

# U.S. WORKERS NEED NOT APPLY: CHALLENGING LOW-WAGE GUEST WORKER PROGRAMS

Jennifer J. Lee\*

*With the vow to protect U.S. jobs by cracking down on immigration, the current federal anti-immigrant agenda appears to limit any opportunities for comprehensive immigration reform. To the extent that such an agenda interferes with their low-wage immigrant workforces, many employers will likely turn to the expansion of guest worker programs as a way to obtain immigrant workers within a controlled migration program. The justification offered for such programs is that low-wage foreign guest workers are an easy way to fill “bad jobs” that no U.S. workers want. This Article challenges this commonly accepted narrative and explores how such programs create a cycle that fuels both U.S. worker shortages and the necessity for guest workers. In so doing, it demonstrates that guest worker programs are harmful to all low-wage workers.*

*Scholars have amply criticized guest worker programs because they impair the rights of guest workers and contravene liberal egalitarian principles of social membership. These criticisms about how foreign workers are treated on U.S. soil, however, have been insufficient to tip the balance against these programs. What is missing from this debate is an attempt to understand why guest worker programs persist despite their many flaws. The programs’ legal framework broadly delegates power to employers to create U.S. worker shortages and to demand highly productive and compliant guest workers in the alternative. Cultural narratives operate to mask this reality by tying these trends to cultural explanations about low-wage workers. Together they create a climate that is favorable to guest worker programs.*

*This Article’s close examination of these problems exposes why guest worker programs should not be a ready solution for immigration reform. It suggests a new approach to challenging such programs by broadening the lens to consider the plight of the U.S. worker. My purpose is not to pit U.S. workers*

---

\* Assistant Clinical Professor of Law, Temple University Beasley School of Law. The author would like to thank Jane Baron, Pam Bookman, Susan DeJaranatt, Rick Greenstein, Jennifer Koh, Corinna Lain, Tom Lin, Greg Mandel, Hiroshi Motomura, Jaya Ramji-Nogales, Colleen Shanahan, Laura Webb, and the participants of the Richmond Colloquium and the Emerging Immigration Scholars Conferences at University of Miami and UCLA. The author would also like to thank Emery Abdel-Latif, Lauren Berkowitz, Michaela Dragalin, and Bradley Napier for their excellent research assistance.

*against guest workers, but rather to offer a viewpoint that might connect normally disparate groups in unified opposition to guest worker programs. The U.S. worker can help shift the legal and social norms surrounding such programs by revealing how the fate of all low-wage workers is interconnected with government-enabled degradation of low-wage jobs. This approach thus suggests new advocacy strategies to eliminate guest worker programs in their current format in order to protect the dignity of all low-wage workers.*

INTRODUCTION .....	2
I. THE CYCLE OF GUEST WORKER PROGRAMS.....	5
A. Snapshot of Degraded Guest Worker Jobs .....	6
B. Degrading Wages and Working Conditions .....	9
1. Controlling Wages .....	10
2. Transforming Working Conditions .....	14
3. Inadequate Recourse.....	17
C. Fueling the Necessity for Guest Workers .....	19
II. CULTURAL NARRATIVES MASK REALITY .....	22
A. Guest Worker Program Cultural Narratives .....	23
1. Brief History of Guest Worker Programs.....	23
2. Development of Cultural Narratives .....	26
B. Natural Phenomena.....	33
C. Marketable Cultural Narratives .....	38
III. THE DIGNITY OF LOW-WAGE WORKERS .....	42
A. Guest Worker Programs Are Impervious to Attack .....	43
B. Revitalization of the U.S. Worker .....	47
IV. SOLUTIONS TO GUEST WORKER PROGRAMS.....	51
CONCLUSION .....	58

## INTRODUCTION

With the vow to protect U.S. jobs by cracking down on immigration, the current federal anti-immigrant agenda appears to limit any opportunities for comprehensive immigration reform.<sup>1</sup> To the extent that such an agenda interferes with their low-wage immigrant workforces, however, U.S. businesses will resist a wholesale restriction on immigration.<sup>2</sup> Many employers will likely

---

1. *See, e.g.*, David Nakamura, *After Years on the Outside, Foes of Legal Immigration Find a Louder Voice with Trump's Election*, WASH. POST (Dec. 19, 2016), [https://www.washingtonpost.com/politics/after-years-on-the-outside-foes-of-legal-immigration-find-a-louder-voice-with-trumps-election/2016/12/19/952421b6-bbcf-11e6-91ee-1adddfe36cbe\\_story.html?utm\\_term=.96bc727de76c](https://www.washingtonpost.com/politics/after-years-on-the-outside-foes-of-legal-immigration-find-a-louder-voice-with-trumps-election/2016/12/19/952421b6-bbcf-11e6-91ee-1adddfe36cbe_story.html?utm_term=.96bc727de76c).

2. *Id.* (noting resistance towards immigration restrictions by members of the business community). The current administration has so far taken a contradictory stance on guest workers. A leaked executive order indicates that the federal government seeks to investigate the integrity of guest worker programs but at the same time streamline the procedures for one of the low-wage guest worker programs, which largely exist to protect workers. *See* Memorandum from Andrew Bremberg, Assistant to the President and Dir. of the Domestic Policy Council, to the President of the U.S. (Jan. 23, 2017), [https://cdn0.vox-cdn.com/uploads/chorus\\_asset/file/7872567/Protecting\\_American\\_Jobs\\_and\\_Workers\\_by\\_Strengthening\\_the\\_Integrity\\_of\\_Foreign\\_Worker\\_Visa\\_Programs.0.pdf](https://cdn0.vox-cdn.com/uploads/chorus_asset/file/7872567/Protecting_American_Jobs_and_Workers_by_Strengthening_the_Integrity_of_Foreign_Worker_Visa_Programs.0.pdf) (“Subject: Executive

turn to the expansion of guest worker programs as a way to obtain immigrant workers within a controlled migration program. The justification offered for such programs is that low-wage foreign guest workers are an easy way to fill “bad jobs” that no U.S. workers want.

This Article challenges this commonly accepted cultural narrative and exposes the ways in which guest worker programs, as intentional government intervention, create a cycle that fuels both U.S. worker shortages and the necessity for guest workers. Instead of resorting to the simplistic model of competition between U.S. and immigrant workers, it examines the ways in which the law surrounding the guest worker programs has structurally degraded the wages and working conditions of U.S. jobs. Given the persistence of guest worker programs that are relatively impervious to attack, the purpose of this revelation is to call into question the need for existing and future programs in order to protect the dignity of all low-wage workers.

Guest worker programs are not, as advertised, simply filling unwanted jobs. Instead, they chase U.S. workers away by degrading guest worker jobs. Guest worker programs are temporary visa programs that authorize employers to lawfully bring over low-wage immigrant workers if there is a shortage of U.S. workers available for these jobs.<sup>3</sup> The legal framework of these programs, however, delegates substantial power to employers to essentially price-fix depressed wages and transform jobs into ones that require backbreaking productivity. By degrading the wages and working conditions of these low-wage jobs, employers ensure that they can only be filled by highly compliant and productive guest workers.

Instead of seeing guest worker programs for what they are, prevailing cultural narratives offer “natural explanations” about U.S. worker shortages and highly productive guest workers that conceal the ways in which this legal framework operates. Cultural narratives explain that U.S. workers are too lazy or superior for these low-wage jobs, and guest workers are eminently well-suited because they are agreeable, dependable, and hard-working. Throughout the history of these programs, pro-guest-worker forces have used these narratives in order to justify their necessity. These cultural narratives continue to frame the debate today not only because they are promoted by powerful employers but also because they resonate with racial and class conceptions of low-wage workers.

---

Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs.”). The current administration has also chosen advisers who are outspoken proponents of the low-wage guest worker programs. See Zaid Jilani, *Trump Transition Team Picks up Yet Another Promoter of Cheap Foreign Labor*, INTERCEPT (Dec. 12, 2016), <https://theintercept.com/2016/12/12/trump-transition-team-picks-up-yet-another-promoter-of-cheap-foreign-labor>.

3. The term has been criticized as a “euphemism for the status and condition of workers.” Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT’L L. & COM. REG. 521, 522 (2002). Within these programs, a “U.S. worker” is defined as “a worker lawfully authorized to work in the United States.” 20 C.F.R. § 655.103(b) (2010); 20 C.F.R. § 655.5 (2015).

As a result, guest worker programs seem unproblematic, hard to attack, and necessary, even as anti-guest-worker forces have publicized the abuse and exploitation of guest workers.<sup>4</sup> Many scholars have also critiqued guest worker programs by arguing that they impair guest worker rights<sup>5</sup> and contravene liberal egalitarian principles of social membership.<sup>6</sup> Yet these critiques have not managed to tip the scales against guest worker programs. Rather, guest worker programs have been made even more popular by appealing to those desiring immigration control without the need to permanently integrate large numbers of immigrants into U.S. society.

What is missing from this debate is an attempt to understand why guest worker programs persist despite their many flaws. I argue that the legal framework masked by a series of cultural narratives creates a climate that is blindly favorable to guest worker programs. While the imbalance of power between employers and guest workers is well known, there has not been a full exploration of the ways in which this framework more broadly delegates power to employers to create U.S. worker shortages and the alternative of the highly productive and compliant guest worker. Nor has the literature fully considered the ways in which cultural narratives operate to mask this reality by tying these phenomena to cultural explanations about low-wage workers. This Article's close examination of these problems exposes why guest worker programs should not be a ready solution for immigration reform.

---

4. See, e.g., GLOB. WORKERS JUSTICE ALL., VISAS, INC.: CORPORATE CONTROL AND THE POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM 47-48 (2012), [http://www.globalworkers.org/sites/default/files/VisasInc\\_FINAL.pdf](http://www.globalworkers.org/sites/default/files/VisasInc_FINAL.pdf); FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H2-A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 30-31 (2011), <https://www.farmworkerjustice.org/content/h-2-guestworker-program>; S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 15-17 (2007), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/Close\\_to\\_Slavery.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/Close_to_Slavery.pdf).

5. See, e.g., Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 27, 28 (2006); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 577 (2001); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 938 (2007); Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & C.R.L. REV. 423, 430-31 (2007); Michael Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1455-56 (2008); see also Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263, 272 (2013).

6. See, e.g., Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 528-29 (2007); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 560 (2007); Dorothy E. Hill, *Guest Worker Programs Are No Fix for Our Broken Immigration System: Evidence from the Northern Mariana Islands*, 41 N.M. L. REV. 131, 182-83 (2011); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 221-22 (2007); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 60-61 (1983); Motomura, *supra* note 5, at 284.

In order to further shed light on guest worker programs, this article suggests a new approach: considering the impact of guest worker programs on the normative conditions of all workers. In particular, it broadens the frame to consider the plight of the U.S. worker in order to help shift the legal and social norms surrounding guest worker programs.<sup>7</sup> This approach is more likely to succeed where critiques focused on how immigrant workers should be treated on U.S. soil have failed. My purpose is not to pit U.S. workers against guest workers—which is a particularly crucial distinction given the current climate of anti-immigrant rhetoric<sup>8</sup>—but rather to offer a viewpoint that might connect normally disparate groups in opposition to guest worker programs. In terms of addressing political realities, U.S. workers can serve as a proxy to address how guest worker programs are harmful to all workers. In this way, the lens of the U.S. worker is useful in revealing how the fate of these workers is interconnected by the common experience of employers—enabled by governmental policy—degrading low-wage jobs. This approach suggests new advocacy strategies to eliminate guest worker programs in their current format.

Part I explores how the legal framework delegates power to employers to push U.S. workers away and demand highly productive and compliant workers, ultimately fueling the necessity for guest workers. Part II reviews the history of guest worker programs and the ways cultural narratives have justified their creation, maintenance, and reformulation. It also explores how these cultural narratives operate today to obfuscate the problematic reality of guest worker programs, as well as the reasons these narratives remain so marketable. Part III explains how focusing on U.S. workers can disentangle guest worker programs to reveal their harmful impact on the normative interests of both U.S. and guest workers. Part IV wrestles with the possibility of redesigning guest worker programs to uphold the dignity of all low-wage workers, although it concludes that guest worker programs in their current form should be eliminated.

## I. THE CYCLE OF GUEST WORKER PROGRAMS

The H-2A and H-2B programs, the low-skilled guest worker programs, were ostensibly created to solve the problem of U.S. labor shortages in certain industries.<sup>9</sup> The H-2A program is for agricultural workers, while the H-2B program is for non-agricultural workers. They permit employers to bring over

---

7. IMMANUEL NESS, GUEST WORKERS AND RESISTANCE TO U.S. CORPORATE DESPOTISM 4-5 (2011). Immanuel Ness is one of the few scholars to focus on the ways in which guest worker programs impact both U.S.-born and foreign-born workers. He argues that they are “intended to increase profits for the capitalist class by further disciplining labor at home and abroad.” *Id.* at 4. Hiroshi Motomura briefly discusses the need to evaluate the distributional impact of guest worker programs on “exacerbating inequalities in U.S. society.” Motomura, *supra* note 5, at 268. Advocacy groups too have tried, at times, to focus on the plight of the U.S. worker. *See, e.g.*, FARMWORKER JUSTICE, *supra* note 4, at 21.

8. *See* Nakamura, *supra* note 1.

9. H.R. REP. NO. 99-682, at 50 (1986).

guest workers if they can first prove that hiring foreign labor does not negatively impact U.S. workers.<sup>10</sup> The current legal framework governed by the U.S. Department of Labor (DOL) attempts to achieve these goals by delineating minimum wages, requiring employers to participate affirmatively in the recruitment of U.S. workers, and prohibiting discrimination against U.S. workers. The reality, however, is that the legal framework of the programs delegates substantial power to employers, further exacerbating the imbalance of power between employers and low-wage workers. It authorizes employers to essentially price-fix a depressed wage rate for these jobs, rather than offering extra pay needed to recruit U.S. workers to jobs that are otherwise difficult. The legal framework also structures the relationship between employer and guest worker such that it enables employers to extract back-breaking productivity rates. At the same time, the absence of meaningful regulation of certain working conditions provides employers with the ability to transform jobs into ones that are unsustainable for U.S. workers. Over time, the jobs that participate in guest worker programs become increasingly degraded.

As a result, the operation of guest worker programs creates a self-feeding loop by shaping the social relations between employers, guest workers, and U.S. workers. A self-feeding loop is where A creates B, which creates more of A. Here, U.S. worker shortages create the necessity for guest workers, which creates even more U.S. worker shortages. It does so by requiring a highly productive and compliant guest worker, which worsens the problem of U.S. worker shortages. As more guest workers enter an industry, employers are even further able to degrade the wages and working conditions because they need not worry about recruiting U.S. workers. Employers prefer guest workers because they become accustomed to being highly productive and compliant. Over time, these phenomena become more extreme.

This Part details how these programs degrade the wages and working conditions of guest worker jobs. It begins with some examples of what these jobs look like today and the ways in which they have been degraded. It then reviews the ways in which guest worker programs delegate power to employers to achieve this result. It concludes by exploring the ways in which the self-feeding loop fuels the necessity of these programs.

#### A. *Snapshot of Degraded Guest Worker Jobs*

An examination of guest worker jobs finds that most are what one would label “bad jobs”—that is, jobs with low wages and poor working conditions. This section provides a snapshot of these jobs.<sup>11</sup> It presents three examples of

---

10. *Id.*

11. Many other industries would reveal a similar story of low wages and working conditions, such as landscaping, forestry, construction, and housekeeping, but are not yet industries that have been dominated by guest workers.

industries where guest workers dominate the labor force: (1) sheepherding, (2) amusement parks, and (3) seafood processing.

The H-2A sheepherding industry, represented by large ranching associations, brings over H-2A workers from Latin America and Asia to work as sheepherders. While sheepherding may appear to be an outmoded profession, the sheepherding industry in the United States still requires workers to herd sheep on largely public lands managed by the Bureau of Land Management.<sup>12</sup> Until recently, the pay for sheepherders had varied by state, with many states paying about \$750 to \$800 per month.<sup>13</sup> Other comparable ranching occupations with jobs filled by U.S. workers have wages that average \$12 per hour, with a monthly wage of about \$2,667 for working forty-eight hours per week.<sup>14</sup> In response to a recent lawsuit, the U.S. Department of Labor recalibrated the wages of H-2A sheepherders to the federal minimum wage of \$7.25 per hour capped at forty-eight hours per week, even though the H-2A program requires sheepherders to be on-call twenty-four hours per day, 365 days per year.<sup>15</sup> The working conditions are onerous and have not improved over time. Many contracts last for three years, during which some sheepherders do not have the opportunity to leave the ranch or get a day off.<sup>16</sup> Ranchers are not required to provide running water, electricity, toilets, or a requisite amount of square footage of living space for each worker while they are out on the range. The minimum housing standards have largely remained static for decades, despite advances in battery- and solar-generated power that can provide the modern conveniences of a mobile recreational vehicle.<sup>17</sup>

Sheepherding is not an exceptional example of a low-wage guest worker job. There are several other industries dominated by guest workers where workers similarly experience degraded wages and working conditions. The amusement park industry is extremely labor-intensive, requiring thousands of H-2B workers to assemble, operate, and disassemble carnival rides and

---

12. *Fact Sheet on the BLM's Management of Livestock Grazing*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., <http://www.blm.gov/wo/st/en/prog/grazing.html> (last visited May 10, 2016).

13. Herding has been a longstanding exemption to the minimum and overtime wages requirements of most minimum wage laws. California's minimum wage law, however, has required that sheepherders be paid a higher amount. CAL. CODE REGS. tit. 8, § 11140.4(E) (West 2017).

14. The mean hourly wage for occupations like ranch hands nationally is \$12.83 per hour in May 2015, which works out to \$2,667 per month for forty-eight hours per week. The information is obtained from *45-2093 Farmworkers, Farm, Ranch, and Aquacultural Animals, Occupational Employment Statistics*, BUREAU OF LAB. STATS., <http://www.bls.gov/oes/current/oes452093.htm> (last visited May 15, 2016).

15. 20 C.F.R. § 655.211(c) (2015).

16. Comments from Advocates for Basic Legal Equality, Inc. (OH) et al. on Department of Labor's Proposed Regulations to the H-2A Program 92 (Apr. 14, 2008) (on file with author).

17. 20 C.F.R. § 655.235 (2015).

concession stands.<sup>18</sup> The amusement park industry, which includes large national companies, regularly lands in the top five industries that request H-2B workers.<sup>19</sup> These H-2B workers face onerous working conditions, working approximately fourteen hours a day, seven days a week, frequently with no days off. Shifts are even longer on days when the fair is scheduled to move locations. As ride operators must quickly set up the rides and break them down, the job involves heavy lifting and dangerous assembling duties, including working at great heights. The fair industry is “marred by frequent accidents and poor treatment of an overworked and underpaid workforce.”<sup>20</sup> Employers’ failure to train or provide safety equipment increases workers’ risk for injuries ranging from cuts to permanent brain injury or death.<sup>21</sup> Industry critics argue that many amusement park accidents are attributable to operator errors, frequently arising out of long working hours, inadequate training, and lack of proper equipment.<sup>22</sup> For these incredibly long hours and dangerous work, the average pay is \$350 per week.<sup>23</sup>

A majority of H-2B workers also comprise the workforce of the seafood processing industry.<sup>24</sup> A profile of Maryland H-2B crab pickers, for example, found immense pressure to perform these jobs at a high productivity rate.<sup>25</sup> The job is tedious and labor-intensive: “[W]omen work silently and intensely, using a sharp knife to separate the valuable jumbo lump from the backfin, taking care not to include any shell parts with the meat.”<sup>26</sup> Some workers stated that “their companies required that they pick at least 20 pounds of crabmeat per day, or risk being fired and sent home.”<sup>27</sup> Because of these minimum poundage

18. AM. UNIV. WASHINGTON COLL. OF LAW IMMIGRANT JUSTICE CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, *TAKEN FOR A RIDE: MIGRANT WORKERS IN THE U.S. FAIR AND CARNIVAL INDUSTRY 3* (2013), [https://www.wcl.american.edu/news/documents/ride\\_report.pdf](https://www.wcl.american.edu/news/documents/ride_report.pdf) [hereinafter *TAKEN FOR A RIDE*].

19. *See, e.g.*, U.S. DEP’T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, *ANNUAL REPORT: 2014 49* (2014), [https://www.foreignlaborcert.doleta.gov/pdf/oflc\\_annual\\_report\\_fy2014.pdf](https://www.foreignlaborcert.doleta.gov/pdf/oflc_annual_report_fy2014.pdf). The other top four are: landscaping, cleaning/housekeeping, meat and seafood processing, and forestry.

20. John Carlos Frey, *Risky Rides: Carnival Workers’ Grueling Hours May Threaten Safety*, NBC NEWS (Aug. 24, 2014), <http://www.nbcnews.com/news/latino/risky-rides-carnival-workers-grueling-hours-may-threaten-safety-n186966>.

21. *TAKEN FOR A RIDE*, *supra* note 18, at 31-32.

22. *Id.* at 30.

