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The H-2B temporary migrant visa: A Policy for Abuse

A human rights-based analysis of a U.S. visa for temporary forestry workers

Part 1

Introduction

Each year, thousands of men from mostly poor regions in Latin America come to the United States on a temporary visa for jobs local workers do not fill. They earn about \$10 an hour as they toil in the nation's forests, taking up some of America's most hazardous jobs. But as temporary workers and foreign nationals, these individuals often have many of their rights restricted, and are susceptible to a range of human rights violations.

This case study will analyze the H-2B temporary visa program in the United States, with a focus on the forestry field – one of the most common industries for H-2B workers and also among the most dangerous.

Part 1 of the paper will introduce low-skilled temporary worker programs in the United States, and provide information on the H-2B policy and the characteristics of the H-2B employees.

Part 2, the bulk of the case study, will analyze rights related to working conditions under the H-2B program through the human rights-based approach. The analysis will begin with an explanation of how this case study is linked to poverty, and why it presents a human rights issue by examining the key vulnerabilities migrants are exposed to under this visa. I will then look at other countries' temporary worker policies, focusing on the rights they provide that differ from those under the H-2B policy. My analysis will continue as I zero in on the U.S. government's obligations regarding rights related to working conditions, which will be scrutinized through the lens of established human rights legal principles.

The human rights-based approach will reveal a number of failures of the U.S. government, and shed light on the importance of incorporating human rights norms into national policies. By assessing the government's obligations through legal principles that

apply to all human rights, the case study will illustrate key concepts embedded in the human rights-based approach to development.

Background

History of Temporary Low-skilled Migration in the United States

The United States has a long history of immigration, which often served as a way of filling labor needs. Since the 1800s, immigrants from mostly European countries came to the United States, helping fuel its economic growth.¹ Under the Naturalization Act of 1790, there were no limits on immigration. But in 1882, the first restriction on foreign labor took place with the Chinese Exclusion Act, which aimed to limit the employment of Chinese laborers.²

Mexicans began arriving in the mid-1800s, often taking up temporary jobs. When numbers of European arrivals declined sharply following the end of World Wars I and II, Mexicans started filling many of the available jobs. The first and largest program for temporary low-skilled migrants was formed in 1942 following a bilateral agreement with Mexico. Under the “Bracero” program – so-called because of the Spanish word “brazo,” which means “arm” and refers to farm labor – Mexicans filled about 4.5 million jobs, mostly in agriculture.³ The program included a number of guarantees for the workers, such as minimum wages, housing and shared transportation costs. But there was widespread evidence of abuse, and a U.S. Department of Labor (DOL) official in charge of the program at one point described it as “legalized slavery.”⁴ The program ended in 1964, and is widely believed to have started a wave of illegal immigration from Mexico. During the 22-year program, there were 4.9 million apprehensions of unauthorized Mexicans.⁵

Today, the United States has more than 20 nonimmigrant programs that allow foreigners to work in the country for various periods of time, based on different skill

¹ Southern Poverty Law Center, “Close to Slavery: Guestworker Programs in the United States,” 3.

² Ibid.

³ SPLC, “Close to Slavery,” 4.

⁴ Ibid.

⁵ Philip Martin, “Managing Labor Migration: Temporary Worker Programmes for the 21st Century,” 10.

levels and other criteria.⁶ The H-2 program was created in 1943 after the Florida sugar cane industry got permission to hire workers from Caribbean countries. In 1986, the H-2 program was revised as part of the Immigration Reform and Control Act, which aimed to control and deter illegal immigration, legalize certain agricultural workers, increase sanctions for employers hiring undocumented workers and increase border security. As part of the Act, the H-2 program was separated into the H-2A visa for agricultural workers and the H-2B visa for non-agricultural workers.⁷

Case Study: The H-2B Visa for Forestry Workers

Under the H-2B program, employers in need of temporary low-skilled workers can petition DOL for permission to bring workers from outside the United States. The employers must undertake a recruitment process in order to certify that there are no American workers able, willing and qualified for the job, and that the wages of American workers in similar jobs will not be adversely affected. Employers must follow regulations about advertising the position for a required amount of time in a certain number of publications, informing unions in some circumstances, and submitting a list of any U.S. applicants to DOL. Once they pay the required visa fees and receive a temporary labor certification for H-2B employment from DOL, employers must file a petition with U.S. Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security (DHS). USCIS approves the visas – which can be issued for multiple employees at the same time – and the employers can then offer jobs to foreign nationals.

Foreign nationals can apply for the H-2B visa at a U.S. consulate once they have a job offer. Once employees arrive in the country, U.S. employers are obligated to give them full-time employment and pay them at least the prevailing wage. Employees cannot switch employers during their time under the H-2B visa. Visas are valid for up to a year, and can be renewed up to three times. After that, the workers must leave the country for at least three months before they can apply for the visa again. H-2B workers may seek admission for their spouses and unmarried children under 21 through another visa classification, H-4.

⁶USCIS, Temporary Nonimmigrant Workers.

⁷ SPLC, “Close to Slavery,” 5.

H-2B visas are subject to an annual cap of 66,000 set by Congress, with 33,000 visas allocated in each half of the federal fiscal year and any unused visas carried over to the following year.⁸ The table below indicates the number of visas approved in recent years:⁹

Year	New H2-B visas	Returning H-2B visas (H-2R)
2005	N/A	N/A
2006	97,279	36,792
2007	75,727	79,168
2008	104,618	5,003
2009	56,381	162

Who Are the H-2B Employees?

