* Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J.C.R. & C.L. 23, 61–65 (2009) (describing the nation's current immigration policy as centered around its "criminalization" of migrants).

22. *See* Janet Murguia, *A Change of Heart on Guest Workers*, WASH. POST, Feb. 11, 2007, at B7.

23. *See, e.g.*, Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 U. DAYTON L. REV. 3, 6–7, 10–11 (2008) (describing expansion of guest worker programs as a "second-best policy" to the present policy of exclusion).

24. *See* Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 SOC. JUST. 92, 92–93 (2004), *available at* http://www2.ucsc.edu/cjtc/docs/Guest_Workers_Transnationalism.pdf; SCOTT BITTLE, ET AL., PUBLIC AGENDA, A PLACE TO CALL HOME: WHAT IMMIGRANTS SAY NOW ABOUT LIFE IN AMERICA 40 (2009), *available at* http://www.publicagenda.org/files/pdf/Immigration.pdf (citing a survey that found that immigrants overwhelmingly support a guest worker plan).

25. *See, e.g.*, Chang, *supra* note 23, at 7–8 (advocating for reformed guest worker programs, calling particularly for mobility as a means to prevent guest worker abuses); Janet Murguia, *A Change of Heart on Guest Workers*, WASH. POST, Feb. 11,

The authors of recent comprehensive immigration bills with a guest worker component, most notably Senators John McCain and the late Edward Kennedy in their 2005 bill, have also been cognizant of the problematic history of guest worker programs, and have made concerted and thoughtful efforts to design programs with more safeguards and worker rights.[26] The McCain-Kennedy guest worker proposal allowed employees to change jobs, created an administrative complaint system, and established more government oversight.[27] It also created a path to citizenship—a right that must be earned by remaining continuously employed for several years, and meeting all other program requirements.[28] Most comprehensive immigration reform bills since the McCain-Kennedy bill have included these reforms in their respective guest worker components; it is likely that a similar program will be included in any reform package to come.[29]

The evidence presented in this article establishes that a large-scale unskilled guest worker program, even with McCain-Kennedy–style safeguards,[30] would neither alleviate immigrant worker abuse nor quell the flow of unauthorized immigrants, at least in the absence of a terrific dedication of enforcement resources. In addition, it would likely create a host of new problems created by the very safeguards designed to protect guest

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2007, at B7 (stressing that the proposed program La Raza supported contained far more protections than past or current programs).

26. *See* Secure America and Orderly Immigration Act, S.1033, 109th Cong. (2005); 152 CONG. REC. S4947 (daily ed. May 23, 2006) (Sen. Kennedy speaking in favor of the bill noted that "[i]mmigrant workers are among the most vulnerable in our Nation. While performing society's most difficult and dangerous work, they face abuse by employers, the denial of basic rights, and economic exploitation. In negotiating the McCain-Kennedy bill, we took great care to include protections that will halt these alarming trends and ensure fair wages and working conditions for guest workers.").

27. *See* discussion *infra* Part III.D.

28. This is referred to as "adjustment of status." S. 1033, 109th Cong. § 306 (2005).

29. *See generally* 2010 CRS GUEST WORKER REPORT, *supra* note 12 (outlining various bills and regulations that have sought to modify the existing guest worker programs).

30. This article does not speak to the possibility of programs that radically depart from the models that have existed to date. Jennifer Gordon has begun to envision such a program. Under her proposed framework, international labor organizations would take the lead role in governing and monitoring guest worker programs, and the participants would be "transnational labor citizens." *See* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 504–505, 568–70 (2007). While even Gordon has acknowledged that conditions are not quite ripe for transnational labor organizations to assume control over immigration, the model she has proposed could, one day, transform immigration policy. *Id.* at 568–70.

workers, including, a flood of both valid and fraudulent worker complaints and predatory sham employment arrangements to enable guest workers to remain in the country and on the path to citizenship. As such, this "reform" would essentially add a state-administered system of exploitation of nonimmigrant workers alongside the already existing extralegal system of exploitation of unauthorized immigrant workers, marking a significant step back in the nation's slow but steady legislative march toward curtailing exploitation of workers. Accordingly, a guest worker program should not be part of immigration reform.

In Part II, this article makes the case for employing an evidence-based approach to the question of whether a guest worker program should be a component of comprehensive immigration reform. It argues that this methodology is critical when one of the targets of the legislation is a group as marginalized as unskilled guest workers. Part III of this article lays out the evidence, beginning first with a discussion of the country's largest unskilled guest worker program to date, the Bracero program,[31] along with existing federal unskilled guest worker programs and the problems associated with these programs. It then describes recent proposals for reform, focusing on McCain-Kennedy–style proposals that seem the most likely to gain traction in the upcoming months and years. Part IV then reviews the evidence presented by the guest worker program of the Commonwealth of the Northern Mariana Islands (CNMI). This program was unique in the United States because the CNMI controlled its own immigration from 1976 until November 28, 2009, and during that time established a sweeping guest worker program.[32] This article will demonstrate that the CNMI's guest worker program had far more worker protections than comparable federal programs, including more employment mobility and an accessible, administrative complaint system with robust remedial powers. In this way, the CNMI program resembled the McCain-Kennedy–style programs. This part will show that notwithstanding such safeguards, the CNMI's guest worker program was notori-

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31. *See infra* note 69.

32. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, PUB. L. NO. 94-241, 90 Stat. 263 (codified at 48 U.S.C. § 1801 note). This anomaly came to an end on November 29, 2009, when the federal immigration laws were extended to the CNMI pursuant to Title VII of the Consolidated Natural Resources Act of 2008, PUB. L. NO. 110-229, 122 Stat. 754, § 702 (codified at 48 U.S.C. § 1806) [hereinafter CNRA]. For further discussion of this Act, see *infra* Part II. The CNMI enacted the Nonresident Workers' Act (NWA) in 1983, modeling it after a nonresident workers law that had been part of the Trust Territory Code. Sagana v. Tenorio, 384 F.3d 731, 734 (9th Cir. 2004) (citing 3 N. MAR. I. CODE §§ 4411 et seq. (1983); Protection of Resident Workers Act, 49 Trust Territory Code § 1 et seq. (1970)).

ous, characterized by sweatshop conditions, a high incidence of human trafficking, and an ineffectual administrative apparatus charged with preventing these problems.[33] Part V compares the CNMI guest worker example with McCain-Kennedy–style programs, arguing that the problems that defined the program in the CNMI will almost certainly accompany any large-scale federal program.

Part VI explores the connection between exploitation and guest worker programs. In doing so, it considers why all U.S. unskilled guest worker programs, both past and present, including one run by a far-flung U.S. commonwealth, have all resulted in widespread abuse of guest workers. It argues that this result is inevitable because, by design, unskilled guest worker programs rely on poor migrants' economic, cultural, and linguistic vulnerability to maximize their economic output. As such, unskilled guest worker programs are not a solution to the ills associated with unauthorized immigration, but, rather, serve to perpetuate these ills with the aid of state apparatus. They should therefore not be a component of comprehensive immigration reform.

II. EVIDENCE AS A TOOL FOR CRAFTING TRANSFORMATIVE, RATIONAL LEGISLATION IN THE OFTEN IRRATIONAL ARENA OF IMMIGRATION POLICY

Daniel Ibsen Morales has argued that the nation's contemporary immigration policy has become characterized by "discord" and "schizophrenia."[34] The central example Morales points to in support of these characterizations are the hundreds of miles of fence that have been built along the United States/Mexico border to prevent unauthorized immigration, even though at least 40 percent of unauthorized immigrants arrive in the United States by legal avenues and then overstay their visas.[35] The fence building continues despite evidence that the fences along the border have only led to an increase in migrant deaths because of the treacherous routes migrants now take to get around them.[36] Morales attributes this irrationality to the nation's high regard for "ordered liberty," which "privileges the democratic will" over effective solutions and ties the hands of administrative authority, curtailing the mediating effect adminis-

33. *See* Glenn Schloss, *Lured by jobs "in the US," workers denied even basic human rights; "Factories of hell" in paradise*, S. CHINA MORNING POST (HONG KONG), Jan. 24. 1999, at 3; discussion *infra* Part IV.

34. Morales, *supra* note 22, at 27–30.

35. *Id.* at 64–65.

36. *Id.* at 53.

trative expertise might bring to bear.[37] To embrace the "strictest kind of order" in the realm of immigration (and in others), is only to widen the divide between those who enjoy the liberties and rights of the nation and those to whom they are foreclosed.[38]

The federal government's approach to the CNMI's guest worker program stands as another example of the nation's schizophrenic approach to immigration reform. For more than a decade, Congress has tried numerous times to wrest control over immigration from the CNMI based on concerns about the abuses associated with its guest worker program. (The efforts finally succeeded in November 2009).[39] In 1997, the U.S. Commission on Immigration Reform, in a report about the CNMI, described its immigration system as "antithetical" to U.S. immigration principles and ideals.[40] The report stated:

> The CNMI immigration system is antithetical to the principles that are at the core of U.S. immigration policy. Over time, the CNMI has developed an immigration system dominated by the entry of foreign temporary contract workers. These now outnumber U.S. citizens but have few rights within the CNMI and, in some cases, are subject to serious labor and human rights abuses. In contrast to U.S. immigration policy, which admits immigrants for permanent residence and eventual citizenship, the CNMI admits aliens largely as temporary contract workers who are ineligible to gain either U.S. citizenship or civil and social rights within the commonwealth. Only a few countries, and no democratic society, have immigration policies similar to the CNMI. The closest equivalent is Kuwait.
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> The end result of the CNMI policy is to have a minority population governing and severely limiting the rights of the majority population who are alien in every sense of the word.[41]

Similarly, in support of another effort to take control of the CNMI's immigration in 1999, Senator Murkowski charged that the CNMI's guest worker program failed to comport with the "American tradition of employing U.S. workers in private sector jobs that promote the growth of a middle class," and disdainfully described it as a system of "importing and

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37. *Id.* at 27 (deriving the term "ordered liberty" from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

38. *See id.* at 86.

39. CNRA, PUB. L. NO. 110-229, 122 Stat. 754, §§ 702–705 (codified at 48 U.S.C. §§ 1806, 1808).

40. *See* U.S. COMMISSION ON IMMIGRATION REFORM, IMMIGRATION AND THE CNMI 4 (1997).

41. *Id.*

exploiting a rolling stream of alien workers, without permanent immigrant status or family ties, in low-paid permanent positions."[42] Finally, in one of the many oversight hearings held by Congress in 2007 in the lead-up to passing the federal legislation that ended the CNMI's local control of its immigration, then-Deputy Assistant Secretary for the U.S. Department of the Interior's Office of Insular Affairs, David Cohen, described the guest worker program in the CNMI as having created "a risk of exploitation and abuse."[43] He further cautioned:

> Our experience tells us . . . that excessive reliance within the CNMI on a foreign, low-wage work force creates a risk of abuse. That risk could be overcome with a high level of effort, vigilance and resources, but it would probably be difficult to sustain such efforts under the CNMI's current fiscal and economic conditions . . . [a]nd eliminating the most overt forms of abuse will not necessarily eliminate subtler forms of exploitation that arise when foreign employees have little power and a great deal to lose if they assert even the limited rights they have.[44]

Remarkably, at nearly the same time, in some other Capitol hearing room, lawmakers were considering introducing a federal large-scale unskilled guest worker program as part of comprehensive immigration reform that would have looked very similar to the CNMI program the government was preparing to dismantle.[45] In addition, since gaining control over the CNMI's immigration system, the federal government is now in the process of replacing the CNMI's guest worker program with the arguably more exploitative H-2A and H-2B guest worker programs, while maintaining the same "rolling stream of alien workers, without permanent immigrant status or family ties" that led the federal government to intervene in the first place.[46]

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42. S. REP. NO. 106-204, at 32 (1999).

43. *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the Comm. on Energy and Natural Res.,* 110th Cong. 7 (2007) (statement of David B. Cohen, Deputy Assistant Sec'y for the Office of Insular Affairs, U.S. Dep't of the Interior), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg35819/pdf/CHRG-110shrg35819.pdf [hereinafter *Conditions in the Commonwealth of the Northern Mariana Islands*].

44. *Id.* at 11.

45. *See, e.g.*, CIRA of 2007, S. 1348, 110th Cong. (2007) (including a nearly identical guest worker program as the 2006 reform bill); CIRA of 2006, S. 2611, 109th Cong. (2006) (including a large-scale unskilled guest worker program).

46. S. REP NO. 106-204, at 32 (1999) (quoting Bo Cooper, Gen. Counsel Immigration & Naturalization Service). "'Extending federal immigration law to the Commonwealth of the Northern Marianas closes the guest worker loophole under which so many were held in modern slavery. The Constitution's guarantee of freedom must

This dichotomy deserves the attention of those who seek to craft legislation that will truly fix our broken immigration system, as does the rich body of evidence generated by the CNMI program. To capitalize on this evidence, scholars and legislators should employ the evidence-based methodology developed by Ann and Robert Seidman to the question of whether a large-scale guest worker program should be a part of comprehensive immigration reform. The Seidmans have long-observed that data gathering and analysis of the existing problem, including the law governing the issue, the institutions enforcing it, and the impact on the target groups, is generally incomplete.[47] To address these shortcomings, the Seidmans have developed an evidence-based approach to drafting legislation (called an "institutional legislative theory and methodology," or ILTAM).[48] Key to their evidence-based approach is to first engage in a "careful description" of the existing problem; second, focus on the problematic behavior of the targeted group and the involved agencies; and third, develop reasoned hypotheses as to the causes of the problem.[49] In this way, ILTAM aims to lead to the drafting of law that ensures "effective implementation."[50]

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apply everywhere in the United States, no matter how remote.'" Press Release, H. Comm. on Nat. Res., House Clears Final Hurdle for CNMI Immigration Bill (Apr. 29, 2008) (quoting H. Judiciary Comm. Chairman John Conyers, Jr.), *available at* http://unheardnomore.blogspot.com/2008/04/s-2739-passes-house.html; *see also* CNRA, PUB. L. NO. 110-229, 122 Stat. 754, §§ 702–705 (codified at 48 U.S.C. §§ 1806, 1808) (Title VII of the CNRA extends the Immigration and Nationality Act (INA) to CNMI); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-553, DHS SHOULD CONCLUDE NEGOTIATIONS AND FINALIZE REGULATIONS TO IMPLEMENT FEDERAL IMMIGRATION LAW n.5 (2010) (stating that the "CNRA established federal control of immigration on June 1, 2009, but granted the Secretary of Homeland Security the authority to delay the start of the transition period for up to 180 days . . . . The Secretary of Homeland Security elected to delay the transition period start . . . to November 28, 2009 . . . .").

47. Ann Seidman & Robert B. Seidman, *The Role of Congress in the Twenty-First Century: Panel II: Is Legislation an Unprincipled, Incoherent, Undignified Mess? ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change*, 89 B.U. L. REV. 435, 437–43 (2009) [hereinafter *ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change*]. Some scholars have observed that the promulgation of ineffective laws often stems from legislators' tendency to gloss over data related to the marginalized groups and legislation targets. *See, e.g.*, Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851, 1855 (2006).

48. *ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change*, *supra* note 47, at 436 n.1.

49. *Id.* at 469–75.

50. *See id.* at 466–68.

ILTAM finds strong support in legal realism and instrumentalism, and rests on a belief that law can effect social change by inducing desired behaviors.[51] ILTAM posits that evidence-based legislation might give voice to the less powerful in that it sets in motion a rational discourse such that a critic must come forward with more or different evidence to counter a well-supported legislative proposal.[52] A methodology like ILTAM that considers, values, and exhaustively gathers and analyzes existing data of the often silenced guest workers' experiences is critical.[53]

III. FEDERAL UNSKILLED GUEST WORKER PROGRAMS PAST, PRESENT, AND FUTURE

A. The Features of Guest Worker Programs That Invite Worker Exploitation

Included under the Immigration and Nationality Act (INA) are numerous "temporary worker" (or guest worker) programs.[54] These admit foreign nationals into the country for a limited period of time to perform specific types of work.[55] Visas are available for various categories of workers, including nurses, professional specialty workers, internationally recognized entertainers, agricultural workers, and unskilled nonagricultural workers.[56] In 2007, 1.9 million temporary worker visas were issued.[57] All contain some type of a labor market test to guard against the dis-

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51. *See id.* at 462–66.

52. *See id.* at 482 (citing JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, 8–42 (Thomas McCarthy trans., Beacon Press 1984)); *see also* Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 20 (1992) (arguing that "[t]he rejection of rationality in favor of power as the principal mode of policy-making reflects the interests of power and privilege").

53. Guest workers are not wholly without representation. Certainly, the governments of sending countries, most prominently Mexico, would likely have some input in the form or implementation of guest worker programs. *See, e.g.*, 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 14 (noting that the Bush administration discussed potential guest worker programs with its Mexican counterpart in 2001 as part of the two nations "binational migration talks"). But the potential workers themselves, all of whom are noncitizens, and most of whom are not physically in the United States, likely have few means to express their interests or concerns.