23. Barry Meier, *Union Accused of Betraying Migrant Carnival Worker*, N.Y. TIMES (Sept. 1, 2015), [http://www.nytimes.com/2015/09/02/business/union-accused-of-betraying-migrant-carnival-workers.html?\\_r=0](http://www.nytimes.com/2015/09/02/business/union-accused-of-betraying-migrant-carnival-workers.html?_r=0). Many seasonal amusement parks can fall under an exemption for minimum and overtime wages under the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(3) (West 2016).

24. Ashok K. Mishra & Jeffrey Gillespie, *Hiring Preferences for Nonimmigrant Labor: The Case of the Seafood Processing Industry*, 31 MARINE RES. ECON. 83 (2016).

25. AM. UNIV. WASHINGTON COLL. OF LAW IMMIGRANT JUSTICE CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, *PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 21* (2010) [hereinafter *PICKED APART*].

26. *Id.*

27. *Id.* at 27.



requirements and the resulting rushed work environment, workers frequently suffer occupational injury.<sup>28</sup> Despite these working conditions, DOL has previously required that employers only pay these Maryland workers near the minimum wage of around \$8 per hour.<sup>29</sup> The industry will often structure pay on a piece rate system (e.g., \$1.00 to \$2.50 per pound), which fuels the productivity pressure on H-2B workers.<sup>30</sup>

These working conditions did not simply evolve by accident. The next section details how employers have managed to degrade the wages and working conditions of H-2A and H-2B jobs. In particular, it will focus on how the legal framework of guest worker programs delegates substantial power to employers to achieve this result.

### B. *Degrading Wages and Working Conditions*

Guest worker programs amplify the power imbalance between employers and workers in low-wage jobs. The governing regulatory scheme for both the H-2A and H-2B programs requires that employers maintain minimum job standards in order to both competitively recruit U.S. workers and ensure that the employment of guest workers does not adversely impact U.S. workers.<sup>31</sup> The legal framework, however, fails to achieve its purpose. Rather, it delegates substantial power to employers to degrade the wages and working conditions of guest worker jobs.

First, through various wage methodologies, employers can essentially price-fix a suboptimal wage for these jobs so they will attract few U.S. workers. Second, guest worker programs also permit employers to further degrade these relatively undesirable jobs into ones with even poorer working conditions that require high productivity and long hours. The legal framework provides employers with enormous control over an essentially captive workforce without requiring that employers meet either modernized or effective regulations governing workplace conditions. Third, while workers can file complaints

---

28. *Id.*

29. In Dorchester County, Maryland, for example, the wage rate for meat, poultry, fish cutters and trimmers was: \$8.59/hour (FY 2010); \$8.02 (FY 2011); \$8.21 (FY 2012); \$8.44 (FY 2013). With the recent recalibration of H-2B wages, *see infra* note 46, the prevailing wage for this occupation increased to \$10.17 (FY 2015). This data is derived from the Foreign Labor Certification Data Center Online Wage Library, <http://www.flcdatacenter.com/OesWizardStep2.aspx?stateName=Maryland> (data on file with author).

30. PICKED APART, *supra* note 25, at 25.

31. While the development of the regulatory framework has been divergent for the H-2A and H-2B programs, the regulations for the two programs have become similar over time. *Compare* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010), *with* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042 (Apr. 29, 2015); Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24146 (Apr. 29, 2015). The implementation of portions of the revised H-2B regulations has been obstructed by an appropriations rider. *See* Department of Labor Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2583, 2599 (2015).

against their employers, the complaint process is inadequate in addressing the broad authority by which employers can degrade wages and working conditions. Yet employers face no consequence for degrading these jobs, as they can always be filled with desperate guest workers.

### 1. *Controlling Wages*

Both the H-2A and H-2B programs use various wage methodologies to set minimum wages that employers are required to pay both U.S. and guest workers. This approach, however, provides employers with excessive power to set wages below what would be required to recruit U.S. workers competitively. The wage methodologies, administered by the U.S. DOL, produce lower wage rates because they are based on formulas that are ineffective at preventing wage stagnation. Given that guest worker jobs are largely considered “bad jobs” (i.e., jobs with difficult working conditions), employers would normally be required to pay higher wages to attract U.S. workers to these jobs. Yet guest worker programs essentially price-fix wages for employers, who need not pay higher wages because they can always opt to hire guest workers at these lower wage rates.

The H-2A program requires employers to pay the Adverse Effect Wage Rate (AEWR), which is published annually.<sup>32</sup> The AEWR is based on the “annual weighted average hourly wage rate” for field and livestock workers for the region obtained from the annual Farm Labor Survey conducted by the U.S. Department of Agriculture.<sup>33</sup> The flaws of this methodology are well known. The primary problem with any survey of current wages is that the presence of undocumented workers in a given industry depresses wages for the industry.<sup>34</sup> This fact has been repeatedly acknowledged by DOL.<sup>35</sup> It is now an increasing problem as the proportion of the agricultural workforce becomes more predominantly undocumented, with estimates ranging from fifty to seventy percent.<sup>36</sup>

---

32. 20 C.F.R. § 655.120(a) (2010).

33. 20 C.F.R. § 655.103(b) (2010).

34. See Comments from Advocates for Basic Legal Equality, *supra* note 16, at 72-73; Comment from Sylvia A. Allegretto on the Proposed Rule Change Submitted to the Department of Labor, Wage and Hour Division Regarding Calculation of the AEWR 3-4 (2008) (on file with author); *Adverse Effect Wage Rate Rule*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/sites/default/files/AEWR%20Fact%20Sheet.pdf> (last visited May 3, 2016).

35. Comments from Advocates for Basic Legal Equality, *supra* note 16, at 71 (“Use of undocumented workers and other non-immigrant aliens clearly results in depressed wages for U.S. workers.” (quoting 44 Fed Reg. 32209, 32210 (June 5, 1979))); 50 Fed. Reg. 50311, 50312 (Dec. 10, 1985) (establishing an AEWR for depression of wages in Montana); 54 Fed. Reg. 28037, 28043 (July 5, 1989) (“[B]ecause of the nature of the illegal alien workforce, and because of the concentration of that workforce in particular localities and crops, such adverse effects as may exist are not reflected, to any substantial extent, if at all, in USDA average wage data.”).

36. Comments from Advocates for Basic Legal Equality, *supra* note 16, at 72-73.

The agricultural jobs offered within the H-2A program have long suffered from stagnated wages.<sup>37</sup> According to the most recent National Agricultural Worker Survey, the average family incomes for farm workers are between \$7,500 and \$12,500.<sup>38</sup> When the H-2A program came into existence, the prevailing wage already suffered from years of wage depression created by the presence of foreign workers in the predecessor H-2 and Bracero programs.<sup>39</sup> When DOL revised its AEW methodological methodology in 1989, advocates unsuccessfully challenged its revision in *AFL-CIO v. Dole* on the basis that the methodology failed to ensure that wages did not adversely affect U.S. workers.<sup>40</sup> The D.C. Circuit rejected the claim that DOL's AEW methodology did not need to take into account wage depression, accepting DOL's assertion that there was no adequate way to quantify the impact.<sup>41</sup>

The H-2B wage methodology is even more problematic. Employers are required to pay a prevailing wage specific to the kind of job offered by the employer.<sup>42</sup> The Economic Policy Institute (EPI) examined fifteen occupations with large numbers of H-2B workers and concluded that real wages were stagnant in those H-2B occupations between 2004 and 2014.<sup>43</sup> It found that “[f]or workers in 10 of the top 15 H-2B occupations, wages declined, between \$0.13 and \$0.93 in 2014 dollars.”<sup>44</sup> DOL has revised the H-2B wage methodology several times largely in response to extensive litigation.<sup>45</sup> DOL currently determines the appropriate prevailing wage that must be paid by using the “arithmetic mean of the wages of workers similarly employed in the area of intended employment.”<sup>46</sup> The arithmetic mean is derived based on the Occupational Employment Statistics (OES), a survey conducted by the Bureau of Labor Statistics.<sup>47</sup> The prevailing wage methodology is more problematic

---

37. Historically, the continued intervention by government on behalf of agricultural employers has relieved them of having to improve labor conditions. Greg Schell, *Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness*, in *THE HUMAN COST OF FOOD* 139-40 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

38. *The National Agricultural Worker Survey: Chapter 3: Income and Poverty*, U.S. DEP'T OF LAB., <https://www.doleta.gov/agworker/report/ch3.cfm> (last updated Jan. 11, 2010).

39. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 71 (1992).

40. 923 F.2d 182, 187 (D.C. Cir. 1991).

41. *Id.*

42. 20 C.F.R. § 655.10 (2015).

43. DANIEL COSTA, *THE H-2B TEMPORARY FOREIGN WORKER PROGRAM: FOR LABOR OR CHEAP, TEMPORARY LABOR?* 2 (Jan. 19, 2016), <http://www.epi.org/publication/h2b-temporary-foreign-worker-program-for-labor-shortages-or-cheap-temporary-labor>.

44. *Id.* at 14.

45. See *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013); *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013).

46. 20 C.F.R. § 655.10 (West 2017).

47. *Id.*

than the AEWWR because it involves much smaller scale wage surveys of employers in a local area, where wages can be skewed in that area because they have often already been depressed by the presence of undocumented or foreign workers.<sup>48</sup> In the job categories that regularly land in the top five for requesting H-2B workers<sup>49</sup>—landscaping, cleaning/housekeeping, construction, forestry, and amusement parks—the national average wage rates are already depressed, ranging from \$7 to \$11 per hour.<sup>50</sup>

Yet the H-2A and H-2B jobs are precisely the kind of inherently difficult low-wage jobs for which employers need to offer higher wages to attract U.S. workers. Farm work, for example, is one of the most dangerous jobs with consistently high fatality rates and risk of traumatic injury and death, musculoskeletal disorders, exposure to chemicals, dust, and particulate matter, and prolonged exposure to weather-related risks.<sup>51</sup> Some of the top H-2B industries represent hazardous occupations with higher than average injury or fatality rates.<sup>52</sup> Construction laborers are exposed to numerous harms, including poor equipment or hazardous chemicals and a lack of protective gear.<sup>53</sup> Forestry work includes common injuries such as traumatic brain injuries, fractures of the spine, skull, and legs, and eye injuries. Workers are

48. *Adverse Effect Wage Rate Rule*, *supra* note 34; Comments from California Rural Legal Assistance et al. on Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Open Range, Addendum 1 (June 1, 2015) [hereinafter California Rural Legal Assistance et al.] (on file with author) (explaining that because of small sample sizes in the shepherd context, surveys in some years relied on sample sizes as small as six to nine workers).

49. See U.S. DEP'T OF LABOR, *supra* note 19.

50. These averages reflect May 2012 data derived from the Occupational Employment Statistics of the U.S. Bureau of Labor Statistics (on file with author). Wages have long stagnated in the forestry industry, for example, where 85% of forestry workers earned less than the federal poverty level for a family of four. *Forest Service Workers: Hearing on the Role of the Forest Service and Other Federal Agencies in Protecting Foreign Guest Workers Before the S. Comm. on Energy & Nat. Res.*, 109th Cong. 32 (2006) (statement of Cassandra Moseley, Institute for Sustainable Environment, University of Oregon). Construction wages, especially for non-specialized laborers, have failed to rise over time, most likely due to the declining strength of unions and the growing structural insecurity within the industry. See KRIS PAAP, *WORKING CONSTRUCTION* 35-36 (2006).

51. See *Fatal Occupational Injuries by Industry and Event or Exposure: All United States, 2012*, BUREAU OF LAB. STAT., <http://www.bls.gov/iif/oshwc/cfoi/cftb0268.pdf> (last visited Feb. 13, 2017); Sara A. Quandt et al., *Occupational Health Outcomes for Workers in the Agriculture, Forestry and Fishing Sector: Implications for Immigrant Workers in the Southeastern US*, 56 AM. J. INDUS. MED. 940, 941-43 (2013).

52. See *Forest Service Workers*, *supra* note 50, at 7-8 (statement of Victoria A. Lipnic, Assistant Sec'y of Employment Standards Administration, Dep't of Labor); *Fatal Occupational Injuries Incurred by Contractors, 2011*, BUREAU OF LAB. STAT., <http://www.bls.gov/iif/oshwc/cfoi/contractor2011.pdf> (last visited Feb. 13, 2017); TAKEN FOR A RIDE, *supra* note 18, 29-30; Quandt et al., *supra* note 51, at 941-43; NIKLAS KRAUSE, *WORK-RELATED INJURY AND ILLNESS AMONG HOTEL HOUSEKEEPERS* (Oct. 23, 2012), <https://www.dir.ca.gov/dosh/doshreg/DrNKrauseppt.pdf>.

53. See Analiz Deleon-Vargas, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 243-44 (2008).

often exposed to the heat, sun, and chemicals including fertilizers, pesticides, lubricants, diesel and gasoline fuels, and their emissions.<sup>54</sup> Housekeepers are prone to both acute injuries, occurring after a one-time incident, and cumulative trauma injuries, developed over a period of weeks, months, or years.<sup>55</sup> They face numerous hazards: ergonomic hazards; trauma hazards including slips, trips, and falls; respiratory, and dermal hazards from chemicals in cleaning products;<sup>56</sup> mold and microbial contaminants; skin reactions from detergents and latex; infectious agents; and occupational stress.<sup>57</sup>

Employers can use guest worker programs to avoid paying higher wages to U.S. workers for these difficult jobs. In both the H-2A and H-2B context, these wage methodologies have the effect of setting the maximum rate for guest worker jobs. Employers have no incentive to pay higher wages to attract U.S. workers if they can always obtain guest workers by paying the AEWR or prevailing wage.<sup>58</sup> Setting these rates pressures employers to establish them “as the norm for a position, resulting in the eventual reduction in higher wages now received by U.S. workers in the position.”<sup>59</sup> The result is a government-enabled price-fixing scheme.<sup>60</sup> U.S. workers need not bother to compare wages offered by different employers. They are all paying the established maximum rate for guest worker jobs—a rate far below what is necessary to attract U.S. workers to these otherwise undesirable jobs.<sup>61</sup>

The result, over time, is that guest worker jobs experience further wage degradation. A recent EPI study of immigrant workers from Mexico found that those who participated in guest worker programs earned significantly lower

---

54. Quandt et al., *supra* note 51, at 945.

55. See *Housekeeper Managers: Improving Housekeeping Work Using Ergonomics*, INST. FOR ERGONOMICS, [https://www.osha.gov/dte/grant\\_materials/fy10/sh-20998-10/Housekeeper\\_Manager\\_Ergo\\_Training.pptx](https://www.osha.gov/dte/grant_materials/fy10/sh-20998-10/Housekeeper_Manager_Ergo_Training.pptx) (last visited Feb. 13, 2017).

56. See, e.g., N.J. DEP’T OF HEALTH, ENVTL. & OCCUPATIONAL HEALTH SURVEILLANCE PROGRAM, ASTHMA & CLEANING PRODUCTS: WHAT WORKERS NEED TO KNOW, [http://www.nj.gov/health/workplacehealthandsafety/documents/work-related-asthma/wra\\_cleaning\\_products.pdf](http://www.nj.gov/health/workplacehealthandsafety/documents/work-related-asthma/wra_cleaning_products.pdf) (last visited Feb. 13, 2017).

57. NIOSH *Fact Sheet Highlights Safety, Health Concerns Among Hotel Cleaners*, OCCUPATIONAL HEALTH & SAFETY (July 8, 2011), <http://ohsonline.com/articles/2011/07/08/niosh-fact-sheet-highlights-safety-health-concerns-among-hotel-cleaners.aspx>.

58. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 542 (2007); Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 555, 597 (2007).

59. 80 Fed. Reg. 24156 (Apr. 29, 2015).

60. A couple of cases have been filed alleging price-fixing by employer groups or recruiting intermediaries to uniformly set the wages to the maximum rate required by the governmental wage methodologies for temporary workers. See, e.g., *Complaint, Llacua v. Western Range Ass’n*, 15-cv-01889-REB-CBS (D. Colo. filed Sept. 1, 2015); *Complaint, Beltran v. Noonan*, 14-cv-03074 (D. Colo. filed Nov. 13, 2014).

61. The Court has ruled that restraints on competitive bidding for professional services is prohibited by the antitrust laws. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 781 (1975).

wages than their counterparts with lawful permanent residency.<sup>62</sup> In fact, the wages of guest workers were on par with the wages earned by undocumented workers.<sup>63</sup> The experience with the Bracero program was similar: “farm wages as a whole increased 14% between 1953 and 1959, but remained the same in regions with braceros.”<sup>64</sup> The situation was even worse for domestic workers in California, who “earned less per hour in 1955 than they had in 1950.”<sup>65</sup> The use of guest worker programs within degraded industries means that the guaranteed wage rates necessarily reflect this wage depression. As long as these wage methodologies fail to take into account wage depression and price-fix a maximum wage rate, employers will continue to have the power to set wages at this artificially lower non-competitive wage rate for the work performed.

## 2. *Transforming Working Conditions*

Apart from the wage methodologies, guest worker programs also provide employers with the power to further degrade inherently difficult jobs into ones that require back-breaking productivity. Employers execute this transformation in several ways. Through the control that employers exercise over guest workers, employers are able to extract high productivity from compliant guest workers. Employers are able to do so not only because a guest worker’s visa is tied to the employer but also because guest workers serve as an essentially captive workforce. In addition, the existence and absence of certain regulatory standards permit employers to further degrade the working conditions in guest worker jobs. While the existence of certain regulations gives the appearance of minimum standards, these outdated standards actually release employers of the obligation to improve or modernize working conditions. As a result, employers have the ability to transform these jobs into extremely undesirable ones given the absence of regulatory guidelines relating to breaks, hours, or workplace safety.

Because a guest worker’s visa is issued to a particular employer or association, an employer may dominate all aspects of the guest workers’ existence—including the key aspects of being able to remain and return for another season. Many have written about this control and the ways in which it makes guest workers obedient and susceptible to exploitation.<sup>66</sup> The employer “dictates the terms and conditions of the contract, terminates the guest worker at will, and determines whether to extend the work relationship.”<sup>67</sup> Guest

---

62. LAUREN A. APGAR, AUTHORIZED STATUS, LIMITED RETURNS: THE LABOR MARKET OUTCOMES OF TEMPORARY MEXICAN WORKERS (May 21, 2015), <http://www.epi.org/publication/authorized-status-limited-returns-labor-market-outcomes-temporary-mexican-workers>.

63. *Id.*

64. CALAVITA, *supra* note 39, at 70-71.

65. *Id.* at 71.

66. This phenomenon has spawned a great deal of writing by both advocates and scholars on behalf of guest workers. *See, e.g., supra* notes 3-5.

67. Elmore, *supra* note 6, at 535.

workers may expend a considerable sum of money to arrive in the United States so that they have every incentive to remain on the job.<sup>68</sup> They fear retaliation by employers, which can include deportation, blacklisting, and denial of rehiring for the following season.<sup>69</sup> This climate of fear can be created by the employers' explicit threat to call "immigration officials," the existence of a blacklist, or even the mere fact that the employer holds the "deportation card."<sup>70</sup> Workers are unwilling to come forward given all that they have to lose.

Employers are also able to obtain back-breaking productivity rates on grueling schedules because they have an essentially captive workforce that has none of the distractions that accompany family life. One H-2A employer describes: "When Jose gets on the bus to come here from Mexico he is committed to the work . . . It's like going into the military. He leaves his family at home. The work is hard, but he's ready."<sup>71</sup> Guest workers are shipped in groups to arrive at the worksite and often live in employer-owned housing nearby. Guest workers work into the night and for seven days per week.<sup>72</sup> Employers may demand grueling schedules, such as amusement park workers clocking in fourteen-hour days, seven days per week,<sup>73</sup> or orchard workers' schedules described as "8- to 12-hour days, and a workweek is often Sunday to Saturday."<sup>74</sup> In contrast, everyday life intrudes for U.S. workers. A U.S. worker might have to attend a parent-teacher conference or take an elderly parent to the doctor. Employers comment that U.S. workers, shockingly, "ask[] for time off after they had just started"<sup>75</sup> or complain about the jobs being "too hard."<sup>76</sup>

The regulatory framework delineates some minimum standards but they largely reflect the already degraded conditions in these jobs. In the H-2A program, for example, field agricultural workers must be provided free housing. The standards require a minimum of fifty square feet per person, one toilet facility for fifteen people, and a laundry tray or tub for every thirty

---

68. Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 43 (2012).

69. Elmore, *supra* note 6, at 542; Holley, *supra* note 5, at 596–97; Read, *supra* note 5, at 430–31.

70. S. POVERTY LAW CTR., *supra* note 4, at 15; Hall, *supra* note 3, at 533.

71. Ethan Bronner, *Workers Claim Race Bias As Farms Rely on Immigrants*, N.Y. TIMES (May 6, 2013), [http://www.nytimes.com/2013/05/07/us/suit-cites-race-bias-in-farms-use-of-immigrants.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2013/05/07/us/suit-cites-race-bias-in-farms-use-of-immigrants.html?pagewanted=all&_r=1).