DHS issues a list of countries eligible to send H-2B workers on a rolling basis. The most recent list had 39 countries from every region of the world.¹⁰ But the vast majority of guest workers in the program have been from Mexico. A newspaper series estimated about nine in ten workers come from Latin America, with most arriving from Mexico, followed by Guatemala.¹¹ In 2009, when 56,381 H-2B visas were approved, 66% were for workers from Mexico, followed by 7% from Jamaica and 5% from Guatemala.¹²

The employees work across the United States, but the most popular state for H-2B workers in recent years has been Texas, followed by Florida, Colorado, Louisiana and

⁸ USCIS, Cap Count for H-2B Nonimmigrants.

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=356b6c521eb97210VgnVCM10000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM10000082ca60aRCRD>

⁹ DHS, Yearbook of Immigration Statistics, 63,

http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf

Note: USCIS counts the number of events, and not individuals, which is why the numbers exceed the annual cap. For example, an individual on the visa may go in and out of the country several times, and each occurrence would be included in the count. Additionally, USCIS does not provide an allowance for withdrawals, denials, and revocations, which also raises the actual number.

¹⁰ USCIS, H-2B Temporary Non-Agricultural Workers.

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d1d333e559274210VgnVCM10000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM10000082ca60aRCRD>.

¹¹ Tom Knudson and Hector Amezcua, "The Pineros: Men of the Pines," *The Sacramento Bee*, Part 1.

¹² DHS, Yearbook of Immigration Statistics 2009, Table 1, Nonimmigrant admissions, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/nimsuptable1d.xls>

Virginia.¹³ A total of 10 states had more than 5,000 H-2B certifications in 2009. Because of the economic downturn, there was a 25% decrease in the number of H-2B positions requested in 2009 compared to 2008, and a 38% decline in the number of positions approved.¹⁴

For the purpose of narrowing down the case study, I will focus on the forestry field. Between 10,000-15,000 of the H-2B workers admitted annually are forestry workers, the second-largest group after landscape workers.¹⁵ Since the program started, demand for forestry workers has soared from about 4,000 in 1996 to about 27,000 in 2004. Not all the demand is met by the guest workers, but H-2B workers are believed to make up a large portion of the estimated 15,000-20,000 Latinos working in the nation's forests.¹⁶

In 2009, there were 11,375 positions certified for H-2B forestry employees, the second highest number after the laborer/landscape occupational title. Their average hourly wage was \$9.98, the highest among the ten most common H-2B occupations.¹⁷

Forestry workers perform a range of tasks, such as planting and cutting trees, removing fallen logs and branches, and thinning vegetation. They often work in difficult weather conditions, cover miles of rough terrain in a single day, and carry a lot of equipment, such as 50-pound bags of seedlings, gallon-sized jugs of water, oil and gas, and other equipment that cannot otherwise be brought into deep forests, stream banks and other areas.¹⁸ Dangers of forestry work include injuries from chain saws, tumbling logs, rocks and trees.

Government data indicate that forestry jobs are among the most dangerous in America. They fall under the category of "agriculture, forestry, fishing and hunting," which had a death rate of 30.4 per 100,000 workers in 2008, the highest of all industries and nearly 10 times the overall average of 3.7.¹⁹ A study in the Journal of Occupational and Environmental Medicine found that tree planters typically cover 9.6 miles per day of

¹³ DOL, The Foreign Labor Certification Report, 2009, 32, http://www.foreignlaborcert.doleta.gov/pdf/2009_Annual_Report.pdf.

¹⁴ Ibid., 33 and 25.

¹⁵ Knudson and Amezcua, "The Pineros: Men of the Pines," Part 1.

¹⁶ Ibid.

¹⁷ DOL, Foreign Labor Certification Report 2009, 34.

¹⁸ Knudson and Amezcua, "The Pineros," Part 1.

¹⁹ DOL, Strategic Plan 2011-2016, 6, <http://www.dol.gov/sec/stratplan/StrategicPlan.pdf>.

difficult terrain; and that in the process of planting, 20% will suffer a debilitating injury.²⁰ Logging has consistently been one of the country's most hazardous occupations.²¹

Additionally, the Occupational Safety and Health Administration (OSHA) has recognized that fatality rates for Hispanic workers are higher than overall rates. In 2008, the fatality rate for Hispanic workers was 4 per 100,000, higher than the overall fatality rate of 3.6. That was the smallest gap in recent years.²²

Why Are the H-2B Workers Here?

There are many push factors that lead to temporary labor migration, including a desire to live a life of dignity, the need to survive and provide for family members, as well as safety and security.²³ Unfavorable conditions can lead someone to migrate, and migration may lead them to enjoy more freedom.²⁴ Migration may be linked to development for both the origin and sending countries.²⁵

For many migrant workers, a move may lead to higher earnings. Even though migrants' wages may never catch up to native workers' salaries, they still tend to be higher than the wages in their countries.²⁶ In high-income countries such as the United States, pay can be 4 to 12 times higher.²⁷ One study found that in 2000, the annual income gained due to migration for an average 35-year-old urban Mexican with 9-12 years of education was \$9,200.²⁸

A number of indicators may help illustrate the difference between the United States and the H-2B workers' main countries of origin. In 2009, GDP per capita in the United States was \$46,436.²⁹ This was nearly six times the figure for Mexico, the main source country of H-2B workers. The U.S. figure was nearly 18 times more than the GDP per capita of another major source country for forestry workers, Guatemala, which was

²⁰ Knudson and Amezcua, "The Pineros," Part 2.