54. *See* 8 U.S.C. § 1188 (2006).

55. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS 1 (2011) [hereinafter 2011 CRS IMMIGRATION POLICY REPORT]; 8 U.S.C. § 1101(a)(15) (2006).

56. 2011 CRS IMMIGRATION POLICY REPORT, *supra* note 55, at 3.

57. *Id.* at 11.

placement of domestic workers.[58] Traditionally, these programs have been used to fill temporary gaps in the domestic labor market without adding settlers to the population.[59] However, in recent years, temporary worker programs have been used increasingly to meet ongoing labor market demands and, for skilled workers, as a feeder for those applying to become employment-based legal permanent residents.[60] Most immigration reform proposals would move immigration policy even further in this direction.[61] This part of the article will focus on unskilled federal guest worker programs, as compared to skilled programs, because that is the type of program that is likely to be included in a comprehensive reform package.

Before turning to the evidence, it is important to create a frame through which to consider these programs. There is a consensus that the principal characteristics that lead to guest worker exploitation include: (1) the practice of tying guest workers' immigration status to a single employer (or, a lack of "portability");[62] (2) a dearth of effectual government oversight and accessible and meaningful avenues to enforce guest worker rights;[63] and (3) an absence of a path to citizenship.[64] Although high recruitment fees are also cited as a significant factor leading to the exploitation of guest workers because workers generally must go deep in debt in order to repay the fees, this article will pay particular attention to the three aforementioned factors.[65] Historically, all unskilled guest worker programs in the United States have shared these characteristics, and all have been characterized by widespread exploitation of the guest work-

58. *See id.* at 6.

59. Philip Martin, *Guest Workers: New Solution or New Problem*, 2007 U. CHI. LEGAL F. 289, 294 [hereinafter Martin, *Guest Workers: New Solution or New Problem*].

60. SPENCER ABRAHAM, ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER 21 (2006), *available at* http://www.migrationpolicy.org/ITFIAF/finalreport.pdf.

61. *See* discussion *infra* Part III.D (describing comprehensive reform packages proposed in 2005, 2006, and 2007, all of which contained proposals for large-scale, long-term guest worker programs and a path to citizenship for workers).

62. SPLC REPORT, *supra* note 17, at 1.

63. SPLC REPORT, *supra* note 17, at 99.

64. *See Principles for Comprehensive Immigration Reform*, COALITION FOR COMPREHENSIVE IMMIGRATION REFORM, http://www.aila.org/content/default.aspx?bc=6755%7C25669%7C19898%7C18690%7C27899%7C21960 (last visited Apr. 20, 2011); Michael Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1455 (2008) (noting that from a "labor rights perspective," "genuine" portability and a path to permanent legal status as essential to preserving the individual liberty of guest workers and preventing workplace exploitation and abuse).

65. SPLC REPORT, *supra* note 17, at 9–14.

ers.[66] They have also been accompanied by a depression of wages in industries most populated by guest workers.[67] Finally, all guest worker programs have led directly and indirectly to unauthorized immigration.[68]

B. The Bracero Program[69]

The Bracero program represents one of the United States' largest guest worker programs to date, importing as many as 400,000 Mexican farm workers per year during its height.[70] The program was commenced

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66. *See Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor*: *Hearing Before the H. Comm. on Educ. & Labor,* 110th Cong. 49 (2007) [hereinafter *Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor*] (statement of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO) ("[T]he current system is a blueprint for exploitation of workers . . . AFL-CIO's answer to the 'immigration crisis' . . . has three core principles: (1) the law must provide a real mechanism by which all undocumented workers can regularize their status; (2) foreign workers must hereafter come into the United States with full and equal access to workplace protections . . . and (3) enforcement of labor laws must go hand-in-hand with enforcement of immigration laws."); *see also* U.S. COMM'N ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS: BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 81–102 (1997).

67. *See* Gerald Mayer, CONG. RESEARCH SERV., RL33772, THE COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006 (S. 2611): POTENTIAL LABOR MARKET EFFECTS OF THE GUEST WORKER PROGRAM 16 (2006) (concluding that an increase of foreign workers "could be expected to lower the relative wages of competing U.S. workers" and that the impact would likely be greatest "on young, native-born minority men and on foreign-born minority men in their early working years").

68. MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 95 (noting that based on the history and legacy of the Bracero program, guest worker programs are "the best way to begin a flow of immigrants," not a means of quelling that flow).

69. *Bracero* means "strong arm" in Spanish. The Bracero program's official name was the "Mexican Labor Program" [Mexican Farm Labor Program], which was created by Congress in 1942 as part of an omnibus appropriations bill known as Public Law 45. *Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future: Hearing Before the Subcomm. on Immigration, Border Sec. & Citizenship of the S. Judiciary Comm.*, 108th Cong. 100 (2004) (statement of Dr. Vernon Briggs, Professor of Industrial & Labor Relations), *available at* http://www.access.gpo.gov/congress/senate/pdf/108hrg/94556.pdf) [hereinafter *Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future*]. It was extended by subsequent enactments until 1947, and then continued informally until 1951 when it was officially extended by Public Law 78. *Id*. Martin, *Guest Workers: New Solution or New Problem*, *supra* note 59, at 298.

70. *See Temporary Agricultural Work Visa Programs: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 105th Cong. 37 (1997) [hereinafter *Hearing on Temporary Agricultural Work Visa Programs*] (statement of Bruce Goldstein, Co-Exec. Dir., Farmworker Justice Fund, Inc.); 2010 CRS GUEST WORKER REPORT, *supra* note 9, at 1. Martin, *Guest Workers: New Solution or New Problem*, *supra* note 59, at 298.

during WWII with the stated aim of alleviating the alleged shortage of resident workers due to the war.[71] However, the program did not end with the war, but continued until 1964.[72] During the life of the program, approximately 4.5 million jobs were filled by braceros.[73]

On paper, the law governing the program contained many provisions designed to protect the braceros from exploitation, as well as provisions to protect domestic workers from displacement and wage depression.[74] Specifically, growers using the program had to: (1) have individual contracts with workers under the supervision of the government; (2) provide housing that complied with minimum standards; (3) pay the higher of either the minimum or the prevailing wage; (4) offer at least thirty days of work; and (5) share the burden of paying transportation costs with the worker and U.S. government.[75] In addition, the federal government was required to support workers if a grower failed to pay.[76]

In practice, however, braceros were subjected to terrible working conditions, with low wages, minimal work, and squalid living conditions.[77] Indeed, the U.S. Department of Labor (U.S. DOL) officer in charge of the program, Lee G. Williams, described the program as a system of "legalized slavery."[78]

These poor conditions have been attributed in part to the fact that the workers were tied to a single employer.[79] Also credited was the pau-

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71. Shannon Leigh Vivian, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Toward Mexico and Recommendations for Combating Employer Exploitation of Non-immigrant and Undocumented Workers*, 30 SETON HALL L.J. 189, 197 (2005).

72. 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 1.

73. SPLC REPORT, *supra* note 17, at 4. The actual number of guest workers who entered the country under the program may have only been one to two million because many were repeat participants in the program. *See* PHILIP L. MARTIN, PROMISE UNFULFILLED UNIONS, IMMIGRATION AND THE FARM WORKERS 46–47 (2003) [hereinafter MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS].

74. *See* SPLC REPORT, *supra* note 17, at 4–5.

75. *Id.* at 4.

76. *Id.*

77. *See id.* (citing ERNESTO Galarza, STRANGERS IN OUR FIELDS (1956)); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 585 (2001) (recounting a bracero's experience: "'They treated us like animals. . . . But, as a bracero, you knew you couldn't complain.'") (internal quotation omitted).

78. SPLC REPORT, *supra* note 17, at 2 (quoting THEO J. MAJIKA & PATRICK H. MOONEY, FARMERS' AND FARM WORKERS MOVEMENTS 152 (Twayne Publishers 1995)).

79. *See* Lorenzo A. Alvarado, *A Lesson from My Grandfather the Bracero*, 22 CHICANO-LATINO L. REV. 55, 61 (2001).

city of resources allocated to the U.S. DOL to enforce the program.[80] Another contributing factor was the braceros' reluctance to lodge complaints because it was widely understood that growers would blacklist any bracero who complained and return him to Mexico.[81] Because most braceros arrived in the United States deeply in debt—in part on account of the bribes and fees it was necessary to pay Mexican officials to secure a job through the program—few were willing to risk such retaliation.[82]

The program also caused a depression in agricultural wages and the displacement of a significant number of domestic agricultural workers.[83] This outcome was due largely to the U.S. DOL's failure to correctly determine the prevailing wage, along with the meager bargaining power of debt-laden braceros relative to debt-free domestic workers.[84] Given a choice, growers preferred braceros over domestic workers because they were more "dependable," which was merely a euphemism for vulnerable.[85]

Finally, while one of the stated aims of the Bracero program was to reduce the number of unauthorized Mexican workers, their numbers ac-

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80. *See* Holley, *supra* note 77, at 585 (citing ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 47 (1964)) (citing as an example of the DOL's insufficient resources its inadequate number of qualified personnel to calculate farmworkers' prevailing wage, as required by the law, instead DOL just accepted employers' representations).

81. *Id.* at 585.

82. *Id.*

83. *Id.* at 584; *see also* Philip L. Martin, *Guest Workers: Past and Present, in* MEXICO-UNITED STATES BINATIONAL MIGRATION STUDY, U.S. COMMISSION ON IMMIGRATION REFORM, MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 877, 882 (1998), *available at* http://www.utexas.edu/lbj/uscir/binpapers/v3a-3martin.pdf [hereinafter Martin, *Guest Workers Past and Present*] (explaining a presidential commission report from 1951 that determined the Bracero program was detrimental to domestic farm laborers); Linda Levine, CONG. RESEARCH SERV., RL 95-712, IMMIGRATION: THE LABOR MARKET EFFECTS OF A GUEST WORKER PROGRAM FOR U.S. FARMERS (2009) (citing a study by a pair of researchers in which they examined seven states, which employed more than 90 percent of braceros, and concluded that the Bracero program decreased domestic farm employment and lowered farm wages by 6 to 7 percent, but expanded total farm employment by about 120,000); *Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future*, *supra* note 72, at 101 (statement of Dr. Vernon Briggs, Professor of Industrial & Labor Relations) (testifying that the wide availability of Mexican workers from the Bracero program significantly depressed wages in some regions, particularly the Southwest where agricultural employment was "virtually removed from competition with the nonagricultural sector").

84. *See* Holley, *supra* note 77, at 584–85 (citing ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 47 (1964)).

85. *Id.*

tually increased during the program years.[86] Most scholars agree that the principal enduring legacy of the Bracero program is the significant population of undocumented Mexican immigrants in the country today.[87] Specifically, many of these modern immigrants follow patterns of migration and dependence established during the Bracero period.[88] The Bracero program ended on December 31, 1964, after a documentary about the program, *Harvest of Shame*, was aired on CBS, purportedly convincing President Kennedy that the program was adversely affecting wages and working conditions for U.S. workers.[89]

C. H-2A and H-2B Programs[90]

There are two federal programs in existence for unskilled guest workers: the H-2A program, for temporary agricultural guest workers,[91] and the H-2B program, for temporary nonagricultural unskilled guest workers.[92] The programs are administered jointly by the Employment and

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86. *See* Martin, *Guest Workers Past and Present*, *supra* note 83, at 881 (1998) (attributing the increase in unauthorized workers to the realization of these workers that they could avoid paying bribes to Mexican officials by entering the United States without authorization, and to employers' preference because employers did not need to cut through any "red tape," like subjecting themselves to government inspections).

87. Martin, *Guest Workers: New Solution or New Problem*, *supra* note 59, at 295 (noting that most researchers point to the Bracero program as the genesis of undocumented Mexican migration).

88. *See id.*

89. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION AND THE FARM WORKERS, *supra* note 73, at 50.

90. Nonimmigrant visas are commonly referred to by the subsection letter and number that designates their category under section 1101(a)(15) of the INA. For instance, guest workers who enter the country as skilled "specialty workers and fashion models" pursuant to 8 U.S.C. § 1101(a)(15)(H)(i)(b) are referred to as H-1B workers; those entering as unskilled "agricultural workers" pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(a) are referred to as H-2A workers; and guest workers entering as unskilled "nonagricultural" workers pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b) are referred to as H-2B workers. *See Temporary (Non-immigrant) Worker*, U.S. CITIZEN & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Working in the US," then follow "Temporary Workers," and then follow links "H-1B," "H-2A," and "H-2B") (last visited June 27, 2011).

91. 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006).

92. *Id.* § 1101(a)(15)(H)(ii)(b). Guest workers are referred to as "non-immigrant aliens" under the INA. *See id.* § 1101(a)(15). The three most common H-2B occupations by industry in 2007 were: laborer/landscaper (62,442); cleaner/housekeeper (22,347) and construction worker (totaling 17,697). OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION: INTERNATIONAL TALENT HELPING MEET EMPLOYER DEMAND, PERFORMANCE REPORT 31, 33 (2007), *available at* http://www.foreignlaborcert.doleta.gov/pdf/FY2007_OFLCPerformanceRpt.pdf. Not all guest workers who gain admission to

Training Administration (ETA) of the U.S. DOL and the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS), with all enforcement responsibilities related to employer violations of worker rights handled by the U.S. DOL's Wage and Hour Division.[93] While the exact numbers vary each year, more than 100,000 H-2A workers are admitted into the United States annually (although there exists no statutory cap), and approximately 66,000 H-2B workers (which, in most years, represents the statutorily mandated cap).[94] All H-2 workers are authorized to enter the country to work solely for the petitioning employer,[95] generally for a period of less than a year, although visas may be extended for up to three years.[96] An H-2 visa provides no path to permanent residence.[97]

For an employer to obtain a visa for an H-2 worker, the DOL must "certify" that capable U.S. workers are unavailable, and that employing guest workers will not adversely affect wages and working conditions.[98] To gain certification, H-2B employers need only attest to their efforts to recruit United States workers at the prevailing wage.[99] H-2A employers,

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work under the H-2B program are unskilled; for instance, professional athletes and entertainers are also admitted under this nonimmigrant category. *See* 20 C.F.R. § 655.3(b) (2011).

93. *See* 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 2; 29 C.F.R. § 501.1(c) (2011). While there is no specific delegation in the case of H-2B workers, most would fall within the WHD's jurisdiction as the agency is charged with enforcing the wage and other provisions of the Fair Labor Standards Act (FLSA). *See Wage and Hour Division: Major Laws Administered/Enforced*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/regs/statutes/summary.htm. (last visited Apr. 23, 2011).

94. OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT. OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: TEMPORARY ADMISSION OF NON-IMMIGRANTS TO THE UNITED STATES 65 (2010) (reporting that in 2009, 56,381 H-2B workers were admitted and 149,763 H-2A workers).

95. 8 C.F.R. § 274a.12(b)(9) (2011); see also 8 C.F.R. § 214.2(h)(2)(i)(A) (2011) (indicating that to employ an H-2A or H-2B worker a U.S. employer must file a petition). If more than one employer wants to employ the same worker, both must file a petition. 8 C.F.R. § 214.2(h)(2)(i)(C). If a worker seeks to work for a different employer, then the new employer must file a petition and receive approval before employing the worker. *Id.* § 214.2(h)(2)(i)(D).

96. *See id.* § 214.2(h)(15)(ii)(C); 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 2, 6.

97. *See* 8 C.F.R. § 214.2(h)(16)(ii).

98. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33977, IMMIGRATION OF FOREIGN WORKERS: LABOR MARKET TESTS AND PROTECTIONS 17 (2010).

99. *Id.* New H-2B (and H-2A) regulations were enacted in 2009 in the final days of the Bush administration. One significant change in both was the creation of an "attestation-based" certification process, rather than a more cumbersome process that required submission of various forms of proof that the employer had made a diligent

on the other hand, must submit documentation demonstrating that they undertook local recruiting efforts and met all other program requirements.[100] In particular, they must demonstrate that they are offering wages that meet (or exceed) the highest of four different wage rates: the federal or applicable state wage rate, the Adverse Effect Wage Rate (AEWR), the prevailing wage, or an agreed upon collective bargaining rate.[101]

The H-2 programs are widely disfavored by worker advocates. They have been criticized as being exploitative and abusive of the guest workers, notwithstanding the existence of significant employee protections and benefits on paper, at least for H-2A workers.[102] Specifically, H-2A workers are entitled to: (1) housing; (2) meals; (3) transportation from housing to work; (4) reimbursement for travel from the country of residence after having completed 50 percent of the contract; (5) workers' compensation for injuries and illness incurred in the course of employment; and (6) a return ticket to the worker's residence upon completion of the contract.[103] In addition, they are guaranteed to be paid for three-fourths of the workdays of work promised in the contract (referred to as the "3/4 guarantee") unless a domestic worker is found within the first 50 percent of the contract period (in which case the employer must hire the domestic

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search for qualified domestic workers before it could gain certification. *See id.* at 14–15, 17. The Bush H-2A regulations were recently replaced in February 2010 with new regulations that reinstate the certification process previously in effect. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884–6995 (Feb. 12, 2010).