72. Bronner, *supra* note 71; Alli Knothe, *Seasonal Workers in H-2A Guest Worker Program Vital to Central Mass. Orchards*, TELEGRAM (June 15, 2015), <http://www.telegram.com/article/20140615/NEWS/306159974>.

73. TAKEN FOR A RIDE, *supra* note 18, at 22.

74. Knothe, *supra* note 72.

75. *Citizens Not Exactly Eager for Farm Jobs*, MERCURY NEWS (Sept. 27, 2010, 10:08 AM), <http://www.mercurynews.com/2010/09/27/citizens-not-exactly-eager-for-farm-jobs/>.

76. Kirk Johnson, *Hiring Locally for Farm Work Is No Cure-All*, N.Y. TIMES (Oct. 5, 2011), [http://www.nytimes.com/2011/10/05/us/farmers-strain-to-hire-american-workers-in-place-of-migrant-labor.html?\\_r=2&hp](http://www.nytimes.com/2011/10/05/us/farmers-strain-to-hire-american-workers-in-place-of-migrant-labor.html?_r=2&hp).

persons.<sup>77</sup> These regulations were promulgated decades ago and have remained largely unchanged.<sup>78</sup> Older housing constructed prior to April 3, 1980, is grandfathered in to an even weaker set of standards.<sup>79</sup> As discussed above, the H-2A shepherding program has a set of special mobile housing standards exempted from these even modest housing requirements for agricultural workers. These 1989 standards remain largely unchanged and do not require employers to provide running water, electricity, toilets, or a requisite amount of square footage of living space for each worker. Like in the context of setting wages, employers have no incentives to modernize their worker housing if they can always obtain guest workers who will live under these substandard conditions.

The absence of explicit regulations also permits employers to create intolerable working conditions. While guest worker programs require that employers abide by local, state, and federal law, they do not extend protections beyond any of those requirements to specifically regulate the backbreaking productivity requirements of employers.<sup>80</sup> Unless otherwise limited by existing law, employers generally have free rein to require high productivity, no breaks, and no sick days.<sup>81</sup> Given the kinds of health hazards involved in guest worker jobs, the absence of additional occupational health and safety regulations leaves workers subject to continued risk of injury and fatality. While the absence of adequate health and safety regulation mirrors that of the larger low-wage workplace, it is exacerbated in this context where employer control means that guest workers often accept violations of workplace safety laws without complaint. Overall, employers also have no impetus to improve these intolerable working conditions because there will always be desperate guest workers who will accept them.

At their worst, employers subject guest workers to egregious abuses. A recent report by the U.S. Governmental Accountability Office (GAO) confirmed that workers may be subjected to verbal and physical abuse, hazardous working conditions, confiscation of identification, unsanitary living conditions, problems regarding rate of pay, and improper paycheck deductions.<sup>82</sup> Guest workers with significant recruitment debt become

---

77. 29 C.F.R. § 1910.142 (2005).

78. 39 Fed. Reg. 23502 (June 27, 1974). *But see* 70 Fed. Reg. 1102, 1114 (Jan. 5, 2005) (updating communication modes from “telegram” to “telephone”); 70 Fed. Reg. 53925, 53927 (Sept. 13, 2005) (updating provision about “drinking fountains”).

79. 20 C.F.R. § 654.401 (2016).

80. 20 C.F.R. § 655.135(e) (2010); 20 C.F.R. § 655.20(z) (2015).

81. Employers in the H-2A program that tie productivity requirements to payment by the piece rate may be subject to certain limitations, such as “those [standards] normally required by other employers for the activity in the area of intended employment.” 20 C.F.R. § 655.122(l)(2)(iii) (2010).

82. U.S. GOV’T ACCOUNTABILITY OFFICE, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 36 (2015), <http://www.gao.gov/assets/670/668875.pdf>.



susceptible to debt bondage and forced labor.<sup>83</sup> Abuses, such as the confiscation of documents, intimidation, and threats, relate to human trafficking.<sup>84</sup>

Despite this bleak picture, guest workers do not entirely lack agency.<sup>85</sup> Guest worker programs, however, produce a stark disparity of power between employer and workers. Given this power delegated to employers, they are able to transform these difficult jobs into ones that are generally acceptable only to a captive and compliant workforce of guest workers.

### 3. *Inadequate Recourse*

The legal framework fails to provide adequate recourse for workers to complain about degraded wages and working conditions. It also cannot reach many instances of employer discrimination against U.S. workers. In theory, the legal framework requires that: (1) “the employment of [guest] workers will [not] adversely affect the wages and working conditions of workers in the U.S. similarly employed;” and (2) guest workers are not hired unless there are insufficient “able, willing, and qualified U.S. workers.”<sup>86</sup> While at first glance, these requirements appear to address the issue of maintaining minimum jobs standards in order to competitively recruit U.S. workers, they fail to achieve this purpose. The existing complaint process is inadequate to reach the employer transformation of guest worker jobs.

The first problem is that the regulations are limited in scope. While both guest workers and U.S. workers are able to complain to the DOL about their wages and working conditions, they can only do so if their employers have violated the obligations imposed by the legal framework.<sup>87</sup> An actionable complaint, however, cannot be filed with DOL as long as the employer is paying the wage required and meeting the otherwise minimal obligations. Even an employer’s more egregious acts, such as intimidating workers, denying medical care, or threatening workers, generally cannot be reached under the complaint process because there are no specific regulatory provisions that address these issues.<sup>88</sup> Guest workers are also unlikely to use this complaint

---

83. *Id.* at 30.

84. *Id.* at 36-37.

85. In fact, guest workers may exercise agency in relation to their personal life, *see* David Trouille, *Life Beyond the Company in Temporary Agriculture* (conference proceeding) (manuscript at p. 1) (on file with author), and less commonly exercise agency vis-à-vis the workplace by standing up for their rights, *see* Michelle Chen, *She Came to the U.S., Was Forced into Indentured Servitude, and Now Faces Deportation*, *NATION* (Oct. 21, 2015), <http://www.thenation.com/article/she-came-to-the-us-was-forced-into-indentured-servitude-and-now-faces-deportation>. *See also* Lee, *supra* note 68, at 67.

86. 20 C.F.R. § 655.100 (2010); 20 C.F.R. § 655.18(a)(1) (2015).

87. 20 C.F.R. § 655.185 (2010); 29 C.F.R. § 503.7 (2015).

88. The regulations contain no explicit protections from this kind of behavior, except for the extremely limited provision that prohibits retaliation after a worker has “exercised or asserted” any right or protection afforded by the H-2A regulations. 20 C.F.R.

process given the fear of retaliation that arises from the delegation of power to employers.<sup>89</sup>

Further, the legal framework, which provides a process for U.S. workers to complain about discrimination with U.S. DOL, is inadequate to address many instances of preferential treatment of guest workers.<sup>90</sup> The regulations state:

The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering . . . to [foreign] workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's [foreign] workers.<sup>91</sup>

In some cases, eligible U.S. workers may also file a claim under the civil rights laws, primarily under the prohibition for immigration-related unfair employment practices.<sup>92</sup>

While these antidiscrimination provisions should ostensibly protect U.S. workers, they cannot reach the preference for guest workers created by the employer's transformation of the job into one requiring high productivity and compliance. As a result, U.S. workers are sometimes unable to meet the requisite job-related standards.<sup>93</sup> By increasing productivity demands, for example, employers have not imposed additional "restrictions or obligations" on U.S. workers that will not be imposed on guest workers in violation of the legal framework. Thus, U.S. workers who are unable to meet those productivity demands may be fired at any time for cause. For similar reasons, civil rights laws cannot reach this employer behavior because employers have not engaged in differential treatment between guest and U.S. workers. Rather, employers have reasons that the law views as "legitimate" and "non-discriminatory" for these decisions.

These antidiscrimination provisions also cannot reach the ways in which employers transform guest worker jobs into ones that are ultimately undesirable

§§ 655.135(h)(5) (2010), 655.20(n)(5) (2015). Workers may, of course, bring private civil claims if they can fit the misconduct into other civil claims. *Lee, supra* note 68, at 50.

89. Even assuming that a worker has an actionable basis for a complaint, the complaint process neither specifies "when or in what manner the agency must act." *Holley, supra* note 5, at 601. DOL historically has failed to pursue worker complaints because of a lack of will and resources. *See Lee, supra* note 68, at 46-47.

90. 20 C.F.R. § 655.122(a) (2010); 20 C.F.R. § 655.20(q) (2015).

91. 20 C.F.R. § 655.122(a) (2010); 20 C.F.R. § 655.18(a)(1) (2015).

92. U.S. citizens and some lawful permanent residents may also have a claim under 8 U.S.C. section 1324b (1996). In fact, complaints concerning U.S. workers in the H-2A program will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel. 20 C.F.R. § 655.185(b) (2010). U.S. workers may also have a legal claim under other civil rights laws. *See* 42 U.S.C. § 2000e-2(a)(1) (2016); 42 U.S.C. § 1981 (2016).

93. It is unclear what training obligations exist for employers to train U.S. workers who may not perform the work to the employer's standards. Complaint at ¶ 20, *Obregon v. Spring Farms, Inc.*, No. 0:10-cv-00682-CMC, 2010 WL 4312985 (D.S.C. filed Mar. 30, 2010) ("Plaintiff was yelled at by the crew leader for pruning the peach trees unsatisfactorily. When Plaintiff asked for instruction, he was ignored.").

to U.S. workers. Through the systematic degradation of wages and working conditions, employers discourage U.S. workers from applying in the first instance. The reality in many guest worker industries around the country is that U.S. workers are simply not interested in applying to jobs with degraded wages and working conditions. U.S. workers have likely come to accept that these low-wage jobs are better filled by guest workers who are willing to work for such wages and under such conditions. When no U.S. workers have applied for or are working these jobs, these protections cannot legally encompass an employer who has not taken any actions to actively discriminate against U.S. workers.<sup>94</sup>

The current complaint processes, therefore, cannot encompass the larger underlying structural issues created by guest worker programs. Since employers, through the legal framework, have the license to degrade wages and working conditions, there is little that workers can complain about that actually violates the laws on the books. While more explicit regulations and a meaningful complaint process for workers could help shift the dynamics between employers and workers, the current processes simply fail to do so.

### C. *Fueling the Necessity for Guest Workers*

The operation of guest worker programs fuels the necessity for guest workers by chasing away U.S. workers. In their place, employers are always able to obtain willing guest workers to work under substandard conditions. As industries become increasingly dominated by guest workers, guest worker jobs enter a downward spiral of degradation, and U.S. workers are even less likely to apply. Employers too become accustomed to highly productive guest workers available through the programs, which creates a stronger preference for guest workers over U.S. workers. This cycle amounts to a self-feeding loop where the use of guest worker programs exacerbates the U.S. labor shortages that the programs are supposed to solve.

As employers help transform guest worker jobs, U.S. workers soon experience working conditions that make guest worker jobs intolerable.<sup>95</sup> U.S. workers who are not able to keep up with the expected productivity rates either

---

94. Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 984 (2006).

95. See, e.g., David Griffith, *New Immigrants in an Old Industry: Mexican H-2B Workers in the Mid-Atlantic Blue Crab Processing Industry* (Sept. 1997), <https://migration.ucdavis.edu/cf/more.php?id=148> (quoting U.S. workers as stating: “Only Mexicans worked the evening shift. That cut us out of working at night.”); FARMWORKER JUSTICE, *supra* note 4, at 21. Employers also favor foreign workers because they discriminate against guest workers based on age and gender. See Bruce Goldstein, Farmworker Justice, *Regional Perspectives on Agricultural Guestworker Programs*, Written Testimony before the Judiciary Subcomm. on Immigration Policy and Enf’t (Feb. 9, 2012), [http://judiciary.house.gov/\\_files/hearings/Hearings%202012/Goldstein%2002092012.pdf](http://judiciary.house.gov/_files/hearings/Hearings%202012/Goldstein%2002092012.pdf). H-2A employers also do not pay payroll taxes. See *id.*; 26 U.S.C. § 3121(b)(1) (2014); 26 U.S.C. § 3306(c)(1)(B) (2015).

quit or are fired.<sup>96</sup> In *Fulford v. Daughtry*, for example, U.S. workers complained because they were fired for failing to work quickly enough and meet production standards.<sup>97</sup> The court granted summary judgment to the employer finding that there was no really quantifiable production standard being imposed other than the requirement of “keep[ing] up with fellow workers” and that they were not otherwise “subjected to different working conditions” than the employed guest workers.<sup>98</sup> The result is that industries in certain geographic locales that participate in guest worker programs may be able to truly claim that they see declining numbers of “able, willing, qualified, and available” U.S. workers.<sup>99</sup>

With guest workers who can deliver long hours, high productivity, and minimal complaints for low wage rates, it is unsurprising that employers prefer them to U.S. workers.<sup>100</sup> Employers become adherents of guest worker programs. They have no problems finding available guest workers as foreign workers are often desperate to come to work in the United States.<sup>101</sup> The several-fold difference in income that can be earned in the United States compared to their home country creates a significant pull factor to seek out these guest worker jobs.<sup>102</sup>

As more guest workers dominate an industry, the more degraded the jobs become. Guest worker industries profiled above—shepherding, amusement parks, and seafood processing—all reveal how an industry that relies almost exclusively on guest workers has managed to use the legal framework to freeze wages and working conditions for decades. The shepherding industry has a longstanding history of using temporary foreign workers since the 1950s and became part of the H-2A program in 1986.<sup>103</sup> With some limited exceptions,

---

96. See, e.g., *Fulford v. Daughtry*, No. 4:11-CV-103-FL, 2013 WL 2458368, at \*3 (E.D.N.C. June 6, 2013) (granting summary judgment to employer on not providing false and misleading information about productivity “keep up with fellow workers”); *Obregon*, 2010 WL 4312985, at ¶ 20 (alleging that “plaintiff was yelled at by the crew leader for pruning the peach trees unsatisfactorily . . . [and] was then ordered to clear branches beneath the peach trees and was isolated from the foreign H-2A guest workers from Mexico”).

97. See, e.g., *Fulford*, 2013 WL 2458368, at \*3.

98. *Id.* at \*5, \*10.

99. See, e.g., Carol Ryan Dumas, *Sheep Industry Fears Loss of Herder H-2A Provision*, CAPITAL PRESS (Mar. 12, 2015, 10:06 AM), <http://www.capitalpress.com/Livestock/20150312/sheep-industry-fears-loss-of-herder-h-2a-visa-provisions>; *Forest Service Workers*, *supra* note 50, at 32.

100. In fact, this preference may cause some employers to act unlawfully. See *infra* notes 272-74.

101. AARON TERRAZAS, DEMETRIOS G. PAPADEMETRIOU, & MARC R. ROSENBLUM, *EVOLVING DEMOGRAPHIC AND HUMAN-CAPITAL TRENDS IN MEXICO AND CENTRAL AMERICA AND THEIR IMPLICATIONS FOR REGIONAL MIGRATION 2* (2011), <http://www.migrationpolicy.org/research/RMSG-demographic-human-capital-trends-mexico-central-america>.

102. *Id.*

103. In the early 1950s, the United States had special legislation that enabled herders from foreign countries to gain lawful permanent residency, bring over family members, and

workers had seen their monthly salaries increase by approximately \$100 over a period of twenty years.<sup>104</sup> Their working and housing conditions, including the requirement of being on-call twenty-four hours per day, seven days per week, have remained basically unchanged for decades. A similar story could be told about the amusement park industry that has used guest workers since the 1970s. By accounting for 2014 dollars, the wages for these workers have actually decreased by 1.3% from 2004 to 2014.<sup>105</sup> The working conditions remain onerous with fourteen hour days, seven days per week, and dangerous.<sup>106</sup> The Maryland crab industry turned to guest worker programs in 1986, replacing a network of female African American workers who lived near the plants with H-2B workers.<sup>107</sup> These jobs are now solely filled by H-2B crab pickers, who risk occupational injury because they face incredible pressure to work as quickly as possible to meet company poundage requirements.<sup>108</sup> The general pay for meat and seafood processing workers has also decreased over the past decade, by 3.3% when accounting for current dollars.<sup>109</sup> While the recent recalibration of the wages in these occupations provide for higher wages in certain industries, the wage methodologies are still inadequate to protect against further degradation of wages over time.<sup>110</sup>

For these industries, U.S. workers have become irrelevant as employers have no need to improve wages or working conditions under guest worker programs. In those industries that are not yet dominated by guest workers, the continued participation in guest worker programs means that while U.S. worker shortages worsen, the apparent necessity for guest workers will grow. Yet this necessity is ironically borne out of a system that not only seeks to protect U.S. workers from being adversely affected by the employment of guest workers, but also exacerbates the very problem it is designed to fix.<sup>111</sup>

---

ultimately become naturalized U.S. citizens. At the behest of ranchers, the sheep industry was folded into the H-2A program. H.R. REP. NO. 85-67, at 5 (1957).

104. Until the recent change in pay, the pay for shepherders was set by a prevailing wage methodology similar to the H-2B programs. DOL used data collected by the states about U.S. workers employed in shepherding but since there were so few U.S. workers the results became skewed. *See* California Rural Legal Assistance et al., *supra* note 48.

105. COSTA, *supra* note 43, at 13.

106. TAKEN FOR A RIDE, *supra* note 18, at 22.

107. GRIFFITH, *supra* note 95.

108. PICKED APART, *supra* note 25, at 25.

109. COSTA, *supra* note 43, at 13.

110. The recent increase in salary for shepherders, *see supra* note 14, is too little too late, as a minimum wage capped at forty-eight hours per week will not be sufficient to attract U.S. workers to these jobs. The H-2B program has recalibrated wages as well. *See* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24145 (Apr. 29, 2015). The prevailing wage for seafood workers in Dorchester County, Maryland, for example, *see supra* note 29, increased by \$1.73 per hour.

111. 20 C.F.R. § 655.100 (2010).

## II. CULTURAL NARRATIVES MASK REALITY

Cultural narratives mask the ways that guest worker programs delegate significant power to employers to degrade wages and working conditions to the detriment of all low-wage workers.<sup>112</sup> There are three main cultural narratives. The first narrative is about U.S. workers and how they lack sufficient work ethic to perform tedious or physically demanding jobs. These same U.S. workers might also refuse these jobs because they decide they are just “too good” for these jobs. In contrast, the second cultural narrative focuses on how guest workers possess the skills to do “hard work” because they are more biologically, culturally, and psychologically appropriate for the work at hand. The third cultural narrative focuses on the victimization of employers while characterizing their employment of guest workers as a benevolent act of foreign policy. Instead of recognizing the real impact of guest worker programs, these cultural narratives explain the phenomena of U.S. worker shortages and highly compliant guest workers as a product of individual cultural characteristics.

These cultural narratives, however, are not new. Rather, the earlier history of guest worker programs reveals that these narratives developed to counter opposition to these programs. This opposition was rooted in many of the same concerns that exist today: U.S. unemployment, the control of migration, and the treatment of guest workers. While these cultural narratives have altered over time to reflect the language of each era, the underlying theme of each narrative has remained remarkably consistent. Over time, these narratives have offered natural explanations about worker behavior, helping to conceal the ways that the legal framework of guest worker programs plays a significant role in shaping the interaction between employers, U.S. workers, and guest workers.

Yet these explanations are sweeping generalizations that are based on a questionable account of low-wage workers. Despite the fact that they more closely resemble cultural mythologies, these narratives have managed to persist because they “bear the imprint of dominant cultural meanings and relations of power as any other social practice.”<sup>113</sup> Powerful employer groups have managed to broadcast these narratives far and wide. These narratives have also had staying power because they resonate with certain prevailing conceptions about race, nationality, or class.

This section will analyze how these various cultural narratives are deployed within the discussion about guest worker programs. It begins with a

---

112. I use the term cultural narrative to signify the storytelling or rhetoric that reflects “the meanings and values” which are ascribed to “distinctive social groups and classes.” Stuart Hall, *Cultural Studies: Two Paradigms*, in *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 520, 527 (Nicholas B. Dirks, Geoff Eley & Sherry B. Ortner eds., 1994); see also Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J.L. & HUMAN.* 89, 89-90 (2000) (describing how racialized culture is misused to justify the subordination of women).

113. Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC’Y REV.* 197, 211 (1995).

brief history of guest worker programs and then reviews how these cultural narratives have developed to play a prominent role in the creation, reformulation, and maintenance of the programs. From these discussions, it analyzes how these cultural narratives continue to operate today to mask the reality of guest worker programs. It concludes by exploring considerations behind the staying power of these cultural narratives within the guest worker debate.

#### A. *Guest Worker Program Cultural Narratives*

Throughout the history of guest worker programs, pro-guest worker forces exploited cultural narratives to overcome ongoing opposition. The creation of guest worker programs resembles the trajectory of greater immigration history, which is rife with instances of embracing and rejecting immigrants in times of prosperity and decline.<sup>114</sup> The economic ups and downs which accompanied and followed World Wars I and II provided the impetus to create and terminate the first guest worker programs. Outside of war time, however, guest worker programs faced substantial opposition. A review of the historical and legislative record reveals that cultural narratives played a prominent role in justifying the need for such programs.