²¹ Centers for Disease Control and Prevention, Logging Safety, <http://www.cdc.gov/niosh/topics/logging/>

²² DOL, OSHA Enforcement, http://www.osha.gov/dep/2009_enforcement_summary.html.

²³ Patrick Taran, "Human Rights of Migrants: Challenges of the New Decade," 12.

²⁴ Hein de Haas and Francisco Rodríguez, "Mobility and Human Development: Introduction," 179.

²⁵ Ibid.

²⁶ Martin Ruhs, "Migrant Rights, Immigration Policy and Human Development," 28.

²⁷ Ibid.

²⁸ Gordon Hanson, "The Governance of Migration Policy," 189.

²⁹ The World Bank, GDP per capita, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

\$2,623.³⁰ In the 2010 Human Development Index, the United States ranked fourth out of 169 countries; Mexico ranked 56th, and Guatemala 116th.³¹

Part 2 - Analysis

The Link to Poverty

Temporary worker programs are common among high and medium-income countries, but virtually non-existent in low-income countries.³² Since 2000, temporary migration of foreign workers into high-income countries has grown by 4-5% per year; in the United States, the yearly growth has been closer to 9% since 1997.³³

As previously mentioned, H-2B workers overwhelmingly come from Mexico. Human development indicators for Mexico are much worse than those of the United States. Nearly half of all Mexicans live in poverty, and almost 4% live on less than \$1.25 per day.³⁴ Mexico's 2009 unemployment rate was 5.5%, but underemployment is believed to be as high as 25%.³⁵ The average number of years of schooling is 8.7, compared to 12.4 in the United States.³⁶ Security is also an issue, and Mexico's homicide rate of 11.6 per 100,000 is more than double the U.S. rate of 5.2; its robbery rate of 505 is nearly quadruple the U.S. figure of 142.³⁷

In addition to already being poor, H-2B workers often arrive with significant debt because of the costs they incur to come here. According to a study by the Southern Poverty Law Center (SPLC), Guatemalan forestry workers on H-2B visas paid an average of \$2,000 in travel, visa and hiring fees.³⁸ Most were also required to provide a recruiter with collateral, which was generally a property deed. Because they typically have low salaries while working on the H-2B visa – the average hourly pay was just shy of \$10 in 2009 – many workers are unlikely to repay their debt during their U.S.

³⁰ Ibid.

³¹ UNDP, Human Development Index 2010 Rankings, <http://hdr.undp.org/en/statistics/>.

³² Manolo Abella, "Policies and Practices for Management of Temporary Migration," 7.

³³ Ibid., 8.

³⁴ UNDP, National Human Development Indicators, <http://hdr.undp.org/en/data/profiles/>.

³⁵ CIA, World Factbook, Mexico, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>.

³⁶ UNDP, National Human Development Indicators.

³⁷ Ibid.

³⁸ SPLC, "Close to Slavery," 20.

contract.³⁹ Some forestry workers may work for only three months – the length of the pine tree planting season – earning less than \$1,000 a month.⁴⁰

Poverty is thus a major factor that drives these workers to the United States, and often keeps them working despite abusive conditions. As a UN report pointed out, a poor person has very restricted opportunities to pursue his well-being.⁴¹ Because of the lack of opportunities at home, workers from low-income countries are often willing to work in higher-income countries at wages and under conditions that are worse than those mandated by national laws and international standards.⁴²

Why is this a Human Rights Issue?

Human rights are those basic rights and freedoms to which all people are entitled. They include economic, social and cultural, and civil and political rights – all of which are indivisible and interdependent. All individuals are entitled to these rights, which place obligations on others to realize them.

Recognizing that there are many factors that make migrants susceptible to human rights violations, the UN General Assembly has designated them a vulnerable group. The H-2B policy can exacerbate many of these vulnerabilities. Below, I examine some of these key factors.

Poverty

Amartya Sen is among the scholars who have argued that poverty is about more than low earnings; it is also about deprivation of essential capabilities.⁴³ From Sen's approach, poverty can be seen as the inadequate realization of certain basic freedoms, while a human rights approach views poverty as the non-fulfillment of rights.⁴⁴ Because rights are so interrelated, poverty can also lead to violations of many other rights. Poverty can constrain one's ability to lead a dignified life and access services and resources needed to assert other rights, whether it be the right to health, the right to food or the right

³⁹ Ibid., 19.

⁴⁰ Ibid., 11.

⁴¹ OHCHR, "Human Rights and Poverty Reduction: A Conceptual Framework," 9.

⁴² Ruhs, "Migrant Rights, Immigration Policy and Human Development," 13.

⁴³ Amartya Sen, *Development as Freedom*, 20.

⁴⁴ OHCHR, "Human Rights and Poverty Reduction: A Conceptual Framework," 9-10.

to education. Poverty thus contributes to people's vulnerabilities, or, as Sen said, makes them "helpless prey in the violation of other kinds of freedom."⁴⁵

As indicted earlier, H-2B workers are overwhelmingly poor, come here with debt, and earn low wages during their stay. Additionally, many workers send significant amounts of their earnings home to support their families, many of whom live in poverty. Poverty is therefore strongly implicated in the program, and limits migrants' opportunities to assert their rights.

