Why Transparency in the Recruiter Supply Chain is Important in the Effort to Reduce Exploitation of H-2 Workers: A Global Workers Justice Alliance Position Paper September 2011

> *"'All I wanted was to provide my children with a better education and living standards. If my children get the education I want them to have, they won't be tricked the same way. They wont' be taken advantage of like their father.'"*[1]

The reality is that there was little, if anything, this Indonesian worker could have done to uncover that he was walking into a human trafficking situation. It was not the lack of education that turned him into a trafficking victim, but an H-2 recruitment process that operates practically clandestinely and keeps the balance of power tipped against workers who are desperate for jobs. This paper is motivated by these workers who, when provided with the proper tools, may be able to take steps to reduce their victimization under the H-2 system.

I. Introduction

Obtaining an H-2 visa is not an empowering process for foreign workers. On the one hand, it is quite understandable that this should be so, since the program is not structured with foreign workers' interests in mind. In responding to U.S. employers demand for foreign labor, the U.S. government created a visa category and a process that is focused on obtaining foreign workers without adversely affecting U.S. workers. From the U.S. perspective, what happens to foreign workers is not a priority. Additionally, and perhaps more telling, foreign workers have no right to vote in the U.S. and therefore have little influence on the policymakers who create the laws that govern their work experience in the United States.

An unsurprising consequence of their lack of political power is that few regulations effectively empower H-2 workers to make informed choices about working in the U.S. Prospective H-2 workers have no official mechanism to discern if a recruiter who sets up shop in their small town and offers jobs in the United States actually has authorization to offer such jobs. Willing to take extreme risks to escape poverty, many will pay steep fees on the sheer hope that the offer is indeed real, not fraudulent or even worse, a human trafficking scheme.

The purpose of this paper is to contribute to a broader discussion on how to reduce fraud, trafficking, and other abuses in H-2 recruitment. *It is narrowly and specifically*

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[1] Steven Greenhouse, *Low Pay and Broken Promises Greet Guest Workers in U.S.*, N.Y. Times, February 28, 2007, http://query.nytimes.com/gst/fullpage.html?res=9906E7DC1F3EF93BA15751C0A9619C8B63.

limited to one issue: the impact on workers caused by their lack of knowledge as to the recruiters' identities and the nature of their connection to the U.S. employers. It should be emphasized that there are many other factors that contribute to workers' vulnerability to exploitation during recruitment, including extreme poverty, lack of knowledge of the H-2 process and rules, and the failure of foreign countries to enforce their own protective laws; however, this paper does not claim to provide an accounting of all of these, or assert that greater transparency could compensate for other fundamental flaws in the H-2 program. Nevertheless, with a mapping of some of the problems associated with the lack of transparency, this paper argues that requiring U.S. employers to divulge their "Recruitment Supply Chain" is an important aspect to reduce the abuses that happen under the guise of the H-2 program.[2]

Much more analysis of the recruitment process is necessary, to complement the work that has been done documenting the abuses suffered once workers arrive on U.S. soil. It is also hoped that further research will extend some of the insights below to other countries besides those described here.[3] Global Workers intends to prioritize collaborative efforts on both fronts in the near future.

II. Government Regulation of H-2 Recruiters

A. How Employers Obtain H-2 Workers: H-2 Process Overview

As sketched briefly below, the U.S. employer initiates the process to bring H-2 workers into the United States.

1. Step One: Department of Labor/Employment and Training Administration

The process begins with the U.S. Department of Labor (DOL), Employment and Training Administration (ETA) when a U.S employer requests a temporary labor certificate to bring foreign workers to the United States. The employer must demonstrate to the DOL that workers in the United States are not available to fill the positions needed. In addition to the "labor market test," DOL takes steps to protect working conditions in the U.S. by establishing the permissible minimum wage that

[2] This paper is not an exhaustive study of this approach. Nor has it been exhaustively vetted. Global Workers hopes to convene a meeting, or contribute to other efforts, to focus on the regulation of recruiters where the Recruitment Supply Chain would be one of the approaches advanced to enrich the current dialogue.

[3] The paper utilizes examples mostly from where Global Workers Justice Alliance ("Global Workers") has on-the ground programs to date, which is Mexico and Guatemala. The reason for the limited geographic sourcing is primarily due to the effort to utilize primary sources that had yet to be publicly available.

the H-2 workers must earn.[4] This is done so that workers in the U.S. are not "adversely affected" by foreign workers who may, due to the disparity of earnings between the U.S. and their home countries, or simply their vulnerabilities, accept lower wages than their U.S counterparts. Wages below the U.S. market rate would result in a perverse incentive for U.S. employers to hire foreign workers in order to reduce labor costs, while simultaneously undermining the U.S. economy by driving the U.S. labor force out of work.

2. Step Two: Department of Homeland Security/ United States Citizen and Immigration Service

Once a temporary labor certificate is obtained, the employer "petitions" the Department of Homeland Security (DHS), United States Citizen and Immigration Service (USCIS) for permission to seek workers abroad.[5]

3. Step Three: Department of State/U.S. Consulates

Once authorized by DHS, the employer takes the final step, which is to notify the Department of State (DOS) U.S. consulates abroad of the number of workers they seek to be issued H-2 visas at that particular consulate. Each worker must complete individual visa applications and attend an in-person individual interview at the consulate.[6] The visa itself does not guarantee entry to the U.S.[7] Once the visa is issued, the H-2 workers must pass immigration inspection at the port of entry, which is under the purview of DHS.[8]

B. From Job Offer to Job Site: What The Government Knows About the Recruitment Supply Chain and the Employers

[4] *See* 20 C.F.R. § 655 (2010) (Sub Part A is for H-2B and Sub Part B is for H-2A regulations); *See generally Hiring Foreign Workers*, U.S. Dep't of Labor; *See also* http://www.foreignlaborcert.doleta.gov/hiring.cfm (last updated Jan. 11, 2011).

[5] *See* 8 C.F.R. § 214 (2009); *Employer Information,* U.S. Citizenship and Immigration Services, U.S. Dep't of Homeland Security, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ff1d83453d4a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=ff1d83453d4a3210VgnVCM100000b92ca60aRCRD (last updated August 18, 2010).

[6] See *generally Foreign Affairs Manual* (FAM) 41.53; *Temporary Worker Visas*, Bureau of Consular Affairs, U.S. Dep't of State, http://travel.state.gov/visa/temp/types/types_1271.html#5 (last updated August 18, 2010).

[7] 8 C.F.R. § 235.1(f)(1) (2009).

[8] *See* Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Sam Bernsen, Immigration Law and Business § 2:11 (2010) ("The issuance of a nonimmigrant visa gives the alien permission to apply for admission to the United States at a port of entry…The visa does not assure an alien that he or she will be admitted to the United States, however; it merely indicates that a consular officer has found the alien eligible for temporary admission to the United States and not inadmissible under § 212(a) of the INA, 8 U.S.C.A. § 1182(a).").

In a transparent system, workers would know how the person recruiting them is connected to a job waiting in the United States. That means every recruiter along the way must be disclosed so the worker can trace the offer to a legitimate and verifiable job in the U.S. The Recruitment Supply Chain should also divulge information on the ultimate employer, in case the person or entity requesting the visas is not the one that will employ the workers.

Under current H-2 regulations, no system of recruiter registration exists. The information that is collected on the principal recruiters and sub-recruiters is not publicly available. Petitioners, who are not end-beneficiary employers,[9] i.e. labor contractors or agents, must divulge at various points where the H-2 workers will be employed, though this information is not always requested.