##### 1. *Brief History of Guest Worker Programs*

The first guest worker program was established during World War I.<sup>115</sup> Although contract labor had generally been banned by the Immigration Act of 1917, an exception allowed the Bureau of Immigration (then housed in the Department of Labor) to “regulate the admission of and return of otherwise inadmissible aliens applying for temporary admission.”<sup>116</sup> The Department of Labor, therefore, permitted contract workers to come primarily from Mexico, but also from the Bahamas and Canada, to work in agriculture, on railroads, and in coal mining after the Bureau of Immigration was deluged with complaints about labor shortages.<sup>117</sup> Portions of the program shut down in 1918 with the end of the war, but the agricultural segment was extended until

---

114. EDIBERTO ROMÁN, *THOSE DAMNED IMMIGRANTS: AMERICA’S HYSTERIA OVER UNDOCUMENTED IMMIGRATION* 112-13 (2013).

115. CONG. RESEARCH SERV., LIBRARY OF CONG., 96TH CONG., *TEMP. WORKER PROGRAMS: BACKGROUND AND ISSUES* (1980) [hereinafter *TEMPORARY WORKER PROGRAMS*]. Prior to that time, there were a number of instances of workers brought into the United States to work, such as the 55,000 Mexicans brought in after the Mexican American War. ROMÁN, *supra* note 114, at 116.

116. An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, Pub. L. No. 301, 39 Stat. 874 (1917). Section 3 of the 1917 Act denied admission to all “persons . . . induced, assisted, encouraged, or solicited to migrate to this country by offers or promises of employment . . . to perform labor.” *Id.*

117. *TEMPORARY WORKER PROGRAMS*, *supra* note 115, at 6-7.

1921 upon the request of growers.<sup>118</sup> The onset of the Great Depression changed the tide generally against foreign workers. The U.S. government began its mass repatriation of those of Mexican origin, by either deportation or “voluntary” departure due to government pressure during the 1930s.<sup>119</sup> Numerous political interest groups, such as the American Federation of Labor and the American Eugenics Society, joined the movement to curtail or end Mexican immigration on the basis of American unemployment or xenophobia.<sup>120</sup> Guest worker programs were not a viable option.

With the onset of World War II, however, the second guest worker programs began. In the 1940s, growers began anew to request foreign labor because of wartime shortages of workers. At first, the government resisted such requests from growers from multiple states, including the Governor of California, until the entry of the United States in World War II in December 1941.<sup>121</sup> Wartime legislation authorized the admission of workers pursuant to intergovernmental agreements in agriculture, timber and lumber, and railroad work, beginning with the Bracero program in 1942 and the British West Indies (BWI)/Bahamian program in 1943.<sup>122</sup>

With the end of WWII, it seemed that these guest worker programs would come to a close with the end of wartime legislation.<sup>123</sup> The Bracero program and BWI/Bahamian programs, however, continued to operate through a series of intergovernmental agreements under the same exception to the Immigration Act of 1917.<sup>124</sup> In 1951, the Bracero program with Mexico was formalized into federal law with the passage of Public Law 78.<sup>125</sup> One year later, Congress created the H-2 program through the Immigration and Nationality Act of 1952 to admit all other foreign unskilled workers.<sup>126</sup> These two combined programs created a spike in guest workers; the Bracero program swelled to five times the

---

118. *See id.*

119. George Kiser & David Silverman, *Repatriation During the Great Depression, in MEXICAN WORKERS IN THE UNITED STATES: HISTORICAL AND POLITICAL PERSPECTIVES* 33 (George C. Kiser & Martha Woody Kiser eds., 1979).

120. *See id.* at 48-51.

121. TEMPORARY WORKER PROGRAMS, *supra* note 115, at 16.

122. *See id.* at 16-17.

123. *See id.* at 18-19 (discussing the array of wartime legislation governing the admission of temporary workers).

124. *Id.* at 28; STAFF OF S. COMM. ON JUDICIARY, 95TH CONG., ON THE WEST INDIES (BWI) TEMPORARY ALIEN PROGRAM 1943-1977, at 8-9 (Comm. Print 1978) [hereinafter THE WEST INDIES].

125. Agricultural Act, 1949, amendment, Pub. L. No. 82-78, 65 Stat. 119 (1951). During the end of the wartime period, INS agents who found undocumented workers were authorized to contract them and legalize them into Braceros. RONALD L. MIZE & ALICIA C. S. SWORDS, *CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA* 32 (2011).

126. 1952 Immigration and Nationality Act, Pub. L. No. 82-414, 182 Stat. 66 (1952).



size it had been during World War II, and the BWI/Bahamian program tripled in size.<sup>127</sup>

The Bracero program continued for another decade until further mounting criticism in the 1960s caused Congress to end the program in 1964. Historians conclude that the program ended with the confluence of three events: (1) the Department of Labor took over the program, holding growers accountable to the bilateral agreements, (2) technological advancements in the cotton harvest made it so the large bloc of cotton growers no longer needed a vast amount of labor, and (3) farm worker advocates against the program successfully argued against the mistreatment of Braceros.<sup>128</sup> There were last-minute attempts to try to continue the Bracero program under the auspices of the H-2 program,<sup>129</sup> but the Department of Labor made clear through regulation that the intent of Congress was to end the Bracero program “to reduce the country’s dependence on imported labor.”<sup>130</sup> By 1964, with the end of the Bracero program, the country was left with only the H-2 program, a comparatively smaller guest worker program that would continue to decrease in size.<sup>131</sup>

As early as 1965, legislative efforts were introduced to reform the H-2 program.<sup>132</sup> For the following two decades, discussions about the expansion of the existing guest worker program took place within the context of the larger debate about the need to curb unauthorized migration. This expansion was proffered as a way to essentially legalize the already existing “large-scale illegal temporary worker program.”<sup>133</sup> In 1977, President Carter announced his program to control unauthorized migration through legalization and employer sanctions while considering the H-2 program as a potential solution:

I believe it is possible to structure this program so that it responds to the legitimate needs of both employees, by protecting domestic employment opportunities, and of employers, by providing a needed workforce. However, I am not considering the reintroduction of a Bracero-type program for the importation of temporary workers.<sup>134</sup>

---

127. CINDY HAHAMOVITCH, *NO MAN’S LAND: JAMAICAN GUESTWORKERS IN AMERICA AND THE GLOBAL HISTORY OF DEPORTABLE LABOR* 120 (2011).

128. DEBORAH COHEN, *BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO* 216-17 (2011); HAHAMOVITCH, *supra* note 127, at 126-32; *see also* Ellis W. Hawley, *The Politics of the Mexican Labor Issue, 1950-1965*, in *MEXICAN WORKERS IN THE UNITED STATES*, *supra* note 119, at 97, 114.

129. H. Michael Semler, *The H-2 Program: Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 *YALE L. & POL’Y REV.* 187, 195 (1983).

130. *TEMPORARY WORKER PROGRAMS*, *supra* note 115, at 65.

131. *See* Semler, *supra* note 129, at 194-95, 197 (stating that H-2 admission reduced by 40% from 1964 to 1968).

132. *TEMPORARY WORKER PROGRAMS*, *supra* note 115, at 69.

133. *Id.* at 110.

134. *Id.* at 72 (quoting 123 *CONG. REC.* 26682, 26982 (1977) (address by President Carter)).

While the Carter Administration's bill failed to advance beyond Senate hearings,<sup>135</sup> these three concepts—legalization, employer sanctions, and a guest worker program—continued to be debated over the next decade. While opponents eventually managed to fight back proposals for large-scale guest worker schemes, proponents won more expanded and streamlined guest worker programs.<sup>136</sup> On November 6, 1986, Congress ushered in the modern era guest worker programs as part of the Immigration Reform and Control Act (IRCA). IRCA split the H-2 program into the H-2A program and H-2B program.

## 2. *Development of Cultural Narratives*

The history of guest worker programs reveals that cultural narratives play a prominent role in justifying the formation, maintenance, and expansion of the programs. This section will explore the three main cultural narratives used by pro-guest worker forces: (1) U.S. workers are lazy or incapable, (2) guest workers are innately migratory and well-suited for hard work, and (3) employers are beneficent citizens victimized by market forces. These narratives were deployed in debates about maintaining the Bracero and BWI/Bahamian programs after the end of World War II and creating the modern era guest worker programs in 1986.

The first cultural narrative focused on lazy and incapable U.S. workers. The earliest version of this narrative described how U.S. workers were incapable of performing the requisite physical labor.<sup>137</sup> During the Bracero era, pro-guest worker forces emphasized the laziness of U.S. workers. Testifying before President Truman's 1951 Commission on Migratory Labor, one grower stated: "No amount of money would induce" the average U.S. worker "to accept steady employment" and "the payment of higher wages is usually an incentive to loaf, *not* to work."<sup>138</sup> Growers alleged that there was a genuine labor shortage because domestic workers "would no longer pick cotton, make use of a short-handed hoe, or engage in other 'stoop labor,'" and the few that came "were so lazy, shiftless, and spoiled that no employer should be required to use them."<sup>139</sup> These narratives cast doubt on the quality of U.S. workers as "unreliable, winos, incompetent, unstable or cantankerous" or even "damn tramps."<sup>140</sup>

---

135. TEMPORARY WORKER PROGRAMS, *supra* note 115, at 72.

133. HAHAMOVITCH, *supra* note 127, at 204-05.

137. In his testimony before the U.S. Chamber of Commerce in the 1920s, Charles Collins Teague, a grower, president of Sunkist Cooperative, and legal counsel for two powerful growers' associations, observed that "'Americans' were being educated 'away from hard work and menial tasks' precisely because very few could do agricultural work 'without serious physical consequences.'" COHEN, *supra* note 128, at 51.

138. HAHAMOVITCH, *supra* note 127, at 113.

139. Hawley, *supra* note 128, at 108.

140. COHEN, *supra* note 128, at 58.

During the debate about the modern era guest worker programs in the late 1970s and early 1980s, the cultural narratives about the deteriorating work ethic of U.S. workers continued to flourish. The corruption of U.S. workers in the modern era was now related to their reliance on public benefits. With the beginning of the Reagan Administration, conservatives attacked the liberal welfare policies of the 1960s, arguing that such policies had exacerbated the problem by making the poor less self-reliant.<sup>141</sup> As one Southwestern Senator expounded, the need for a robust guest worker program was essential because these jobs “are rejected by our citizens” who “find it more profitable and secure to collect unemployment or public assistance.”<sup>142</sup> A fact sheet on guest worker programs reprinted into the congressional record represented this sentiment of U.S. workers being able to shun jobs because of “the alternative” of governmental benefits.<sup>143</sup> These discussions echoed the sentiments of employer representatives, who on multiple occasions in hearings before the U.S. Senate stated that U.S. workers prefer to draw unemployment compensation, welfare, or food stamps.<sup>144</sup> The “simple truth is that Americans will not take these . . . positions” because “[t]he incentives not to work are simply too great and the alternative, hard work, is undesirable.”<sup>145</sup> Employers testified before the Committee on Agriculture not only about worker shortages but about U.S. workers who “do not show up for work at the time of need or, after working a few hours, refuse to complete the job.”<sup>146</sup> Employers’ reports of local workers quitting within the first hour or first day were circulated by representatives.<sup>147</sup> These stories focused on U.S. workers voluntarily making the choice to not do “the hard work” they find “undesirable.”<sup>148</sup>

---

141. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 175-76 (1997).

142. 125 CONG. REC. 16789, 16862 (1979) (statement of Sen. Harrison Schmitt).

143. 127 CONG. REC. S3085, S3237 (daily ed. Apr. 1981).

144. *Agricultural Labor Certification Programs and Small Business: Hearing on Agricultural Labor Programs and Small Business Before the Select Comm. on Small Bus.*, 95th Cong. 99, 117, 278, 328 (1977) (statement of Perry R. Ellsworth, National Council of Agricultural Employers) (statement of C.H. Fields, American Farm Bureau Association), at 117 (statement of S. Steven Karakalas, Counsel to the Farm Labor Executive Committee), at 278 (statement of Fruit Growers’ League of Jackson County, Oregon), at 328 (statement of George Ing, White Salmon, Washington) [hereinafter *Agricultural Labor Certification Programs*].

145. 128 CONG. REC. S7443, S7507 (daily ed. June 4, 1982) (Memo from Sen. S.I. Hayakawa).

146. H.R. REP. NO. 98-115, at 14 (1983).

147. 130 CONG. REC. 16339, 16371 (1984) (statement of Rep. Dan Lungren); 130 CONG. REC. 16339, 16388 (1984) (statement of Rep. Denny Smith).

148. 128 CONG. REC. S7443, S7507 (daily ed. June 4, 1982) (Memo from Sen. S.I. Hayakawa); see also *Oversight Hearing on Department of Labor Certification of the Use of Offshore Labor: Hearing Before the Subcomm. on Agric. Labor of the H. Comm. on Educ. & Labor*, 94th Cong. 84 (1975) (statement of Bert Perry, Virginia Employment Commission) (“If we could teach domestic workers to get up and go to work on Monday morning and work on Friday afternoon.”).

Anti-guest worker forces attempted to paint a different version of the U.S. worker as victim. They told a story about guest worker programs that displace and undercut American workers by giving employers cheap foreign labor.<sup>149</sup> U.S. unemployment was at “a post-war high of 10.4 percent” and guest worker programs would cause unemployment to increase.<sup>150</sup> Pro-guest worker forces, however, drowned out such claims by emphasizing U.S. workers’ deteriorating work ethic.<sup>151</sup> The cultural narrative about lazy or incapable U.S. workers, therefore, was crucial to refuting any concerns about the negative impact of expanded guest worker programs on U.S. workers.

Pro-guest worker forces developed a second cultural narrative about guest workers who, in contrast, were superior to U.S. workers for these low-skilled jobs. This narrative takes multiple forms over the history of the programs. The earliest versions described how immigrant workers were psychologically and biologically well-suited for manual labor.<sup>152</sup> In the 1920s, Charles Collins Teague, a grower, president of Sunkist Cooperative, and legal counsel for two powerful growers’ associations explained that Mexicans “are naturally adapted to agricultural work” and not part of that “roving class known as ‘tramps’ . . . who never work.”<sup>153</sup> These narratives were not exclusive to the Mexican laborer, as Asian immigrants were also sometimes seen as suitable: “The Chinese coolie is the ideal human mule. He will turn less food into more work, with less work, than any domestic animal.”<sup>154</sup> During World War II, employers praised Bahamian guest workers as “very satisfactory,” “superior to native

149. 130 CONG. REC. 16339, 16352 (1984) (statement of Rep. Howard Berman).

150. 128 CONG. REC. 28761, 28778 (1982) (statement of Rep. Patricia Schroeder).

151. But see arguments that guest worker programs helped sustain U.S. workers who pack, haul, market, and ship U.S. commodities. H.R. REP. NO. 99-682, pt. 1, at 83 (1986) (statement of John Norton, Deputy Secretary, Department of Agriculture); 132 CONG. REC. 10121, 10211 (1986) (statement of Rep. Lungren); 128 CONG. REC. 32115, 32172 (1982) (statement of Rep. Charles Pashayan); *Agricultural Labor Certification Programs*, *supra* note 144, at 381 (1977) (statement of Peter Naumes, Fruit Growers League).

152. Lisa Flores traces the narrative of the Mexican as the “peon laborer” created by “agricultural and industrial business working with journalists and political leaders” during the 1920s and 1930s. She explains that this narrative describes Mexicans as an eminently controllable workforce—individuals who were docile, ignorant, and willing to work hard on a temporary basis. See Lisa A. Flores, *Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration*, 20 CRITICAL STUD. MEDIA COMM. 362, 369-71 (2003); see also Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 315-23 (2012).

153. CHARLES COLLINS TEAGUE, FIFTY YEARS A RANCHER 141-42 (1928).

154. Flores, *supra* note 152, at 371; see also TEAGUE, *supra* note 153, at 143. In the reconstruction era, Asian immigrants were compared by one Southern newspaper as workers who were “more obedient and industrious than the negro.” Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 231 (1995). The employment of Chinese immigrants on the railroads “was accompanied by the same praise of their docility and efficiency.” *Id.* at 232 n.21. Secretary of Labor Wilson, however, shut down requests for the entrance of Hawaiian and Filipino workers and the suspension of the Chinese Exclusion Act by stating “[w]e have all the race problems in the United States that is advisable for us to undertake at this time.” TEMPORARY WORKER PROGRAMS, *supra* note 115, at 9.

workers,” and “far better than riffraff now walking our roads and shooting craps in the fields.”<sup>155</sup> Growers similarly praised Mexican braceros, stating that their productivity was great and claiming that Mexicans were innately “better ‘at this type of work’ because ‘of their short stature.’”<sup>156</sup> After the end of World War II, this narrative of the suitable guest worker would continue to circulate. Representative George Murphy from California would confirm that Mexicans actually preferred farm work and that “their proficiency at this labor was due to their ‘manual ability’ and ‘skill in the handling of tools.’”<sup>157</sup> Government officials with the Farm Placement Service (FPS) even reported these alleged facts: “I’ve seen the [braceros] work stooping over for hours at a stretch without straightening up. An Anglo simply couldn’t take it. But it didn’t seem to bother these boys a bit. . . . Mexicans are a good deal shorter than the Anglos—they’re built closer to the ground.”<sup>158</sup> Another FPS representative said, “[Anglos] wouldn’t last a day out there. . . . Filipinos can work out there, and it never affects them. Mexican[s], the same. But with light skins, it’s murder.”<sup>159</sup> Yet the representative also added that “Negroes can’t take it either.”<sup>160</sup>

During the debate about the modern era guest worker programs, pro-guest worker forces continued to use these series of cultural narratives about an eminently suitable guest worker based on the softer cultural characteristics of workers. The American Farm Bureau claimed that their “[e]xperiences over the years with foreign workers from Mexico, Jamaica, and Canada” were the opposite of experiences with U.S. workers who “are of limited value due to poor motivation and other limiting factors,” given that these jobs require “certain skills, a certain physical stamina and a desire to perform this kind of hard work.”<sup>161</sup> Ashton Hart, of the National Council of Agricultural Employers, stated in hearings before the U.S. Senate that “many [unemployed persons] are unable to meet the physical demands.”<sup>162</sup> An accompanying news article discussed H-2 workers in Maine who “climb[] up and down a 22-foot ladder, lugging 30 pounds of apple,” where the grower stated of his H-2 workers: “the Jamaican is the best picker I’ve ever seen . . . . They’ve never seen welfare. They like to work.”<sup>163</sup> In a memorandum to the Senate Judiciary

---

155. HAHMOVITCH, *supra* note 127, at 82, 23.

156. COHEN, *supra* note 128, at 56.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Agricultural Labor Certification Programs*, *supra* note 144, at 105 (statement of C.H. Fields, American Farm Bureau Association).

162. *H-2 Program and Non-Immigrants: Hearing Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 29, 34 (1981) (statement of Ashton Hart, National Council of Agricultural Employers) (reprinting Steven Morrison, *Jamaicans in Maine: Stint Profitable – for Boss, Workers*, L.A. TIMES, Oct. 21, 1981) [hereinafter *H-2 Program and Non-Immigrants*].

163. *Id.*

Committee, one senator stated that foreign workers “are harder workers and more reliable” because they are primarily motivated “from their desire to earn money to support their families back home,” while the motivation for U.S. workers to show up for work is “in order to satisfy the welfare requirements.”<sup>164</sup> In this way, pro-guest worker forces promoted guest workers over U.S. workers as eminently suitable for the job because they possessed cultural characteristics that made them capable of doing the difficult work required.

Besides being suitable for the work, a separate but related cultural narrative developed about how guest workers were truly migratory and ultimately unlikely to stay and assimilate. During the debate about the modern era programs, this narrative was crucial to addressing concerns about unauthorized migration. Within this discussion, some viewed undocumented immigrants as taking jobs, depressing wages and working conditions, and competing with unskilled and uneducated U.S. workers.<sup>165</sup> Pro-guest worker forces used the cultural narrative of the truly migratory guest worker who was ultimately unlikely to stay and assimilate to counter these general fears about immigration.<sup>166</sup> They explained that guest workers do not even want U.S. citizenship, but rather only want to work on a temporary basis, “which will help them survive their temporary hardship.”<sup>167</sup> Alan Nelson, Deputy Commissioner of the INS, confirmed such assertions, stating that there had only been “a few situations” of guest workers “not leaving” and that the great majority “do return to their country of origin.”<sup>168</sup> In this way, pro-guest worker forces argued that guest worker programs would essentially replace the “illegal” immigrant with a new kind of “legal” immigrant, a kind of suitable immigrant whose stay is merely temporary. Employers can obtain work from the “legal” immigrant without having to address the broader aspects of their person, including the issues created by their accompanying family life and integration into a

---

164. 128 CONG. REC. S7443, S7507 (1982) (Memo from Sen. S.I. Hayakawa); *see also H-2 Program and Non-Immigrants*, *supra* note 162, at 107 (1981) (statement of John Etchepare of Western Range Association) (“[T]he boys generally that we work with . . . they are here strictly to build a base to go home or buy farms, help their families buy farming properties.”).