100. *See* 20 C.F.R. §§ 655.121–122 (2011).

101. 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 5–6. Notably, under the 2009 version of the regulations enacted in the final days of the Bush administration, the wage rate was calculated in a way that significantly lowered the wage rate for H-2A workers. *See* N.C. Growers' Ass'n, Inc. v. Solis, 644 F. Supp. 2d 664, 666, 669–70 (M.D.N.C. 2009) (denying the Obama administration's effort to suspend the new regulations on the grounds that the complaining North Carolina growers would be irreparably harmed were the rules allowed to be suspended because the new rules effectively lowered the wages the growers would have to pay from $9.34 under the old rule, to between $7.25 and $8.51 under the Bush regulations). As noted in *supra* note 99, in February 2010 the DOL issued new regulations, reinstating many aspects of the old regulations, including those related to wage calculations.

102. *See* discussion *infra* Part III.C.3.

103. 20 C.F.R. § 655.122; *see also* Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13261-01 (Mar. 26, 2009) (withdrawing from the interpretation in 73 Fed. Reg. 77148-52 (Dec. 17, 2008), for the H-2A program, and 73 Fed. Reg. 78039-41 (Dec. 18, 2008) for the H-2B program; these interpretations that did not require employers to reimburse H-2A and H-2B workers earning the minimum wage for relocation expenses).

employee, may terminate the H-2A worker, and is not bound by the 3/4 guarantee).[104] Remarkably, the only benefit or safeguard afforded H-2B workers is the right to workers' compensation.[105] As will be discussed below, to the extent the law provides H-2 workers with any benefits or rights, they have proven largely theoretical due to a lack of effective enforcement mechanisms and reluctance by most H-2 workers to complain. Additionally, H-2 workers have been credited with driving down wages in the industries with the greatest number of guest workers, largely due to lax enforcement of the wage rate requirements.[106]

The programs are also unpopular with employers who find them cumbersome and inefficient and their many obligations overly burdensome.[107] These criticisms prompted the Bush administration, during its final days in power, to promulgate new regulations aimed at streamlining

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104. 20 C.F.R. § 655.122(i) (2011).

105. *See* 20 C.F.R. § 655.22 (2011) (setting forth the very few obligations imposed upon H-2B employers; there is no mention of benefits or worker protections comparable to those that exist for H-2A workers); *see also* SPLC REPORT, *supra* note 17, at 25–26 (noting that this one "benefit," workers' compensation, is often effectively unavailable to H-2 workers because the rules of many states bar or limit nonresident family members from receiving death benefits, or require that an injured worker see a doctor in the state—an impossible requirement to meet if an H-2 worker is no longer authorized to be in the country).

106. *See* SPLC REPORT, *supra* note 17, at 21 (discussing the decrease in wage rates for tree planters in Alabama, and attributing the decline to a recent modification by the DOL in its methodology for determining the prevailing wage and to the substantial number of guest workers employed in tree planting in Alabama who have no ability to bargain for better wages); LINDA LEVINE, CONG. RESEARCH SERV., 95-712 E, IMMIGRATION: THE LABOR MARKET EFFECTS OF A GUEST WORKER PROGRAM FOR U.S. FARMERS 6 (2004) (noting that while the H-2A program has likely not driven down farm wages, in part because of low utilization of the program, it might have a more substantial effect on wages in certain local labor markets that rely heavily on guest workers); Gordon, *supra* note 30, at 541–42 (2007) (arguing that the Adverse Effect Wage Rate (AEWR), which governs H-2A guest worker wage rates, while set above the minimum wage, acts as a ceiling to farm worker wages because when wages increase an employer may declare applicants "unavailable" and become authorized to bring in workers from abroad).

107. *See* ARIN GREENWOOD, COMPETITIVE ENTER. INST., THE CASE FOR REFORMING U.S. GUEST WORKER PROGRAMS 4 (2008), *available at* http://cei.org/contributor/arin-greenwood (follow "The Case for Reforming U.S. Guest Worker Programs") (noting that the U.S. DOL itself has described the H-2A application process as "slow, burdensome, duplicative, and expensive"); Temporary Employment of H-2A Aliens in the United States, 73 Fed. Reg. 77110-01 (Dec. 18, 2008) (2008 rule governing H-2A workers (since replaced) referring to many employer comments criticizing various program requirements, like the obligation to provide employee housing as a "serious impediment to program participation").

the application and certification process for both H-2 programs.[108] The Obama DOL has since promulgated new H-2A regulations that reversed most of the changes, and has proposed similar H-2B regulations.[109]

1. Portability

With a few limited exceptions, H-2 workers cannot change jobs without losing their visa status.[110] Nor can H-2 workers quit work—even if their employers have violated work agreements, failed to pay wages or overtime, or committed some other labor violation—without risking deportation because H-2 workers' immigration status rests solely on their employment with their petitioning employer.[111] On rare occasions, the law

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108. *See* Changes to Requirements Affecting H-2A Non-Immigrants, 73 Fed. Reg. 76891-01 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 214, 215, 217a); Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78020-01 (Dec. 19, 2008) (to be codified at 8 C.F.R. pts. 655, 656). These regulations were fiercely opposed by advocates of guest workers who believe that streamlining and other elements would leave H-2 workers even more vulnerable to abuse. *See, e.g.*, *The Department of Labor Fiscal Year 2010 Budget and Priorities for Enforcing the Rights of Guest Workers: Hearing Before the H. Subcomm. on Domestic Policy of the H. Comm. of Oversight & Gov't Reform*, 111th Cong. (2009), *available at* http://www.splcenter.org/get-informed/news?page=15 (follow "SPLC to Congress: Protect H-2B Guest Workers . . . ") (statement of Mary Bauer, Director Immigrant Justice Project at the Southern Poverty Law Center) [hereinafter Bauer testimony] (describing the regulations as having "Eviscerated the Few Protections that Existed for Guestworkers").

109. *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884–6995 (Feb. 12, 2010); Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15130 (proposed Mar. 18, 2011); *see also* 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 5–6 (providing an overview of the new rules). Both sets of regulations were prompted, in part, by order of the Eastern District of Pennsylvania, which invalidated parts of the Bush H-2B regulations and ordered the U.S. DOL to promulgate new provisions. *See* 76 Fed. Reg. at 15131–32 (discussing *Comité de Apoyo a los Trabajadores Agricolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), and the various provision the CATA court invalidated). U.S. DOL also recently promulgated new regulations governing the calculation of the prevailing wage for H-2B workers Wage Methodology for the Temporary Non-agricultural Employment H-2B Program Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) (revising 20 C.F.R. § 655.10).

110. *See* 8 C.F.R. § 274a.12(b)(9) (2011) (stating that "[a]n alien in [H-2] status may be employed only by the petitioner through whom the status was obtained" except in the case of a professional athlete, who may change employers after being "traded" under certain circumstances).

111. *See* 8 C.F.R. § 274a.12(b)(6)(v)(9) (providing that aliens employed under H-2A and H-2B status "may be employed only by the petitioner through whom the status was obtained.").

allows H-2A workers to transfer employers when the petitioning employer cannot fulfill the contract.[112] But even then, workers can only transfer to employers who are certified to employ H-2A workers; if such employers cannot be found, the workers must depart the country.[113] In the case of H-2B workers, they have even fewer opportunities to change employers because, since 2004, the H-2B cap has always been reached, and generally very quickly.[114] Accordingly, it is nearly impossible for H-2B workers to find new employers certified to hire them, even under the rare conditions that might allow a worker to change employers.[115] And, for all H-2 workers, no employment with a certified employer means that the workers must leave the United States or face the loss of their authorized nonimmigrant status and the possibility of deportation.[116]

2. Government Oversight and Accessible Avenues for Complaint

As noted above, the U.S. DOL's Wage and Hour Division (WHD) has enforcement authority over employment-related complaints by H-2 workers.[117] It also possesses the authority to bar employers from future hiring of H-2 workers based on past violations of worker rights and to conduct workplace investigations.[118] In addition, guest workers may pursue private actions against employers in court.[119]

In practice, the WHD has largely failed to protect H-2 workers through its affirmative enforcement mechanisms, and it is nearly impossible for H-2 workers on their own initiative to vindicate their rights through WHD channels or private litigation. First, the WHD has seldom taken effective steps to prevent worker abuses by consistently monitoring employer worksites or barring employers with a record of violating

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112. 20 C.F.R.§ 655.122(o) (2011).

113. *See id.*

114. Greenwood, *supra* note at 107, at 5.

115. *Id.*

116. *See* 8 C.F.R. § 214.1(a)(3)(ii) (2011) (requiring nonimmigrants, including H-2A and H-2B workers, to agree to depart the United States at the end of their visa period, or upon abandonment of their authorized nonimmigrant status, or face loss of their nonimmigrant status). Performing unauthorized work, such as for an employer other than the petitioning employer, may constitute a "failure to maintain" authorized nonimmigrant status. *Id.* § 214.1(e).

117. 29 C.F.R. § 501.1(c) (2011) (H-2A workers); 20 C.F.R. § 655.50(a) (2011) (H-2B workers).

118. *See* 8 U.S.C. § 1188(b)(2)(A)–(B) (2006) (providing conditions for denial of labor certification for H-2A employers); 20 C.F.R. § 655.65 (2011) (describing other remedies for violations by H-2 employers).

119. *See* Laura Parker, *Guest Workers Sue Companies Over Pay, Foreign laborers in visa program allege exploitation*, USA TODAY, Nov. 15, 2006, at 1A.

worker rights.[120] Specifically, as of 1997 the WHD had never denied an application to employ H-2A workers because of previous violations of worker rights.[121] In 2004, the WHD conducted only 89 investigations of H-2A employers.[122] As a result of this lack of enforcement, many H-2 workers are not aware of the rights afforded to them under the law.

In addition, local WHD offices are not accessible or equipped to effectively resolve complaints lodged by guest workers; this is the case even though the H-2A regulations expressly give these workers a right to pursue administrative complaints with the WHD.[123] Guest workers generally do not know where U.S. DOL offices are located, most offices are only open during business hours when guest workers are working, and most are not set up to help workers who do not speak English.[124] Moreover, the majority of guest workers work in remote locations, with scant access to transportation (other than what is provided by the employer).[125] In the rare instances in which H-2 workers find their way to a U.S. DOL office, file a complaint, and the WHD successfully carries out an investigation, the fines and other remedies are generally so little they are ineffective as a means of deterring future violations.[126] By way of example, the U.S. DOL website reports that eight out of approximately 6,500 H-2A employers in 2009 have been temporarily barred from employing H-2A workers, and that five out of approximately 7,300 employers in 2009 have been temporarily barred from employing H-2B workers.[127]

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120. *See* Bauer testimony, *supra* note 108.

121. *See* U.S. GOV'T ACCOUNTING OFFICE, GAO-HEHS-98-02, H-2A AGRICULTURAL GUEST WORKER PROGRAM, CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 62 (1997).

122. Lornet Turnbull, *New State Import: Thai Farmworkers*, THE SEATTLE TIMES, Feb. 20, 2005, at A1. There does not seem to be data on the number of H-2B sites that have been investigated in recent years.

123. *See* Bauer testimony, *supra* note 108 (testifying that local U.S. DOL agencies are "difficult to access, many lack the ability to communicate with workers in languages other than English . . . are completely inaccessible to workers outside of traditional work hours . . . [and] lack[ ] the capacity to deal with workers calling internationally"); Holley, *supra* note 77, at 599 (describing how there is no set procedure for initiating or investigating H-2A complaints, no guarantee that they will be pursued by the U.S. DOL, and no timeline for investigations).

124. *See* Bauer testimony, *supra* note 108.

125. SPLC REPORT, *supra* note 17, at 31, 37.

126. *See* Bauer testimony, *supra* note 108.

127. *See* OFFICE OF FOREIGN LAB. CERTIFICATION, U.S. DEP'T OF LABOR, PROGRAM DEBARMENTS 2, http://www.foreignlaborcert.doleta.gov/pdf/Debartment_List_Revisions.pdf. (last visited June 28, 2011); *H-2A Program Data*, FOREIGN LAB. CERTIFICATION DATA CTR. ONLINE WAGE LIBR., http://www.flcdatacenter.com/CaseH2A.aspx (last visited May 5, 2011) (using data downloaded from "H-2A Disclosure Data

Notably, in a 2009 report on WHD, the General Accountability Office (GAO) essentially concluded that the agency was failing to protect the workplace rights of low wage workers, including their basic right to be paid at least the minimum wage for all hours worked.[128] The report attributes botched investigations, long delays and a failure to follow up with employers who agreed to pay back wages due as the reasons for this failure.[129] One illustrative example described in the report is a case in which a GAO investigator posed as a complainant reporting possible child employment at a factory with dangerous machinery.[130] No investigation was undertaken for four months.[131] Ultimately, only one of a total of ten fictitious cases that were presented to the WHD was handled properly, and even that one was marked by significant delays.[132] While the report does not specifically mention guest workers, most fall squarely within the underserved group of low-wage workers.

Certainly, one reason for the failings of the WHD is that there are desperately few investigators. According to a 2005 study by the Brennan Center for Justice, over the period 1975–2004, enforcement activities and resources allocated to the U.S. DOL "either stagnated or declined" at the same time that the workforce steadily increased.[133] Specifically, during this period, the number of workers covered by the wage and hour laws of the Fair Labor Standards Act (FLSA) grew by 55 percent (from 56,648,000 in 1975 to 87,691,695 in 2004), while the number of WHD investigators declined by 14 percent (from 921 in 1975 to 788 in 2004).[134] While in 2010, the U.S. DOL hired 250 new WHD investigators—bring-

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2009" and determining that approximately 6,500 employers requested H-2A certification in 2009); *H-2B Program Data*, FOREIGN LAB. CERTIFICATION DATA CTR. ONLINE WAGE LIBR., http://www.flcdatacenter.com/CaseH2B.aspx (last visited June 20, 2011) (using data downloaded from "H-2B Disclosure Data 2009" and determining that approximately 7,280 employers requested H-2B certification in 2009).

128. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT (2009).

129. *Id.* at 4.

130. *Id.* at 5.

131. *Id.*

132. *See id.* at 4–5 (citing that it took one investigator working on the first complaint five weeks to contact the fictitious employer "but another investigator working on the second complaint contacted the fictitious employer immediately").

133. Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004*, BRENNAN CTR. FOR JUST. AT NYU SCH. OF LAW, 1 (No. 3 Sept. 2005), *available at* http://www.brennancenter.org/page/d/download_file_35553.pdf.

134. *Id.* at 2.

ing the number of WHD investigators up to 949[135]—this still translates into approximately one investigator for every 91,600 covered workers—a ratio that cannot possibly ensure adequate enforcement of any of the many laws under the WHD's jurisdiction, let alone close monitoring of the H-2 programs.[136] What is more, the cases that involve serious abuses of the kinds to which guest workers are particularly vulnerable—like forced labor and debt peonage—require the investment of even more scarce resources than other cases.[137]

Given the WHD's shortcomings, the only viable avenue for relief open to most H-2 workers is private litigation. This avenue is also full of nearly insurmountable obstacles. First, many fear a lawsuit would be met with retaliation from recruiters in the workers' sending countries or result in the workers being blacklisted and unable to secure employment in the future.[138] Second, it is very difficult for H-2 workers to find legal representation because of geographic isolation and lack of transportation.[139] Moreover, H-2B workers have been deemed ineligible for Legal Services assistance because of their nonimmigrant status.[140] Of course, most H-2 workers, particularly those whose rights have been violated by their employer, do not have funds to pay private attorneys.[141]

Finally, there is no certain or established procedure available to H-2 workers who have stopped working for their petitioning employer due to labor violations to secure the right to remain in the country.[142] In most

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135. Jeremy Gantz, *Labor Dept.'s New "Sheriff" Offers Overdue Help to Wage-Theft Victims*, IN THESE TIMES, Apr. 1, 2010 4:41PM, http://www.inthesetimes.com/working/entry/5771/labor_dept.s_new_sheriff_offers_overdue_help_to_wage-theft_victims (reporting that the DOL has recently hired 250 investigators and that the budget was back to pre-2001 levels).

136. The ratio is based on an estimate of 87 million covered workers. See Bernhardt & McGrath, *supra* note 133, at 2 (Figure One) (reporting that more than 87 million workers were covered by the FLSA in 2004) This number has likely grown since reported in 2004.

137. *See* HUMAN RIGHTS CTR., U. CAL. BERKELEY & FREE THE SLAVES, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 16–17 (2004) [hereinafter HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES] (citing an anonymous DOL WHD official who discussed the difficulties in handling forced labor cases that often arise in the agricultural sector where most workers are immigrants, and very vulnerable to abuse).

138. SPLC REPORT, *supra* note 17, at 16–17.

139. *Id.* at 31.