1. Department of Labor

a. No Recruiter Information Requested

In this first stage of the process, under the current H-2 regulations, no information is asked about foreign recruitment.[10] The DOL certifies the number of "aliens" the employer may seek abroad. DOL does not require the employer to reveal who the aliens will be, from where they will be recruited, or who will recruit them.[11] The only regulation at this stage in regard to recruiters is that employers must prohibit them from charging recruitment-related fees to potential H-2 workers.[12]

b. End-beneficiary Information Partially identified

On the application itself, known as the Form 9142, the applicant must identify its "Type." In the H-2B context this can be the Individual Employer or a Job Contractor, which is defined in part as someone "who contracts services or labor on a temporary basis to one or more employers.[13] Although a Job Contractor is required to reveal the "Place of Employment" company names are not requested, just

[9] The term "end-beneficiary employer" is used to describe someone who has an actual job to offer. Contractors, on the other hand, hire workers and place them in positions where another employer owns the land, runs the job site, etc.

[10] In March 2011, DOL proposed regulatory changes to the H-2B program to address disclosure of recruiter identity for the first time. Specifically they proposed that employers provide DOL with copies of agreements with a foreign labor contractor or recruiter. "[I]nformation about the identity of the international recruiters will assist DOL in "its audits and investigations" as well "provide greater transparency" to the recruitment process. It plans to use the list to "facilitate information sharing with the Department and the public" so, when appropriate, DOL can "more closely examine applications…involving a particular labor contractor…identified by members of the public to have engaged in improper behavior." Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15130, 15138 (proposed March 18, 2011) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R.pt. 503).

[11] 20 C.F.R. § 655 Subpart B (2010) (H-2A DOL regs); 20 C.F.R. § 655 Subpart A (2010) (H-2B DOL regs).

[12] 20 C.F.R. § 655.135(j) (2010) (H-2A); 20 C.F.R. § 655.22(j) (2009) (H-2B); Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6924 (February 12, 2010) (Final rule explaining why recruiter fees charged to potential employees are banned).

[13] 20 C.F.R. § 655.4 (2009).

worksite addresses.[14] Without individual employer names, it is more difficult to surmise where the H-2B workers will actually be working.

For H-2A petitions, more "types" are permitted to apply yet more information is requested as well about the agricultural businesses where workers will be employed.[15] If an H-2A Labor Contractor (H-2ALC) applies it must state the name and location of each fixed-site agricultural business to which it expects to provide H-2A workers.[16] Agents or attorneys may petition on behalf of any type of employer.[17]

2. Department of Homeland Security

a. Principal Recruiter Requested as Well as Country of Recruitment
In this secondary phase, some information is requested about the overseas recruitment. Employers must specify from which country they will recruit workers.[18] Since January 2009,[19] DHS specifies the countries from which employers are permitted to recruit H-2 workers.[20] If an employer seeks workers from a non-designated country without prior permission, it is not likely that the visas will be issued.[21] This rule change was prompted by the U.S. interest to force the hand of foreign countries to be more cooperative in accepting their nationals being deported

[14] U.S. Dep't of Labor, Application for Temporary Employment Certification ETA Form 9142, 4 http://www.foreignlaborcert.doleta.gov/pdf/OMBETAForm9142.pdf (expires 11/30/2011).
[15] U.S. Dep't of Labor, Application for Temporary Employment Certification ETA Form 9142, 2, http://www.foreignlaborcert.doleta.gov/pdf/OMBETAForm9142.pdf (expires 11/30/2011) (14. Type of employer application (choose only one box below): Individual Employer; Association – Sole Employer (H-2A only); H-2A Labor Contractor or Job Contractor; Association – Joint Employer (H-2A only); Association – Filing as Agent (H-2A only).")
[16] C.F.R. § 655.132 (2010).
[17] 20 C.F.R. § 655.130 (2010); U.S. Dep't of Labor, Application for Temporary Employment Certification ETA Form 9142, 3 http://www.foreignlaborcert.doleta.gov/pdf/OMBETA Form9142.pdf (expires 11/30/2011).
[18] Form I-120, Petition for Nonimmigrant Visa, Section 3, Question 7, http://www.uscis.gov/files/form/i-129.pdf. Part 4, "Processing" asks "…state the U.S. Consulate or inspection facility you want notified if this petition is approved." In the H-Classification Supplement, Section 3 question 4. "List the country(ies) of citizenship of the H-2A/H-2B worker(s) you plan to hire."
[19] Final rule changes for DHS H-2A and H-2B regulations were published one day apart in December 2008 and were essentially identical. Both rules became effective in January 2009. Changes to Requirements Affecting H-2A Nonimmigrants and Their Employers, 73 FR 76891 (Dec. 18, 2008); Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78104 (Dec. 19, 2008).
[20] DHS publishes the list of H-2 eligible countries on a rolling basis and is valid for one year from publication. Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 76 FR 2915, 2916 (January 18, 2011). A national from a country not on the list may only be the beneficiary of an approved H-2 petition if the Secretary of Homeland Security determines that it is in the U.S. interest for that alien to be the beneficiary of such a petition. 8 C.F.R. § 214.2(h)(5)(i)(F)(ii) (H-2A); 8 C.F.R. § 214.2(h)(6)(i)(E)(2) (H-2B).
[21] One H-2 employer petitioned for Mexicans to apply at the U.S. consulate in Haiti. When Haitians, not Mexicans, arrived for the consular appointments, the consulate denied them the visas. Although there is no administrative penalty for trying to bring workers without permission from non-authorized countries, the petition would be sent back to DHS for possible revocation, not an insignificant consequence for the employer. Interview with Department of State officials during 2011.

from the U.S.[22] The government rightly assumed that countries would want to be on the H-2 list so their nationals would have the opportunity to go to the U.S.

During this same rule change, DHS enacted an "anti-fraud and worker protection measure" requiring employers for the first time to state the names of the recruiters and the countries in which they will be recruiting in order to "complement" the proposed change on prohibiting recruiter's fees.[23] To avoid increasing employers' "administrative burdens" DHS amended the application to include attestation provisions rather than requiring a separate document to show that the employers communicated the ban to their recruiters.[24] Employers, however, are not required to disclose whom the "staffing, recruiting, or similar placement service or agent" engages as subcontractors to recruit the workers, a common practice.[25]

b. End-Beneficiary information: no additional information requested
DHS only requests "addresses where beneficiaries will work" not specific information as to the employer name, if not otherwise revealed as when they are the primary petitioners.[26]

3. Department of State/U.S. Consulates

a. No information on Recruiters or End-Beneficiaries Requested
There is no DOS official policy or regulation about collecting information about recruiters or end-beneficiary employers.[27]

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[22] [1] DHS enacted this rule because it had "faced an on-going problem of countries refusing to accept or unreasonably delay[] the acceptance of their nationals who have been ordered removed." Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 8230, 8234 (Feb. 13, 2008). In the final H-2A rule, DHS explained that the more "efficient" and "flexible" H-2A program would led to less "aliens entering the country illegally" and more H-2As, however, it was expected that more H-2As would "abscond from their workplace or overstay their immigration status. Therefore, the success of the program will depend significantly upon countries accepting the return of their nationals." Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 76891, 76903 (Dec. 18, 2008). The final H-2B rule similarly stated that the program would be "enhanced by countries accepting the return of their nationals." Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78104, 78110 (Dec. 19, 2008).

[23] *See* Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 FR 78104 (Dec. 19, 2008). Just before the George W. Bush administration ended it enacted many changes the H-2 program. One of the few worker protection oriented changes was the prohibition of recruiter fees through DOL and DHS regulations.

[24] Changes to Requirements Affecting H-2A Nonimmigrants and Their Employers, 73 FR 76891, 76894 (Dec. 18, 2008); Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78104, 78105 (Dec. 19, 2008).