165. H.R. REP. NO. 93-108, at 7 (1973); *see also* H.R. REP. NO. 97-890, at 31 (1982); William Raspberry, *Their Tired, Their Poor – Our Jobs*, WASH. POST, July 4, 1980.

166. These sentiments resembled earlier cultural narratives about Mexicans who loved their “patria,” to explain why they were less interested in staying, assimilating, and becoming naturalized. Flores, *supra* note 152, at 371. Even earlier government reports reflected this narrative: “While the Mexicans are not easily assimilated, this is not of very great importance as long as most of them return to their native land after a short time.” Katherine Benton-Cohen, *Other Immigrants: Mexicans and the Dillingham Commission of 1907-1911*, 30 J. AM. & ETHNIC HIST. 33, 38 (2011).

167. 124 CONG. REC. 17097, 17161 (1978) (testimony of Sen. Harrison Schmitt); *see also* 127 CONG. REC. 1, 59 (1981) (statement of Sen. Harrison Schmitt).

168. *H-2 Program and Non-Immigrants*, *supra* note 162, at 12 (1981) (statement of Alan Nelson, Deputy Comm’r of the Immigration and Naturalization Service), at 13 (statement of A. James Barnes, Legal Counsel, Department of Agriculture).

community.<sup>169</sup> As Harold Edwards with the BWI Central Labour Organization explained, because the worker “is far from his home and his family and his own personal interests . . . [t]his removal from his environment helps to induce him to put in a full day . . . for seven days on a stretch.”<sup>170</sup> In this fashion, the suitable guest worker narrative coheres to the immigrant narrative of threat and danger,<sup>171</sup> whereby suitable guest workers can replace unwanted undocumented immigrants, because they provide labor without the attendant social “problems” that arise from the integration of immigrants into U.S. society.

Finally, pro-guest worker forces were successful at painting employers as both victims of market forces and good-will ambassadors of foreign policy. During the Bracero era, there was mounting opposition against guest worker programs. In 1951, President Truman’s Commission on Migratory Labor issued a report criticizing these guest worker programs, stating “[w]e have used the institutions of government to procure alien labor willing to work under obsolete and backward conditions.”<sup>172</sup> Pro-guest worker forces countered these criticisms by shining a positive light on employers involved in “an exercise in international good will” or providing “indirect foreign aid,” where Braceros could “earn several times as much as in his native land, learn American agricultural techniques, and then return with a ‘nest egg’ that would give him a chance in life.”<sup>173</sup> A House Report discussing the enactment of the H-2 program echoed this sentiment of employer beneficence towards foreign countries, where “foreign trainees [will be able] to acquire the knowledge of American industrial, agricultural, and business methods.”<sup>174</sup> Even the AFL-CIO President wrote that employers through the BWI H-2 program are “making a substantial aid contribution to the West Indies, at no cost to the American taxpayer, at no loss of self-respect to the West Indians, but merely as a fair return for a fair day’s work on the part of law-abiding and ambitious West Indian workers.”<sup>175</sup> Further, pro-guest worker forces similarly used the narrative of “the long-suffering farmer” who was constantly harried by the vagaries of weather and insects, subjected to the iron grip of a cost-price

---

169. As one congressional representative explained, Americans can understand a guest worker program to fill unwanted jobs but not any program where they would be expected to pay “welfare benefits.” 132 CONG. REC. 26393, 26400 (1986) (statement of Rep. William Dannemeyer).

170. *Agricultural Labor Certification Programs*, *supra* note 144, at 93.

171. See LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 45 (2008) (describing how immigrants can be threatening because they are perceived as “immutable and impervious to the influences of the larger society,” uneducated and segregated into ethnic enclaves, and unwilling to integrate).

172. REPORT OF THE PRESIDENT’S COMMISSION ON MIGRATORY LABOR, *MIGRATORY LABOR IN AMERICAN AGRICULTURE* 23 (1951).

173. Hawley, *supra* note 128, at 109.

174. H.R. REP. NO. 18-3265 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1698.

175. *THE WEST INDIES*, *supra* note 124, at 21.

squeeze” while subject to U.S. worker shortages.<sup>176</sup> This narrative aligned well with the overall description of employers as victims of the preferences, capabilities, and behavior of U.S. workers.

During the debate about the modern era programs, pro-guest worker forces focused on employer good will. This cultural narrative describes employers as benevolent actors who not only helped poor workers and their families but also aided poorer countries “through contributions to the income of those countries and the acquisition of skills by nationals of those countries.”<sup>177</sup> This narrative was important to counter anti-guest worker forces, who used the specter of the discredited Bracero programs to argue that such programs would amount to the abuse and exploitation of guest workers. Anti-guest worker forces told a counter-narrative about greedy employers who were interested in slave labor, calling the program a “rent-a-slave program,” which “would appall the conscience even of a 19th-century slave owner.”<sup>178</sup> As put by one congressional representative: “What a cruel hypocrisy it is that we are working on a bill to protect this country from a supposed flood of cheap labor, and in the midst of it, we find provisions that guarantee an endless flood of cheap and cruelly exploited foreign workers.”<sup>179</sup> By hiring guest workers, pro-guest worker forces responded that they were actually helping poor workers and their families as a matter of benevolent foreign policy. The employment of such guest workers would be a munificent act, where poorer countries would also benefit from the training of their nationals in first-world techniques to bring back to their home countries. They countered strongly registered complaints about the abuse and exploitation of guest workers during the Bracero era although the potential for recreating Bracero-like conditions did not go unnoticed.<sup>180</sup>

At the same time, employers again countered with their own victimization. They were victims of U.S. worker shortages, the vagaries of weather, and the squeeze of consumers. They were subject to the deteriorating U.S. worker ethic or preference, where the introduction of employer sanctions for hiring undocumented workers bolstered the claim of future worker labor shortfalls and dislocations.<sup>181</sup> This created U.S. worker shortages that then exposed growers

---

176. Hawley, *supra* note 128, at 107.

177. H.R. 3270, 98th Cong. § 2 (1983).

178. 130 CONG. REC. 16339, 16387 (1984) (statement of Rep. Henry Gonzalez).

179. *Id.*; see also 130 CONG. REC. 16339, 16447 (1984) (statement of Rep. Howard Berman).

180. See *infra* notes 248-49 and accompanying text for discussion about increasing regulation of the modern era programs.

181. *Agricultural Labor Certification Programs*, *supra* note 144, at 467 (statement of Hugo Shibahara, Hood River County Chamber of Commerce) (“Without getting deeply into the work ethic philosophy of the new generation-American labor force, it would seem that the domestic work force would rather do nothing . . . .”); H.R. REP. NO. 99-682, at 83 (1986) (statement of Deputy Sec’y of Agriculture John Norton); 130 CONG. REC. 16339, 16374 (1984) (statement of Rep. Romano Mazzoli); *H-2 Program and Non-Immigrants*, *supra* note



to the haphazard growing season, where the absence of workers meant leaving “weather-sensitive crops rotting on the ground.”<sup>182</sup> John Norton, Deputy Secretary of Agriculture, also pointed to the American consumers who paid “reasonable price levels,” which created a squeeze on employers.<sup>183</sup> This economic narrative focused on the “tremendous, unnecessary cost to American businesses” of U.S. worker shortages.<sup>184</sup>

In this fashion, pro-guest worker forces developed a series of cultural narratives about U.S. workers, guest workers, and employers, to counter opponents’ concerns. From the latter period of the Bracero era to the debate about the modern era programs, there was no longer a ready justification for these programs based on wartime necessity. During such debates, therefore, the cultural narratives deployed by pro-guest worker forces became significant to justify the creation, maintenance, and reformulation of guest worker programs.

### B. *Natural Phenomena*

These three main cultural narratives ultimately conceal the ways in which the legal framework of guest worker programs degrades guest worker jobs. Instead of presenting the reality of how guest worker programs authorize employers to worsen U.S. worker shortages and coerce guest worker productivity, cultural narratives offer an explanation that makes these phenomena appear natural. Leticia Saucedo has argued that prevailing cultural narratives about immigrant workers help to obfuscate employers’ practices of targeting subservience and avoiding native born workers, which create “the brown-collar workplace.”<sup>185</sup> Here too, cultural narratives offer an explanation

---

162, at 18 (1981) (statement of A. James Barnes, Legal Counsel, Department of Agriculture).

182. 130 CONG. REC. 17225, 17289 (1984) (Bob Sexter & Ronald B. Taylor, *New Wave of Cheap Labor Seen: Alien Farm Workers Fear Immigration Law Change*, L.A. TIMES (Oct. 22, 1985), [http://articles.latimes.com/1985-10-22/news/mn-12275\\_1\\_farm-worker](http://articles.latimes.com/1985-10-22/news/mn-12275_1_farm-worker)); see also H.R. REP. NO. 99-682, at 50-51 (1986); *Agricultural Labor Certification Programs*, supra note 144, at 218 (statement of Peter Langrock, Shoreham Cooperative Apple Producers Association) (“I have enclosed colored photographs showing apples that had fallen to the ground because labor was unavailable to pick them.”).

183. H.R. REP. NO. 99-682, pt. 1, at 83 (1986) (Deputy Sec’y of Agriculture John Norton). Competition with mechanically harvested fruit or fruit from abroad also created a squeeze on employers. *Agricultural Labor Certification Programs*, supra note 144, at 339.

184. 127 CONG. REC. 3878, 3996 (1981) (statement of Sen. Harrison Schmitt); 119 CONG. REC. 14171, 14208 (1973) (statement of Rep. White); see also, e.g., 128 CONG. REC. 21655, 21689 (1982) (statement of Sen. Mark Hatfield); H.R. REP. NO. 98-115, at 14 (1983) (statement of James Matson, President of Matson Fruit Co.); 130 CONG. REC. 17225, 17289 (1984) (statement of Rep. Jim Slattery).

185. Saucedo, supra note 94, at 962-63; see also Saucedo, supra note 152, at 315-23. More recent scholarship looks at the intersection of these immigrant cultural narratives with gender. See, e.g., Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 HARV. J.L. & GENDER 625 (2010); Llezlie Green Coleman, *Exploited at the*

for the behavior of U.S. workers, guest workers, and employers based on their individual cultural characteristics. Unpacking these cultural narratives, however, reveals a series of cultural mythologies premised on problematic stereotypes.

Pro-guest worker forces continue to explain current U.S. worker shortages by blaming U.S. workers. They are increasingly using the language of mismatched skills to argue that U.S. workers are either incapable of doing these jobs or simply “too good” for these jobs. On the one hand, U.S. workers lack the skills to perform these jobs. Employers, for example, describe how U.S. workers cannot follow instructions because they “were actually planting the plants upside down”<sup>186</sup> or generally “perform work in an unsatisfactory manner.”<sup>187</sup> H-2B employers similarly claim that “welfare recipients lack the skills to perform H-2B jobs.”<sup>188</sup> U.S. workers are perceived as so ill-suited for these jobs that they do not even look the part; they can be fired for failing to wear the right clothes and shoes for the job.<sup>189</sup> On the other hand, students that traditionally filled certain H-2B jobs are described by employers as “want[ing] everything handed to them on a silver platter.”<sup>190</sup> Other H-2B employers state that U.S. workers do not apply because these are not the kind of jobs that parents envision that their children will do when they grow up.<sup>191</sup> The rationale used by employers is that U.S. workers are too educated to take jobs to perform this kind of manual labor.<sup>192</sup> At the same time, employers have not let go of the

---

*Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL’Y & L. 397, 398 (2015).

186. Garance Burke, *Despite Economy, Farm Jobs Still Go Begging*, NBC NEWS (Sept. 27, 2010), [http://www.nbcnews.com/id/39380593/ns/business-personal\\_finance/t/despite-economy-farm-jobs-still-go-begging/#.VzRc7fkrJ48](http://www.nbcnews.com/id/39380593/ns/business-personal_finance/t/despite-economy-farm-jobs-still-go-begging/#.VzRc7fkrJ48).

187. Sean Cockerham, *Seasonal Farm-Worker Visa Program Frustrates Growers*, MCCLATCHY DC (May 7, 2012, 5:00 AM), <http://www.mcclatchydc.com/news/politics-government/article24729139.html>.

188. See DAVID SEMINARA, CTR. FOR IMMIGR. STUD., *DIRTY WORK: IN-SOURCING AMERICAN JOBS WITH H-2B GUESTWORKERS* 9 (2010), <http://cis.org/sites/cis.org/files/articles/2010/h-2b.pdf>.

189. First Amended Complaint at ¶ 5.21, *Briones v. Gerten Greenhouses & Garden Ctr., Inc.*, No. B-05-009, 2005 WL 2576717 (S.D.Tex. Aug. 25, 2005).

190. Denny Lee, *Fewer Visas, Fewer Resort Workers*, N.Y. TIMES (June 10, 2005), <http://www.nytimes.com/2005/06/10/travel/escapes/few-visas-fewer-resort-workers.html>.

191. Lorraine Mirabella, *Md. Seafood Businesses Stand to Benefit from Discovery of Unused Guest Worker Visas*, BALTIMORE SUN (June 5, 2015), <http://www.baltimoresun.com/business/bs-bz-seafood-workers-visas-20150605-story.html>.

192. *H-2A Visa Program: Meeting the Growing Needs of American Agriculture?: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 2 (2011) (statement of Rep. Zoe Lofgren); *H-2B Program: Hearing Before the Subcomm. on Immigration, Citizenship, Refugee, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 70 (2008) (statement of Stephen Camarota, Director of Research, Center for Immigration Studies) [hereinafter *H-2B Program*]. This is not a new concept. In his testimony before the U.S. Chamber of Commerce in the 1920’s, Teague observed that “‘Americans’ were being educated ‘away from hard work and menial tasks’ precisely because very few could do agricultural work ‘without serious physical consequences.’” COHEN, *supra* note 128, at 51; see also ROGER

characterization of some U.S. workers as lazy or derelict. Growers have complained that U.S. workers have “gotten soft” and “end up quitting because it is hard, leaving the crops to rot in the fields.”<sup>193</sup> A nursery owner complained that they have “absentee problems”<sup>194</sup> or, according to one Idaho grower, “are lazy, don’t want to be there, don’t want to put in the time and don’t want to do anything.”<sup>195</sup> Employers also complain that U.S. workers often have “a [criminal] background that makes them difficult to employ.”<sup>196</sup>

These narratives help mask the ways in which guest worker programs degrade wages and working conditions to chase U.S. workers away. Rather, cultural narratives enter to explain how U.S. workers may have insufficient skills, are “too good” or too lazy for these jobs. These narratives serve as a ready cultural explanation for the phenomenon of U.S. worker shortages. As a result, they help refute the idea that raising wages and improving working conditions could recruit more U.S. workers to guest worker jobs. They also refute any allegation of discrimination “because they conform to the narrative of the employer as an innocent participant in a natural process.”<sup>197</sup> Viewed through the lens of these cultural narratives, the decline of U.S. workers in H-2A and H-2B jobs fits comfortably within the natural explanations about the behavior of U.S. workers.

In turn, pro-guest worker forces argue that guest workers are well suited for these low-wage jobs. While the current cultural narrative about the highly productive and compliant guest worker continues to eschew overtly eugenic-based conceptions, it still focuses on softer cultural characteristics nonetheless based on race, ethnicity, or nationality.<sup>198</sup> Staffing agency websites that provide H-2B labor, such as [www.latinlabor.com](http://www.latinlabor.com), [www.mexicanlabor.com](http://www.mexicanlabor.com), and

---

WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 158 (2003).

193. See Johnson, *supra* note 76.

194. Burke, *supra* note 186.

195. Sean Cockerham, *Employers Seek Changes to Farmworker Program*, SPOKESMAN REV. (May 12, 2012), <http://www.spokesman.com/stories/2012/may/12/employers-seek-changes-to-farmworker-program>.

196. Nancy Lofholm, *Hiring Efforts Fail to Bear Fruit: Orchards Try to Hire Locals, But Most Job-Seekers Aren’t Interested*, DENVER POST (Apr. 18, 2010), [http://www.denverpost.com/recommended/ci\\_14911550](http://www.denverpost.com/recommended/ci_14911550). Guest worker jobs may require that they pass criminal background checks, a growing trend among all employers. John Lantigua, *Use of Guest Workers Draws Fire: Residents Won’t Take Service Jobs, Employers Say*, PALM BEACH POST, June 12, 2011, at 1A. There is an increasing trend for employers to use criminal background checks regardless of job qualifications. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1-2 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

197. Saucedo, *supra* note 94, at 975, 984 (explaining that the antidiscrimination framework is not equipped to look beyond what appears to be a “societally driven phenomenon” of the “brown collar workforce”).

198. Modern racial ideology depends on complex notions of cultural, national, and physical difference rather than simple biology. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 8 (2004).

www.maslabor.com, extol Mexican workers as “happy agreeable people” with a “strong work ethic” that are often “underemployed.”<sup>199</sup> Another recruitment company promises H-2B workers with “higher labor productivity” while a recruiter of H-2A workers from Mexico and Asia ensures “dependable, experienced, and motivated” workers “delivered to your doorstep.”<sup>200</sup> MJC Labor Solutions, Inc., which brings over H-2B workers from Central and South America, provides employer testimonials about guest workers who “are very eager to learn,” “always willing to work late,” and “never complain.”<sup>201</sup> H-2B workers in the resort industry are described by congressional representatives as a “professional, trained, and dependable work force” that consists of “trusted and well-trained workers.”<sup>202</sup>

These cultural narratives explain that the high productivity and compliance of guest workers arises from their old-fashioned work ethic or docility. They operate to mask the ways in which the operation of guest worker programs is responsible for creating what are perceived as the cultural characteristics of the suitable guest worker. Guest worker programs authorize employers to shape these undesirable jobs and coerce guest workers into high rates of productivity. Workers who do not demand raises or question working conditions, therefore, are labeled as “happy” and “agreeable” workers with “work ethic.”

Yet these cultural narratives, which essentially amount to cultural mythologies, are suspect for a number of reasons. The power imbalance between employers and low-wage workers belies this prevailing cultural narrative of workers with free choice and employers victimized by their circumstances. The concept of the “long-suffering” farmer continues to abound. H-2A employers allege that they “have to bear almost all the labor market risk” of obtaining workers and face the dire consequences of having a “field left unharvested.”<sup>203</sup> H-2B employers similarly claim that they are squeezed by consumers who expect reasonable prices while confronted with U.S. workers uninterested in service jobs.<sup>204</sup> In reality, however, employers are not mercilessly subject to the naturally occurring phenomena of U.S. worker shortages, but rather are active participants in this story. While workers do have the agency to make decisions about whether to apply for a job, accept a job, or work at a grueling pace, these cultural narratives mask the context in which these choices get made. The context reveals a series of constraints that severely

199. SEMINARA, *supra* note 188, at 11.

200. GROWER LAB. SERVS., <http://www.growerslaborservices.com> (last visited Feb. 20, 2017); *see also* H2A & H2B Guest Worker Services, FED’N OF EMPLOYERS & WORKERS OF AM., <http://www.fewaglobal.org/services> (last visited Feb. 20, 2017).

201. *Testimonials: testimonios*, LATINLABOR.COM, <http://latinlabor.com/employers/testimonials.htm> (last visited Feb. 21, 2017).

202. *H-2B Program*, *supra* note 192, at 9 (statement of Rep. Bart Stupak); *id.* at 13 (statement of Rep. Timothy H. Bishop).

203. Johnson, *supra* note 76.

204. Nicole Cotroneo, *Visa Denials Mean Unfinished Business*, N.Y. TIMES (May 20, 2007), <http://www.nytimes.com/2007/05/20/nyregion/nyregionspecial2/20mainli.html>.

curtail worker choices. Employers, within this context, are often making the choice to use guest worker programs to avoid paying higher wages<sup>205</sup> and recognize that despite the administrative burden or cost guest workers are highly productive and compliant.<sup>206</sup> Immanuel Ness concludes that employers are not victims but rather operators who use guest worker programs as “part of a calculated effort . . . to lower labor costs and expand profits.”<sup>207</sup>

Nevertheless, there are counterexamples that negate some of these sweeping generalizations about U.S. workers. Not all U.S. workers are highly educated. For the 25-64 age range, there are 19.6 million individuals who do not have a high school degree and 44.1 million more with only a high school degree.<sup>208</sup> Nor are U.S. workers unwilling to take difficult or migratory jobs if they pay well. Some examples include garbage collection, custodial work, and dishwashing.<sup>209</sup> Alaska has not had a hard time attracting workers for temporary jobs from the 48 continental states by offering attractive wages and affordable housing.<sup>210</sup> Sanitation jobs demonstrate a willingness of U.S. workers to perform a difficult job in return for better wages. In 2014, more than 90,000 individuals submitted applications to become sanitation workers in New York City, with nationwide starting salaries of well over \$40,000 including typical overtime pay.<sup>211</sup> Similarly, the oil industry has been able to attract workers to remote locations to work difficult jobs that can require long hours and intemperate conditions. Thousands of workers flocked to North Dakota searching for jobs with a starting salary of \$66,000, even given that the jobs require 80-120 hours per week in conditions that can reach -30 degrees Fahrenheit.<sup>212</sup>

Finally, these cultural narratives are problematic as sweeping generalizations. Like all mythologies, they are not based on wholesale falsity. There are, in fact, U.S. workers who would likely claim that they are too

---

205. A recent radio report profiling one of the first citrus growers to use the H-2A program in Florida recounted how he turned to the H-2A program when he lost his U.S. workers to the farm across the street that was paying more. Now the H-2A program dominates the citrus industry in Florida. Dan Charles, *Guest Workers, Legal yet Not Quite Free, Pick Florida's Oranges*, NPR (Jan. 28, 2016), <http://www.npr.org/sections/thesalt/2016/01/28/464453958/guest-workers-legal-yet-not-quite-free-pick-floridas-oranges>.