Foreign Environment

Like most migrants, H-2B workers must deal with the obstacles that come with living in a new country, which can add to their marginalization. Many H-2B employees speak little or no English, have little or no education, and are unfamiliar with U.S. financial, legal and other systems. They are typically detached from their families and support systems, and may find themselves in a culture that leaves them disoriented and unable to access information and services.⁴⁶ All of these issues can make them more susceptible to abuse.

While the government does not segregate data to include social indicators on H-2B workers, some reports help illustrate the challenges facing the foreign-born in the United States. A new study on Mexican migrants in the United States found that nearly three-fourths of them spoke English less than "very well," and three in five had no high school degree. Fifty-six percent of the Mexican immigrants said they lacked health insurance, and 47% reported they did not have a source of regular medical care.⁴⁷

Employer Restrictions and Visa Sponsorship

The H-2B program restricts employees to a single employer, creating a dangerous power imbalance. Workers' rights often depend on their employers' behavior,⁴⁸ and the prohibition against switching employers takes away an important protection against employer abuse.

⁴⁵ Sen, *Development as Freedom*, 8.

⁴⁶ Fernand de Varennes, "Strangers in Foreign Lands: Diversity, Vulnerability and the Rights of Migrants," 8.

⁴⁷ Laureen Laglagaron, "Protection through Integration," 5.

⁴⁸ UNDP, "Human Development Report 2000: Human Rights," 85.

Additionally, employers are also the employees' visa sponsors, so an employee's residence in the United States depends on their employer. This further tips the scale of power and often means that employees are less likely to complain if they are being abused. Despite widespread violations of workers' rights in the Bracero program, only one in 4,300 workers complained.⁴⁹ As the SPLC report points out, a power gap that so strongly favors the employer can lead to the nullification of employees' rights.⁵⁰ The UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, has also said that policies that restrict switching employers and have employer sponsorship systems render migrants particularly vulnerable.⁵¹

In the forestry field, there have been many examples of abuse as a result of this power imbalance. One H-2B Guatemalan forestry worker said that when a supervisor would see a person who was ready to leave work because of low pay, he would take their papers away or threaten to call immigration officials to get them deported.⁵² A Mexican forestry worker reported that his employer would confiscate workers' passports – the only evidence of their legal status – as soon as they arrived to the United States.⁵³

The single-employer system combined with the employer-sponsored visa creates a dangerous power imbalance, and power is an important concept in human rights. As a UN group noted, powerlessness is “an essential element” of migrants' vulnerability.⁵⁴

Recruitment

Under the H-2B policy, once an employer is approved to fill positions with H-2B employees, recruitment can essentially take place in any manner, as U.S. anti-discrimination rules do not apply to foreign recruitment.⁵⁵ Recruitment can therefore target vulnerable groups. For example, a number of Guatemalan forestry workers have been recruited from Huehuetenango, an extremely poor region with many indigenous and

⁴⁹ SPLC, “Close to Slavery,” 16.

⁵⁰ *Ibid.*, 15.

⁵¹ UN Economic and Social Council, Report of the Special Rapporteur on the human rights of migrants, Dec. 30, 2005, 13.

⁵² SPLC, “Close to Slavery,” 15.

⁵³ *Ibid.*, 15-16.

⁵⁴ UN Economic and Social Council, Report of the working group of intergovernmental experts on the human rights of migrants, 1997.

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/e696166bf66373f3c12566180046b9c6>.

⁵⁵ Martin, “Managing Labor Migration,” 24.

illiterate residents.⁵⁶ Some recruiters have taken advantage of migrants' limited information about the host country, and have charged them excessive fees through the process⁵⁷ or demanded they leave collateral, such as the deed to their house or car.

Dangerous Jobs

The program's design ensures H-2B workers may only take jobs that cannot be filled by the local workforce, which hints at the conditions such jobs entail. H-2B jobs are often called "3-D jobs," which stands for dirty, dangerous and demeaning.⁵⁸ Recognizing that the workers are only in the country temporarily, some employers have been known not to invest in the safety equipment necessary to provide a secure working environment.⁵⁹ This is of particular concern in the forestry field, one of the most dangerous occupational areas.

Weak Legal Framework

Migrants' vulnerabilities have been recognized in many legal instruments, conventions and declarations, but the legal framework for their protection remains weak. Migrants' sending countries typically do not have legal jurisdictions outside their territory, while host countries by large do not grant migrants the same protections they do to citizens and permanent residents.⁶⁰

Migrant workers are "inherently more vulnerable to deprivation of even their most basic human rights" than citizens and permanent residents.⁶¹ A 2003 ILO survey found that migrants have limited rights in many categories. For example, out of the 42 net immigration countries, migrant workers had the right to family reunification in 69% of them and equal access to social protection in only 64%.⁶² International legislation that applies to migrants' rights is also very dispersed, as it is codified in a range of instruments focusing on employment, issues concerning foreign-nationals and regulations

⁵⁶ SPLC, "Close to Slavery," 10.

⁵⁷ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 13.

⁵⁸ Abella, "Policies and Best Practices for Management of Temporary Migration," 13.

⁵⁹ SPLC, "Close to Slavery."