140. *See id.*

141. *See id.* at 30.

142. *See* 8 C.F.R. § 214.1(a)(3)(ii) (2011) (requiring nonimmigrants, including H-2A and H-2B workers, to agree to depart the United States at the end of their visa period, or upon abandonment of their authorized nonimmigrant status, or face loss of

cases, the only avenue available to them is to seek deferred action status from USCIS.[143] Deferred action is a purely discretionary, non-reviewable action by USCIS to delay removal proceedings against an individual, or class of individuals, generally for humanitarian reasons, for instance, because the nonimmigrant is suffering medical problems.[144] However, the process for obtaining deferred action is shrouded in mystery and never a certainty.[145] To begin, it is granted solely at the discretion of USCIS, has no statutory basis, and only passing reference is made to it in the federal regulations.[146] In addition, there are no regulations or publicly posted procedures for filing for deferred action, nor is there any mechanism for en-

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their nonimmigrant status); Title 8, section 214.1 of the C.F.R., which contains DHS's regulations governing nonimmigrants including H-2A and H-2B workers, makes no mention of providing workers who have left their petitioning employer because of labor violations with an alternative visa status that would allow them to remain in the country while seeking remedial action against the employer. DHS regulations do provide for special nonimmigrant status for alien victims of severe forms of trafficking in persons, *id.* § 214.11(f)(1), and for alien victims of certain qualifying criminal activity, *id.* § 214.14(a)(9). Thus, these visas can provide temporary status to H-2A and H-2B workers who are victims of serious crimes, such as, "involuntary servitude, peonage, debt bondage, or slavery," *id.* § 214.11(f)(1), or rape, torture, the slave trade, or abusive sexual contact, among other serious crimes, *id.* § 214.14(a)(9), but not to victims of wage theft, sex discrimination, or other civil labor and employment law violations. *Cf.* Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 892 (2008) (proposing that the "U" visa, which grants nonimmigrant status to victims of crime who have "suffered substantial physical or mental abuse as a result" of the crime and are cooperating with law enforcement in the investigation or prosecution of the crime, become one of the tools used by labor advocates to address workplace abuses of unauthorized immigrants).

143. *See* 8 C.F.R. § 274a.12(c)(14) (referring to "deferred action" as "an act of administrative convenience to the government which gives some cases lower priority").

144. *See* Memorandum from Prakash Khatri, CIS Ombudsman, to Dr. Emilio T. Gonzalez, Dir., USCIS 3 (Apr. 6, 2007), *available at* http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf (last visited June 21, 2011).

145. *Id.* (suggesting that the USCIS does not maintain even a "minimal level of transparency" with respect to deferred action, and suggesting by way of reform, that USCIS provide basic information on deferred action "including 1) general criteria for relief; 2) what information to include with the submission, and 3) where to submit a request"). Human Rights Watch recently recommended that deferred action be routinely granted to guest workers while pursuing legal claims for workplace violations. *See Tough, Fair and Practical: A Human Rights Framework for Immigration Reform in the U.S.*, HUMAN RIGHTS WATCH 6–7 (2010), *available at* http://www.hrw.org/node/91455 (follow "Download this Report").

146. *Id.* at 1 (while the ombudsman in this memo made several recommendations, including that the USCIS "post general information on deferred action on its website," it does not appear that this recommendation has been implemented).

suring that uniform standards are being applied across the country, nor formal statistics kept on requests, grants and denials, or any way to appeal a decision related to a deferred action request.[147] Accordingly, there is no guarantee an H-2 worker pursuing legal action against an employer will be granted such status. Nor is there any guarantee that a worker who has left the country can gain readmission to participate in litigation because that also lies within the discretion of USCIS.[148]

3. Abuses of H-2 Workers Are Commonplace Along with Depressed Wages

By many accounts, exploitation and abuse of H-2 workers is commonplace.[149] H-2 workers are routinely cheated of wages.[150] It is also common for them to have to pay kickbacks and up-front fees to labor contractors and recruiters.[151] In one recent case, H-2B guest workers paid $3,500 to $5,000 to work for hotels in New Orleans for a nine-month pe-

147. *See id.*

148. *See, e.g.*, Bauer testimony, *supra* note 108 (recounting a case in which a named plaintiff in a class action handled by SPLC was not granted a visa to testify at his own deposition).

149. *See generally* SPLC REPORT, *supra* note 17 (a report outlining the exploitation and abuse suffered by guest workers); Laura Wides-Munoz, *Migrants See Abuse in Guest Worker Jobs*, WASH. POST, June 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/02/AR2007060200049.html (recounting stories of guest workers forced to pay kickbacks to growers' contractors and the exploitation suffered by farm workers under such a system).

150. *See* Janine Zeitlin, *Ignored and Cheated; Farm Workers Earn Nada in America's Green Bean Capital*, MIAMI NEW TIMES, Mar. 14, 2008, http://www.smfws.com/articles2008/march2008/art03142008d.htm (quoting a local community organizer describing wage theft in the industry as "massive and ubiquitous" and noting that "[i]t's rare to find an immigrant worker in South Dade who hasn't been ripped off at some point").

151. Laura Wides-Munoz, *Migrants See Abuse in Guest Worker Jobs*, WASH. POST, June 2, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/02/AR2007060200049.html. Since November 2009, the law has prohibited the collection of recruitment or other placement fees by employers, or others, and required that petitions be denied or revoked if it is established that such fees were sought or collected. *See* 8 C.F.R. § 214.2(h)(5)(xi)(A) (2011) (for H-2A workers); *id.* § 214.2(h)(6)(i)(B) (2011) (for H-2B workers). In such cases the worker will have thirty days to return to his country of residence (at the employer's expense), or to find another employer. *Id.* § 214.2(h)(5)(xii) (for H-2A workers); *id.* § 214.2(h)(6)(i)(B) (for H-2B workers). It is too early to tell whether this prohibition can, or will, be effectively enforced.

riod after Hurricane Katrina.[152] Under the contract terms, each guest worker would have had to work full time for three to four months just to pay off the recruitment fee debt.[153] As it turned out, the employer did not even provide the workers with full-time work.[154] Another tactic routinely used by H-2 employers to control and intimidate workers is to seize workers' travel documents upon arrival.[155] It is also widely understood that these workers are particularly vulnerable to human trafficking.[156] Indeed, in an effort to curb this abuse, the State Department recently published a pamphlet aimed at preventing trafficking of H-2 workers and other nonimmigrant visa holders.[157] Finally, in industries and in geographic areas where H-2 guest workers are employed in substantial numbers, wage rates have declined.[158]

D. McCain-Kennedy–Style Bills

In May 2005, the McCain-Kennedy comprehensive immigration reform bill was introduced in the Senate, representing the first of numerous immigration reform packages that were introduced during the years 2005 to 2007—the last time that comprehensive immigration reform legislation was introduced.[159] One component of each of the comprehensive propos-

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152. *Workers Pay up to $5,000 for Post-Katrina Hotel Jobs*, S. POVERTY LAW CTR. (Apr. 2007), http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/recruitment-exploitation-be-1.

153. *Id.*

154. *Id.*

155. *See* SPLC REPORT, *supra* note 17, at 2 (noting the frequent practice of taking guest workers' travel documents, an observation based on interviews with thousands of guest workers and "scores of legal cases").

156. *See* HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES, *supra* note 137, at 3 (recommending, among other actions, that the U.S. government eliminate the visa requirement that ties an employee to a single employer as a step towards combating forced labor).

157. *See* Press Release, U.S. Dep't of State, Informational Pamphlet to Protect Guest Workers and other Non-Immigrants (June 23, 2009), *available at* http://www.state.gov/r/pa/prs/ps/2009/06a/125279.htm (announcing the publication of a new pamphlet, aimed at preventing trafficking and exploitation of nonimmigrant visa holders; the pamphlet specifies the rights of H-2A and H-2B workers, among other nonimmigrant visa holders, and highlights the availability of services for victims of trafficking and exploitation).

158. *See supra* note 106.

159. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005). Others included: Comprehensive Immigration Reform Act of 2007 (also known as the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007), S. 1348, 110th Cong. (2007); Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007), H.R. 1645, 110th Cong. (2007); Comprehensive Immigration Reform Act of 2006 (CIRA), S. 2611, 109th Congress (2006).

als was a large-scale unskilled guest worker program designed to control future migrant flow.[160] The guest worker programs were essentially the same in each bill, with key worker safeguards, including, portability,[161] stronger enforcement mechanisms,[162] and a path to earned adjustment.[163] It is likely that the guest worker component of any comprehensive immigration reform bill that will be proposed in the near future will resemble these programs. While none of the bills became law, the Comprehensive Immigration Reform Act of 2006 (CIRA 2006) progressed the furthest in the legislative process in that it was passed by the Senate.[164] For this reason, this discussion will center on CIRA 2006's proposed H-2C guest worker program.

The H-2C program would admit guest workers to perform nonagricultural jobs of a temporary or seasonal nature upon a showing by a petitioning employer that no qualified U.S. worker was available at the time of need, and an employer attestation that the hire would not "adversely affect the wages and working conditions" of similarly employed domestic workers.[165] While CIRA 2006 would wait on a job study to determine the number of guest workers to be admitted,[166] McCain-Kennedy proposed the admission of 400,000 in the first year, with increases of 10 to 20 percent permitted in later years.[167] Under the H-2C program, the initial visa would be effective for a period of three years and could be extended for another three years.[168]

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160. *See* S. 1033, Title III; S. 2611, Title IV; S. 1348, Title IV; H.R. 1645, Title IV. Notably, the H-2C program would not have been available to unauthorized immigrants as a means of adjusting their status. *See* S. 2611, § 403(f)(5). Similarly, from the information thus far released about the framework for comprehensive immigration reform now under consideration it does not seem that the guest worker program will be designed to provide status to current unauthorized immigrants, but rather, will be directed toward addressing the future flow of immigrants. *See* Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23; Peter Baker, *Obama Exhorts Congress to Back Immigration Overhaul*, N.Y. TIMES, July 2, 2010, at A12.

161. *See* S. 1033, § 302; H.R. 1645, § 402; S. 2611, § 403; S. 1348, § 403.

162. *See* S. 1033, § 304; H.R. 1645, § 403; S. 2611, § 404; S. 1348, § 404.

163. *See* S. 1033, § 306; H.R. 1645, § 407; S. 2611, § 408; S. 1348, § 408.

164. *See Social Security Legislative Bulletin, Senate Passes S. 2611*, SOCIAL SEC. ONLINE, http://www.ssa.gov/legislation/legis_bulletin_062206.html (last visited June 29, 2011).

165. S. 2611, § 404(b)–(c).

166. *Id.* § 401.

167. S.1033, § 305(C)(i)–(ii). The STRIVE Act also proposed an initial 400,000 cap, which could be raised to 600,000, depending on demand. H.R. 1645, § 406(C)(i), (iii).

168. S. 2611, § 403(f).

H-2C employers would be required to pay the greater of the actual wage rate for similarly situated employees of the employer or the prevailing wage level in the area of employment.[169] Guest workers would also be entitled to receive the same benefits as similarly situated employees and the equivalent of workers' compensation insurance, if not covered by the state.[170] Foreign labor contractors and recruiters would be prohibited from collecting any fees from guest workers.[171]

1. Portability

To qualify for an H-2C visa, and to gain admission to the United States, an H-2C worker would need to find an employer willing to hire them, and petition for a visa.[172] Once in the United States, an H-2C guest worker would be able to change jobs if the subsequent employer was certified as being unable to find qualified domestic workers and the guest worker could demonstrate that he or she had never worked without authorization.[173] A guest worker's H-2C status would terminate if the worker was unemployed for sixty or more consecutive days, unless the period of unemployment was due to medical problems, authorized leave, or "any other period of temporary unemployment caused by circumstances beyond the [guest worker's] control."[174]

2. Government Oversight and Avenues for Complaint

By way of enforcement, CIRA 2006 directed the Secretary of Labor to hire an additional 2000 compliance investigators annually to be dedicated to administering the guest worker program, "subject to the availability of appropriations for such purpose."[175] The H-2C program would have featured a comprehensive administrative complaint system, while also retaining the guest worker's right to seek vindication of contractual or statutory rights in other forums, like the courts.[176] Under the system, upon receipt of a complaint, the Secretary of Labor would either initiate a hearing, or notify the aggrieved party that the U.S. DOL would not be proceeding.[177] The guest worker would then have a right to pursue an

169. *Id.* § 404(b)(1)(B)(2).
170. *Id.* § 404(b)(2)(C).
171. *Id.* § 404(g)(4).
172. *See id.* § 403.
173. *See id*. § 403(j).
174. *Id.* § 403, § 218(A)(f)(3)(A)(2) (Senate engrossed version).
175. *Id.* § 303(a).
176. *Id.* § 404(h)(4).
177. *Id.* § 404(h)(4)(B).

administrative hearing on his or her own initiative.[178] CIRA 2006 did not seem to provide for a means by which workers could remain in the United States during the pendency of a labor claim.[179]

3. Path to Citizenship

The H-2C program would have provided two avenues for guest workers to adjust their status to lawful permanent residents, placing them on a path to citizenship. First, a guest worker could be sponsored for an employment-based immigrant visa by his or her employer.[180] Second, a guest worker could self-sponsor upon a showing that: (1) the guest worker had been employed as an H-2C worker for at least a cumulative four years; (2) an employer attestation that it would employ the guest worker; and (3) an attestation by the Secretary of Labor that there were insufficient available domestic workers.[181]

IV. THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS GUEST WORKER PROGRAM

The CNMI's guest worker program employed many of the worker safeguards that have been proposed in recent legislation—namely, visa portability and a comprehensive, accessible administrative complaint system—with little success. As such, it offers useful evidence when considering a large-scale guest worker program as an element of immigration reform. It also stands as a cautionary tale.

A. A Brief History of the CNMI

The CNMI comprises fourteen small islands in the Philippine Sea, several of which are inhabited by little more than a few people.[182] It is located about 3,300 miles from Honolulu and 1,270 miles from Tokyo,[183]

178. *See id.* § 404(h)(4), (h)(8).

179. *See id.* § 404(h)(4) (failing to state whether and how a worker could stay in the United States while waiting for his or her claim to be heard).

180. *Id.* § 408(h) (Senate engrossed version).

181. *Id.*

182. *See Commonwealth of the Northern Mariana Islands*, U.S. DEP'T OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, http://www.doi.gov/oia/Islandpages/cnmipage.htm (last visited May 7, 2011). The largest island, Saipan, is approximately 12 miles long and 5 miles across. *Saipan*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Saipan (last updated June 15, 2011).

183. *Id.*

and overall is home to about 46,000 people,[184] approximately 16,000 of whom are guest workers.[185] Saipan, the largest and most populated island, is best known as the site of a decisive WWII battle in 1944.[186] Neighboring Tinian was the launching site for the Enola Gay, which carried the atomic bomb dropped on Hiroshima.[187]

After the war, the Northern Mariana Islands were administered by the United States as part of the Trust Territory of the Pacific Islands, a United Nations trusteeship.[188] In the mid-1970s, the Northern Marianas opted to become a Commonwealth of the United States and entered into a covenant with the United States that governs the relationship.[189] Under the covenant, the CNMI was allowed to govern itself, but agreed to be subject to most provisions of the U.S. Constitution and most federal laws, with a few notable exceptions.[190] In particular, until November 29, 2009, when legislation went into effect federalizing the CNMI's customs and immigration system, the CNMI was not subject to U.S. Immigration and Customs Laws.[191] In addition, until June 2007, the CNMI was not covered by the minimum-wage provisions of the FLSA.[192] Under the covenant, those born in the CNMI are U.S. citizens.[193]

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184. *The World Factbook: The Northern Mariana Islands*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/cq.html (last updated Apr. 29, 2011).

185. REPORT ON THE ALIEN WORKER POPULATION IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, SEC'Y OF THE INTERIOR ii (2010), *available at* http://marianaslabor.net/news/DOI_Rpt_AlienWrkr_Pop-Apr_2010.pdf (estimating that as of January 1, 2010, there were 20,859 aliens residing in the CNMI, of which 16,304 were alien workers).

186. *See Battle of Saipan*, HISTORYNET.COM (Aug. 31, 2006), http://www.historynet.com/battle-of-saipan.htm.

187. *Tinian*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/facility/tinian.htm (last visited June 29, 2011).

188. HOWARD P. WILLENS & DEANNE C. SIEMER, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES 4 (2002).

189. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, PUB. L. NO. 94-241, 90 Stat. 263–264, § 101–102 (1976) (codified at 48 U.S.C. § 1801 note).

190. *Id.* §§ 102–105.

191. 48 U.S.C. § 1806(1)-(3) (2006) (Supp. 2010); *infra* note 195 (the law's effective date was delayed 180 days to November 29, 2009).

192. *Commonwealth of the Northern Mariana Islands*, *supra* note 182.

193. 48 U.S.C. 1801, § 301(a) (2006).