[25] Form I-120, Petition for Nonimmigrant Visa, http://www.uscis.gov/files/form/i-129.pdf. (was amended as follows: The H-Classification Supplement, Section 3 Question 7. "Did you or do you plan to use a staffing, recruiting, or similar placement service or agent to locate the H-2A/H-2B workers that you intend to hire by filing this petition? If yes, list the name and address of the service used.").

[26] Form I-120, Petition for Nonimmigrant Visa, Part 5, 4, http://www.uscis.gov/files/form/i-129.pdf.

[27] *See generally,* 9 *Foreign Affairs Manual (FAM) 41.53*; Interviews with Department of State officials during 2010 and 2011.

III. Foreign Workers Lack of Information as to H-2 Recruiter Identities Creates Context where Abuses Flourish

The current regulations have no mechanism for potential H-2 workers to determine if the persons offering H-2 jobs, i.e. recruiters, are connected to U.S. employers that have certified petitions. As a result, the worker has only informal sources to rely on, such as the recruiters' local reputation, to determine if the offer is real. If the recruiter is unknown, workers have few options. If they gamble incorrectly, the result can be financial ruin or even worse, human trafficking. If the recruiters are legitimate, transparency can help ensure that they only charge the fees and expenses allowed under the system.

A. Fraud

Potential H-2 workers fall victim to outright fraud in alarming numbers. Although no statistics are readily available, anecdotal evidence suggests it is almost a daily occurrence in large migrant sending countries, such as Mexico.

The ruse ranges from a one-day operation to elaborate, almost yearlong schemes. All have the same outcome: workers give persons posing as recruiters hundreds of dollars with the hope that the "recruiter" will secure them a work visa in the United States. After gathering large sums of money, the "recruiter" disappears taking the workers' money and shattering their dreams of going to the United States legally. Workers are left in serious financial straits and unlikely to pay off the debt they incurred, even less so as it balloons from the high interest rate that is usually attached to these informal and unregulated loans.[28]

An example of fraud recently occurred in Guatemala's third largest city, Quetzaltenango. Two Mexican nationals hired a Guatemalan to execute an elaborate scheme over a course of three months that ultimately defrauded 1,500 Guatemalans. The "recruiters" opened an office for "Empleo Fácil de Guatemala" or "Easy Employment of Guatemala" to recruit workers to go to Florida through the H-2A program. It started with a 100 Quetzal (equivalent of $12) application fee. Subsequently, the workers signed a work contract for six months, starting July 1, 2011. Upon signing the contract, 3,500 Quetzales was due (equivalent of $440). The recruiters issued receipts for the payments but declined to provide copies of the contract. Days before the supposed travel date, the workers found the office

[28] Mary Bauer et. al., S. Poverty Law Ctr.,11, *Close To Slavery: Guestworker Programs In The United States* (2007), http://www.splcenter.org/pdf/static/SPLCguestworker.pdf. (noting that interest rates can be as high as 20% per month in Guatemala).

shuttered. The victims included the Guatemalan recruiter, who filed a criminal complaint against the Mexican national who had hired him.[29]

Less sophisticated recruiter fraud schemes are also successful, and likely more common. Workers are so prone to take risks to secure employment in the United States, that sometimes even in the absence of contracts, receipts, or even in-person meetings with the recruiter, the workers still press forward driven, practically blindly, by the hope that the promises may be real. For example, in June 2010, a group of 25 Mexican nationals in the state of Guanajuato heard about a recruiter in a neighboring town offering H-2A visas for six months of work in the Arizona lettuce harvest. The workers telephoned the "recruiter" and agreed to pay him 2,000 pesos (equivalent of $160) to "process the visa application." Unaware of the legitimacy of the job offer, who the recruiter was, or who he was representing, the 25 Mexicans sent the money and their passports to the address the "recruiter" provided. After several weeks of no response, the workers inquired at the address given, but were told by the person living there that the recruiter had "died." The workers lost both their money and their passports.[30]

People around the world fall victim to fraud like this. The result for them and their families is deepened poverty and increased desperation.

B. Human Trafficking

The lack of transparency in the recruitment supply chain also, tragically, contributes to human trafficking. Without the ability to connect the dots from the sub recruiter in the small town to the petitioner and then the actual end-beneficiary employer, it is a guessing game for prospective H-2 workers. This creates an environment where human trafficking can easily occur.

People can be unwittingly snared into trafficking schemes, misled by visas that turn out to be fraudulent. This results in workers not even knowing that they are on fraudulent work visas until well after they are in a trafficked situation.[31] Without the knowledge of the proper process to obtain a visa or how to check if the recruiter is working under a legitimate U.S. job offer, foreign workers are vulnerable to this trafficking scenario.

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[29] Interview with Aroldo Palacios, private practitioner and Global Workers Network Defender, Huehuetenango, Guatemala, (July 13, 2011) (Attorney Palacios is representing one of the defrauded victims).

[30] Interview by Mariano Yarza, Dimensión Pastoral De La Movilidad Humana, with workers in Irapuato, Guanajuato, Mexico (Jan. 26, 2011).

[31] Interview with Ann Jordan, Director, Program on Human Trafficking and Forced Labor, Center for Human Rights and Humanitarian Law, American University Washington College of Law, (September 15, 2011).

Allowing persons who are not end-beneficiary employers to petition has also been fertile ground for trafficking. In some cases the petitioners fraudulently recruit for unsuspecting businesses. In a case highlighted in a Government Accountability Report released in 2010, petitioners posed as executives from a legitimate business to bring in H-2B workers for the hospitality sector. The petitioners were convicted for treatment of the workers the court considered to be "'legal slavery.'" [32]

In other trafficking cases, recruiters exaggerate the amount of workers end-beneficiary employers need, resulting in jobs lasting shorter than promised, or sometimes in no jobs at all. In a North Carolina case the petitioner told Thai workers that the farming job was good for three years when the reality was that the work was only for a few months, for farmers that were not listed on the petition. When the work ended, the petitioners forced the workers to undertake post-Katrina hurricane cleanup jobs in New Orleans under horrific conditions, for which they were never paid.[33] In another North Carolina case, a petitioner encouraged a farmer to allow her to request more workers than the farmer needed. There was no job waiting for the Indonesian worker when he arrived after using his in-law's ancestral land as collateral to pay the $6,000 fees the recruiter charged. He finally ran away after spending two weeks sleeping on the floor in a warehouse behind the recruiter's house.[34] In both cases, the workers obtained legal status in the U.S. as trafficking victims.[35]

Although not every case ends up in trafficking when no jobs await, it is easy to see how the situation could take a dark turn. In the 2011 proposed H-2B regulatory changes DOL cited three criminal cases, which were a result of petitions for "non-existent jobs."[36] In a spectacular case in Virginia, petitioners amassed up to $21

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[32] Gov't Accountability Office, H-2B Visa Program 9 (2010). The 2010 GAO report *H-2B Visa Program. Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse* highlights vulnerabilities in the H-2B program, which have resulted in serious abuses of workers.

[33] Interview with Lori Johnson, Attorney, Legal Aid of North Carolina, Farmworker Unit, (Sept. 21, 2011); Steven Greenhouse, *Low Pay and Broken Promises Greet Guest Workers in U.S.*, N.Y. Times, February 28, 2007, http://query.nytimes.com/gst/fullpage.html?res=9906E7DC1F3EF93BA1575 1C0A9619C8B63.

[34] Ibid.

[35] Interview with Lori Johnson, Attorney, Legal Aid of North Carolina, Farmworker Unit, (Sept. 21, 2011).