⁶⁰ Ruhs, "Temporary foreign worker programmes: Policies, adverse consequences, and the need to make them work," 13.

⁶¹ Ruhs, "Temporary foreign worker programmes," 12.

⁶² Abella, "Policies and Best Practices for Management of Temporary Migration," 20.

specifically for migrants. Such fragmentation makes it difficult for migrants to enforce their rights and for activists to advocate on their behalf.⁶³

The ratification of treaties protecting other vulnerable groups such as women and children have been widespread, but treaties concerning migrant workers have had very little success. The International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICPMW) has been the least-ratified treaty of the major human rights treaties.⁶⁴ It was adopted by the UN General Assembly in 1990, but did not go into effect until 2003 because of the low number of ratifications. Moreover, ratification is almost non-existent among developing countries, which run the majority of temporary migrant programs. The United States exemplifies this, as it has not ratified any of the major international legal instruments specifically designed to protect migrants.

A number of other factors also increase migrants' susceptibility to abuse, such as discrimination, which will be elaborated on later. All of these vulnerabilities make it imperative for duty-bearers to ensure migrants' rights are protected.

Literature Review of Migrants' Rights Under Temporary Migrant Programs

Countries with temporary migrant visa programs have provided varying levels of benefits and placed different restrictions on migrants' rights. The programs have been far from perfect, but the following section will examine policies that offer better alternatives than the H-2B visa in terms of rights protection.

United States

The H-2A program for agricultural workers is similar by design, but includes the following benefits that are not a part of the H-2B program: free housing, eligibility for federally-funded legal services, and reimbursement of the cost of travel from the worker's home to the job once 50% of the contract work has been completed. In fact, because this program offers so many more benefits, there have been cases of employers trying to classify H-2A positions as H-2B jobs in order to save money.⁶⁵ Another U.S program,

⁶³ Bimal Ghosh, *Elusive Protection, Uncertain Lands: Migrants' Access to Human Rights*, 9-10.

⁶⁴ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 4.

⁶⁵ SPLC, "Close to Slavery," 23.

the H-1B program for highly-skilled workers, also allows for more rights, such as the ability to switch employers and the possibility of sponsorship for permanent residence.

Canada

The Commonwealth Caribbean and Mexican Agricultural Seasonal Workers Program allows Mexican and Caribbean workers to work on Canada's farms for up to eight months at a time. Unlike the H-2B program, it provides free approved housing and meals or cooking facilities. Additionally, an official arranges transport for the workers to Canada, the cost of which is deducted from their wages but is not to exceed Canadian \$575.⁶⁶ Another important component involves access to information. Most program participants are Mexican, and upon arriving at Canadian airports, they are met by Mexican consular officials and informed of their rights. A bilateral agreement also allows these officials to inspect migrants' housing and solicit complaints. Workers are also exempt from the usual three-month wait for provincial health insurance programs.⁶⁷

Sweden

Sweden's program has been cited as an example of one based on "low numbers, comprehensive rights," as the country has few migrants but provides them with many of the same rights as citizens.⁶⁸ The Swedish government has taken a number of steps to ensure migrants' rights are protected, such as working closely with the trade unions to guarantee they get the same wages and unemployment benefits as Swedish citizens. After 48 months, the employees are eligible for a permanent residence permit.⁶⁹

Mauritius

Mauritius has a system notable for its expansive oversight and enforcement mechanisms. The Special Migrant Workers Unit performs inspections of migrants' workplaces and dormitories, informs workers of their rights upon hire, distributes pamphlets in their languages and conducts educational programs for workers and

⁶⁶ Martin, "Managing Labor Migration," 28.

⁶⁷ *Ibid.*, 29-31.

⁶⁸ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 21.

⁶⁹ *Ibid.*, 22-24.

employers.⁷⁰ Multi-lingual officials meet with migrants when they begin working to inform them of their rights. There is also a hotline migrant workers can call with complaints. The unit also reviews employment contracts to ensure they meet certain requirements, which include insurance, health care and a return air ticket.⁷¹

The Philippines

This major migrant-sending country is often cited as a best practice example in regards to services it provides for citizens who are leaving for temporary work; many of these services reflect international norms that also apply to host countries. The Philippines Overseas Employment Administration is a specialized labor agency that formulates emigration policies, conducts awareness campaigns, provides pre-departure training and assists nationals in destination countries.⁷² For example, migrant workers get pre-departure training on social and working conditions abroad, life insurance and pension plans, medical insurance and tuition assistance. Migrants are given identification cards that provide them with access to international savings accounts and low-cost remittance transfers. The government also has a center for migrant workers in Manila that assists both migrating workers and those who have returned.⁷³

Other Policies

Some countries have implemented bilateral agreements to help ensure migrants' rights are protected. Of the 92 respondents in a 2003 ILO survey, 57 reported having bilateral agreements that deal with the treatment and rights of migrant workers.⁷⁴ For example, France has agreements with Morocco, Tunisia, Turkey and Algeria that include provisions to ensure equal treatment and non-discrimination.⁷⁵ Spain has bilateral agreements with a number of nations, including Morocco, Colombia, and Eastern European countries. The agreements include guarantees of labor-related and other rights. Spanish and Catalan governments organize the workers' travel, as well as their reception

⁷⁰ Abella, "Policies and Best Practices for Management of Temporary Migration," 50.

⁷¹ Ibid.

⁷² ILO, "Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration," 50-51.