206. See Lofholm, *supra* note 196; Trouille, *supra* note 85, at 5.

207. NESS, *supra* note 7, at 14.

208. *National Data*, LUMINA FOUND., <http://strongernation.luminafoundation.org/report/2016/> (last visited Feb. 20, 2017).

209. SEMINARA, *supra* note 188, at 11.

210. *Id.*

211. Jamie Hellman, *Sanitation Gold: NYC Garbage Collection Jobs in Huge Demand*, AL JAZEERA (Jan. 13, 2015), <http://america.aljazeera.com/watch/shows/real-money-with-alivelshi/articles/2015/1/13/sanitation-gold.html>; Patrick Gillespie, *The \$100,000 Job: Garbage Workers*, CNN (Feb. 26, 2016), <http://money.cnn.com/2016/02/24/news/economy/t-rash-workers-high-pay>.

212. Blair Briody, *10 Highest-Paying Jobs in North Dakota Oil Boom*, FISCAL TIMES (Nov. 5, 2013), <http://www.thefiscaltimes.com/Articles/2013/11/05/North-Dakota-Oil-Jobs-10-Highest-Paying-Positions>.

superior for guest worker jobs. There are some guest workers who would be highly compliant under any working conditions. These generalizations, however, are tied to racial, ethnic, or class assumptions. The earlier eugenic-based conceptions of workers, for example, are ones that today would readily be rejected as false. Even with the shift away from innate biology, these explanations of behavior based on inherent cultural characteristics of workers remain problematic and lend credence to their status as cultural mythologies.

Since the enactment of the modern era programs, therefore, cultural narratives have continued to play this crucial role in helping to maintain and push for the expansion of guest worker programs. By focusing on U.S. workers, guest workers, and employers as atomized individuals with particular cultural characteristics, these cultural narratives conceal the larger structural reality of how guest worker programs shape worker behavior. Viewed through the lens of these prevailing cultural narratives, the reality is more readily explained by a coherent picture of lazy or unwilling U.S. workers, suitable guest workers, and benevolent employers subject to the vagaries of the labor market. The next section examines how these series of cultural mythologies have maintained their primacy as the explanation for the natural phenomena of U.S. worker shortages and highly productive and compliant guest workers.

### C. Marketable Cultural Narratives

Despite the fact that they more closely resemble cultural mythologies, these cultural narratives are eminently marketable. They are pushed by organized employers who are a powerful voice within this realm. As a result, they get frequent play within the media and political sphere. These cultural narratives also comport with prevailing stereotypes of workers based on race, ethnicity, and class. They resonate as natural explanations of behavior of low-wage workers. Cultural narratives, therefore, become easier to embrace than a complex explanation about how guest worker programs operate to create U.S. worker shortages and guest worker suitability.

From the early history of guest worker programs, employers have driven the conversation about guest worker programs. In this conversation, employers repeatedly pushed these cultural narratives about U.S. workers and guest workers, while continuing to paint themselves as munificent benefactors of impoverished guest workers. One need not look further than the congressional record to see the kind of influence that was wielded by employers to contest anti-guest worker forces. During the debates concerning the Bracero and modern era programs, the cultural narratives of pro-guest worker forces became largely prominent because of the ability of the agricultural industry to organize and exert political power.<sup>213</sup> Elected officials, who represented the political

---

213. TEMPORARY WORKER PROGRAMS, *supra* note 115, at 45; *see also* COHEN, *supra* note 128, at 168-69; Hawley, *supra* note 128, at 102-04, 110.

interests of employers, bought into these various cultural narratives, repeating them throughout the guest worker debates.

Today, employers continue to play a significant role in marketing cultural narratives. Their powerful voices now extend beyond the mainstay of the agricultural industry to the multiple industries covered by the H-2B program. Industries that have weighed in include the American Hotel & Lodging Association, the Forest Resources Association Inc., National Association of Landscape Professionals, and the Maryland Seafood Industry.<sup>214</sup> They are increasingly organized. The H-2B Workforce Coalition has been created to specifically lobby on H-2B issues, which includes powerful forces such as the U.S. Chamber of Commerce and large recruiting companies that play an intermediary role, such as the Federation of Employers and Workers of America.<sup>215</sup> Many approved H-2B petitions go to big businesses that import hundreds, and sometimes thousands, of worker each year.<sup>216</sup> Yet much of the rhetoric is about saving “small businesses” from closing down.<sup>217</sup> These associations unsurprisingly continue to tout the familiar cultural narratives about U.S. and guest workers to explain the need for guest worker programs. Employers have generally been more successful in offering a cultural perspective where their own power over shaping the wages and working conditions of these jobs is irrelevant. They are successful in getting their viewpoint out beyond the strictly political sphere into the mainstream media.<sup>218</sup> In this way, employers have not only tried to expand the number of guest workers who could be brought through the modern era programs, but also sought to resist any tightening of the legal framework that would be unfavorable to employers.<sup>219</sup>

---

214. *See, e.g.*, Press Release, H-2B Workforce Coal., H-2B Workforce Coalition Applauds Introduction of House Bill to Reform H-2B Visa Program (Nov. 5, 2015), <https://www.ahla.com/PressRelease.aspx?id=38411>; Press Release, Sen. Barbara Mikulski, Mikulski Calls on Homeland Security Secretary to Conduct Audit of Seasonal Worker H-2B Visas (Apr. 29, 2015), <http://www.mikulski.senate.gov/newsroom/press-releases/mikulski-calls-on-homeland-security-secretary-to-conduct-audit-of-seasonal-worker-h-2b-visas-and-make-available-unused-visas-for-businesses-that-use-h-2b-visas>.

215

*Member Associations*, H-2B WORKFORCE COALITION, [http://www.h2bworkforcecoalition.com/page.asp?g=h2b&content=member\\_associations](http://www.h2bworkforcecoalition.com/page.asp?g=h2b&content=member_associations) (last visited Feb. 20, 2017).

216. In fiscal year 2015, the top three in approved petitions were: TruGreen LandCare (1,319); Silver Bay Seafood, LLC (959); and Superior Forestry Service, Inc. (947). *See* U.S. DEP’T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, H-2B TEMPORARY NON-AGRICULTURAL LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 2015 (2015), [https://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_Selected\\_Statistics\\_FY\\_2015\\_Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY_2015_Q4.pdf).

217. *See supra* note 214.

218. *See* NESS, *supra* note 7, at 5.

219. *See, e.g.*, Department of Labor Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2599 (2015); *NHLA, Others Sue DOL, DHS Over H-2B Policies*, LANDSCAPE MGMT. (June 4, 2015), <http://landscapemanagement.net/nhla-others-sue-dol-dhs-over-h-2b-policies> (“The National Hispanic Landscape Alliance (NHLA) joined Bayou Lawn & Landscape Services, the National Association of Landscape Professionals, Superior Forestry and the Small and Seasonal Business Legal Center in filing a lawsuit against the U.S.

Moreover, these cultural narratives about low-wage workers resonate because they often connect to racialized notions about workers perpetuated by employers, workers, and the public at large. Employers in the agricultural industry, for example, find Latino immigrants preferable based on their “essentially unchangeable cultural inclinations or characteristics,” which also makes them ill-suited to take on managerial positions.<sup>220</sup> Employers prefer Latinos for low-wage work because they “will work on a repetitious basis,” “seem to be good with their hands,” and “are willing to come do whatever job you tell them without question.”<sup>221</sup> Employers view Asian workers as also suitable for tedious work because they are “patient people.”<sup>222</sup> On the other hand, they perceive white workers as not wanting “to get their hands dirty” because they are too good for low-wage jobs.<sup>223</sup> Some employers also view African Americans workers as reluctant to take the lowest-paid jobs.<sup>224</sup> Workers themselves may self-segregate, where they view certain “bad jobs” as appropriately belonging to certain ethnic groups, such as “Mexican work.”<sup>225</sup> The cultural assumption about the superiority of white or African American workers, however, can sometimes appear both in tension and harmony with the characterizations of these groups as lacking “work ethic.” In particular, employers may view whites as lacking “work ethic” specifically for the manual jobs, although they may have the motivation to fill management positions.<sup>226</sup> On the other hand, elites might generally identify the white poor, particularly the rural white poor, as lazy and dumb where the privilege of the color of their skin means that not working “can be due only to laziness.”<sup>227</sup> Employers’ negative bias against African American workers derives from the notion that they have poor work ethic and are militant, where such problems are often couched as “attitude problems” that have deleterious effects on their work ethic

---

Department of Labor (DOL) and the Department of Homeland Security (DHS) in the U.S. District Court for the Northern District of Florida. The lawsuit asks the court to declare recently enacted H-2B rules illegal.”).

220. Marta María Maldonado, *Racial Triangulation of Latinola Workers by Agricultural Employers*, 26 HUM. ORG. 353, 358 (2006).

221. WALDINGER & LICHTER, *supra* note 192, at 162.

222. Edmund J.W. Park, *Racial Ideology and Hiring Decisions in Silicon Valley*, 22 QUALITATIVE SOC. 223, 229 (1999) (studying employers’ hiring preferences in the assembly labor force for the high tech industry).

223. WALDINGER & LICHTER, *supra* note 192, at 156.

224. *Id.* at 176-77.

225. *See id.* at 182-83; *H-2B Program*, *supra* note 192, at 69 (statement of Stephen Camarota, Director of Research, Center for Immigration Studies); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1229 (2008).

226. WALDINGER & LICHTER, *supra* note 192, at 157; Maldonado, *supra* note 220, at 355.

227. Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 796-97 (2011) (quoting JOE BAGEANT, DEER HUNTING WITH JESUS: DISPATCHES FROM AMERICA’S CLASS WAR 9 (2007)).



and respect for authority.<sup>228</sup> In this way, these racialized narratives can also dovetail with cultural assumptions about low-wage workers available for guest worker jobs.

The cultural narrative about the personal failure of U.S. workers is one that resonates with the prevailing view of blaming those at the bottom of the socioeconomic hierarchy. This viewpoint explains the poverty of low-wage workers as the result of “the natural concomitant of individual defects in aspiration or ability.”<sup>229</sup> In other words, “a low wage is somehow the worker’s fault, for it simply reflects the low value of his labor.”<sup>230</sup> Over time, the U.S. political discourse has promoted “self-reliance,”<sup>231</sup> while American surveys reveal that individualistic explanations for poverty, such as the lack of effort or ability, poor morals, or poor work skills, are overwhelmingly favored over structural explanations.<sup>232</sup> The victim blaming discourse supports the idea that anyone willing to work can make it.<sup>233</sup> The cultural narrative of U.S. worker laziness, criminality, or lack of skills, therefore, resonates with a prevailing cultural norm about low-income individuals.

While these cultural narratives are created by pro-guest worker forces, they also remain powerful because of the ways in which they are often absorbed by the protagonists themselves. It is difficult to separate out what is certainly intertwined in the employer context—the extent to which these cultural narratives serve merely strategic ends or are a reflection of employers’ true beliefs. Given the dominance of such narratives, some workers themselves also adopt them as an accurate world view, particularly when considering the “other” group of workers. U.S. workers, for example, describe their difference from guest workers by saying, “[w]e are not going to run all the time . . . [w]e

---

228. WALDINGER & LICHTER, *supra* note 192, at 172; WILSON, *supra* note 141, at 118, 132.

229. James Jennings, *Persistent Poverty in the United States: Review of Theories and Explanations*, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 13, 14 (Louis Kushnick & James Jennings eds., 1999).

230. DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 5-6 (2004). The author, however, recognizes a countervailing “American Anti-Myth” about society being largely responsible for an individual’s poverty.

231. Valerie Polakow, *The Shredded Net: The End of Welfare as We Know It*, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 167, 167 (Louis Kushnick & James Jennings eds., 1999).

232. WILSON, *supra* note 141, at 159; see also Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 504-06 (2008) (discussing the trend towards dispositionism based on the failure to appreciate the influence of situational forces). Today’s discussion about income inequality reveals a similar theme, where the poor need “social capital” to be equipped “with the skills, values, and habits that will allow them to succeed,” although there is some recognition of the need for structural policy reforms as well. Peter Wehner & Robert P. Beschel, Jr., *How to Think About Income Inequality*, 11 NAT’L AFF. 94, 113 (2012).

233. Polakow, *supra* note 231, at 170.

are not Mexicans.”<sup>234</sup> Guest workers, on the other hand, may believe that they innately have better work ethic than do U.S. workers.<sup>235</sup>

Pro-guest-worker forces are ultimately able to market their cultural narratives far and wide. These cultural narratives played a prominent role in the earlier debates and directly countered concerns about guest worker programs. Their persistence today continues to obfuscate the ways in which the underlying structural factors delegate differential amounts of power among groups to achieve a result that is contrary to a normative vision for all low-wage workers. Cultural narratives will continue to be strategically revived to push for the maintenance and expansion of the current guest worker programs.

### III. THE DIGNITY OF LOW-WAGE WORKERS

Guest worker programs have become largely impervious to attack. The goal here, despite the inevitable tensions in finding the right policy solution, is to advocate for an open recognition of the ways in which the current guest worker programs are shaped by legal and social norms. The governing law has fueled its own necessity by exacerbating U.S. worker shortages and creating preferences for guest workers. In turn, the strong prevailing cultural narratives that surround guest worker programs mask this reality and further justify its continued existence and expansion. Despite regular revelations about the abuses of guest workers, therefore, guest worker programs continue to persist. In the past five years alone, there have been dozens of proposals for expanding guest worker programs.<sup>236</sup> With a highly politicized climate focused on curbing unauthorized migration and protecting U.S. businesses, the concern about the rights of guest workers can easily become lost.

Given this context, a new approach—an appeal to the normative concern about the dignity of all low-wage workers—is crucial to reshape these legal and social norms. In order to do so, the strategy must extend beyond focusing on

---

234. Bronner, *supra* note 71.

235. See, e.g., Shannon Gleeson, *Labor Rights for All?: The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 590-91 (2010); Trouille, *supra* note 85, at 5.

236. For agricultural programs, see, for example, Family Farm Relief Act of 2015, H.R. 1805, 114th Cong. (2015); Agricultural Guest Worker Act (AG Act), H.R. 1773, 113th Cong. (2014); Short Term Retention for Agricultural Workers (STRAW) Act, H.R. 70, 113th Cong. (2013); Legal Agricultural Workforce Act, H.R. 242, 113th Cong. (2013); Better Agricultural Resources Now (BARN) Act, H.R. 3443, 112th Cong. (2011); American Specialty Agricultural Act, H.R. 2847, 112th Cong. (2011); Helping Agriculture Receive Verifiable Employees Securely and Temporarily (HARVEST) Act, S. 1384, 112th Cong. (2011). For non-agricultural programs, see, for example, Strengthen Employment and Seasonal Opportunities Now (SEASON) Act, H.R. 3918, 114th Cong. (2015); Save our Small and Seasonal Businesses Act of 2015, S.2225, 114th Cong. (2015); Seasonal Labor for Job Creators Act, H.R. 2758, 114th Cong. (2015); Save Our Season Act, H.R. 2756, 113th Cong. (2013); Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. (2013); Save Our Small and Seasonal Businesses Act of 2011, H.R. 3718, 112th Cong. (2011).

the abuses of guest workers to include the plight of the U.S. worker. The ultimate goal is to use the U.S. worker as a proxy for examining the normative conditions of guest worker jobs for all low-wage workers. The U.S. worker offers the possibility of constructing both legal claims and discourse that can help disentangle the contradictions of guest worker programs. As a matter of legal claims, the focus on the U.S. worker helps to reveal how the legal framework degrades jobs and exacerbates U.S. worker shortages. As a matter of discourse, it can be more politically palatable to serve the interest of all low-wage workers impacted by guest worker programs. The advantage of this strategy is that it can serve to unify normally disparate groups on the issue of immigration. The challenge, however, is finding ways through which to avoid replicating the divisive discourse between U.S. and immigrant workers.

A. *Guest Worker Programs Are Impervious to Attack*

Anti-guest worker forces have highlighted the abuses of guest workers within the H-2A and H-2B programs. As a result, they have helped to shape the regulation of these programs. This advocacy ultimately, however, has led to neither a drastic overhaul nor an eradication of the programs. Instead, it has been drowned out by the legal framework that fuels the necessity for such programs and the cultural narratives that mask this reality. The rights of guest workers can also become lost within the highly politicized discussion about curbing unauthorized migration and maintaining U.S. businesses. Pro-guest-worker forces have been successful in seizing on these anxieties to push for the expansion of guest worker programs.

A number of advocacy groups have been actively working to expose the ways in which the current regime is rife with guest worker abuse. The Southern Poverty Law Center and Farmworker Justice both advocate for guest worker rights by filing lawsuits against abusive employers and lobbying for change to guest worker programs.<sup>237</sup> Both organizations have exposed exploitation that rose to the level of human trafficking and have compared guest worker programs to slavery.<sup>238</sup> The National Guest Worker Alliance (NGA) similarly focuses on advancing working conditions for guest workers and working towards a more just migration policy.<sup>239</sup> While the NGA has used similar tactics of exposing guest worker exploitation to campaign for changes to the H-2B program, it has also sought to support guest workers' own organizing efforts to bring about these changes.<sup>240</sup> These groups, along with other similar

---

237. *Guest Worker Rights*, S. POVERTY LAW CTR., <https://www.splcenter.org/issues/immigrant-justice/guest-workers> (last visited Feb. 20, 2017); *About Farmworker Justice*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/about> (last visited Feb. 20, 2017).

238. *See supra* note 4.

239. *About NGA*, NAT'L GUEST WORKER ALLIANCE, <http://www.guestworkeralliance.org/about-nga> (last visited Feb. 20, 2017).

240. *Id.*

advocacy organizations, have been largely responsible for strengthening the regulatory protections within the H-2A and H-2B programs.<sup>241</sup>

Focusing on the exploitation of guest workers is crucial because it garners significant public attention and subjects to scrutiny the value of guest worker programs.<sup>242</sup> This focus on bad actors, however, has often resulted in narrowing the solution to one centered on increasing the efficacy of enforcement rather than examining the underlying program.<sup>243</sup> Certainly the end of the Bracero program in 1965 was, in part, because of the growing recognition of the “slave-like” condition of Braceros.<sup>244</sup> This counter-narrative was particularly timely during the civil rights era, when the continuation of the program became a moral issue.<sup>245</sup> Two decades later, however, it did not ultimately stop the creation of modern era guest worker programs.<sup>246</sup> Pro-guest-worker forces were able to get these programs enacted, in part, by offering to strengthen protections for guest workers to avoid repeating the mistakes of the Bracero program.<sup>247</sup> Currently, strengthened regulatory protections for guest workers can similarly appear facially reasonable for addressing labor abuses. The H-2B program, for instance, was recently

---

241. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010); Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042 (Apr. 29, 2015); Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24145 (Apr. 29, 2015).

242. See, e.g., Alvaro Bedoya, *Captive Labor: The Plight of Peruvian Shepherders Illuminates Broader Exploitation of Immigrant Workers in U.S. Agriculture*, DOLLARS AND SENSE, <http://www.dollarsandsense.org/archives/2003/0903bedoya.html> (last visited Feb. 20, 2017); Nigel Duara, *\$20-Million Settlement Reached in Guest-Worker Lawsuits*, L.A. TIMES (July 14, 2015), <http://www.latimes.com/nation/la-na-ff-workers-lawsuit-20150714-story.html>.

243. A recent Government Accountability Office Report found that the main issues facing the guest worker programs included a lack of information sharing regarding disbarred employers, a disproportionate allocation of resources towards H-2A employer investigations, and an inability to investigate violations before the statute of limitation has run. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 82, at 47-52.

244. The ending of the Bracero program was also due to the loss of support from cotton farmers due to the mechanization of cotton and the strong leadership of the U.S. Department of Labor. See *supra* note 128.

245. Hawley, *supra* note 128, at 113-14.

246. The eventual compromise of farm worker legalization and guest worker programs was endorsed by a broad cross-section of groups including the Farm Labor Alliance, the American Farm Bureau Federation, the H-2 Coalition, the AFL-CIO, as well as number of civil rights groups. H.R. REP. NO. 99-682, pt. 5, at 5837 (1986).