[36] "There has also been increasing evidence in the H–2B program of violations rising to the criminal level. The Department has seen increasing evidence of employers and agents filing fraudulent applications—involving hundreds or thousands of requested employees—for non-existent job opportunities. U.S. v. Broyles, 2:09-cr- 00003–MSD–TEM–23 (E.D. Va. 2010) (conspiracy to conspiracy to fraudulently obtain H–2B visas), U.S. v. Barbugli, 6:10-cr-00177–MSS–DAB, 6:10-mj-01089–KRS, 6:10-cr-00180–MSS–GJK (C.D. Fl. 2010) (three family members guilty for operations involving a labor staffing company obtaining fraudulent H–2B visas through more than 11 subsidiary companies), and U.S. v. Manuel, 9:10-cr-80057–KAM (S.D. FL. 2010) (false statements and conspiring to hold approximately 39 Filipino nationals in forced service to work in H–2B status in country clubs and hotels in Southeast Florida) represent the most recent criminal actions involving H–2B applications filed for fraudulent job opportunities or containing false information at odds with the treatment actually received by the workers." Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15130, 15132 (proposed March 18, 2011) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R.pt. 503).

million in 18 months by lying to foreign workers that U.S. employers had jobs for them, when in fact the employers were entirely unaware of the labor petitions in their name.[37]

In a more transparent system, it is possible that these trafficking cases could have been prevented. A phone call to the local U.S. consulate to determine if the recruiter was legitimately hired by a U.S. company could help people realize that a visa was fraudulent. Perhaps reaching out to the U.S. employer identified in the petition, either directly or though government channels, could have revealed that the employer was not seeking H-2 workers at all, or that no more workers were needed for that season.

Some might say it is far fetched that workers would take steps to verify the offer, even if informed how to do so, due to their desperation to escape poverty. While the poverty, and the hope to escape it, is undeniable, the sheer scale of the obstacles should not deter us from trying to provide the tools for workers and advocates who may use them. If we develop a mechanism to allow workers the opportunity to judge, evaluate, and assess job offers before they move forward, there is good reason to believe that at least some may be empowered to prevent their own victimization. We owe it to them to try.

C. Recruiter Abuses

Even when recruiters are hiring for legitimate H-2 jobs with legitimate petitions and employers, abuses still occur. The problems can involve charging unlawful fees or non-monetary prerequisites. Transparency can help workers and their advocates report and possibly stop the abuses from occurring.

1. Investment Costs for Workers

a. Recruitment Fees

Until recently, workers were allowed to bear all the costs of the international recruitment before departing for the United States. To illustrate the creativity recruiters would exercise in exacting fees and costs from prospective H-2 workers, one can look at the prevailing practice in a remote mountainous region of Guatemala. In 2007, a well-established H-2B recruiter in Huehuetenango, Guatemala, regularly charged his H-2B recruits a host of fees. To be included on the list of workers to go to the United States, each had to pay $125. To obtain the visa (presumably covering passport and visa fees, although not specified) he charged $625. For the airplane ticket he charged $1,750. Finally, he added an extra $35 so

[37] The case broke when a Chili's restaurant received notice of an approved petition for which they had never requested. The visas were for employer-based petitions, although the exact type visa was not specified. Tom Jackman, *Va. Men Charged In Visa Scheme*; *2,700 Fake Papers Filed, U.S. Says*, Wash. Post, July 25, 2002, at A1.

that the road to his house would be paved.[38] The grand total of over $2,500 is charged in a country where the gross national income per capita is $2,730.[39]

Even though recruiter fees have been banned since 2009, some recruiters still charge them.[40] Over one year after the rule went into effect, when an H-2 recruiter in Guatemala had no H-2 jobs lined up, he sent his workers to another recruiter. The workers returned jobless after refusing to pay the shockingly high recruitment fees. One recruiter was asking for a $200 "inscription fee." Workers were then expected to pay the other recruiter $1,000 and then allegedly an additional $1,000 once in the United States. [41]

Even if recruiters stopped charging recruitment fees, it is not difficult to mask the unlawful fees by exaggerating legal ones. In essence, cherry picking which fees are legal and which are not, opens the door for an endless shell game of hiding and shifting fees to arrive at the same result—workers fronting large amounts of money to go to the United States.[42]

Recall that the prospective H-2 workers absorb these costs *before receiving the visa from the U.S. consulate*—the issuance of which is not guaranteed. If the consulate denies the visa, there is no recourse for the workers. This means that the chances of the recruiter reimbursing the worker the money is extremely low. From the workers' perspective, they are little better off than someone who fell victim to a fraudulent recruiter scheme.[43]

A more transparent system will allow for well-trained advocates and workers to monitor the recruiters more closely to help ensure that only lawful fees and costs are passed on to the workers.[44]

2. Non-monetary Acts to Ensure Compliant H-2 Workers

Non-monetary acts during the recruitment process also render H-2 workers vulnerable and thereby prone to exploitation once in the United States. In

[38] Interview by Aroldo Palacios, private practitioner and Global Workers Network Defender, with H-2B worker in Huehuetenango, Guatemala (2007).
[39] *Guatemala*, The World Bank, http://data.worldbank.org/country/guatemala (last visited Sept. 29, 2011).
[40] *See e.g. Rivera v. Peri & Sons Farms, Inc.*, No. 3:11-CV-00118-RCJ, 2011 WL 3177538 at *2 (D. Nev. July 27, 2011). According to counsel, the recruiters continue to charge recruitment fees as of two months ago. Interview with Greg Schell. Managing Attorney, Migrant Farmworker Justice Project, Sept. 2, 2011.
[41] Interview with a Guatemala recruiter May 7, 2010.
[42] For example, "visa processing fees" are still considered legal. This has resulted in some workers paying hundred of dollars for a five minute session to fill out a one page form. Interview with Greg Schell, Managing Attorney, Migrant Farmworker Justice Project, (Sept. 25, 2011).
[43] In fact, maybe victims of fraud are better off because they have the legal possibility of criminal prosecution and restitution.
[44] Of course, this assumes advocates and workers are well versed on the H-2 regulations; an issue Global Workers and others are actively addressing.

Guatemala, it is common for H-2B recruiters for the U.S. pine tree industry to require recruits to turn over the deeds to their family lands to ensure that the workers will remain with the H-2 employer in the United States, no matter the conditions.[45] Indentured status can also be achieved through false loans, known in Guatemala as "pagaré" (I will pay). A worker signs a contract saying that they borrowed money from the recruiter, in one case for over $6,000, when in fact no such transaction occurred. If the worker leaves the U.S. employment the recruiter recalls the "loan."[46] Sometimes workers are forced to sign contracts committing them to the employer, regardless of the circumstances.[47] Recruiters also turn to family members to "guarantee" that their loved ones will not abandon the H-2 contracts.[48]

With a more transparent system, there is at least a chance that advocates and workers will be able to address these issues as they are occurring by alerting employers, governmental authorities, or confronting recruiters themselves.

3. Legal Costs also Result in Exploitation

Over the past few years, the H-2 regulations have undergone various changes and even more are expected soon.[49] While many of the changes have been positive for workers, nonetheless, the H-2 regulations and case law precedent have created a patchwork of rules that few workers, let alone advocates or government officials understand well.[50]

Currently, recruitment fees are banned, however, workers may be required to pay up front for other costs (such as government mandated fees or transportation) as long as they are reimbursed up to the H-2 wage rate or the federal minimum wage

[45] This practice is the subject of a forthcoming Global Workers report. *See also* Mary Bauer et. al., S. Poverty Law Ctr., *Close To Slavery: Guestworker Programs In The United States,* 11 (2007), http://www.splcenter.org/pdf/static/SPLCguestworker.pdf.

[46] Pagaré used by the H-2B recruiter for Eastern Ship Building of Panama City, Florida (2006).