B. Guest Workers

The CNMI began using guest workers during the trust territory period because it was deemed necessary in order to support economic development given the small size of the population.[194] In 1983, the newly formed Commonwealth enacted the Nonresident Workers Act, which remained in effect until January 1, 2008.[195]

The number of guest workers in the CNMI surged in the 1980s when garment manufacturers from Hong Kong and Korea discovered that by incorporating and setting up their businesses in the CNMI they could avoid the U.S. quota system, which limited the number of garments foreign countries could sell in the United States.[196] Also, the CNMI's low minimum wage and its guest worker program allowed manufacturers to import workers from China and the Philippines, among other countries, and pay them very low wages.[197] At the height of the boom, in the year 2000, more than 36,000 guest workers were working in the CNMI[198] (out of a total population of about 69,221 at the time).[199]

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194. *See* HOWARD P. WILLENS & DEANNE C. SIEMER, *supra* note 188, at 345–46; 357–59. In 1980, the population totaled 16,780. *Id.* at 361.

195. The Nonresident Workers Act, 1983 N. MAR. I. PUB. L. No. 3-66, was replaced by the Commonwealth Employment Act of 2007, 2007 N. MAR. I. PUB. L. NO. 15-108, effective Jan. 1, 2008. The Commonwealth Employment Act was effectively rendered invalid on Nov. 29, 2009, by Title VII of the Consolidated Natural Resources Act of 2008 which extended U.S. immigration laws to the CNMI, thus displacing existing CNMI immigration laws. *See* PUB. L. NO. 110-229, 122 Stat. 853–67, §§ 701–705 (codified at 48 U.S.C. §§ 1806, 1808). The law was scheduled to go into effect on June 1, 2009, although the effective date was later delayed 180 days until November 29, 2009. Press Release, Office of Homeland Sec'y, DHS Delays the Transition to Full Application of U.S. Immigration Laws in the Commonwealth of the Northern Mariana Islands (Mar. 31, 2009), http://www.dhs.gov/ynews/releases/pr_1238533954343.shtm (last visited June 29, 2011).

196. JOHN BOWE, NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE GLOBAL ECONOMY 169 (2007).

197. *Id.* at 160–70.

198. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 85–86 (Appendix 1). This estimate is based on the number of work permits issued to alien workers in 2000 (36,261). Because aliens needed a work permit to legally work in the CNMI, the number of permits issued closely approximated the number of guest workers residing in the CNMI during that period. However, this number did not include the number of temporary work permits issued, meaning that there were likely several hundred to 1,000 more guest workers in the Commonwealth in 2000. *Id.* at 86.

199. DONALD L. EVAN ET AL., 2000 CENSUS OF POPULATION AND HOUSING, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 1–2 (2000), *available at* http://www.census.gov/prod/cen2000/island/CNMIprofile.pdf.

C. The Nonresident Workers' Act

The Nonresident Workers' Act (NWA) allowed aliens to temporarily enter the CNMI for employment purposes.[200] The policy that drove the NWA was the legislative finding that guest workers were "essential to a balanced and stable economy in the Commonwealth" and necessary "at the present state of economic development."[201] The law allowed guest workers to perform almost any job (skilled or unskilled) with a few specific categories excluded.[202] To be permitted to hire a guest worker, the employer had to establish that no resident worker was available, that a minimum percentage of employers' workers were resident workers, and that employment of a guest worker would not drive down wages of resident workers.[203] Employment visas could be issued for no more than a one-year period, but as a practical matter could be renewed indefinitely.[204] The law did not provide guest workers a path to permanent resident status or citizenship.[205]

The employment of guest workers was highly regulated by the CNMI government. To secure a visa, guest workers had to be hired by a particular employer pursuant to a contract approved by the CNMI Department of Labor (CNMI DOL).[206] To be approved, the employment contract had to specify the hours and location of work, wages to be paid for straight time and overtime work, and an itemized list of any deductions to be made.[207] Further, any substantive changes to the contract had

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200. *See* 3 N. MAR. I. CODE § 4411(a) (2004).

201. *Id.* § 4411(a).

202. *See id.* § 4434(e)(1)–(2), (h)(i) (guest workers could not be hired for most governmental positions or for nongovernmental positions, such as taxicab drivers, secretaries, or bus drivers—to name a few).

203. *See id.* §§ 4411(b), 4413, 4433.

204. 26 N. MAR. I. REG. 22711–22713 (June 24, 2004). The NWA contains a four-year cap on renewal. *See* 3 N. MAR. I. CODE § 4411(b). Notwithstanding the cap, based on personal observations and experience it was rarely enforced.

205. *Id.* §§ 4411(b), 4437(a).

206. *Id.* § 4434. During the approximately 25 years that the NWA was in effect, the name of the agency charged with administering it changed several times. For instance, for a period ending in 1994, the agency was called the Department of Labor and Commerce, at which time it was renamed the Department of Labor and Immigration (DOLI). *See* CNMI Exec. Order 94-3 §§ 103, 301 (Aug. 23, 1994). Then, in 2003, the agency was restructured and renamed the Department of Labor. *See* CNMI Exec. Order No. 03-01 § 101(d) (Mar. 10, 2003). Notwithstanding the name changes, the agency's functions under the NWA did not change significantly. For the sake of clarity, I will simply refer to the agency as the CNMI Department of Labor (CNMI DOL) throughout this article.

207. *Id.* § 4433(g).

to be approved by the Director of Labor.[208] The NWA also required employers to: pay guest workers the minimum wage for the occupational category;[209] cover all medical expenses (not just work-related expenses);[210] cover all expenses associated with work visas;[211] and cover the transportation costs to the CNMI and back to the employee's point of origin.[212] Employers were also prohibited from terminating guest workers' employment without cause.[213] The law also required employers to purchase a bond ensuring the employer's performance of its obligations,[214] including the payment of back wages,[215] medical bills,[216] and repatriation costs in the event of insolvency.[217]

1. Portability

The NWA provided guest workers with three ways to "transfer" to a new employer. First, a guest worker was afforded forty-five days to find a new employer at the end of the contract.[218] Second, a guest worker could transfer mid-contract upon the consent of both the original contracting employer and the new employer and the CNMI DOL.[219] Finally, a guest worker could gain the right to transfer by administrative order upon a finding by an administrative law judge that the employer had committed a violation of the NWA, had closed the business, terminated the worker without cause, or because of other specified grounds.[220]

2. Government Oversight and Accessible Avenues for Complaint

The CNMI DOL had broad authority to monitor employers of guest workers and to enforce the provisions of the NWA, the Commonwealth Minimum Wage and Hour Law, and the terms of guest workers' nonresi-

208. *Id.* §§ 4434(d), 4437(d).
209. *Id.* § 4437(b).
210. *Id.* § 4437(c).
211. *Id.* § 4424(a)(5).
212. *See id.* § 4435(a); 26 N. MAR. I. REG. 22708 (June 24, 2004).
213. *See* 26 N. MAR. I. REG. 22733–22734 (providing guidelines for notice of termination with cause and subsequently requiring review of termination by the CNMI DOL to ensure the reasons for termination complied with relevant contract provisions).
214. 3 N. MAR. I. CODE § 4435(a).
215. 26 N. MAR. I. REG. 22708 (requiring that the bond be sufficient to cover six months wages, repatriation costs, $10,000 for medical costs, and $5,000 for embalming and repatriation costs in the event of the worker's death).
216. *Id.* § 4437(c).
217. *Id.* § 4435(a).
218. *Id.* § 4602(b).
219. *Id.* § 4602(a).
220. *See id.* § 4444(e)(5); 26 N. MAR. I. REG. 22742.

dent worker contracts.[221] Specifically, the CNMI DOL was authorized to inspect worksites and employer-provided housing and to review payroll records and records related to workers illnesses and injuries.[222] During the years 2001 through 2006, the CNMI DOL Health and Safety Unit conducted more than 1,000 worksite inspections, and a few hundred inspections of employee housing, each year.[223] During this same period, however, unannounced regulatory inspections were very rare due to the invalidation of some of the regulatory inspection provisions of the NWA by a federal district court in February 2000.[224] Corrective legislation was enacted, but proved to be overly restrictive, largely curtailing the authorities' ability to conduct inspections.[225]

The NWA also created an accessible administrative complaint system, which allowed guest workers (and employers) to file complaints with the CNMI DOL for a contract violation.[226] Complaints ran the gamut, from allegations of forced prostitution, to unpaid wages, recruitment scams, and claims of being confined in employee barracks during nonworking hours.[227] A complaint could be initiated either by the local CNMI DOL, or by a worker or employer.[228]

In the case of worker-initiated complaints, the complaint could take the form of a short, handwritten description of the problem.[229] The filing costs for such a complaint were $20.[230] While an attorney was not required

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221. *See* 3 N. MAR. I. CODE §§ 4421, 4437(d)(j)(k); Commonwealth Minimum Wage and Hour Act, 4 N. MAR. I. CODE § 9231.

222. *See* 3 N. MAR. I. CODE § 4437(d) (requiring an employer's application for renewal of a nonresident certificate to include evidence of payment of the employee's monthly taxes, quarterly tax revenues, and a copy of the employee's 1040 tax form); *id.* § 4421 (allowing the CNMI DOL to "oversee, monitor, and review the use of nonresident workers and all matters related to such use, including the health, safety, meals, lodging, salaries, and working hours and conditions of such workers").

223. *Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 96.

224. *See* JIM BENEDETTO, FEDERAL OMBUDSMAN'S REPORT ON THE STATUS OF NONRESIDENT WORKERS IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: CURRENT CONDITIONS, ISSUES AND TRENDS IN THE CNMI 16 (2006), http://www.doi.gov/oia/reports/OmbudsmansReport.pdf (citing Gorromeo v. Zachares, No. 99-0018 (D. N. Mar. I. 2000)).

225. *Id.*

226. 3 N. MAR. I. CODE § 4447(b).

227. *See* BENEDETTO, *supra* note 225, at 27 n.14; Reich v. Japan Enters. Corp., Nos. 94-17151, 95-15074, 1996 U.S. App. LEXIS 17677, at *16–17 (9th Cir. July 10, 1996) (affirming awards of compensation for nonworking hours where the plaintiffs were confined to the employer's barracks).

228. *See* 26 N. MAR. I. REG. 22747, 22752–53 (June 24, 2004).

229. 26 N. MAR. I. REG. 22747.

230. 26 N. MAR. I. REG. 22748.

for the administrative proceedings, the NWA provided for attorneys fees for a guest worker who prevailed in an administrative proceeding.[231] The federal ombudsman of the U.S. Department of the Interior, Office of Insular Affairs, who assists guest workers with labor and immigration complaints, would provide translators for a guest worker, if needed.[232] A worker could also seek administrative review of the hearing officer's decision and subsequent judicial review.[233] Finally, a worker unable to collect on an administrative or court order awarding back wages who was ready to leave the CNMI could assign his or her right to collect on the order to the CNMI DOL, and it would front the worker up to three months of back wages and a plane ticket to the worker's point of hire.[234]

During the period 2000–2006, there were on average thirteen CNMI DOL investigators on staff,[235] and a labor force of approximately 42,750,[236] which translated into approximately one investigator for every 3,900 workers. In addition, there were three hearing officers permanently assigned to the CNMI DOL to handle labor matters.[237] Generally an assistant attorney general was also assigned.[238] The hearing officers and the Secretary of Labor had broad authority to award back pay and liquidated damages,[239] and to bar serious offenders from further hiring of guest workers.[240] As of May 2011, the CNMI had approximately 190 employers on its barred list, many of whom have been permanently barred from employing guest workers.[241]

A tremendous number of labor complaints were filed by guest workers and some by employers. In addition, some were initiated by the

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231. 3 N. MAR. I. CODE § 4447(d).

232. See WENDY R. GINSBERG & FREDERICK M. KAISER, CONG. RESEARCH SERV., RL 34606, FEDERAL COMPLAINT-HANDLING, OMBUDSMAN, AND ADVOCACY OFFICES 33, n.137 (2009).

233. *Id.* §§ 4445, 4446.

234. Commonwealth Nonresident Worker Relief Act of 1999, N. MAR. I. PUB. L. 11-66 no.

235. *Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 104 (Appendix 1).

236. *Id.* at 89 (Appendix 1) (this number represents the entire labor force in 2000, not just employees under the CNMI DOL's jurisdiction, which would be a lesser number; thus, the ratio of investigators to covered workers was actually higher).

237. *Id.*

238. *Id.*

239. *See* 3 N. MAR. I. CODE § 4447(d).

240. *See id.* § 4444.

241. *Barred Employers*, CNMI DEP'T OF LABOR, https://marianaslabor.net/barred.asp (last visited May 13, 2011). It remains to be seen whether the U.S. DOL will honor this list as it takes over administration of the guest worker program applying federal law.

CNMI DOL. Specifically, from 2000–2006, 200 to 800 complaints regarding working conditions were filed each year, and in 2006 and 2007, there were approximately 400 complaints objecting to denials of requests for labor permits or transfers.[242] Some of these cases involved numerous complainants and required time-intensive investigations.[243] As a result of the high volume of cases, and an inadequate number of trained experienced investigators, the administrative system was overwhelmed with a backlog of cases.[244] In 2007, more than 3000 cases dating from 1996–2004 were pending.[245]

In the early 1990s, the CNMI Supreme Court issued a number of decisions that established that guest workers alleging any infringement on their right to life, liberty, or property, including a claim of unpaid wages, had a due process right to remain in the Commonwealth until afforded a hearing.[246] In response to these decisions, the CNMI DOL began holding mediation sessions after a worker filed a complaint, and if the complaint was deemed non-frivolous and one that arguably warranted that the employee cease working for the contract employer, the DOL would grant

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242. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 96 (Appendix 1); Ferdie de la Torre, *Labor Cases Piling Up Anew*, SAIPAN TRIB., Oct. 19, 2007, http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=73442 (reporting that in 2006, 358 labor cases were filed and 441 denial case applications appealed, and as of October 2007, 280 labor cases had been filed and 400 denial case applications appealed).

243. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 96–97 (Appendix 1) (discussing "compliance agency cases," which were initiated by the CNMI DOL and generally were more complex, as they involved multiple workers).

244. *See* BENEDETTO, *supra* note 225, at 9.

245. Ferdie de la Torre, *Over 3,000 Backlog in Labor Cases Eliminated*, SAIPAN TRIB., Mar. 21, 2007, http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=66720; *see also* Liberty Dones, *DOLI: Aging Labor Cases Under Review*, SAIPAN TRIB., Nov. 23, 2002 http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=24189 (describing the CNMI's Department of Labor and Immigration review of old pending cases that had, as of 2002, been at the courts for years).

246. *See, e.g.*, *Office of the Attorney Gen. v. Deala*, 3 N. Mar. I. 110, 116 (1992) (holding that "[i]n an administrative proceeding where a person's life, liberty, or property is at stake, Article I, § 5 of the Commonwealth Constitution requires, at a minimum, that the person be accorded meaningful notice and a meaningful opportunity to a hearing, appropriate to the nature of the case"); *Office of the Attorney Gen. v. Rivera*, 3 N. Mar. I. 436, 445 (1993) ("[A]n order of deportation, while a valid wage claim is pending, must be stayed until, at the very least, the worker is provided a meaningful opportunity to a hearing . . . . the opportunity for a hearing cannot be meaningful when a worker is required to leave the island and then return for a hearing and it is undisputed that the worker has no financial means to return.").

the employee a temporary work permit to seek work elsewhere during the pendency of the case.[247]

This due process right, combined with the tremendous backlog of cases, meant that many workers were authorized to remain in the CNMI without formal employment while awaiting a labor hearing, often for years.[248] This created a large pool of available workers, at times exceeding 1,500 workers (out of a guest worker pool of 25,000 to 35,000), who were authorized to work on a temporary three-month basis and available to change jobs at the end of each contract period, or who were unemployed, but authorized to seek temporary work.[249] Some of these workers ended up working illegally, without a long-term or short-term contract, which meant that they were not afforded the same protections as guest workers under contract (such as health benefits or bonds to cover wages and repatriation costs in the case of employer insolvency), and in some cases were paid even lower wages than those working lawfully.[250]

3. Abuses of CNMI Guest Workers Were Commonplace Along with Depressed Wages

The CNMI's guest worker program gained worldwide notoriety in the 1990s when reports of horrid sweatshop conditions and widespread abuse of the guest workers began to surface.[251] Its notoriety was renewed

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247. 26 N. MAR. I. REG. 22756 (June 24, 2004).

248. *See* BENEDETTO, *supra* note 225, at 19–20.

249. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 102 (Appendix 1) (stating that during a three-month period there were generally 1,500 temporary work authorizations (TWA) in effect, along with some unspecified number of guest workers holding a memo authorizing them to seek a TWA, but who had not yet found work).