247. The design of the H-2A program was intended to address the concerns raised by anti-guest worker forces. Compare 132 CONG. REC. 2887, 2979 (1986), at 2971 (statement of Rep. Albert Bustamante); 132 CONG. REC. E2635, E2645-46 (1986) (statement of Rep. Howard Berman) (reprinting letter from the ACLU); 131 CONG. REC. 24,291, 24,392 (1985), at 24,317 (statement of Sen. Ted Kennedy) (reprinting statement of Dolores Huerta); H.R. REP. 99-682(I), at 5684 (1986) with H.R. REP. 99-682(V), at 5684, 5837 (1986); 132 CONG. REC. 30,156, 30,218 (1986) (statement of Rep. Dan Lungren); 130 CONG. REC. 16,339, 16,447 (1984), at 16,382 (statement of Rep. George Miller) (supporting a guest worker program with adequate safeguards for the recruitment, free housing, and employment standards for a workable H-2 program).

revamped to increase protections for guest workers, including provisions to regulate foreign recruiters, unauthorized deductions, and travel and visa expenses.<sup>248</sup> Both programs now explicitly prohibit employers from engaging in human trafficking, including by holding or confiscating “workers’ passports, visas, or other immigration documents.”<sup>249</sup> Increased regulation on the books helps pro-guest-worker forces argue that guest worker programs can regulate against the few “bad apples” who engage in unlawful labor practices.<sup>250</sup>

Beyond the response of regulatory revisions, the counter-narrative about guest worker abuse has not managed to tip the scales against these programs. Powerful employers have been able to capitalize on the phenomena of U.S. worker shortages and highly suitable guest workers created by the law. In turn, the strong prevailing cultural narratives that surround guest worker programs mask this reality and further justify its continued existence and expansion. Despite the well-known abuses of guest workers, therefore, the opposition finds itself consistently fighting against this steady march towards expanding guest worker programs.<sup>251</sup> On April 15, 2015, for example, several members of New York’s congressional delegation, led by Representative Chris Gibson (R-NY), reintroduced the failed “Family Farm Relief Act of 2015,” to expand the H-2A program by including year-round industries, such as dairy and livestock, for a period of up to three years.<sup>252</sup> Multiple attempts have also been made to increase the number of H-2B workers, including by Representative Charles Boustany (R-LA) on June 12, 2015. In fact, the H-2B cap for certain returning guest workers was just recently removed by an appropriations rider attached to the Fiscal Year 2016 Labor, Health and Human Services, Education and Related Agencies bill.<sup>253</sup>

This push for expansion also conveniently dovetails with the concern about unauthorized migration. On March 26, 2015, for example, at a Senate Homeland Security and Governmental Affairs Committee hearing, a number of speakers focused on the need to streamline and expand a low skill guest worker program to address unauthorized migration.<sup>254</sup> As Madeline Zavodny, of the

---

248. See generally 20 C.F.R. § 655.20 (2015).

249. 20 C.F.R. § 655.20(z) (2015); 20 C.F.R. § 655.135(e) (2015).

250. See, e.g., *H-2B Program*, supra note 192, at 20 (statement of Rep. Bart Stupak).

251. Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 385 (2016).

252. Family Farm Relief Act of 2015, H.R. 1805, 114th Cong. (2015).

253. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (amending section 214(g)(9)(A) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(9)(A)) by striking “2004, 2005, or 2006 shall not again be counted toward such limitation during fiscal year 2007” and inserting “2013, 2014, or 2015 shall not again be counted toward such limitation during fiscal year 2016”).

254. *Securing the Border: Hearing on Defining the Current Population Living in the Shadows and Addressing Future Flows Before the S. Comm. on Homeland Sec. & Gov’t Affairs*, 114th Cong. (2015), <http://www.hsgac.senate.gov/hearings/securing-the-border-defining-the-current-population-living-in-the-shadows-and-addressing-future-flows> [hereinafter *Securing the Border*].

American Enterprise Institute testified, “the United States should try to channel immigration into legal streams” through guest worker programs, given “that employer demand for foreign labor is strong . . . and that the supply of potential immigrants is enormous.”<sup>255</sup> This hearing echoes the sentiments of pro-guest worker forces who believe that the concept “brings us closer to solving the immigration puzzle”<sup>256</sup> by “reap[ing] significant returns on reducing illegal immigration and improv[ing] the economy.”<sup>257</sup> In practice, however, guest worker programs have not reduced unauthorized migration.<sup>258</sup> Yet the push to substantially limit immigration is substantial. Conservative lawmakers increasingly argue that the United States has “failed to send a clear message . . . that you can only come to the United States lawfully.”<sup>259</sup> For the U.S. Chamber of Commerce, it is evidently “clear as a matter of logic that legal temporary worker programs for lesser-skilled workers would enhance U.S. security and border control.”<sup>260</sup>

Further, guest worker programs appeal to the “nativist xenophobic sentiment to permanent immigration.”<sup>261</sup> Given the increasingly vocal anti-immigrant movement,<sup>262</sup> guest worker programs resonate because they avoid the complications presented by immigrant integration while achieving greater border security.<sup>263</sup> As guest workers only seek to offer their “machine-body” for work and otherwise come temporarily without need to assimilate, it remains an attractive option for those that seek to reject the permanent immigration of low-wage workers. The cultural narrative of the guest workers who stay temporarily underlines their orderly “importation” and “exportation,” which aligns with those who advocate restrictive immigration policies.

255. *Id.* at 6-7 (statement of Madeline Zavodny).

256. Press Release, H. Comm. on the Judiciary, Chairman Goodlatte Introduces Ag Guestworker Bill (Apr. 26, 2013), <https://judiciary.house.gov/press-release/chairmangoodlatte-introduces-ag-guestworker-bill>.

257. Matthew La Corte, *Immigration Experts Fail to Recognize Probable Guest-Worker Program Successes*, NISKANEN CTR. (July 17, 2015), <https://niskanencenter.org/blog/immigration-experts-fail-to-recognize-probable-guest-worker-program-successes/>.

258. HAHAMOVITCH, *supra* note 127, at 237.

259. P.J. Tobia, *No Country for Lost Kids*, PBS NEWS HOUR (June 20, 2014), <http://www.pbs.org/newshour/updates/country-lost-kids>.

260. *Securing the Border*, *supra* note 254, at 5 (statement of Randel Johnson, Senior Vice President, Labor, Immigration, and Employee Benefits, U.S. Chamber of Commerce).

261. NESS, *supra* note 7, at 5; HAHAMOVITCH, *supra* note 127, at 123 (tracing historically how it is offers a manageable solution “guestworkers offered in exchange for ‘wetbacks’ — the essence of the Drying Out policy”).

262. See generally Cristina Costantini, *Anti-Latino Hate Crimes Rise as Immigration Debate Intensifies*, HUFFINGTON POST (Oct. 18, 2011, 8:27 AM), [http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration\\_n\\_1015668.html](http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html); Lauren Fox, *Anti-Immigrant Hate Coming from Everyday Americans*, U.S. NEWS (July 24, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/07/24/anti-immigrant-hate-coming-from-everyday-americans>; Katie Linthicum, *How Donald Trump Turned the Immigration Debate from Reform to ‘Anchor Babies’*, L.A. TIMES (Aug. 26, 2015, 3:00 PM), <http://www.latimes.com/nation/la-na-immigration-politics-20150826-story.html>.

263. NESS, *supra* note 7, at 55.

At the same time, guest worker programs can appear as a compromise option to those who would like to expand opportunities for immigration to the United States. Pro-guest worker forces find support for such programs by artfully crafting them as an option that can increase migration possibilities while achieving both greater border and economic security. This rhetorical strategy ensures that guest worker programs continue to persist as a component of most immigration reform proposals.<sup>264</sup> Thus far, guest worker programs have prevailed over concerns about abuses of guest workers.

### B. *Revitalization of the U.S. Worker*

Given the persistence of guest worker programs, U.S. workers can provide an additional basis from which to construct arguments about the failed guest worker programs. These arguments not only form the basis of legal claims but also serve as important discourse for the larger policy debate about guest worker programs. The use of U.S. workers as a proxy for the overall failure of these programs for all workers can be a more successful tactic given the increased political salience of arguments concerning U.S. workers. This strategy also has the potential to unite normally politically disparate groups on the issue of immigration. A simplistic U.S. worker focus, however, risks alignment with anti-immigrant politics. A more comprehensive explanation is needed, in the form of a clear message that shifts the blame away from workers towards employers' use of guest worker programs to chase away U.S. workers. With careful framing, the focus on the U.S. worker can help to expose both how the legal framework systematically fuels the necessity for guest worker programs and how cultural mythologies help to mask this fundamental problem.

The first strategy is to enlist U.S. workers as the basis for legal challenges to the operation of guest worker programs. Some lawsuits, for example, have argued that guest worker programs contravene the statute's purpose of protecting U.S. workers. In one series of cases focused on H-2B wage methodology, Plaintiffs stated that U.S. DOL has consistently failed to require employers to pay wages that did not "adversely affect the wages and working conditions" of U.S. workers.<sup>265</sup> In another series of cases relating to the H-2A shepherding program, Plaintiffs sued on similar grounds alleging that U.S. DOL failed to protect against the "influx of cheap foreign labor that would depress American wages and displace American workers from agricultural

---

264. S. 744, 113th Cong. § 2109 (as passed by Senate, June 27, 2013); Press Release, White House, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html>.

265. First Amended Complaint at 3, *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (2:09-CV-00240-LP); *see also* *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014) (*CATA III*); *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (*CATA II*).

jobs” and that the recently issued guidance was substantively inadequate because it allows employers to import foreign workers under conditions that adversely affect the employment opportunities, wages, and working conditions of U.S. workers.<sup>266</sup> The result of some of these lawsuits has been a reformulation of the wage regulations that govern guest worker programs to better protect U.S. workers, although they still fall short of curing the problem of wage depression.<sup>267</sup>

In the future, advocates may be able to assert even broader statutory legal claims against the programs on the basis of their adverse impacts on U.S. workers. A new collaborative at the Economic Policy Institute (EPI) seeks to increase transparency about the ways in which employers use guest worker programs and the resulting impact on U.S. workers in local state markets.<sup>268</sup> While EPI has previously published studies quantifying the impact of the wage methodology more generally on the prevailing wages in guest worker jobs,<sup>269</sup> evidence of the adverse impact of guest worker wages in specific job occupations in local areas on U.S. workers could form the basis for further legal challenges to guest worker programs.

U.S. workers have also filed lawsuits against individual employers for discrimination. These lawsuits showcase the strategies employers use to favor guest workers. Employers may choose to pay lower wages or provide unequal benefits to U.S. workers.<sup>270</sup> They may seek to mislead U.S. workers about the terms and conditions of the jobs.<sup>271</sup> Employers may hold U.S. workers to

266. Amended Complaint, *Hispanic Affairs Project v. Perez*, 141 F. Supp. 3d 60 (D.D.C. 2015) (No. 1:15-CV-0162-BAH); *see also* Complaint, *Zacarias-Mendoza v. Solis*, 924 F. Supp. 2d 307 (D.D.C. 2013) (No. 1:11-CV-01790-BAH); Complaint, *Llacua v. Western Range Ass'n*, No. 15-CV-01889-CBS (D. Colo. Sept. 1, 2015).

267. Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24145 (Apr. 29, 2015) (to be codified in 20 C.F.R. pt. 655); Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States, 80 Fed. Reg. 62958, 62960 (Oct. 16, 2015). *See supra* notes 15 and 46 for a discussion about the limitations of these reformulations and *infra* notes 295-96 for potential solutions.

268. Led by researchers Daniel Costa and Michael Wasser, GuestworkerData.org is “A Research Collaboration of Jobs with Justice Education Fund and the Economic Policy Institute.” *See About this Project*, GUESTWORKER DATA, <http://guestworkerdata.org/about> (last visited Feb. 20, 2017).

269. Apgar, *supra* note 62; Costa, *supra* note 43.

270. *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d 334, 340 (D. Mass. 1999); *Perez-Farias v. Glob. Horizons, Inc.*, 286 P.3d 46, 48 (Wash. 2012); Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages, *Murillo v. Servicios Agricolas Mex, Inc.*, No. CV07-02581 PHX-GMS, 2010 WL 4875393 (D. Ariz. Oct. 4, 2010); Complaint for Injunctive Relief and Restitution, Breach of Contract at 2, *Orea v. Harry Singh & Sons Farming Ltd. P'ship*, No. 04 CV 1881 WQH (POR), 2004 WL 2657063 (S.D. Cal. Sept. 17, 2004); Complaint at 4, *Vega v. McKinstry*, No. 05CV30173, 2005 WL 2097996 (D. Mass. July 25, 2005).

271. *Malacara v. Garber*, 353 F.3d 393, 396 (5th Cir. 2003); *Villalobos v. N. Carolina Growers Ass'n, Inc.*, 252 F. Supp. 2d 1, 5 (D.P.R. 2001); *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 2d at 340.



productivity standards that are not applied to the guest workers, and pay U.S. workers less.<sup>272</sup> Over time, these lawsuits have accrued multiple examples of the ways in which guest worker programs discriminate against U.S. workers.

Apart from legal claims, increased discourse about U.S. workers and guest worker programs can offer a useful counter-narrative about how such programs fail local communities. In Palm Beach County, for example, a series of news articles exposed the use of guest workers in local clubs and resorts, even with the high unemployment rates for U.S. workers in the region.<sup>273</sup> It revealed the employer preference for highly compliant guest workers, working as housekeepers, waiters, kitchen personnel, and groundskeepers, and questioned the ways in which employers recruited local workers.<sup>274</sup> As a result, county officials began a program to work with employers to reduce their dependence on guest workers, with the “goal of eliminating all foreign workers in the county hospitality industry in four years.”<sup>275</sup> Efforts to publicize similar problems could also dovetail with ongoing concerns with temporary visa programs. One example is the temporary cultural exchange visa (the J-1 program), which is being used to bring “student guest workers” into low-wage jobs in domestic work, factories, and agriculture.<sup>276</sup> In the well-publicized incident with Hershey’s chocolate workers, hundreds of J-1 workers walked off the job because of poor working conditions and sub-par minimum wages.<sup>277</sup> Hershey, through a series of subcontractors, had transformed these jobs into undesirable jobs to be filled by J-1 workers and had been reducing the number of U.S. workers who were full-time union employees.<sup>278</sup> Advocates need to find ways to better connect with low-wage U.S. workers to promote such counter-narratives.

A glimpse into the discourse about high-tech guest worker programs also reveals how U.S. workers can bring to light the ways in which guest worker programs promote a preference for foreign workers. The layoffs of U.S. information technology workers at Disney in favor of high-skilled guest

---

272. Second Amended Complaint at 12, *Tomason v. Stanley*, No. 6:13 CV 42, 2014 WL 4276122, at ¶ 68 (S.D. Ga. Feb. 14, 2014).

273. John Lantigua, *Hotels Reducing Foreign Workers: Country Clubs Also Agree to a County Plan to Recruit and Train Locals*, PALM BEACH POST, Oct. 18, 2011, at 1A; Editorial, *Win for Homegrown Workers*, PALM BEACH POST, Oct. 21, 2011, at 16A.

274. Lantigua, *supra* note 273; Editorial, *supra* note 272.

275. John Lantigua, *Foreign Hires Down as Palm Beach County Clubs and Resorts Are Pressed to Hire Locals*, PALM BEACH POST (Dec. 15, 2012), <http://www.palmbeachpost.com/news/news/state-regional-govt-politics/foreign-hires-down-as-palm-beach-county-clubs-and-1nTXnn>.

276. 8 U.S.C. § 1101(a)(15)(J) (2014).

277. Julia Preston, *Pleas Unheeded as Students’ U.S. Jobs Soured*, N.Y. TIMES (Oct. 16, 2011), [http://www.nytimes.com/2011/10/17/us/hershey-foreign-exchange-students-pleas-were-ignored.html?ref=todayspaper&\\_r=0](http://www.nytimes.com/2011/10/17/us/hershey-foreign-exchange-students-pleas-were-ignored.html?ref=todayspaper&_r=0).

278. Julia Preston, *Companies Point Fingers as Students Protest Conditions at Chocolate Plant*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/2011/08/19/us/19students.html>.

workers (H-1B), for example, created an outcry about the H-1B program. The H-1B program was criticized as “destroy[ing] the livelihoods and dignity of tens of thousands of American workers” and the U.S. DOL opened an investigation on two outsourcing companies for high tech workers.<sup>279</sup> A recent poll of employers found that 73% opposed expanding H-1B programs and that 55% stated that the focus should be on “re-skilling American workers.”<sup>280</sup> Rather than focusing on the personal failures of these high-skilled U.S. workers, there was a willingness to look at solutions that could address the structural barriers to employing U.S. workers. There are many distinctions between low-wage and high-tech workers, including that high-tech guest workers can eventually apply for lawful permanent residency. The outcry over the high-skilled guest worker programs, however, has opened up the possibility of shifting the blame from workers to the structural factors of guest worker programs that create such conditions.

The U.S. worker, therefore, can serve as a basis for challenging low-wage guest worker programs. In other contexts, courts have been more receptive to claims by immigrant workers when they connect to the greater good of U.S. workers. Courts have justified the enforcement of antidiscrimination laws, health and safety laws, and wage and hour laws on behalf of immigrant workers, based on the impact such enforcement has on U.S. workers.<sup>281</sup> In the guest worker debate, U.S. workers can serve a similar “citizen proxy” purpose, with an emphasis on their practical ties to guest workers in the unskilled labor market.<sup>282</sup> Messaging that aligns with mainstream cultural values “explicitly associated with . . . dominant groups” is more powerful.<sup>283</sup> Because U.S. workers outwardly express a collective insider identity that is familiar to mainstream society, they are a more “serious and sympathetic agent of change” than guest workers.<sup>284</sup>

---

279. See, e.g., Caroline May, *Expert: Disney Rewards Employees for Record Profits by Replacing Them with Cheaper Foreign Workers*, BREITBART (June 9, 2015), <http://www.breitbart.com/big-government/2015/06/09/expert-disney-rewards-employees-for-record-profits-by-replacing-them-with-cheaper-foreign-workers>; Julia Preston, *In Turnabout, Disney Cancels Tech Worker Layoffs*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/17/us/in-turnabout-disney-cancels-tech-worker-layoffs.html>; Patrick Thibodeau, *Fury Rises at Disney over Use of Foreign Workers*, COMPUTERWORLD (Apr. 29, 2015), <http://www.computerworld.com/article/2915904/it-outsourcing/fury-rises-at-disney-over-use-of-foreign-workers.html>.

280. Jennifer Harper, *73 Percent of U.S. Employers Oppose Issuing More H-1B Visas for Foreign Workers*, WASH. TIMES (Aug. 10, 2015), <http://www.washingtontimes.com/news/2015/aug/10/73-percent-us-employers-oppose-issuing-more-h-1b-v>.

281. Jennifer J. Lee, *Outsiders Looking in: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 5 UTAH L. REV. 1063, 1076-77 (2014).

282. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1753-54 (2010).

283. DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 80 (1st ed. 1999).

284. RON EYERMAN & ANDREW JAMISON, *SOCIAL MOVEMENTS: A COGNITIVE APPROACH* 56, 138-39 (1991).

The potential pitfall is the mistaken alignment of such rhetoric with the rise of nationalism that centers on fearmongering about immigrants.<sup>285</sup> One of the rallying cries for opponents of immigration, such as the Federation for American Immigration Reform (FAIR), is that immigrants steal U.S. worker jobs.<sup>286</sup> The reality, however, is much more complex than this stripped down view.<sup>287</sup> The problem for U.S. workers is not the supposed competition and replacement by guest workers but rather the ways in which guest worker programs authorize employers to degrade jobs that can then only be filled by guest workers. Any such rhetoric must be carefully framed within the more complete narrative concerning the larger structural issue of how employers use guest worker programs.

The use of the U.S. worker as a yardstick for measuring the normative values of workplace conditions can be a method for advocates to expose the ways in which governmental policy, as used by employers, influences the behavior of workers. The trap to avoid is simplistic discourse about U.S. workers and guest workers competing for jobs. Rather, a carefully framed narrative about the U.S. worker can offer a rallying cry for examining the conditions of all low-wage workers impacted by guest worker programs.

#### IV. SOLUTIONS TO GUEST WORKER PROGRAMS

By focusing more on U.S. workers, the goal is to break through the ready cultural narratives to disentangle the true impact of the operation of guest worker programs on the dignity interests of all low-wage workers. Assuming success on that front, the next concern is how to address the problems created by guest worker programs. This section reviews three potential solutions by analyzing their overall effect on low-wage workers. It first examines regulatory reform of guest worker programs. Next, it considers the more drastic transformation of such programs. Finally, it explores the eradication of guest worker programs altogether and concludes that redesigning guest worker programs ultimately will not comport with the dignity interests of low-wage workers. Rather, guest worker programs should be eliminated, although alternative policy proposals raise complications associated with the need for larger systemic immigration and workplace reforms.

---

285. See Daniel Marans, *How Trump Is Inspiring a New Generation of White Nationalists*, HUFFINGTON POST (Mar. 7, 2016, 5:19 PM), [http://www.huffingtonpost.com/entry/trump-white-nationalists\\_us\\_56dd99c2e4b0ffe6f8e9ee7c](http://www.huffingtonpost.com/entry/trump-white-nationalists_us_56dd99c2e4b0ffe6f8e9ee7c).