[47] Copy of the Acta Notarial de Declaración Jurada used by the H-2B recruiter for Eastern Ship Building of Panama City (Apr. 23, 2006) (worker signed sworn statement promising not to abandon the work or leave to work for another company without prior permission from Eastern Ship Building).

[48] *See, e.g.,* Mary Bauer et. al., S. Poverty Law Ctr., 11, *Close To Slavery: Guestworker Programs In The United States* (2007), http://www.splcenter.org/pdf/static/SPLCguestworker.pdf. (noting the worry H-2B worker felt about leaving the H-2 employment because his wife in Guatemala had signed a form which made her responsible if her husband left the job); Interview with Greg Schell, Managing Attorney, Migrant Farmworker Justice Project, (Sept. 25, 2011) (commenting that Mexican and Filipino clients have been subject to this practice. In the Philippines these notes are sometimes enforceable in court).

[49] DOL is expected to issue new H-2B regulations by the end of 2012. Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 76 Fed. Reg. 15130 (proposed March 18, 2011) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R.pt. 503).

[50] This point was brought home recently when Global Workers was asked to review a draft of materials a U.S. consulate was producing to educate H-2A workers on their rights. The materials were based on outdated H-2A regulations.

during the first week of work, depending if on an H-2A or H-2B visa.[51] Not surprisingly, the complicated structure results in workers who are not well informed about their rights and therefore more likely to absorb costs they should not.[52]

Regardless of these positive changes, the fact is that the H-2 system is structured so that workers shoulder, upfront, almost all the costs of the program, some of which may, or may not, be reimbursed, at some point. Even if all the rules are followed during recruitment, the seed of vulnerability is nonetheless sown because of the steep investment the workers have made. As a result, before the H-2 workers even set foot on U.S. soil they are already disadvantaged and vulnerable. If policymakers

[51] Recruitment fees are banned. *See* 20 C.F.R. § 655.135(j) (2011) (H-2A DOL regulation prohibits charging employees recruitment fees); *See* 20 C.F.R. § 655.22(j) (2011) (H-2B DOL regulation prohibits charging employees recruitment fees).

H-2B employers are allowed to deduct transportation, visa, and passport costs subject to the FLSA. *See* 20 C.F.R. § 655.22(g)(1)-(2) (2011) (H-2B employers are not prohibited from collecting reimbursement from employees for costs that are the employee's responsibility, such the cost of visas or passports); *See also* Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 78020, 78039-78040 (December 19, 2008) (explaining that "[t]he Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation, as well as worker expenses such as passport and visa fees.").

H-2A employers are able to deduct transportation costs subject to FLSA minimum wage, yet visa and other government mandated fees subject to H-2A wage rate. *See* 8 C.F.R. § 214.2(h)(5)(xi)(A) (2011) (no fees shall be collected from an H-2A employee "other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the alien to pay such costs and fees." Note that 20 C.F.R. § 655.22 for H-2B workers also cites 8 C.F.R. § 214.2(h)(5)(xi)(A) (2011), even though the language reads H-2A); *See also* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6914-6916 (February 12, 2010) (explaining that according to the regulation, transportation costs can be an initial deduction, but must be reimbursed to the employee when 50% of the work is done. However, since employers must comply with FLSA, the transportation cost must be reimbursed in the first week, so as not to violate the minimum wage requirement); *See also* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (February 12, 2010) ("Government-mandated fees such as visa application, border crossing and visa fees (including those imposed by the DOS or other government contractors) are integral to the employer's choice to use the H-2A program" thus the rule requires "employers to bear the full cost of their decision to import foreign workers."); *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 FR 6884, 6916 (stating that aside from transportation, "all other deductions must be reasonable…and… are tested against the required H-2A wage rate, not just the FLSA minimum wage.").

[52] For example, in a recent Georgia case the court disallowed clearly reimbursable expenses because the H-2A workers failed to keep receipts, something the workers were never advised to do. *Ojeda Sanchez v. Bland Farms, LLC,* No. 6:08-CV-96, 2011 WL 2457519 at *2-3 (S.D. Ga. June 16, 2011) (disallowing hotel and subsistence costs for H-2A workers for travel from Mexico to Georgia due to the failure to maintain receipts).

were serious about reducing this climate of exploitation, and protecting U.S. workers, the costs of the H-2 program would be shifted to U.S. employers.[53]

IV. Consular Efforts to Track Recruiters and Stem Recruitment Abuses and Fraud

Although there is no official Washington D.C. directed DOS policy or regulation on the tracking of H-2 recruiter information, some consulates have pioneered their own initiatives.

For over a decade, at least two consulates have requested U.S. employers to divulge the name of the local representative who will coordinate the recruitment of the H-2 workers.[54] These initiatives were prompted, in part, by an effort to monitor the fees that recruiters were charging, when those fees were still legal. Excessive recruiter fees, consular officials realized, caused workers to overstay their H-2 visas in order to earn enough money to pay off the high debts they undertook to pay the fee.[55] For that reason, consulates, like the one in Guatemala, started asking H-2 applicants about the fees they paid.[56]

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[53] Foreign workers are less likely to complain about abuses (e.g. failure to reimburse costs, wage theft) because they have so much to lose (often loans are secured by the family property), are likely uninformed as to their rights or the resources that can help them, and are very easily black listed. As a consequence, shifty employers could actually save money by hiring foreign workers, not only undercutting U.S. workers but also their U.S. law abiding competition. For that reason, the simplest way to level the playing field is to shift all recruitment-related costs to the employer. Another positive result would be that U.S. workers, from the recruitment cost perspective, would be less expensive and perhaps hired instead. A more in-depth analysis (which would also examine how foreign workers are more likely to be subject to discriminatory hiring practices and other reasons they can be considered more desirable then U.S. workers) though merited, is beyond the scope of this paper.

[54] *See, e.g.,* H-2A/B Visa Program American Consulate General Monterrey Company Agreement, January 2004 (requesting representative name, contact information, and amount of recruiter fee to be charged to the workers, if any); H-2A/B Visa Processing - U.S. Embassy Guatemala. October 2002 (requesting same information as Monterrey). This practice continues today although no longer do the embassies inquire about fees. *See e.g.* Consulate in the Embassy of United States, Guatemala; United States Department of State, Types of Nonimmigrant Visas: Company Contact Information (2010) Available at http://guatemala.usembassy.gov/temporary_worker_visas.html (requesting employers to designate local representative). It is unclear which consulates request U.S. employers to disclose the local recruiter they hire. Consular websites reviewed that revealed no such similar request on the U.S. employer include: *See* U.S. Consulate in Guadalajara, Mexico, http://guadalajara.usconsulate.gov/index.html (last updated May 24, 2011); U.S. Consulate in New Delhi, India, http://newdelhi.usembassy.gov/ (last visited Sept. 30, 2011); U.S. Consulate in Bangkok, Thailand, http://bangkok.usembassy.gov/ (last updated Sept. 28, 2011); U.S. Consulate in Cape Town, South Africa, http://southafrica.usembassy.gov/consulate_capetown.html.

[55] Interview with consular officials 2006 and 2007. The fees of course, were even harder to pay off when the U.S. employers did not met the terms and conditions they promised to pay.

[56] *See, e.g.*, Declaración del Solicitante de Visa H-2B, 2002, (requesting H-2B visa applicant to indicate the expenses they paid to obtain the visa including passport, visa, recruiter fee, airplane ticket, airport exit tax).