250. *See id*.; BENEDETTO, *supra* note 225, at 19–20; Ferdie de la Torre, *Arrested workers not paid the hourly rate; briefed on escape*, SAIPAN TRIB., Apr. 29, 2006, http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=57073; Ferdie de la Torre, *57 workers are awarded $.4M*, SAIPAN TRIB., Oct. 15, 2006, http://www.saipantribune.com/newsstory.aspx?newsID=62051&cat=1 (reporting that 57 guest workers, many of whom did not have an approved contract, were not paid at all for months at a time, and that the back wages would be hard to collect because the employer, who had since fled the Commonwealth, had not posted bonds with the DOL to cover the workers' wages because the workers were working illegally).

251. *See* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 77 (2009) (describing a nonprofit's (Sweatshop Watch) efforts to internationalize "the legal struggle against sweatshops by targeting producers in Saipan" where goods could be exported as "duty-free while being exempt from labor laws"); Robyn Plummer, *Sweatshops, made in the good, old U.S.A.*, ST. PETERSBURG TIMES, Oct. 29, 2006, at 5P (describing efforts by Jack Abramoff and influential Republican leaders to prevent a U.S. Depart-

during the Jack Abramoff scandal because Abramoff had been the principal lobbyist for the Northern Marianas, hired to head efforts by the federal government to prevent the extension of U.S. labor laws to the CNMI.[252] Some of the worst abuses of the 1990s were resolved by three landmark class-action lawsuits that were filed against some of the biggest names in the apparel industry, including The Gap, Calvin Klein, Liz Claiborne, Sears, and Nordstrom.[253] Ultimately, the defendants agreed to a settlement that required them to pay the workers more than $20 million, and submit to ongoing monitoring.[254] Also during this period, the U.S. DOL imposed its largest fine ever ($9 million in wage restitution), on garment magnate Willie Tan for the wages garment workers in his Saipan factories were still owed.[255] Notwithstanding these large settlements and the introduction of independent monitoring at the large garment factories, the number of labor abuses continued to be significant.[256]

Specifically, instances of wage theft were common.[257] Over a ten-month period in fiscal year 2005, the federal ombudsman referred 701 employee cases to federal and local agencies. Most of the complaints involved nonpayment of wages, breach of contract, wrongful termination, national origin discrimination, nonpayment of overtime, and illegal de-

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ment of the Interior official, Allen Stayman, from helping exploited immigrant workers in the CNMI).

252. *Controversial Lobbyist Had Close Contact with Bush Team*, ASSOCIATED PRESS, May 7, 2005, *available at* http://www.usatoday.com/news/washington/2005-05-06-abramoff-bush_x.htm (reporting that in the first ten months of the Bush administration, Abramoff and his team had nearly 200 contacts with administration officials regarding the CNMI and its interest in maintaining the Commonwealth's exemption from minimum wage laws).

253. *See* Cummings, *supra* note 251, at 77–78 (suits were brought in California as well as the CNMI); Doe I v. Gap, Inc., No. CV-01-0031, 2001 WL 1842389, at *6, 22 (D. N. Mar. I. Nov. 26, 2001) (among claims alleged were involuntary servitude and violation of the right of freedom of association and the right to be free from discrimination, rights alleged to be protected under international law and actionable under the Alien Tort Claims Act).

254. Cummings, *supra* note 251, at 78 (citing Jenny Strasburg, *Saipan Lawsuit Terms OKd: Garment Workers to Get $20 Million*, S.F. CHRON., Apr. 25, 2003, at B1.

255. BOWE, *supra* note 196, at 174.

256. *See* BENEDETTO, *supra* note 225, at 27, 27 n.14 (concluding that while labor conditions had improved significantly in the CNMI since the late 1990s "complaints of illegal recruitment scams and non-payment of wages [were] still prevalent").

257. *See, e.g.*, *151 Filipino Workers Get $500,000 in Back Wages*, SAIPAN TRIB., July 16, 2008, http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=81685; *Garment firm pays $238K in back wages*, SAIPAN TRIB., Nov. 6, 2004, http://www.saipantribune.com/newsstory.aspx?newsID=41723&cat=1; *Tinian Dynasty ordered to pay $591K in back wages*, SAIPAN TRIB., Oct. 6, 2002, http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=22895.

ductions from paychecks.[258] Unhygienic and inhumane working conditions in factories and barracks were also widespread.[259] In one notorious case in 1999, 1,200 workers were sickened by food poisoning from food served to them by a factory cafeteria.[260]

Instances of discrimination were also numerous. In 2005, the regional attorney for the Equal Employment Opportunity Commission's (EEOC) district office that covers the Northern Marianas expressed concern about the "extraordinarily high number of charges alleging unlawful terminations based on national origin and various forms of sex discrimination, including harassment against women."[261] He also characterized the discrimination as "blatant and clearly intentional."[262] In 2009, the EEOC reached a $1.7 million settlement with a group of garment manufacturers resolving a series of lawsuits that involved claims of retaliation and pregnancy, age, and national origin discrimination.[263] One employer acknowledged that it segregated Filipino workers and Chinese workers during the work day and at lunch because, according to the employer, this "promoted a harmonious work environment."[264] Human and sex traffick-

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258. *Feds Note Disturbing Labor Cases in CNMI*, PACIFIC ISLAND NEWS SERVICE, Nov. 10, 2005.

259. *See Federal Law Enforcement and the Use of Federal Funds in the Commonwealth of the Northern Mariana Islands Before the H. Comm. on Nat. Res.*, 106th Cong. 4 (1999) (statement of John Berry, Assistant Secretary for Policy, Management, & Budget, U.S. Dep't of the Interior), *available at* http://naturalresources.house.gov/UploadedFiles/John_berry_testimony_916.99.pdf (describing three instances of food poisoning in a garment factory that had sickened hundreds of workers); Schloss, *supra* note 33 (reporting that "[f]lies buzz[ed] around diners in the canteen where dishes were not washed properly" and that the workers refused to eat the food).

260. *See* Ron Harris, *OSHA: Massive Food Poisoning Outbreak at Saipan Garment Factory*, ASSOCIATED PRESS, Apr. 7, 1999, *available at* http://www.globalexchange.org/campaigns/sweatshops/saipan/harris040899.html. A regional administrator of the U.S. Occupational Safety and Health Administration (OSHA), Frank Strasheim, described the scene as "a battle zone. People were lying on the ground with IVs sticking out of them," and noted that in his 28 years at OSHA he had "never seen a food poisoning case of this magnitude." *Id.*

261. *Feds note disturbing labor cases in CNMI*, PACIFIC ISLAND NEWS SERVICE, Nov. 10, 2005.

262. *Id.*

263. Press Release, U.S. Equal Emp't Opportunity Comm., Largest Garment Manufacturers in Saipan to Pay $1.7 in Landmark Discrimination Settlement with EEOC (July 28, 2009), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-28-09.cfm.

264. *Id.*; *see also* Press Release, U.S. Equal Emp't Opportunity Comm., EEOC Obtains Million Dollar Judgment Against Saipan Garment Contractor Sako Corp. (Apr. 25, 2005), *available at* http://www.eeoc.gov/press/4-25-05.html (reporting that the EEOC had won a $1 million judgment against Sako Corp., a garment factory

ing were (and continue to be) prevalent in the CNMI. According to U.S. State Department estimates in 2007, human trafficking was reported as occurring at least 8.8 to 10.6 times more frequently in the Northern Marianas than in the United States as a whole.[265]

Finally, wages in the CNMI were markedly low and jobs sharply demarcated as "guest worker" and citizen. The minimum wage in the Northern Marianas did not exceed the $2.00 mark until 1984, and did not rise above $3.00 until 1995, when it was raised to $3.05 per hour.[266] It stayed at that rate until June 2007, when federal legislation increased it.[267] When compared to the federal minimum wage and median wages paid in neighboring Guam, wages in the Northern Marianas have been woefully slow to increase both for skilled and unskilled workers alike.[268] With most private sector salaries depressed, many U.S. citizens of the CNMI seek work in the public sector, where wages tend to be higher than in the private sector.[269] In the private sector, nearly all jobs involving manual labor, domestic services, restaurant work, or garment manufacturing, continue

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based in Saipan, for discrimination when it failed to renew the contracts of 100 long-time Filipino, Thai, and Bangladeshi guest workers, allegedly for business necessity, and replaced them with less-experienced Chinese nationals; the employer had only five years earlier settled two lawsuits with the EEOC, one alleging pregnancy discrimination, and another, retaliation).

265. *The Northern Mariana Islands Covenant Implementation Act Before the S. Comm. on Energy and Natural Res.*, 110th Cong. (2007) (statement of David B. Cohen, Deputy Assistant Sec'y for the Office of Insular Affairs, U.S. Dep't of the Interior), *available at* http://www.doi.gov/oia/press/2007/07192007.html (according to Cohen, this is an "apples-to-apples comparison, the CNMI's report card would be worse," because U.S. State Department numbers are based on estimates, and the CNMI numbers are based on identified cases; for the period April 30, 2006, to April 30, 2007, 36 *identified* victims of human trafficking, out of a CNMI population of approximately 70,000. In contrast, the State Department *estimates* that 14,500 to 17,500 people are trafficked into the United States, out of a population of roughly 300 million).

266. 4 N. MAR. I. CODE § 9221 (2004) and accompanying Commission Comment.

267. PUB. L. NO. 111-24, § 2(a), 124 Stat. 2618 (making the Fair Labor Standards Act, which includes minimum wage requirements, applicable in the CNMI).

268. *See* Memorandum from Charles Cepeda, Alex Sablan & Josephine Mesta, Co-chairs of the Jobs Study Comm. in the CNMI Office of the Public Auditor, to Michael Sablan 14–15 (May 30, 2007), *available at* http://www.wia.gov.mp/downloads/OPA_Job_Study_Report.pdf [hereinafter Memorandum from the Jobs Study Comm.] (advocating using Guam's median wage as means for increasing the CNMI's median and minimum wage rates).

269. *Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 10 (statement of David B. Cohen, Deputy Assistant Sec'y for the Office of Insular Affairs, U.S. Dep't of the Interior).

to be held by foreign workers.[270] In addition, many skilled jobs have also become "guest worker" jobs; this includes accountant positions, general managers, masons, carpenters, and automotive mechanics.[271]

The very safeguards designed to protect guest workers, namely, the right to transfer, the accessible complaint system, and the due process right to remain in the CNMI pending a hearing, combined with inadequate resources allocated to the CNMI DOL to administer the program, led to a second tier of abuses and scams related to the guest worker program. Namely, there emerged a spate of sham employment arrangements in which unemployed guest workers, desperate to remain in the CNMI, paid local businesses and individuals to pose as their employer to maintain their immigration status.[272] Then the guest worker could remain in the CNMI and continue searching for a real employer (one intending to provide the guest worker with work) and seek a consensual transfer to the new employer.[273] There were also instances in which unemployed guest workers, coming to the end of the forty-five day "transfer" period, would file frivolous complaints knowing that this would very likely buy them a significant amount of time—often years—to remain in the CNMI given the tremendous backlog of labor cases.[274] While these arrangements allowed guest workers to remain in the CNMI, it also left them even

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270. *See* Memorandum from the Jobs Study Comm., *supra* note 268, at 3.

271. *Id.* (listing these occupations among several that are primarily filled by nonresident workers).

272. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 49–50 (testimony of Jim Benedetto, Federal Ombudsman) (describing the prevalence of these illegal sponsorships); *Id.* at 62 (testimony of Lauri Ogumoro, a social worker with Karidat, a Catholic Social Services Agency in the CNMI) (describing one case in which a woman paid $2,000 to a "sponsor" who then ran away with her money without sponsoring her).

273. *Id.* at 50 (testimony of Jim Benedetto, Federal Ombudsman). These same kinds of sponsorships have also been observed by guest worker advocates under the H-2 programs. *See Workers Pay up to $5,000 for Post-Katrina Hotel Jobs*, S. POVERTY LAW CTR. (Apr. 2007), *available at* http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/recruitment-exploitation-be-1 (describing a scheme where employers would lure guest workers to the United States with offers of eight to ten months of work, but would actually provide only two to three months of work, and then advise the workers to seek work elsewhere).

274. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 44–45 (statement of Timothy P. Villagomez, Lieutenant Governor of the CNMI) (describing the numerous "copycat" cases filed by guest workers in 2003 and 2004, so named because many of the complaints filed were identical).

more vulnerable to exploitation, with some guest workers likely becoming prostitutes to support themselves while unemployed.[275]

V. THE EVIDENCE IS UNEQUIVOCAL: A MCCAIN-KENNEDY–STYLE GUEST WORKER PROGRAM WILL NOT SERVE THE STATED AIMS OF IMMIGRATION REFORM

Cornell University labor economist Vernon Briggs began his testimony before a 2004 Senate committee, which was considering the introduction of a large-scale guest worker program as a means to help combat unauthorized immigration, by noting that this idea had been periodically raised over the last thirty years.[276] He then summarized his view of this approach with the words: "It is a bad idea that just will not go away."[277] The CNMI example lends further support to this position, and provides evidence establishing that even with the safeguards of portability and an accessible administrative complaint system, such a program would likely spawn myriad abuses, drive down wages, and damage democracy. The evidence from the CNMI suggests that this would be the case even with the added ingredient of a path for adjustment to permanent immigration status of the kind envisioned in the McCain-Kennedy bill. This evidence should not be ignored.

A. Portability Will Not Protect Guest Workers from Abuse So Long as Their Immigration Status Is Tied to Continued Employment

The NWA provided CNMI guest workers the right to freely transfer to other employers at the end of their contract, by consensual transfer mid-contract, or at the conclusion of an administrative hearing, so long as

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275. *See* TRAFFICKING IN PERSONS REPORT 2010, OFFICE TO MONITOR & COMBAT TRAFFICKING, UNITED STATES DEP'T OF STATE 344 (June 2010), *available at* http://www.state.gov/documents/organization/142979.pdf (describing reports from the Federal Labor Ombudsman in the CNMI that documented claims of foreign women forced into prostitution); *Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 10 (statement of David B. Cohen, Deputy Assistant Sec'y for the Office of Insular Affairs, U.S. Dep't of the Interior) (citing reports that laid-off garment workers are turning to prostitution).

276. *Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future*, *supra* note 72, at 44; *see also Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor*, *supra* note 66, at 52 (statement of Jonathan P. Hiatt, General Counsel, AFL-CIO) (stating that the "United States has been experimenting with temporary worker programs for almost a century, without a single success").

277. *Guestworker Programs for Low-Skilled Workers: Lessons from the Past and Warnings for the Future*, *supra* note 72, at 44.

they were not unemployed for more than forty-five days (or, in the case of an administrative transfer, however many days the hearing officer allowed the worker to find another employer).[278] Arguably, the relative independence provided CNMI guest workers should have protected them from abuse. In fact, most workers remained reliant on their original employers because all transfer options ultimately rested upon the willingness of another employer to officially hire the employee within a set period of time.[279]

A H-2C–type visa would provide guest workers with portability on similar terms. Namely, an H-2C worker, who must initially be petitioned for by a specific employer, would be free to change employers, but only if the worker could secure employment with a certified employer within sixty days of becoming unemployed.[280] Judging from the CNMI example, portability to a limited number of employers under strict time constraints would likely not decrease guest workers' reliance on their sponsoring employers by a significant degree because meeting these conditions would be far from certain, particularly if the guest workers worked in remote locations and had limited access to transportation. The potential for earned adjustment and its requirement of employer sponsorship or continuous employment for four years[281] would arguably make many guest workers even more motivated to either remain with their original employer, no matter the circumstances, or find a new employer, no matter the costs. As such, it is easy to imagine how the combination of portability, with limitations, and earned adjustment, with conditions, could lead to a whole new category of abuses, likely of the type experienced in the CNMI.

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278. *See* 3 N. MAR. I. CODE § 4602(a)–(b), (g) (2004); 26 N. MAR. I. REG. 22742 (June 24, 2004).

279. *Id.* In the case of a consensual transfer, the worker must receive consent from both the current and prospective employer and the CNMI DOL. *Id.* § 4602(a). To transfer at the end of a contract, the guest worker must secure new employment within 45 days or depart the Commonwealth. *Id.* § 4602(b). In the absence of the employer's abandonment, insolvency, or destruction of its business establishment, to be eligible for an administrative transfer, the employee must prevail in an administrative proceeding, and then must secure new employment, generally within forty five days, although it was left to the discretion of the hearing officer. 3 N. MAR. I. CODE § 4444(e)(5) (2004); 26 N. MAR. I. REG. 22742.

280. *See supra* notes 172–74 and accompanying text.

281. *See supra* notes 180–81 and accompanying text.