⁷³ Ibid., 50-51 and 57.

⁷⁴ Abella, "Policies and Best Practices for Management of Temporary Migration," 36.

⁷⁵ Ibid., 39.

upon arrival. The program also includes an accommodation plan for the migrants, as well as community involvement through events and training activities organized specifically for them.⁷⁶

By contrast, some states' policies exemplify systems of "high numbers, few rights."⁷⁷ In Kuwait, a working wife cannot sponsor her husband as a dependent, but a male migrant worker can do so for his wife and children (although he must earn a minimum wage that most migrant workers do not earn). In Singapore, temporary migrant workers do not have the right to marry or co-habitate with Singaporean citizens or permanent residents. Additionally, female migrant workers are required to take a pregnancy test every six months and face the threat of deportation if they test positive.⁷⁸

The diverse policies reflect differences in philosophies among states. Sweden's generous approach is in line with the country's policies as a "social welfare state."⁷⁹ The Swedish government has also argued that labor immigration is of vital importance.⁸⁰ Some more generous policies have also been based on the notion that enhancing workers' rights can contribute to development, as migrant workers who are well integrated in society and fully enjoy their rights are able to contribute more through economic, cultural, political and other spheres.⁸¹

As far as the more restrictive policies, the economic argument has been the most common one, as host countries often restrict migrants' rights in order to minimize costs. Temporary worker programs may also reflect a country's broader immigration goals. Policies allowing pregnancy tests and restrictions on family reunification can reflect host countries' desire to limit arrivals of migrants, or to ensure they remain in the country temporarily. The desire to maintain national identity and security has led to restrictions on migrants' rights in some countries.⁸² Finally, xenophobia and discrimination can prevent the implementation of strong migrants' rights protections in some cases.

⁷⁶ ILO, "Multilateral Framework," 55.

⁷⁷ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 17.

⁷⁸ *Ibid.*, 17-19.

⁷⁹ *Ibid.*, 22.

⁸⁰ *Ibid.*, 24.

⁸¹ Ryszard Cholewinski, "Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment."

⁸² Ruhs, "Migrant Rights, Immigration Policy and Human Development," 21.

A Look at an Economic Analysis Approach

An economic development analysis is commonly used to design and analyze temporary worker programs, particularly since those programs are typically created to address labor market needs. Such an approach often focuses on the resulting financial gains and losses, and the identification of winners and losers.

An economic analysis has led some to conclude that high-income countries have incentives to admit temporary workers into selected sectors and occupations.⁸³ Such programs can provide host countries with a cheap strategy for handling labor shortages, provide a flexible work force, minimize social welfare costs and make particular industries more competitive.⁸⁴

Others have used an economic analysis to argue that the availability of cheap foreign labor can slow down the implementation of labor-saving changes.⁸⁵ Employers may be discouraged from modernizing their production processes, which in turn could keep inefficient companies and industries viable, and therefore not serve a country's long-term economic interests.⁸⁶ Some studies also indicate that such programs can adversely affect the local workforce by depressing wages, particularly for low-skilled occupations.⁸⁷ Because H-2B workers are required to be paid only the prevailing wage, this may help prevent the market from self-correcting measures, such as forcing employers to offer bigger salaries.⁸⁸

Beyond the host countries, temporary migration programs can boost global trade and investments.⁸⁹ Migrants' sending countries can benefit from migrants' remittances, which reached \$265 billion in 2007.⁹⁰ Sending countries may also reap benefits from the transfer of skills and knowledge by returning migrants.

While a conventional economic analysis approach can provide valuable information and financial data, it does not typically take into account important human

⁸³ *Ibid.*, 14.

⁸⁴ Abella, "Policies and Best Practices for Management of Temporary Migration," 21-24.

⁸⁵ Martin, "Managing Labor Migration," 34.

⁸⁶ Martin Ruhs and Philip Martin, "Numbers vs. Rights: Trade-Offs and Guest Worker Programs," 7.

⁸⁷ Cholewinski, "Protection of the Human Rights of Migrants," 22.

⁸⁸ Economic Policy Institute, Statement of Ross Eisenbrey, April 16, 2008, 7, http://www.epi.org/page/-/old/webfeatures/viewpoints/20080416-eisenbrey-judiciary_committee_testimony.pdf.

⁸⁹ Abella, "Policies and Best Practices for Management of Temporary Migration," 25.

⁹⁰ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 29.

rights implications. In fact, such an approach could very well argue for restricting migrants' rights because of the cost-savings this may generate for the host countries. There exists an economic argument that says if migrants were to have all the economic and social rights laid out in the ILO and UN conventions, costs to employers would be higher.⁹¹ In the case of migrant workers – who have been identified as a vulnerable group – such an economic analysis by itself could thus lead to policies that counteract human rights norms.

A Human Rights-based Analysis

Human rights norms are recognized in the UDHR, as well as many other treaties and laws. A human rights-based approach is a particular framework in the development field that uses human rights among its tools.⁹² It views rights as claims and points to the obligations needed to realize these claims. It thus demands an inspection of key components of a nation-state – including social and economic policies, the judicial system and institutional arrangements – in order to analyze whether they embody human rights norms.

As Jack Donnelly said, human rights norms not only help prevent state-based wrongs, but also provide certain goods, services and opportunities.⁹³ A rights-focused analysis can help identify policies and arrangements that are not human rights-compliant, and provide guidance about how to prevent future violations.