When the consulate uncovered excessive recruiter fees their options were limited by the realization that whatever they did punished the worker, who had no responsibility for the recruiters' actions.[57] If consular officials are concerned that the H-2 applicants will overstay the visa, even for understandable reasons, the visa will be denied. In recognition of the incredible hardship denying a visa would cause due to the loans already incurred, consular officials were very hesitant to do this. Additionally, once recruiters and the workers realized the potential consequence of being truthful about the fee paid, they were less forthcoming about it.[58] At some point consulates stopped asking the workers about the fees paid because it "did not seem helpful" and the workers were "coached" on how to answer.[59]

The U.S. Consulate in Monterrey, Mexico issues the most H-2 visas in the world, reaching a high of 1,000 H-2 visas issued daily during the peak season.[60] For over fifteen years, they have developed a database with information on over 3,000 recruiters.[61] Monterrey also collects photographs and fingerprints of the recruiters who pass though their doors.[62]

Other consulates have started tracking recruiter information more recently.[63] Information collected from many sources goes into the databases, which track much more than the principal recruiter listed by the employer. Until recently, the databases were used for internal purposes only.

As a result of increased attention to combat fraud in recent years, DOS has started fraud prevention outreach efforts.[64] In August 2011, for example, the U.S. consulate in Guatemala went to several Guatemalan states to educate workers on how the visa process is supposed to work in an effort to prevent the rampant visa fraud in that country.[65] The U.S. consulate in Monterrey has been doing the same for at least two years. As a result from feedback from the anti-fraud outreach efforts in the Mexican states of San Luis Potosi and Zacatecas, the U.S. consulate launched a "hotline " in March 2011. The hotline, currently limited to a pilot effort in collaboration with the Migration Institute of the State of Zacatecas, is answered by officials in the U.S.

[57] Some consular officials considered $30-$50 the unofficial reasonable recruitment fee. However, "Washington" told them that the consulate had no legal authority to cap recruitment fees so in practice they suggested that the fee be "fair." Interview with consular official (2007).
[58] Interview with Consular official (2006).
[59] Interview with Consular official (2007).
[60] Interview with Consular official (September 2011).
[61] Interview with Consular official (September 2011) and (March 2009).
[62] Interviews with Consular Officials (May 2011) and (March 2009).
[63] For example, the U.S. consulate in Mexico City started a database in 2011. Interview with U.S. Consular Official in Mexico City May 2011. In 2009, only ten recruiters processed visas through the Mexico City consulate, one being responsible for more than 80% of the applicants. Interview with Consular Official in Mexico City March 2009.
[64] When asked what type of "fraud" the response is often "all types"—worker, recruiter, and employer. Interviews with U.S. consular officials (2006-2011).
[65] Interviews with consular officials in U.S. Consulate in Guatemala (May through August 2011).

consulate in Monterrey who will help callers determine if a job offer is actually connected to a U.S. employer with an approved petition. They also offer tips on what to ask of the recruiter to determine if the offer is legitimate.[66] Although the U.S. consulate in Guatemala does not operate a hotline, it does field calls from workers inquiring about specific offers.[67]

These efforts are to be lauded, supported, and expanded to consulate offices around the world. It is especially encouraging, considering resistance from within DOS itself to address these issues. Many DOS officials have raised various reasons why DOS should not be involved in recruiter transparency. These reasons include privacy rights of U.S. citizens, confidentiality of the visa applications, the oft-cited reference that the U.S. government is not responsible for what happens overseas because it is the jurisdiction of local authorities, and the dismissive, yet true statement that "we are not DOL."[68]

The ground breaking pilot "anti-fraud" projects, however, should not be the only effort to bring transparency to the recruitment chain because there are important aspects which limit the potential in reducing fraud, trafficking and general recruiter abuse. Specifically, the database is not public, it may not be complete, and it may not be up to date when recruitment starts.

First, the hotline is not a public database. The only way to access the information is to call the hotline and the responsiveness is limited to the official who answers the phone, meaning that certain officials are likely to provide more information than others.

Second, it is difficult to know what the consulate knows. Since the U.S employers are only asked to reveal the primary recruiter, what does the consulate know about whom that recruiter employs? The prospective H-2 worker is not likely to encounter the main recruiter, but a sub, even a sub of a subcontractor, if it is a large H-2 employer. It is also plausible that someone could be fraudulently recruiting on behalf of a legitimate petition. That scenario would not likely be detected under the current pilot project.

Third, the database many not be current when the recruitment is occurring. Recruitment for H-2 workers may begin well before the U.S. employer has passed through all the official steps to have the petition approved. Although some consulates say they are aware of the approved petition sometimes months in

[66] Interview with consular official in U.S. Consulate in Monterrey, Mexico (September 2011).
[67] Interviews with Consular officials (June 2011). Some officials worry that verifying if a job offer is legitimate has the appearance of making that recruiter "legal" which has negative implications if the recruiter is hired for a legitimate job in the U.S. but committing abuses while recruiting workers for it.
[68] Interviews with dozens of Department of State officials based in Washington D.C., Mexico, and Guatemala (between 2006 and 2011).

advance, other consulates say they are working under a one-week turn around.[69] Timing is everything. If the worker is unable to verify the recruiter's legitimacy at the moment of the recruitment, not only may the worker become a victim but in more volatile countries, the recruiter himself could be harmed if people believe he is trying to defraud them.[70]

It is worthwhile to discuss the effectiveness of DOS playing more than a limited role in monitoring the recruitment process. Understandably, workers view the consular officials as holding the keys to the U.S. visa. Under the current system there is only risk for a worker to be honest about whatever has happened to him prior to the visa interview. Faced with knowledge of abuse the consulate has few options. One is to deny the individual visa, which they will do especially if they think the worker is at risk of being a trafficking victim. The consulate can also ask DHS/USCIS to reconsider the petition, which could potentially result in the U.S. employer's petition being revoked and many more H-2 workers not having the chance to travel to the U.S. to pay off their debts.[71] Another, less official, option is to conduct behind the scenes maneuvering to correct the situation.[72]

Although as noted, individual consular officials and local staff can and do undertake important efforts, DOS' role is limited. To really bring transparency to the Recruitment Supply Chain, the abuses should be halted well before DOS is involved.

V. Divulging Recruiter Identities Will Help to Empower Workers and Reduce Abuses

The old adage, "An ounce of prevention is worth a pound of cure" is just as true in the H-2 recruitment context. As has been noted, by the time DOS knows who the employers will be for that season, it is likely that the workers have already paid the recruiters, been defrauded, or trafficked. For that reason, one must look earlier in

[69] Interviews with Consular Officials (June 2011 and September 2011).

[70] For example, in Guatemala the phenomenon of lynching suspected criminals is not uncommon. *See, e.g.*, Carlos A. Mendoza, *Structural causes and diffusion processes of collective violence: Understanding lynch mobs in post-conflict Guatemala*, University of Notre Dame, http://www.nd.edu/~cmendoz1/collectiveviolencelasa2006.pdf. (prepared to be delivered March 15-18, 2006); *2009 Human Rights* Reports: Guatemala, U.S. Dep't of State (March 11, 2010). http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm.

[71] Interview with consular official (Jan. 2007).

[72] For example, when a consular official uncovered that a recruiter was forcing workers to sign fake loans which would be recalled if the worker left the US employment, the official contacted the U.S. employer and told them to halt the recruiter's action, which it did. Interview with consular official (2007). Others have repeated similar stories of putting employers "on notice" in the hope that the employer will correct the recruiters' actions. Interview with consular official (2011).

the H-2 process to prevent these abuses.[73] This paper focuses on how disclosing the recruiter's identities would provide additional tools for prevention efforts.[74]

A. Recruitment Supply Chain Disclosure: An Alternative Approach

Disclosure of the Recruitment Supply Chain would require details from the sub-recruiter to the job site, on the persons and/or companies that are involved in recruitment and information as to the companies where they will be working.