B. Improved Administrative Oversight and Accessible Avenues for Pursuing Worker Complaints Are Unlikely to End Abuse of Guest Workers

While the CNMI DOL did not engage in significant proactive enforcement efforts, the administrative complaint system available to guest workers under the NWA was accessible, easy to navigate, comprehensive, and generally accompanied by a right to remain and work in the CNMI for the duration of the case.[282] The downside to the accessibility of the complaint process and the nearly automatic protection from deportation was that it led to a tremendous number of cases being filed, including a large number of frivolous cases motivated by a wish to remain in the CNMI.[283] This, in turn, led to a monumental backlog of cases and a large pool of under-employed or unemployed guest workers available to be hired on a temporary basis (or "off the books").[284] Considerable resources were diverted from policing and preventing serious labor abuses to closing "old" cases and aiding guest workers under temporary work authorization.[285]

Notably, the H-2C program would include a comprehensive administrative complaint system that resembles the CNMI system.[286] While it is unclear how effective or accessible such a program would be, if implemented, it is notable that it was to be carried out by the U.S. DOL's WHD. Currently, H-2A and H-2B workers possess a theoretical right to file a work-related complaint with their local wage and hour division of the U.S. DOL.[287] However, as discussed previously, this process is largely ineffective, in part, because U.S. DOL offices are often far from guest workers' place of employment,[288] and because there are far too few investigators to handle what are often time-intensive cases.[289] Additionally, the DOL's WHD is already failing in its duty to protect low-wage workers already in the country from wage theft and thus is certainly not equipped to protect an influx of tens of thousands of vulnerable guest workers.[290] To judge from the experience of the CNMI, a very high investigator-to-worker ratio is needed to effectively and justly administer a large-scale guest worker program. Just to reach the DOL investigator-to-worker ra-

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282. *See supra* notes 226–34 and accompanying text.
283. *See supra* notes 242–45, 274 and accompanying text.
284. *See supra* notes 248–50 and accompanying text.
285. *See supra* notes 242–45 and accompanying text.
286. *See supra* notes 175–79 and accompanying text.
287. *See supra* Part III.C.2.
288. *See supra* note 125 and accompanying text.
289. *See supra* notes 133–38 and accompanying text.
290. *See supra* notes 128–32, 150 and accompanying text.

tio that existed in the CNMI DOL of 1 to 3900,[291] the U.S. DOL would have to hire approximately 18,588 additional investigators to its current workforce of 949 investigators.[292] Given this ratio proved to be woefully insufficient in the CNMI, the number would have to be significantly greater to combat and prevent widespread abuses. In addition, to meet the CNMI's ratio of approximately three hearing officers for 25,000 guest workers,[293] the U.S. DOL would need to hire at least forty-eight hearing officers to cover a guest worker workforce of 400,000.[294]

With the current trend of declining funding levels for agencies charged with enforcing federal minimum wage and hour and workplace safety laws over the last three decades, particularly funding to the U.S. DOL WHD,[295] it seems unlikely that the government would allocate sufficient resources to effectively and fairly enforce a new guest worker program. This is particularly likely given that officials seem to underestimate the extent to which guest worker programs need to be closely policed in order to prevent exploitation and abuses. For instance, in testimony before Congress in 2004, the Under Secretary for Border and Transportation Security in the Department of Homeland Security (DHS) argued that the establishment of a temporary worker program would free up DHS personnel from attending to "problems with unlawful workers."[296]

Unlike the CNMI guest worker program, the H-2C program contains no mechanism which would allow complaining guest workers to remain in the United States to pursue a labor complaint during its pendency if their visa had expired.[297] It appears that H-2C workers, like H-2A and

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291. *See supra* note 236 and accompanying text.

292. *See supra* note 135 and accompanying text. Even assuming that the comparison with the CNMI is imperfect because many of the CNMI's investigators lacked the education and training that U.S. investigators would likely receive, there is no doubt that the U.S. DOL would still have to hire thousands of investigators to provide adequate oversight over a large-scale guest worker program.

293. *See supra* note 237 and accompanying text.

294. *See supra* note 167 and accompanying text (the H-2C program would admit 400,000 workers in its first year).

295. *Rebuilding a Good Jobs Economy: A Blueprint for Recovery and Reform*, NAT'L EMP'T LAW PROJECT 10 (Nov. 2008), *available at* http://nelp.3cdn.net/107e65168f65eacd6e_l1m6ibpdr.pdf) (reporting that "[b]etween 1980 and 2007, the number of wage and hour inspectors declined by 31 percent (from 1,059 to 732) and the number of enforcement actions fell by 61 percent (from 76,452 to 29,584). By contrast, the civilian labor force grew by 52 percent during this same time period.").

296. *Hearing Evaluating a Temporary Guest Worker Program*, *supra* note 5, at 18 (statement of Asa Hutchinson, Under Secretary for Border & Transportation Security, Dep't of Homeland Security).

297. *See supra* note 174 and accompanying text (a H-2C's legal immigration status would terminate after sixty days of unemployment).

H-2B workers, would have to roll the dice with the USCIS on a case-by-case basis and hope that it would grant deferred action.

If a McCain-Kennedy–style administrative complaint system ends up being inaccessible and under-resourced, then it is likely that a new class of guest workers would be as vulnerable to abuses as today's H-2 workers. In addition, if it does not include a transparent and dependable process for granting deferred action, only the most desperate guest workers are likely to complain about unlawful employer practices, particularly when the possibility of earned adjustment hangs in the balance. On the other hand, if the system is well-resourced, offices are located close to where guest workers live and work, and guest workers are allowed to remain in the United States while pursuing complaints, then, based on the CNMI example, the U.S. DOL should be prepared to receive an avalanche of complaints—both legitimate and illegitimate.[298] This is because, as is well documented in the case of the H-2 programs and the CNMI program, many employers will cheat and abuse their guest workers. If there is an effective and fair administrative complaint system, guest workers will likely use it in great numbers, often with legitimate complaints. In addition, some guest workers, desperate to make money to provide for their families, to repay employment-related debts, and to gain citizenship, will game the system with frivolous complaints to try to remain in the country if they find themselves out of work with the sixty-day deadline approaching.[299]

C. A Path to Citizenship That Must Be "Earned" by Means of Continuous Employment Would Not End Guest Worker Abuses

Unlike a McCain-Kennedy–style program, the CNMI guest worker program offered no possibility for earned adjustment.[300] This possibility represents a significant change from past and present federal guest worker programs and arguably, a material difference from the CNMI example. Indeed, such a possibility might resolve any potential for the program to look, in the words of philosopher Michael Walzer, like a

298. *See supra* notes 242–45 (describing the large number of complaints against employers in the CNMI).

299. *See, e.g.*, *supra* note 274 and accompanying text (describing a practice of unemployed nonresident workers in the CNMI who would as they approach the end of the forty-five day transfer period, file a frivolous complaint as an attempt to try to stay in the CNMI pending a hearing for the complaint).

300. *See supra* note 205 and accompanying text.

"tyranny" insofar as the state would not be creating a caste that permanently bars a group that looks exactly like citizens from citizenship.[301]

However, as proposed, earned adjustment seems destined to exacerbate the power imbalance between guest workers and employers. What is more, such a proposal would more sharply define guest workers as a caste separate and apart from the rest. This will be the case so long as earned adjustment is dependent at all on continued employment with some employer, because guest workers who seek to become citizens will be all the more likely to silently endure abuse and exploitation to achieve the dream of citizenship. Guest worker proposals of earned adjustment have already been described as "a formal category of residents who must earn the right to . . . apply for a green card through years of hard manual labor," which according to some is "unprecedented in U.S. history and inimical to this country's professed tradition of equality and citizenship without tiers."[302] As proposed, guest workers are expected and required to labor quietly and without complaint if they want to be certain to earn the right to move from the caste of laborers to that of a long-term permanent resident and eventual citizen. Any misstep or poor turn of luck can lead to the abrupt end to the dream of citizenship.

D. Limitations of the Evidence

There are certainly some limits to the evidence presented by the CNMI. The most significant distinctions are the high proportion of guest workers to permanent residents in the CNMI, where at times nearly 50 percent of the population is guest workers, and, similarly, the CNMI's overwhelming reliance on a foreign labor force.[303] In contrast, the 400,000 or so guest workers that would likely be admitted on an annual basis under a federal program would not even approach 1 percent of the United States' 311,388,943 residents.[304] However, it is almost certain that guest workers would constitute significant portions of certain labor sectors, causing certain sectors of the U.S. economy to become significantly reliant upon guest workers. For instance, it is estimated that in 2008, un-

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301. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983). ([Guest workers] are locked into an inferior position . . . [t]hey are outcasts in a society that has no caste norms, metics in a society where metics have no comprehensible, protected, and dignified places. That is why the government of guest workers looks very much like a tyranny . . . .").

302. Gordon, *supra* note 30, at 561.

303. *See Conditions in the Commonwealth of the Northern Mariana Islands*, *supra* note 43, at 11 (statement of David B. Cohen, Deputy Assistant Sec'y for the Office of Insular Affairs, U.S. Dep't of the Interior).

304. *U.S. and World Population Clocks*, U.S. CENSUS BUREAU, http://www.census.gov/main/www/popclock.html (last visited May 20, 2010).

authorized workers comprised: 25 percent of the farming sector; 19 percent of the building, grounds-keeping and maintenance sectors; 17 percent of the construction sector; 12 percent of the food preparation and serving sector; and 10 percent of the production sector.[305] If guest workers were to replace the unauthorized workers, and a program would certainly steer them in this direction, they would likely populate these industries to a similar extent. Accordingly, the impact guest workers could have on wages and working conditions in many of the industries would not be that different from the CNMI experience.

Adding credence to the claim that the CNMI example is relevant is the fact that the problems that characterize the CNMI program, such as recruitment scams, unpaid wages, substandard working conditions, discrimination and trafficking are the very ones that plague H-2 workers under the current federal programs.[306] This strongly suggests that the lessons from the CNMI should not be discounted notwithstanding the many unique aspects of the CNMI program and society.

VI. GUEST WORKER PROGRAMS CANNOT BE REFORMED, NOR CAN THEY HELP TO REFORM THE BROKEN IMMIGRATION SYSTEM

With the evidence so overwhelming that unskilled guest worker programs are more of a state-run continuation of the unauthorized worker sector than an antidote, the question of why guest worker programs are held up by business interests and politicians as a critical component of immigration reform is laid bare. The answer is not veiled or unspoken. Indeed, it is argued by some immigration scholars and policymakers that to be a successful program, the guest workers must rotate in and out of the country according to the host country's employment needs and must be prevented from establishing roots in the host country.[307] It is also understood that one reason these programs are economically desirable is that guest workers tend to arrive in the host country in debt, and as such,

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305. Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CTR., 15 (Apr. 14, 2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

306. *See* discussion *supra* Part III.C.

307. *See, e.g.*, MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 86, 128–29; Martin Ruhs, *The Potential of Temporary Migration Programmes in Future International Migration Policy*, POLICY ANALYSIS & RESEARCH PROGRAMME OF THE GLOBAL COMM'N OF INT'L MIGRATION, 19–20 (Sept. 2005), *available at* http://economics.ouls.ox.ac.uk/12666/1/TP3.pdf (suggesting measures to be taken to encourage and facilitate the return of guest workers to their home countries at the expiration of their visas).

"have an incentive to be good employees."[308] Indeed, one popular contractor of H-2A and H2-B workers has a website, unsubtly named "mexicanworker.com," and which includes employer testimonials.[309] In one testimonial, an employer praises its "loyal and hardworking Mexican workers," and another exclaims that "the workers stick with me."[310] It has also been documented that some contractors, in a bid to get the most compliant guest workers possible and avoid "visa jumping," refuse to hire Mexican guest workers because they are more likely to have experience in the United States and thus access to local social networks to help them find an unauthorized job if conditions with the contracting employer are poor.[311] They instead hire workers with little experience with the United States and who are from more remote countries, like Guatemala.[312] Nor is it a secret that unskilled guest workers are principally admitted to fill undesirable and dangerous jobs.[313] Thus, rotation and limits on guest worker mobility and rights are necessary to ensure that they continue performing the bottom-rung jobs they were recruited to perform.[314] In effect, these constraints would simply replace the current vulnerable, uncomplaining underclass of unauthorized immigrants with a vulnerable, uncomplaining underclass of authorized guest workers.

The McCain-Kennedy–style guest worker programs lend currency to this view. That is, the very fact of "earned adjustment" leaves no doubt that the value of a guest worker program is in its ability to coerce workers into performing specific, socially undesirable jobs. If it were otherwise, these bills would simply grant 400,000 to 500,000 low-skilled workers long-term permanent resident status. Instead, for the four-year adjustment period, the country would trade on guest workers' economic vulnerability and, in addition, on the fierce desire of many to become U.S.

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308. MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 113.

309. MEXICAN-WORKERS.COM, http://www.mexicanworkers.com (June 3, 2011).

310. *Id.* (follow "Why Foreign Workers").

311. Brinda Sarathy & Vanessa Casanova, *Guest Workers or Unauthorized Immigrants? The Case of Forest Workers in the United States*, 41 POL'Y SCI. 95, 105, 110–11 (2008).

312. *Id.* at 105, 110–11.

313. *See* MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 83.

314. *See* WALZER, *supra* note 301, at 56–57 (describing how employers' choice to turn to international labor to fill jobs too "exhausting, dangerous, and degrading" for domestic workers at the wage rates being offered is dependent on ensuring that the workers are admitted only as "guests," without political rights, and social and economic mobility); 2010 CRS GUEST WORKER REPORT, *supra* note 12, at 15 (noting that some have voiced objections to a quick legalization process on the grounds that it create labor shortages in undesirable jobs as former guest workers seek better work opportunities).

citizens, to ensure that they work in jobs certified as guest worker jobs.[315] Guest workers must pay their dues by performing the dirty, dangerous, and difficult jobs that those with a choice will not do (at least not at the wage rates offered).

Given that guest worker programs succeed only so long as their participants are economically and culturally vulnerable and politically powerless, guest worker programs threaten to damage core American democratic principles like equality and self-governance.[316] Michael Walzer has argued in connection with guest worker programs that the creation of such a laboring class, with members who "resemble citizens in [almost] every respect," yet are barred from participation in the political life of the host community and from citizenship, introduces tyranny into the community.[317] Thus, Walzer concludes, guest worker programs are simply incompatible with democracy.[318]

Guest worker programs also call directly into question our commitment to liberal democracy by departing from the traditional integrationist aim of U.S. immigration policy.[319] Cristina Rodriguez points to guest

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315. This period of "earned adjustment" as a guest worker would represent another step in what is already a long, often unwelcoming road to citizenship. Specifically, even if a guest worker were to matriculate to long-term permanent resident status, he or she would still have to wait approximately five years to apply for naturalization. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 3 (2007). During this period, he or she would be vulnerable to deportation for a violation of a host of requirements, including continuous residence, English-language skills, and strict compliance with U.S. laws. *Id.* Indeed, laws governing noncitizens may be changed without notice, meaning that a long-term permanent resident may be deported for conduct that was not deportable when the individual applied for permanent status. *Id.* at 6.

316. *See* WALZER, *supra* note 301, at 58 (emphasizing that the success of a guest worker program turns on the denial of principles that the nation holds dear—"political rights and civil liberties," and the use of state power in the form of the deportation regime to ensure that guest workers adhere to the system).

317. WALZER, *supra* note 301, at 58–61. It is possible that Walzer would find a guest worker program that offered the possibility of earned adjustment to represent less of a threat to democratic principles because the exclusion of guest workers from civil society would theoretically not be permanent. However, for the reasons discussed previously, there exists the real possibility that the exclusion and mistreatment of many guest workers would likely face during the "adjustment" period—when they are without most civil and social rights—would ultimately lead many of those guest workers who attain long-term permanent resident (LPR) status to choose to never become full citizens, and thus to remain a caste separate and nonintegrated.

318. *Id.* at 61.

319. *See* Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 221 (arguing that guest worker programs in the long-term will "compromise our abil-

workers' lack of economic and social mobility and the United States' lack of reciprocal investment in guest workers as proof that such programs do not fulfill the needs of immigrant integration.[320] While she admits that a guest worker program might be better than no response to the "persistence of undocumented immigration,"[321] she suggests that its movement away from the traditional goal of integration may result in significant social cleavages.[322] Ruben Garcia indicates that guest worker programs contribute to the "democracy deficit," which describe the growing power of unelected institutions in the global community, such as the World Bank and International Monetary Fund, and the large number of people residing in the United States who do not have the right to vote.[323] He argues that guest workers are treated much like commodities in the global market, in part because they have little political or legislative power in their host country or in the international institutions that wield such control over the market.[324]

Hiroshi Motomura has pointed to McCain-Kennedy–style guest worker proposals that double as a path to earned citizenship as running counter to this nation's traditional immigration policy aims of encouraging integration and a sense of belonging through family, educational and economic opportunities, and the equal treatment of citizens and immigrants.[325] Motomura suggests that policies that treat new immigrants ten-

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ity to integrate immigrants effectively into the American body politic"); *see also* S. REP. NO. 106-204, at 32 (1999) (statement by Sen. Lisa Murkowski) (criticizing the CNMI's guest worker program as failing to comport with the "American tradition of employing U.S. workers in private sector jobs that promote the growth of a middle class, rather than importing and exploiting a rolling stream of alien workers, without permanent immigrant status or family ties, in low-paid permanent positions, most to be kept almost all the time on their employers' premises").