286. *Illegal Aliens Take U.S. Jobs*, FED’N FOR AM. IMMIGRATION REFORM, <http://www.fairus.org/issue/illegal-aliens-taking-u-s-jobs> (last updated Mar. 26, 2016).

287. On the other side, this argument is refuted by the assertion that immigrants do the jobs that “Americans will not do.” Jennifer Gordon notes this contradiction by advocates where they represent both that immigrant workers do not steal or impact U.S. residents’ jobs and that the enforcement of immigrant workers rights is significant to resident workers. She suggests that a more nuanced approach is needed to approach these problems. Jennifer Gordon, *Tensions in Rhetoric and Reality*, 2 U.C. Irvine L. Rev. 125, 145-46 (2012).

First, the U.S. DOL could further revise the regulations governing guest worker programs. The regulatory framework could more stringently regulate the recruitment and employment of U.S. workers. For starters, employers could be required to engage in more realistic methods of finding U.S. workers. For the H-2B program, for example, employers must place help wanted ads in the local paper with the highest circulation.<sup>288</sup> These advertisements do little to overcome the substantial recruitment barriers for U.S. workers because these “compliance” ads are written to discourage applicants, run at the wrong time of year, and end up in publications where the readership is a poor match for the jobs.<sup>289</sup> Further, in industries that heavily rely on immigrant workers, it is not only difficult for U.S. workers to find out about job openings, but it also does not occur to them that this is a job they should apply for.<sup>290</sup>

Improved recruitment of U.S. workers could include managing online recruitment through [www.usajobs.com](http://www.usajobs.com), publicizing these job opportunities at unemployment offices, and setting up consortiums to recruit local workers.<sup>291</sup> In addition, regulatory reform could change the conditions under which U.S. workers are employed. Wage methodologies for both programs could be revised to better account for wage depression and stagnation. For the H-2A program, the National Agricultural Worker Survey could be used in conjunction with wage surveys because it includes the actual pay information of workers and can sort through “detailed demographics on race, nationality, place of birth, job description, and legal status.”<sup>292</sup> For the H-2B program, EPI has proposed that the only way to ensure that there is no reduction in wages paid to U.S. workers “would be to set the H-2B wage at the highest [Occupational Employment Statistics] wage for a position.”<sup>293</sup> Finally, there could be more explicit regulation of working conditions, which require that employers comply with certain occupational safety standards and provide breaks, sick days, and vacation.

While the regulatory framework of guest worker programs can always be revised, enhanced regulations face a number of limitations. Any regulatory scheme that relies on effective governmental enforcement will run into the problems associated with DOL oversight, lack of will and resources, and dependence on the commitment of different administrations.<sup>294</sup> Further, stricter regulations can become ineffective because employers have historically

---

288. 20 C.F.R. § 655.42 (2015).

289. SEMINARA, *supra* note 188, at 12-13.

290. *H-2B Program*, *supra* note 192, at 70 (testimony of Stephen Camarota, Director of Research, Center for Immigration Studies).

291. SEMINARA, *supra* note 188, at 23; *see also* Lantigua *supra* note 272.

292. Allegretto, *supra* note 34, at 3-4.

293. Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24,146, 24,156 (Apr. 29, 2015).

294. Lee, *supra* note 68, at 46-47 (also identifying further structural problems with the complaint system administered by DOL); Read, *supra* note 5, at 429; Elmore, *supra* note 6, at 546.

engineered workarounds and manipulated the system to chase U.S. workers away. While the reformulation of regulatory standards can certainly address some problems, regulatory reform is generally a losing proposition in addressing the more comprehensive problem that underlies the legal framework of guest worker programs.

Second, others have argued for a more fundamental change to the structure of guest worker programs by introducing a portable visa system.<sup>295</sup> A portable visa would break the tie between the employer and the guest worker, helping to reduce the extreme control that employers have over guest workers. The idea of portability is a good one, although the design of such a portability system is somewhat problematic. On the one hand, a more limited portability system, akin to the H-1B high-skilled guest worker program, continues to condition initial and subsequent employment on the sponsorship of employers. While there is freedom to move from one employer to another, this more limited form of portability raises many of the same problems of employer control, as H-1B workers can face deportation if they are unable to locate a subsequent participating employer on a timely basis.<sup>296</sup> On the other hand, a more expansive portability system without ties to specific participating employers becomes difficult to design as a guest worker program. It is unclear how the government can define which jobs have a shortage of U.S. workers and subsequently confine workers to these jobs or to a specific region.<sup>297</sup>

Even with such portability, many of the proposals for portable visas still create a subclass of workers who will inevitably negatively impact the wages and working conditions of U.S. workers. Jennifer Gordon explains that the very temporary nature of even a refashioned guest worker program creates a mindset that is not “conducive to the defense of basic rights, much less to union organizing” and that “the very fact that migrants are only in the class temporarily may be used as a justification for lower wages and worse treatment.”<sup>298</sup> While there have been several important examples of guest worker organizing, the barriers to organizing within this context are incredible, limiting such efforts to a handful of employers who participate in guest worker programs.<sup>299</sup> Dorothy Hill has similarly questioned whether portability will

---

295. PENN STATE UNIV. & NAT’L GUEST WORKER ALLIANCE, LEVELING THE PLAYING FIELD: REFORMING THE H-2B PROGRAM TO PROTECT GUESTWORKERS AND U.S. WORKERS 12 (2012), <http://www.guestworkeralliance.org/wp-content/uploads/2012/06/Leveling-the-Playing-Field-final.pdf>; Jayesh M. Rathod, *A Season of Change: Reforming the H-2B Guest Worker Program*, 45 CLEARINGHOUSE REV. 20, 22 (2011); Elmore, *supra* note 6, at 562-63; Wishnie, *supra* note 5, at 1455; Matthew Lister, *Justice and Temporary Migration*, 29 GEO. IMMIGR. L.J. 95, 116 (2014).

296. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 132 (2009); *see also* Hill, *supra* note 6, at 175.

297. Compare Elmore, *supra* note 6, at 562-63 with Wishine, *supra* note 5, at 1457-58.

298. Gordon, *supra* note 6, at 559-61.

299. NESS, *supra* note 7, at 150. Shellion Parris, a former H-2B worker, helped to organize a hundred of her coworkers in a strike protest against their employer Mister Clean,

decrease abuses so long as immigration status is tied to continued employment.<sup>300</sup> In studying the visa portability provision for guest workers in the Commonwealth of the Northern Mariana Islands Program, she found that “most workers remained reliant on their original employer because all transfer options ultimately rested upon the willingness of another employer to officially hire the employee within a set period of time.”<sup>301</sup>

Proposals for portable visas also require that the stay be temporary in some fashion, meaning that a guest worker’s departure must be enforced in some manner. This enforced departure becomes increasingly problematic with guest worker proposals that seek to better integrate guest workers by allowing them to stay for longer periods of time or to bring their families with them.<sup>302</sup> In order to solve the departure problem, more expansive proposals for portable visas include a pathway to legalization. These proposals then raise the question of why choose a modified guest worker program instead of programs for permanent immigration? It is worth noting that solutions that mitigate the second-class nature of temporary worker programs tend to “collide with a major objection” of “making temporary migration permanent.”<sup>303</sup> Even a pre-period of guest worker status prior to legalization can still lead to a subclass of workers “when the possibility of earned adjustment hangs in the balance.”<sup>304</sup> It

---

which provided cleaning services for luxury hotels. Michelle Chen, *She Came to the U.S., Was Forced into Indentured Servitude, and Now Faces Deportation*, NATION (Oct. 21, 2015), <http://www.thenation.com/article/she-came-to-the-us-was-forced-into-indentured-servitude-and-now-faces-deportation>. There are other smaller instances of organizing in Mexico. Whitney Eulich, *Mexico’s First “Union” for Guestworkers Fights Abuses at Home and in the U.S.*, CHRISTIAN SCI. MONITOR (Dec. 28, 2015), <http://www.csmonitor.com/World/Americas/2015/1228/Mexico-s-first-union-for-guest-workers-fights-abuses-at-home-and-in-US>. A more large-scale organizing effort by the Farm Labor Organizing Committee (FLOC) against the North Carolina Growers’ Association, in conjunction with a private civil remedies lawsuit from guest workers, led to an agreement to unionize the thousands of H-2A workers that come from Mexico. FLOC has significantly addressed guest worker complaints. *Organize the South*, FARM LAB. ORGANIZING COMMITTEE, AFL-CIO, <http://www.floc.com/wordpress/cross-border-organizing/north-carolina-organizing> (last visited Feb. 20, 2017). Other coalitions of workers have appeared. The reality is that labor unions overwhelmingly do not have a presence in the low-wage industries that participate in guest worker programs in the United States. The institutional presence of trade unions, however, could make a difference. After unification, German trade unions played a significant role in defending guest workers against job discrimination. Maureen Hirsh & Diana Powell, *Non-governmental Organisations and the Welfare of Minority Ethnic Communities in Britain and Germany*, in SOCIAL WORK AND MINORITIES 125 (Charlotte Williams, Haluk Soydan, Mark R.D. Johnson eds., 1988).

300. Hill, *supra* note 6, at 175.

301. *Id.*

302. Motomura, *supra* note 5, at 285-86 (“[O]utright coercion through enforcement . . . resurrects the problem of creating a second-class status in society.”). Motomura suggests providing some kind of incentive, such as financial incentives, withholding wages, or investing more in foreign countries. These suggestions raise questions of functionality, morality, and practicality.

303. *Id.* at 285.

304. Hill, *supra* note 6, at 178.

may be, however, that some sort of guest worker program with a pathway to legalization is the most pragmatic option for fixing guest worker programs.

For this reason, the best option is to eradicate guest worker programs altogether, if the intention is to improve normative workplace standards on behalf of all low-wage workers. With the eradication of guest worker programs, employers who seek to hire U.S. workers will be forced to raise wages and improve working conditions. The trucking industry, for example, has recently suffered a shortage of U.S. workers. This industry can neither participate in guest worker programs<sup>305</sup> nor can they turn to the undocumented workforce because of the restrictions on commercial driver's licenses.<sup>306</sup> As a result, the industry has offered multiple benefits to attract U.S. workers, including free training, higher wages, and shorter assignments.<sup>307</sup> Some may argue that even with higher wages and improved conditions, guest worker jobs cannot be filled because they are stigmatized as "immigrant jobs." The reality is that many of the industries covered by the H-2B program are still dominated by U.S. workers. The majority of housekeepers, construction laborers, groundskeepers, landscapers, and food processing workers are still U.S.-born.<sup>308</sup> While the agricultural jobs in the H-2A program tend to be dominated by immigrant workers,<sup>309</sup> the true impact of the "immigrant job" stigma is hard to measure because it is inextricably intertwined with degraded wages and working conditions. Apart from improved wages and working conditions, employers will also need to participate in a more organized and deliberate system of recruitment for U.S. workers. Many of the social networks and recruitment

---

305. The trucking industry is not a temporary occupation that qualifies under 8 U.S.C. section 1101(a)(15)(H)(ii) (2014).

306. The vast majority of states do not permit undocumented persons to obtain state driver's licenses. See SHELLER CTR. FOR SOC. JUSTICE & FIGHT FOR DRIVER'S LICENSES, DRIVERS' LICENSES FOR ALL: THE KEY TO SAFETY AND SECURITY IN PENNSYLVANIA 14-16 (2015), <http://www2.law.temple.edu/cs/j/files/fdl.pdf>.

307. Werner Enterprises, one of the largest trucking companies in the United States, raised the salary for some of its drivers by up to \$10,000 and promised more at-home time and relief for on-the-job frustrations. Frank Morris, *Truck Shortage: Drivers Aren't Always in It for the Long Haul*, NPR (Dec. 14, 2015), <http://www.npr.org/2015/12/14/459348786/trucking-shortage-drivers-aren-t-always-in-it-for-the-long-haul>; see also BOB COSTELLO & ROD SUAREZ, AM. TRUCKING ASS'NS, TRUCK DRIVER SHORTAGE ANALYSIS 2015 (2015), <http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/10%206%2015%20ATAs%20Driver%20Shortage%20Report%202015.pdf>.

308. *H-2B Program*, *supra* note 192, at 69 (statement of Stephen Camarota, Director of Research, Center for Immigration Studies). The U.S. Chamber of Commerce is seeking to expand guest worker programs to industries dominated by U.S. workers, such as trucking, hotels, and nursing homes. *Securing the Border*, *supra* note 254, at 14 (statement of Randel Johnson, Senior Vice President, Labor, Immigration, and Employee Benefits, U.S. Chamber of Commerce).

309. *Farm Labor: Background*, U.S. DEP'T OF AGRIC., ECON. RES. SERV., <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx> (last visited Feb. 18, 2017).

practices that used to attract native-born U.S. workers have eroded.<sup>310</sup> The county of Palm Beach, Florida found that a concerted effort to encourage local hiring, recruitment, and training increased the number of local hires four-fold and decreased local employers' reliance on the H-2B program.<sup>311</sup> For the vast majority of guest worker jobs, employers should be able to find U.S. workers with improved wages, working conditions, and better methods of recruitment.

The eradication of guest worker programs also means that some employers may resort to undocumented workers. Despite this fact, there are still net benefits from eradicating guest worker programs. This discussion is not intended to condone the plight of undocumented workers. Just like guest workers, undocumented workers are often required to accept jobs with low wages, hazardous working conditions, and high productivity requirements because of their tenuous immigration status. Undocumented workers, however, usually have more bargaining power than guest workers because they have the freedom to change jobs, albeit with difficulty. Those who have worked with both groups of workers remark that undocumented workers often view guest workers as captive labor and do not envy their situation despite their lawful status in the United States.<sup>312</sup> There is also the growing recognition that there is a range of lived experiences for the undocumented workers—from those who live in the shadows to those who are unafraid.<sup>313</sup> Undocumented workers are usually more integrated into communities than guest workers, especially in locales with inclusive immigrant policies.<sup>314</sup> Given their ties to local communities, undocumented workers are simply more likely to complain, organize, and exercise political power.<sup>315</sup>

Guest worker programs for low-wage workers, therefore, should not be considered as a compromise solution to addressing the problem of unauthorized migration. The arguments in favor of guest worker programs as a second-best option rely on the assumption that undocumented workers would prefer to be guest workers.<sup>316</sup> It is problematic to assume, however, that undocumented workers would prefer to have legal status on a temporary and limited basis, requiring them to seasonally return home or capping their total stay in the United States. Historically, guest worker programs have increased the number

---

310. SEMINARA, *supra* note 188, at 23.

311. *Compare id.* at 12-13 (describing how employers of guest workers have taken advantage of the recruitment system to discourage U.S. workers from applying) with Lantigua, *supra* note 275 (describing Palm Beach County plan to recruit U.S. workers).

312. Hall, *supra* note 3, at 536; Hill, *supra* note 6, at 182.

313. Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 833 (2016).

314. NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES INCREASE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING (2013), <http://www.nilc.org/wp-content/uploads/2016/02/inclusive-policies-advance-in-states-2013-10-28.pdf>.

315. Lee, *supra* note 281, at 1108-09.

316. Howard Chang, *Liberal Ideas and Political Feasibility: Guest Worker Programs as Second-Best Policies*, N.C. J. INT'L LAW L. & COM. REG. 465, 478 (2002).



of undocumented immigrants as guest workers have formed ties and sought to make their stay more permanent in the receiving country.<sup>317</sup> While some subset of immigrants may prefer this option of circular migration,<sup>318</sup> others will find the impermanency of this arrangement highly problematic for establishing lives for their families in the United States. Accepting guest worker programs as a compromise solution also ignores the overall impact of such programs on the normative conditions of all low-wage workers. If employers are forced to fairly compete for U.S. workers, they will have to improve wages and working conditions to recruit workers. While some employers may then resort to undocumented workers, these workers are arguably slightly better off than guest workers in terms of their ability to complain, organize, and walk off the job. While there are undoubtedly similarities between the experiences of these two workforces,<sup>319</sup> it is necessary to expose how intentional governmental intervention in the current form of guest worker programs affirmatively degrades the wages and working conditions in the low-wage workplace. This exposure is significant to exposing how guest worker programs can amount to the substitution of an officially abusive program for an unofficially problematic one.

At the same time, the eradication of guest worker programs is not without its complications. When looking at potential solutions, the plight of undocumented workers is a necessary part of the conversation focused on the normative conditions of all low-wage workers.<sup>320</sup> There are possible connections that can be made between the rejection of guest worker programs and the need for legalization. If it is possible to achieve visa portability for guest worker programs premised on a generalized need for immigrant workers, for example, such advocacy should also translate into other long-term solutions for undocumented workers. As more expansive visions of guest worker programs start to resemble more permanent forms of immigration, it begins to suggest that direct legalization programs might be possible. The issue of

---

317. PHILIP MARTIN, *THERE IS NOTHING MORE PERMANENT THAN TEMPORARY FOREIGN WORKERS* 1 (2001), <http://cis.org/sites/cis.org/files/articles/2001/back501.pdf>; HAHAMOVITCH, *supra* note 127, at 237.

318. Some propose that guest worker programs can solve problems for those whose migration is truly temporary. Motomura, *supra* note 5, at 288; Jorge Durand, *Borderline Sanity*, *AM. PROSPECT* (Dec. 19, 2001), <http://prospect.org/article/borderline-sanity>. This proposal, however, requires that there be other options for those who want to migrate more permanently. Durand proposes a temporary worker program of 300,000 visas from Mexico not tied to any specific industry or employer, but also notes the concomitant need for increasing the immigration quota from Mexico and increasing investment in Mexican infrastructure. *Id.*

319. Douglas Massey refers to the undocumented population as a de facto guest worker program. DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 129 (2007).

320. *See generally* Motomura, *supra* note 5, at 269-70.

legalization, which has substantial popular support,<sup>321</sup> still faces enormous questions of design about its size, shape, and scope. If guest worker programs are eradicated, a robust legalization program is a necessary alternative to truly improve the normative conditions of all low-wage workers.<sup>322</sup>

Another alternative to guest worker programs is to improve workplace conditions for low-wage workers, such as increasing wages or making workplaces safer, to attract U.S. workers. Employers, however, will respond as they always do—that they will go bankrupt or simply move these jobs overseas. It is difficult to parse through this rhetoric to determine the extent to which each business is able to absorb increased labor costs if forced to fairly compete for U.S. workers. It may be that some employers will have difficulty continuing to operate and will need to raise prices with consumers or appeal to the government for some sort of subsidy. Some jobs may be lost to mechanization. Not only does such a proposal for improved workplace protections undoubtedly face strong resistance from employers, but the details are also part and parcel of a larger and complex conversation about economic inequality.<sup>323</sup>

In some ways, the admission of the cost savings generated for employers from highly productive guest workers is a first step forward in recognizing what is being accomplished by guest worker programs—the outsourcing of jobs on American soil.<sup>324</sup> The cost of preservation of these businesses, however, should not rest on the backs of workers who are least able to afford it. The hope is that a transparent discussion about the costs and benefits of eradicating guest worker programs will include the impact that such policies have on the normative values associated with protecting the dignity of all low-wage workers.

#### CONCLUSION

While guest worker programs may appear impervious to attack, there is abundant evidence that they are contrary to the dignity of all low-wage workers. An appeal to the normative concerns about low-wage workers can tap into the growing malaise about the divide between poor and rich that cuts

---

321. Sara K. Goo, *What Americans Want to Do About Illegal Immigration*, PEW RES. CTR. (Aug. 24, 2015), <http://www.pewresearch.org/fact-tank/2015/08/24/what-americans-want-to-do-about-illegal-immigration>.

322. The design of such a program, however, merits fuller discussion elsewhere.

323. The discussion about increasing the minimum wage, for example, is robustly debated. See *Poverty, Prosperity and the Minimum Wage*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 29, 2016), <http://www.nytimes.com/roomfordebate/2016/09/29/poverty-prosperity-and-the-minimum-wage>.

324. SEMINARA, *supra* note 188, at 22.

across party lines.<sup>325</sup> There is growing support for strengthening workers' rights, including changing laws that would impact low-wage workers, such as raising the minimum wage and requiring employers to provide paid sick leave.<sup>326</sup> With changing demographics, the acceptance of more permanent forms of immigration will likely increase over time.<sup>327</sup> These changing conditions can help foster a transformation in the legal and social norms concerning guest worker programs. Given the thirty years of experience with modern-era, low-wage guest worker programs, the time is ripe to call for their end.

---

325. Noam Sheiber & Dalia Sussman, *Inequality Troubles Americans Across Party Lines, Times/CBS Poll Finds*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/business/inequality-a-major-issue-for-americans-times-cbs-poll-finds.html>.

326. *Id.* The nationwide walkouts of fast food workers, for example, have highlighted the struggles of low-wage workers. See Seth Freed Wessler, "We're a Movement Now": *Fast Food Workers Strike in 150 Cities*, NBC NEWS (Sept. 4, 2014), <http://www.nbcnews.com/feature/in-plain-sight/were-movement-now-fast-food-workers-strike-150-cities-n195256>.

327. See Goo, *supra* note 321; Lee, *supra* note 281, at 1108 n.269 ("Currently 22.7% of all children in the United States had parents who were immigrants.").