Human rights are about empowering the weak and the vulnerable, and protecting them from abuse of their rights.⁹⁴ Accordingly, a human rights-based approach draws attention to issues such as inequality, exclusion and discrimination.⁹⁵ Such a lens is therefore very useful when examining migrants' rights, as they are often subject to discrimination and other injustices.

Bustamante, the special rapporteur, has recently noted concerns and violations of many migrants' rights, including their rights to life, food, housing, health, family, and

⁹¹ Ruhs, "Migrant Rights, Immigration Policy and Human Development," 13.

⁹² Sakiko Fukuda-Parr, "Human Rights and Politics in Development," in *Human Rights and Politics*, 167.

⁹³ Jack Donnelly, *Universal Human Rights: In Theory and Practice*, 36.

⁹⁴ Fukuda-Parr, "Human Rights and Politics in Development," 165.

⁹⁵ Peter Uvin, *Human Rights and Development*, 130.

rights related to detention and expulsion. While rights are interdependent and isolating them can be challenging, my analysis will focus on key rights related to migrants' working conditions. Additional rights entitlements could be raised for migrant workers who are female, elderly or disabled, but that is beyond the scope of this study. It must also be noted that any temporary foreign program raises the issue of undocumented workers. While these employees are generally entitled to the same rights as documented workers, their status can bring additional vulnerabilities and complexities, which are also beyond the scope of this study.

Rights-holders and Duty-bearers

The rights-holders in this case are forestry workers legally employed under the H-2B visa. While there are a number of duty-bearers – including employers, recruiters and even migrants' origin countries – the analysis will focus on obligations of the U.S. government as the primary duty-bearer. More specifically, this refers to DOL, which has enforcement authority of the program, as well as DHS, which approves the visas.

In order for human rights to be realized, duty-bearers must respect, protect and fulfill rights.⁹⁶ Respecting rights refers to the duty to refrain from interfering with people's pursuit of their rights, directly or indirectly. Protecting rights is about preventing violations by others, which could be various third parties. Fulfilling rights refers to taking steps to ensure people's rights are realized, whether through legislation, policy-making or other measures.⁹⁷

Obligations thus entail both negative and positive rights, where negative rights only entail forbearance, while positive rights require the provision of some goods, services and opportunities.⁹⁸ The following legal principles also run through all obligations: adequate progress, effective remedy, non-discrimination, and true participation, as well as the implementation of human rights norms, and the recognition

⁹⁶ UNDP, "Human Development Report 2000," 93.

⁹⁷ Ibid.

⁹⁸ Donnelly, *Universal Human Rights*, 30.

of human rights as indivisible and interdependent.⁹⁹ These principles will be referred to throughout the analysis, and also examined individually.

Rights Instruments

Migrants' rights are protected in a range of legal and legally non-binding instruments that apply to all human beings, as well as some that specifically protect migrants. They include the following:

- The Universal Declaration of Human Rights (UDHR).
- The International Covenant on Economic, Social and Cultural Rights (ICESCR). It went into effect in 1976 and has 160 parties. The United States signed the document, but did not ratify it.
- The International Covenant on Civil and Political Rights (ICCPR). It entered into force in 1976 and has 167 parties, including the United States.
- International Convention on the Elimination of All Forms of Racial Discrimination, or CERD, of 1966. It has 174 parties, including the United States.
- International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998. As a member of ILO, the United States is bound by this declaration.
- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, was adopted by the General Assembly in 1985.

Migrant-specific

- The International Convention on the Protection of All Migrant Workers and Members of their Families (ICPMW). It was adopted by the General Assembly in 1990 and went into force in 2003. It is considered the most noteworthy instrument for protecting migrants' rights.¹⁰⁰ The United States did not sign or ratify the ICPMW. As of this writing, only 31 countries have signed and 44 have ratified ICPMW.

⁹⁹ UNDP, "Human Development Report 2000," 100, and Fukuda-Parr, "Human Rights and Politics in Development," 170.

¹⁰⁰ Heikki Mattila, "Protection of Migrants' Human Rights: Principles and Practice," 58.

- The Migration for Employment Convention, or ILO Convention No. 97, of 1949, aims to protect migrants by outlining the necessary procedures for private and public recruitment, and ensuring non-discrimination. The United States has not ratified the convention.
- The Migrant Workers Convention, or ILO Convention No. 143, of 1975, adds specific language designed to protect undocumented migrant workers. The United States has not ratified it.
- ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach. The document, issued in 2006, provides a set of principles and guidelines to help countries implement sound migration policies.
- UN Special Rapporteur on the human rights of migrants, whose mandate was created in 1999 and has continued since, has issued a number of reports, including one specifically on migrant workers in the United States.

National Legislation

- Federal Labor Standards Act (FLSA), includes provisions for minimum wage and overtime.
- The Migrant and Seasonal Agricultural Worker Protection Act provides requirements for housing, transportation and working conditions of migrant and seasonal workers.