320. Rodriguez, *supra* note 319, at 222–23. Rodriguez suggests that the desired endpoint of integration is assimilation, or at a point where immigrants become full participants in a country's economic, social, and cultural life by "becoming not only contributors but equals." *Id.* at 232–34.

321. *Id.* at 288.

322. *Id.* at 230 (citing Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 869–70 (2007)).

323. Ruben J. Garcia, *Labor as Property: Guest Workers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 27, 41–42 (2006).

324. *Id.* at 28, 41–42, 44–45. Garcia notes that guest workers may have some political power in their home country, but that depends on the laws of each country. *Id.* at 43–44.

325. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING 140, 162–63 (2006) (observing that the trend in the United States seems to be moving away from treating most immigrants as Americans in waiting and moving in the direction of immigration as affiliation, which is acquired through the development of family and community ties or earned through work); *see also Remarks by the President on Comprehensive*

tatively and as something other than potential citizens upon arrival (or, as he refers to them, "Americans in waiting") impede both goals of integration and equality.[326] According to Motomura, integration, which he defines not as assimilation into the dominant culture, but as a "reciprocal process in which immigrants change America as much as America changes them," is the best avenue for equality. It has been argued that true integration means that citizens regard and treat immigrants as fellow citizens or as citizens-in-the-making—and immigrants, in turn, feel truly welcomed.[327] Immigration policies that fail to treat immigrants equally upon arrival impede and delay integration and ultimately diminish the desire of immigrants who eventually acquire (or earn) permanent resident status to become full citizens because they were marginalized as newcomers, rather than welcomed and integrated.[328] Motomura suggests that policies that subordinate new immigrants threaten to harm the nation and our liberal democracy by leading many to choose "more parochial and less cosmopolitan or democratic" affiliations, such as those defined by race or ethnicity, rather than an affiliation with the nation through citizenship.[329]

Some immigration rights advocates and immigration law scholars have contended that guest worker programs represent a reasonable compromise in the polarized arena of immigration reform, and one that is surely superior to the status quo of mass, unauthorized immigration.[330] However, the evidence is far from clear that guest workers are better off

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Immigration Reform, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform (reaffirming our nation's self-image as "a nation of immigrants—a nation that welcomes those willing to embrace America's precepts," and one that recognizes that the immigrants "helped to make America what it is").

326. *See* MOTOMURA, *supra* note 325, at 165–67.

327. *See id.* at 163–64.

328. *Id.* at 164–67. Apparently the allure of citizenship has already waned, with an average of 40 percent of lawful immigrants eligible for naturalization opting not to apply. *Id.* at 143–44.

329. *Id.*

330. *See, e.g.*, Janet Murguia, *A Change of Heart on Guest Workers*, WASH. POST, Feb. 11, 2007, at B7 (article by then-president of the National Council of La Raza explaining the organization's cautious shift to supporting guest worker programs as a means of dealing with the future flow of immigrants in an orderly, humane way); Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 SOC. JUST. 92, 92–95 (2004) (arguing for workers' and immigrants' advocates to begin considering guest worker programs as a possible component of contemporary immigration policy in light of new migration patterns); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Non-*

than unauthorized workers. And further, most in this camp assume that a reformed guest worker program is within easy reach.[331] For instance, Howard Chang champions guest worker programs as a "second-best policy" to open borders from a cosmopolitan perspective.[332] He argues that the alternative of excluding unskilled and often impoverished aliens from the nation, in the name of protecting them from exploitation, actually leaves the aliens worse off than a guest worker program.[333] Likewise, Andrew Elmore, Assistant Attorney General in the Civil Rights Bureau of the New York State Office of the Attorney General, has written in support of guest worker programs as a key ingredient of immigration reform on the ground that ending them while continuing the status quo of exclusion would likely increase unauthorized migration at the expense of liberty, equality, and sovereignty.[334] He also doubts that expanding permanent resident admissions would be a realistic solution, and would likely come at the expense of family reunification.[335] These arguments cannot withstand the evidence.

First, it is not at all clear that existing unskilled guest workers labor under conditions that are any better, or less oppressive, than unauthorized immigrants have in comparable jobs. In a recent study of unauthorized and H-2B forest industry workers, the researchers concluded that "there was no significant difference in the working conditions" of the two groups, and that both "face[d] labor exploitation," although the causes of each group's vulnerability were slightly different.[336] Specifically, they found the H-2B guest workers in the forestry industry were vulnerable to labor exploitation because of: (1) isolation at their worksites; (2) their reliance on contractors for their jobs, housing, and transportation; (3) their fear of losing their jobs; and (4) ignorance of their rights. On the other hand, the researchers attributed the vulnerability of the unauthorized workers to their fear of being deported and because they were indebted to relatives who secured their jobs.[337] Notably, they found that

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professional Foreign Nationals, 21 GEO. IMMIGR. L.J. 521, 523–27 (2007) (arguing for a "non-subordination" approach to labor-based admissions).

331. *See, e.g.*, Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C.J. INT'L L. & COM. REG. 465, 465 (2002) (suggesting that the renewed efforts by the Bush administration, in addition to support by labor unions and business interests, "may make liberalizing reforms politically feasible in the near future").

332. Chang, *supra* note 23, at 6.

333. *See id.* at 9.

334. *See* Elmore, *supra* note 330, at 557–61.

335. *Id.* at 559.

336. *See* Brinda Sarathy & Vanessa Casanova, *supra* note 311, at 107, 112.

337. *See id.*

because unauthorized workers had more developed social networks, they were considerably less isolated than the guest workers.[338] Some have even suggested that unauthorized workers, who have more job mobility, are less vulnerable to abuse than guest workers.[339]

Second, many of those who have argued in favor of a guest worker program as a component of comprehensive reform assume that such a program can fundamentally transform the exploitative characteristics that have historically defined guest worker programs.[340] For the reasons discussed in Part V, such reforms are not realistic. This is because the exploitation that has always accompanied guest worker programs is not simply a matter of degree,[341] but a characteristic inherent in state-controlled guest worker programs.[342] That is, the very attributes that make guest worker programs economically efficient, and therefore desired by the state, are what leave guest workers so vulnerable to abuse. Such attributes predominately consist of the ability of the state to limit guest worker mobility to undesirable sectors and its ability to keep a constant flow of uncomplaining replacements coming. And these same attributes are exactly what many business interests seek, causing them to condition their support of comprehensive immigration-reform legislation upon the inclusion of a guest worker program.[343] Without a supply of guest workers to fill the positions abandoned by the unauthorized workers, employers

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338. *Id.*

339. Garcia, *supra* note 316, at 46.

340. *See* Chang, *supra* note 23, at 8. For instance, Howard Chang's proposed guest worker program would resolve the exploitation problem by allowing guest workers "full mobility" between economic sectors and full workplace rights. *Id.* Similarly, the type of program proponed by Andrew Elmore would be reformed along the lines of what he refers to as a "non-subordination" approach. Elmore, *supra* note 334, at 522. Its key features would be a thorough de-coupling of guest worker immigration status from a particular employer, full workplace rights, and effective, accessible enforcement mechanisms, and paths for unauthorized migrants and guest workers to adjust to permanent immigration status so they can follow more circular paths of migration. *Id.* at 561–67.

341. *See* Chang, *supra* note 23, at 8 (arguing that increasing the mobility of guest worker's will reduce workers' exploitation and objections to guest worker programs "[are] really a matter of degree, and a program that provides complete mobility for the guest worker seems much less vulnerable to [such] objections").

342. *See supra* Part V. This article's critique is limited to state-controlled guest worker programs, leaving open the possibility that programs run by workers themselves, or other enlightened non-governmental bodies, such as the program envisioned by Jennifer Gordon in her article on transnational labor citizenship, might defy this characterization. *See* Gordon, *supra* note 30, at 565–70; *supra* note 30 (discussing Gordon's proposed program).

343. *See supra* note 19 and accompanying text.

could suddenly find themselves without workers willing to perform their undesirable jobs at a bargain rate. Finally, guest worker programs have not been shown to reduce unauthorized immigration. To the contrary, they have historically led to more, not less, unauthorized immigration.[344]

Thus, the introduction of a large-scale guest worker program would simply supplement the current underground system of exploitation of unauthorized immigrants with a state-run system of exploitation of authorized immigrants. As such, it would represent a sharp departure from longstanding efforts to combat human exploitation in the workplace and beyond.[345] Indeed, the historical trend in the area of labor and employment law has been to provide workers with greater legal protections and bargaining rights to lessen exploitation.[346] For instance, the Equal Pay Act was enacted to protect women from exploitation they might suffer due to their particularly weak bargaining positions;[347] and the Migrant Seasonal Agricultural Worker Protection Act was passed "to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers."[348] Arguably, the federal government took its most aggressive legisla-

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344. *See* MARTIN, MANAGING LABOR MIGRATION, *supra* note 13, at 95.

345. One exception, however, is the state's involvement in fostering conditions that lead to the exploitation of workers in the H-2A and H-2B programs. *See supra* Part III.

346. *See* Garcia, *supra* note 316, at 35 ("History shows workers progressively gaining more bargaining power over the terms and conditions of their employment over the last two centuries."). This is not to suggest that the laws have been effective in rooting out exploitation, but this has been their stated aim. Indeed, lax enforcement and employer-oriented court decisions have long countered these aims, particularly where immigrant workers have been involved. *See, e.g.*, Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3040 (2006) (asserting that "[t]he failure to protect workers who are victims of abusive labor practices has been a feature of the U.S. legal landscape throughout history, and it has worsened in recent years"); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149–52 (2002) (holding that an unauthorized immigrant worker who was terminated for union activities was not entitled to back pay since he was not legally authorized to work); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983) (noting that then "current odds" were that an average of one in twenty workers was fired for attempting to organize a union in violation of "rights supposedly guaranteed . . . a half-century ago" by the National Labor Relations Act).

347. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 206 (1974) ("Congress enacted the Equal Pay Act recognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor.") (internal quotations omitted).

348. 29 C.F.R. § 500.20(h)(5)(ii) (2011) (quoting H. Rep. No. 97-885, 97th Cong., 1982).

tive step yet when, in 2000, it enacted the Trafficking Victims Protection Act (TVPA) to combat the modern trade of human beings.[349] In the view of Dina Francesca Haynes, the TVPA represented nothing less than an "attempt[ ] to counter . . . the practice of using human beings as commodities."[350]

The introduction of a large-scale guest worker program would counter this trend because guest worker programs are generally breeding grounds for exploitation, including its most virulent form—trafficking.[351] Indeed, in the 2008 Reauthorization of the TVPA, Congress explicitly acknowledged the unique vulnerability of guest workers to trafficking, and required that U.S. State Department consular offices create and distribute pamphlets that set forth the rights of all such workers.[352] In addition, the State Department has recognized that migrant laborers are particularly vulnerable to trafficking schemes that involve debt bondage and involuntary servitude.[353]

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349. 22 U.S.C. § 7101 (2006).

350. Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 43 (2009). This is not to say the TVPA has achieved this end. Indeed, many have criticized its implementation and effectiveness. *See, e.g.*, WOMEN'S COMM. FOR REFUGEE WOMEN & CHILDREN, THE U.S. RESPONSE TO HUMAN TRAFFICKING: AN UNBALANCED APPROACH 17 (2007), *available at* http://womensrefugeecommission.org/reports/doc_download/472-the-us-response-to-human-trafficking-an-unbalanced-approach (criticizing the TVPA for conditioning benefits and other relief on cooperation with law enforcement); Chacon, *supra* note 346, at 2979 (attributing the ineffectiveness of the TVPA in part on "U.S. law and policy that actually facilitate" human trafficking).

351. *See supra* Part III.C.3.

352. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, PUB. L. NO. 110-457, § 202, 112 Stat. 5055. Notably, the Act requires that one provision of the pamphlet advise of "the illegality of . . . worker exploitation in the United States." *Id.* § 202(b)(3). It also requires inclusion of provisions relating to the illegality of "slavery, peonage, trafficking in persons, sexual assault, extortion, [and] blackmail." *Id.*

353. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 20 (2008), *available at* http://www.state.gov/g/tip/rls/tiprpt/2008. The State Department has identified three factors as contributing to migrants' susceptibility to trafficking:

> Abuse of contracts; 2) Inadequate local laws governing the recruitment and employment of migrant laborers; and 3) The intentional imposition of exploitative and often illegal costs and debts on these laborers in the source country or state, often with the complicity and/or support of labor agencies and employers in the destination country or state.

Id. Significantly, it was careful to clarify that high recruitment fees alone do not constitute debt bondage or involuntary servitude, but only "place laborers in a situation highly vulnerable to debt bondage." *Id.* Rather, the magic ingredient that transforms

Thus, a large-scale unskilled guest worker program would represent a large step backward in the campaign against worker exploitation and the trade in human labor. Guest worker programs, including those with McCain-Kennedy–style reforms, are exploitative. Specifically, such programs deliberately take advantage of the material and psychological vulnerabilities of most unskilled guest workers, including their poverty, cultural and linguistic isolation, and strong desire to become citizens in order to meet the nation's employment needs at a cheap rate. In short: guest worker programs treat migrants as commodities by design.[354] What is more, a McCain-Kennedy–style program with its period of earned adjustment would harness a state's apparatus, specifically, its deportation capabilities in combination with its offer of citizenship, coercively maximizing the economic output of a disenfranchised laboring class of guest workers—a profoundly undemocratic proposition.

A guest worker program with an earned adjustment component would also represent a significant step away from the nation's revered self-image as a nation of immigrants. To be true to that tradition, immigrants should be welcomed at the outset as "Americans in waiting," and integration promoted from the point of arrival.[355] A program of earned adjustment that delays integration for many years while the immigrants toil in dangerous and undesirable jobs, largely surrounded by many of their same ethnicity and class while "earning" the right to become citizens, certainly does not foment integration. This is particularly the case if guest workers are commonly subjected to exploitation and abuse, as established by the evidence.

VII. CONCLUSION

Legislators considering comprehensive immigration reform should heed the evidence. The experience of the CNMI guest worker program powerfully demonstrates that even programs that contain key worker safeguards of the kind that have been included in all comprehensive reform proposals in recent years—like portability, considerable government oversight, and an accessible comprehensive administrative complaint system—will be characterized by worker exploitation and abuse. And the possibility of earned adjustment to permanent residence and eventual citizenship is no solution because it will only strengthen employers' hands, and further stifle workers' voices, so long as adjustment is

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high recruitment fees into debt bondage is "exploitation by unscrupulous labor agents or employers in the destination country." *Id.*

354. *See* Haynes, *supra* note 350, at 44.

355. MOTOMURA, *supra* note 325, at 162–65.

contingent upon continued employment. In addition, even if such a program features a highly functioning complaint process that is well-resourced and staffed, and includes a mechanism that allows complaining guest workers to remain in the United States to pursue their complaints, the CNMI program teaches that this will lead to a deluge of legitimate and illegitimate complaints. In short, any guest worker program that has been contemplated, or that can be crafted in the current political climate, will not sufficiently disengage guest workers from their dependence on employers, nor contain sufficient oversight, protections, or administrative safeguards to ensure that it does not result in widespread exploitation of guest workers. Furthermore, it is unlikely that a guest worker program will diminish unauthorized immigration to a significant extent. Essentially, it will supplement, and largely function like, the unauthorized workforce that immigration reform is reputedly designed to dismantle.

A large-scale guest worker program that doubles as a path for immigrants to "earn" the right through hard labor to become Americans counters a central and cherished narrative about America: that this is a nation that welcomes immigrants as equals, and has thrived because of immigrants' contributions to every sector of society. As President Obama reflected in a recent speech on comprehensive immigration reform:

> [W]e've always defined ourselves as a nation of immigrants—a nation that welcomes those willing to embrace America's precepts. Indeed, it is this constant flow of immigrants that helped to make America what it is. The scientific breakthroughs of Albert Einstein, the inventions of Nikola Tesla, the great ventures of Andrew Carnegie's U.S. Steel and Sergey Brin's Google, Inc.—all this was possible because of immigrants.
>
> And then there are the countless names and the quiet acts that never made the history books but were no less consequential in building this country—the generations who braved hardship and great risk to reach our shores in search of a better life for themselves and their families; the millions of people, ancestors to most of us, who believed that there was a place where they could be, at long last, free to work and worship and live their lives in peace.
>
> So this steady stream of hardworking and talented people has made America the engine of the global economy and a beacon of hope around the world.[356]

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356. *Remarks by the President on Comprehensive Immigration Reform*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

Introducing potential new Americans to this nation as guest workers, likely to endure exploitation and abuse along the way, threatens this storied history by discouraging reciprocal commitment and loyalty to the nation, and instead encouraging "more parochial . . . less democratic" affiliations, like race or ethnicity.[357] A guest worker program will not help to fix our broken immigration system, and would represent a step away from the nation's proud tradition as a nation of immigrants that reveres equality and eschews castes.

357. MOTOMURA, *supra* note 325, at 166–67.