1. Collection of Information

Disclosure must begin at the start of the H-2 process, which lies with the Department of Labor. Under the disclosure approach, the DOL would require U.S. employers, during the labor certification process, to divulge all persons involved in recruiting. This would not be confined to the principal recruiter hired by the U.S. employer and now disclosed to DHS; it would also apply to the persons the recruiter employs, subcontracts, or utilizes without compensation (such as family or friends), to recruit workers abroad. Without disclosure down to the sub recruiters, how is the worker in the small village to have any chance at preventing his own trafficking? Again, it is the person who has direct contact with the workers who is the potential cause of so much harm.

Employers may resist disclosure to this detail not only due to the effort involved, but for liability issues which greater knowledge of their own recruitment procedures may entail. Some employers intentionally avoid knowledge of the activities in the supply chain to avoid potential agency liability.[75] However, liability can also be avoided by having a supply chain that follows the law. It is positive for the government to require employers to take a more active role to ensure that fewer abuses are committed under their name. Shifting the human supply chain from national to international sources already requires U.S. employers to undertake many more responsibilities and tasks. Knowledge of the supply chain will reduce abuses and ultimately make the U.S. employer operations smoother in the long run.

After the initial disclosure, it would not be burdensome to update the list, if the employer utilizes the same recruiters year after year. For employers that regularly

[73] The original hypothesis was that DOS should be the lead on recruiter transparency. However, research revealed that while DOS has been the most involved U.S. agency with recruitment issues, and these efforts should continue, it becomes involved very late in the process.

[74] It is recognized that addressing other issues will also aid in reducing exploitation. For example, workers should know the terms and conditions of the employment, as approved by the U.S. government; and they should know their H-2 rights, general labor rights, and resources available to them, both in the U.S. and at home when they return. The current regulations and ideas for how to address these issues are out of the scope of the present paper, but may be a focus of a future publication.

[75] *See, e.g.*, *Arriaga v. Florida-Pacific Farms, LLC*, 305 F.3d 1228, 1244-45 (11th Cir. 2002) (employer not liable for recruitment fees charged by recruiters due to lack of knowledge and recruiters' loose affiliation to employer).

switch recruiters, the extra effort should not outweigh the good that disclosure can achieve.

To account for staffing changes, U.S. employers should be allowed to notify DOL of additional sub-recruiter identities as the season progresses. Although the permissible time for changes should be limited to ensure the most current information is available to the workers.

All the persons disclosed would consent to U.S. jurisdiction for any legal actions related to their recruitment work.

2. Dissemination

With the information collected, the next challenge is how to provide foreign workers with timely access to the information.

One approach explored was for the recruiter to provide copies or show foreign workers proof that indeed he or she is authorized to recruit workers for a specific U.S. employer. Vetting this approach revealed an important flaw. Official documents are easily reproduced fraudulently rendering efforts like these suspect.[76]

To avoid these traps, official sources must be relied upon. The DOL should post the Recruiter Supply Chain on a user friendly website, ideally in multiple languages, as soon as the temporary labor certificate is approved, with an update when approved by DHS. [77] This list should be linked to U.S. consular websites, a location more commonly consulted by foreign advocates and workers.

In addition to public disclosure on a website, the government should operate a hotline to handle inquiries as to recruiter identities. Aside from the ports of entry, the U.S. consulates are the only U.S. governmental agency that H-2 workers will likely interact with during their H-2 tenure. Understandably, workers turn to the U.S. consulates for everything relevant to the H-2 process. For that reason, the consulates should also be available to field inquires as to recruiter status. U.S. consulates should be encouraged to continue collaborating with local human rights organizations to maximize dissemination of the hotline, the website, and ways to denounce violations. As described in previous sections, U.S. consulates are already undertaking similar efforts through their anti-fraud initiatives.

Once the Recruiter Supply Chain is public, other important resources can be mobilized to ensure only disclosed recruiters are recruiting. Organizations that defend workers rights in the countries of origin can utilize this information to

[76] Interview with Consular Officials (June 2011).

[77] This is not without precedent. As of 2010, DOL posts employers' H-2A petitions on the web. *See* H-2A Public Job Registry, http://icert.doleta.gov. Temporary Agricultural Employment of H-2A Aliens in the United States, 20 C.F.R. § 655.144 (2011).

educate workers and check the official sources themselves to help communities where recruitment is occurring. This will be especially helpful in areas where workers have little access or experience using the internet.

Foreign governments can also use this information. Some countries have laws that regulate recruiters. Currently, governments have a ready excuse to not enforce the recruitment laws because it would require proactively identifying the recruiters, an effort that requires resources few of these governments have.[78] If they have easy access to the identity of recruiters they are in a better position to enforce their own laws.

3. Enforcement

Failure to disclose the recruitment supply chain should yield strong and straightforward consequences. Based on a strict liability standard, an employer would be subject to fines and liable for any unlawful actions committed by undisclosed persons recruiting under their petition. In addition to state action, individuals should have the right to bring their own claims to enforce the provisions. When employers are put on notice that undisclosed persons are recruiting, the penalties would increase if the employer did not take remedial action.

Workers can be so desperate to obtain H-2 visas that they are extremely hesitant to do anything to risk their chances. That means that they may be more willing to pay unlawful fees than report them to authorities. Even after securing the visa, workers are fearful of being black listed the next year if they complain.[79] For this reason, some workers may reveal the information only once they are already involved in enforcing other rights or have no possibility of obtaining another visa with that employer.[80] To encourage persons who had held, or currently hold, H-2 visas to come forward, the incentives must outweigh the very real possibility of retaliation. Possible actions could be transfer to another H-2 employer, a significant financial reward such as treble damages based on a year's wages, or eventual permanent legal status in the United States.[81]

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[78] Enforcement of Mexico's recruitment laws is the subject of a forthcoming Global Workers publication.

[79] *See, e.g.*, Interview by Hector Jaimes Abarca Centro, Regional de Defensa de los Derechos Humanos "José Ma. Morelos y Pavón," a Global Workers Defender, with H-2A worker in Chilapa de Álvarez, Guerrero, Mexico. (Sept. 8, 2010) (noting that recruiter's promise of three months of work only resulted in three weeks of employment. Worker was charged a recruitment fee, was never reimbursed for transportation, and did not earn enough money to pay off debts. Notwithstanding these abuses, worker did not want to file complaint to jeopardize possible return the following year).

[80] For example, some cases start after workers are fired, blacklisted, or injured. Once they know they will not be rehired, they are more willingly to exert their rights. But even then sometimes workers are not willing to jeopardize the chances of other people from their community.

[81] Advocates in a variety of contexts have raised similar arguments. For example, the Power Act advances temporary status for persons filing workplace claims or U visa eligibility for workers who suffer serious labor violations. Protect Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. § 1 (introduced June, 13 2011).

Likewise, when H-2 workers end up working at a non-disclosed job site in the U.S. similar penalties and incentives must exist. The employer should be liable to pay the promised wages in full to any workers displaced due to enforcement actions.

Financial consequences provide a key incentive so that employers will be more forthcoming about who is recruiting and for what jobs. Unless the government is more proactive, it is difficult to defend an H-2 process that can cause fraud, trafficking, displace U.S. workers and hurt law-abiding U.S. business. Disclosure helps level the playing field and removes the dangerous guessing game from the current system.

B. Recruitment Registration Approach: The Approach More Commonly Advanced[82]

A Recruitment Supply Chain Disclosure approach is distinct from a recruiter registration system, which is often advanced as a way to reduce abuses committed by recruiters. Broadly speaking, these proposals call for the Department of Labor to oversee an annual or bi-annual registration process, which require employers to hire only recruiters who are registered.[83]

If the goal of registration is to reduce recruiter abuses it is important to look critically at contexts where it is already in use, such as the U.S agricultural sector. The farm labor contractor registration system has been in operation for over thirty years.[84] It was enacted in 1963 "to alleviate the widespread suffering of farmworkers by regulating farm labor contractors."[85] As two leading farmworker advocates noted, however, the registration process is less successful in reducing recruiter abuses as it is as an informational tool to know whom the farmers hire to

[82] This section by no means attempts to fully explore recruiter registration models. It simply raises some points from U.S.-based models in order to flag them for further discussion. For a more complete picture on efforts to reduce recruiter abuses, one should also look to other countries, such as the Philippines.

[83] For example, recently introduced H.R.2830 Trafficking Victims Protection Reauthorization Act of 2011 Sec. 234. Prevention Of Trafficking In Persons Involving Workers Recruited Abroad, section (f) advances a foreign labor contracting registration regime, which requires registration every two years. However, the bill exempts employers who directly recruit from registering. This means that the DOL will not publish the list of persons recruiting for those employers, leaving open the possibility of fraud and trafficking on behalf of "recruiters" who claim they are employees of companies self-recruiting and, therefore, need not show the required proof of registration. Regardless of this loophole, each TVPRA reauthorization has seen increased worker protections, which is a remarkable achievement.

[84] The farm labor contractor system was created in 1963 under the "FLCRA." Farm Labor Contractor Registrations Act of 1963, Pub. L. No. 88-582, 78 Stat. 920 (1964).

[85] *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997). Some of the abuses FLCRA sought to end are remarkably similar to foreign recruiters' abuses today. H.R. Rep. No. 97-885 at 1 (1982) ("the contractor tends to exaggerate conditions of employment when he recruits workers in their home base or that he fails to inform them of their working conditions at all)" (internal quotation marks and citation omitted).

recruit workers.[86] A more effective approach to reducing abuses was later adopted in 1983 when Congress amended the law to impute liability on employers for their recruiters' actions.[87]

A registration process requires the government to review and approve applications, a process that necessarily involves creating a bureaucratic structure. Employers are only supposed to utilize approved contractors. Again drawing from the years of lessons learned in the farm labor contractor context, it is difficult to move DOL to decertify or ban recruiters. This has resulted in recruiters operating "legally" while openly violating laws, if they bother to register at all.[88] In one extreme case, the lack of government action arguably resulted in the deaths of migrant farmworkers.[89] Even if DOL does act, some farm labor contractors are apt at rendering disbarment practically useless by utilizing "straw men" to register for them.[90]

If indeed, the most useful aspect of the farm labor registration process is information on the recruiters, why not create a system that extracts the same information utilizing a lower cost structure for all the parties involved? At least it could be a short-term measure while challenges to registration, and other issues raised in this paper, are addressed.[91]

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[86] Interview with Erik Nicholson, United Farmworkers Union, Sept. 2, 2011; Interview with Greg Schell, Managing Attorney, Migrant Farmworker Justice Project, Sept. 2, 2011.

[87] Although the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) "is similar to the FLCRA, it is different in one critical respect: 'The AWPA corrects the key weakness of the FLCRA, which held only the farm labor contractor responsible for such abuses and shielded the employer unless he fell within the narrow definition of "farm labor contractor."'" *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (quoting 128 Cong. Rec. 32, 883 (1982) (Statement of Rep. Ford)); Interview with Greg Schell, Managing Attorney, Migrant Farmworker Justice Project, Sept. 25, 2011.

[88] Interview with Lori Johnson, Attorney, Legal Aid of North Carolina, Farmworker Unit, Sept. 20, 2011; Interview with Greg Schell, Managing Attorney, Migrant Farmworker Justice Project, Sept. 2, 2011

[89] 14 migrant workers on H-2B visas died when their van careened off a road into a frozen river in the Maine woods. Before the tragedy, North Carolina Legal Aid, and two state agencies repeatedly requested DOL to decertify the farm labor contractor due to chronic wage, housing, and transportation violations; it never did. Interview with Lori Johnson, Attorney, North Carolina Legal Aid Farmworker Unit (Sept. 20, 2011); Bacon, David, *The Wages of Death*, The American Prospect (June 30, 2003) http://prospect.org/cs/articles?article=the_wages_of_death.

[90] In the farmworker context the "game" can be so absurd that when farm labor contractor, Jack Simmons, was serving time for peonage his wife registered as a farm labor contractor to continue the business. Once he was released, he registered and continued mistreating farmworkers well after 1985 when DOL permanently banned him due to chronic violations. *See* Interview with Greg Schell, Managing Attorney Migrant Farmworker Justice Project, (Sept. 2, 2011); Penny Bender, *Migrants: Labor's Forgotten Workers*, Daily Press (June 10, 1990) http://articles.dailypress.com/1990-06-14/news/9006140170_1_migrant-workers-labor-department-social-security; *U.S. v. Simmons*, 497 F.2d 177, 177 (5th Cir. 1974).

[91] For example, a stronger incentive to use only registered recruiters would be provided by holding employers strictly liable for using unregistered contractors. Registration processes, however, still would not address many issues raised in this paper, such as the need for the worker to have the ability to verify the recruiter supply chain, in real time, back to a legitimate job in the United States.

One may argue that Recruiter Supply Chain disclosure would allow U.S employers to utilize recruiters that are known to abuse workers. This is true. Certainly avoiding the registration process removes the government's authority to prohibit the use of certain recruiters. Disclosure places the impetus on advocates and workers to discourage employers from using abusive recruiters, whether that is through holding them liable for the recruiters' actions or through public pressure, such as "name and shame" or boycotts.

Disclosure may not address the myriad violations that occur during recruitment. It is, however, a practical approach to address some of them in recognition of the current shortcomings in the registration processes.

VI. Conclusion

The lack of an accessible and reliable mechanism for workers to verify the validity of an H-2 job offer and the associated recruiter, has contributed to the chronic fraud, trafficking and other abuses committed in the name of the H-2 visa. Not only do we need better protections and remedies, but prospective H-2 workers should be empowered to identify and avoid these situations as well. The economic desperation of so many workers presents challenges to creating meaningful, effectual mechanisms, but it is imperative that we try.

The goal of Recruiter Supply Chain Disclosure is to provide workers the ability to trace the recruiter to the employer waiting in the United States at the time they receive the job offer. This will provide workers a chance to evaluate a recruiters' job offer and make a more informed decision, perhaps helping him or her avoid fraud or trafficking. Greater transparency will hopefully lead to a reduction of other recruiter abuses, such as charging unlawful fees, due to increased monitoring by workers and advocates.

It is our sincere hope that the development and discussion of Recruiter Supply Chain Disclosure will add to the many important and ongoing efforts to reduce the abuse of prospective and actual H-2 workers.

Acknowledgments

Global Workers Justice Alliance would like to thank many people for helping this paper come to fruition. Insight and examples from Greg Schell, Florida Legal Services Migrant Farmworker Justice Project; Erik Nicholson, United Farmworkers; Lori Johnson, North Carolina Legal Aid; Pat Medige, Colorado Legal Services; Ann Jordan, American University Washington College of Law; and Ashwini Sukthankar greatly enriched this effort. Golden MacArthy and Sarah Gavigan are to be thanked for their terrific legal research. Cathleen Caron authored the paper with the support of the Global Workers team who reviewed, edited, and brought it home.

Global Workers is very grateful to the Ford Foundation for its financial support.

About Global Workers Justice Alliance

Global Workers Justice Alliance ("Global Workers") is a nonprofit organization that combats worker exploitation by promoting *portable justice* for transnational migrants through a cross-border network of advocates and resources. *Portable justice*, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is a key, under addressed element to achieving justice for today's global migrants. To realize this mission, Global Workers trains and supports a Defender Network, comprised of trained human rights advocates in the migrant sending countries, to facilitate employment law cases for migrant workers in partnership with advocates in the countries of employment.

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