Rights Related to Working Conditions

The right to certain working conditions is embedded in many legal instruments and affords workers a number of protections. The right to work is stated in Article 6 of ICESCR and the related Article 7 discusses “the right of everyone to the enjoyment of just and favourable conditions of work.” This includes providing all workers with “fair wages and equal remuneration for work of equal value,” ensuring “rest, leisure and reasonable limitation of working hours,” and the right to “safe and healthy working conditions.”¹⁰¹

The United States signed ICESCR but did not ratify it, which means it should follow its principles but is not legally bound by every article. However, the same or

¹⁰¹ ICESCR, Article 7.

similar obligations are laid out in other instruments, such as in Articles 23 and 24 of the UDHR, as well as in other UN and ILO conventions. Likewise, U.S. federal employment laws listed earlier reflect the same or similar requirements regarding working conditions. But despite the existence of so many labor-related laws, there have been numerous reports of problems in this area, including the following:

- H-2B workers are required to be paid at least the prevailing wage, but one investigation found tree planters are more likely to be paid by the number of seedlings they plant, which has resulted in wages below the minimum requirement set by U.S. laws.¹⁰²
- SPLC found that most H-2B forestry employees worked between 8-12 hours a day and rarely, if ever, earned overtime pay despite working six days a week and well over 40 hours a week. For example, one Guatemalan forestry worker said he and others often worked 12-13 hours a day and earned about \$25 a day.¹⁰³
- A group of H-2B workers recruited to plant pine trees in North Carolina was taken by van to Connecticut upon arrival and forced to work up to 80 hours a week in nursery fields. Like many H-2B workers, they were threatened with passport confiscation, deportation and jail if they complained.¹⁰⁴
- Human Rights Watch has found that the threat of deportation – including for workers who are here legally – can lead employers of temporary workers to violate wage and hour laws and subject workers to dangerous conditions.¹⁰⁵
- An award-winning 9-month investigation of the forestry industry by *The Sacramento Bee* found that forestry contractors certified by the government to hire H-2B workers owed them hundreds of thousands of dollars in wages. The investigation found that some people were paid what amounted to as little as 13 cents an hour, and cited many instances

¹⁰² SPLC, “Close to Slavery,” 18.

¹⁰³ *Ibid.*, 19.

¹⁰⁴ *Ibid.*, 33.

¹⁰⁵ Human Rights Watch, “Tough, Fair and Practical: A Human Rights Framework for Immigration Reform in the United States,” 6.

where workers were not paid at all, given overtime pay, or provided adequate time off, as required by national employment laws.¹⁰⁶

- The Brennan Center for Justice found some H-2B workers earned as little as \$1 an hour for some of their work.¹⁰⁷ Their working conditions included having to sleep in lightweight tents without beds or mattresses, and without access to clean water.

- In 2002, 14 Honduran and Guatemalan H-2B workers died when their van went off a bridge. Their workplace was 2.5 hours away from their housing, and they had to pay \$84 a week to ride in the van.¹⁰⁸ While federal law requires drivers who transport workers to be designated as the foreman and authorized to drive by DOL, the *Sacramento Bee* investigation revealed that this law is “routinely ignored.”¹⁰⁹

- State and federal laws require pine tree workers to wear hard hats, boots, earplugs and other protection, but *The Sacramento Bee* investigation revealed these regulations are often ignored, concluding that “in the woods, the laws of the land are optional.”¹¹⁰ Another study found that workers are routinely asked to pay for the company’s tools and equipment.¹¹¹

- The special rapporteur on migrants’ rights has noted that H-2B pine workers have complained of many abuses, including work accidents and injuries.¹¹² Migrant workers in general are often subjected to abuses such as illegal charging of fees by recruiters, working conditions that include long hours without breaks, and illegal deductions of wages. Such treatment sometimes amounts to “situations of forced labour.”¹¹³

¹⁰⁶ Knudson and Amezcua, “The Pineros.”

¹⁰⁷ Brennan Center for Justice, Letter to Secretary of Labor Hilda L. Solis, Oct. 27, 2009, <http://www.brennancenter.org/page/-/Justice/H2B/LtrToDOL102709.pdf>.

¹⁰⁸ Martin, “Managing Labor Migration,” 24.

¹⁰⁹ Knudson and Amezcua, “The Pineros,” Part 2.

¹¹⁰ Ibid.

¹¹¹ SPLC, “Close to Slavery,” 19.

¹¹² UN Economic and Social Council, Report of the Special Rapporteur on human rights of migrants, Dec. 30, 2005, 12.

¹¹³ Ibid, 10.

Duty-bearers' Obligations to Respect, Protect, Fulfill

The duty to respect requires the U.S. government to refrain from interference with workers' rights, directly or indirectly. UNDP has indicated that data collection that segregates information on the vulnerable can help evaluate whether a government is respecting rights; the lack of data can also be revealing.¹¹⁴ While various U.S. agencies collect information on H-2B workers' occupations, nationalities and wages, neither OSHA nor DOL tracks workplace violations by visa types, despite numerous reports of abuses under temporary worker programs. Additionally, the lack of benchmarks and targets regarding protection of H-2B workers' rights makes it challenging to track the government's progress in this area. DOL's strategic plan includes targets for employer compliance for the H-2A program, but does not give benchmarks or targets for compliance under the H-2B program.¹¹⁵ This lack of data collection and benchmarking may indicate the U.S. government's lack of commitment to monitor and protect migrant workers' rights.

The examples cited earlier regarding inadequate wages, unpaid overtime hours and lack of required time off also indicate DOL has failed to meet its obligation to protect employees from abuses by their employers. States are obligated to take "all necessary measures" to protect people's rights,¹¹⁶ and enforcement activities are an important way of gauging a government's compliance.

Until recently, DOL maintained that it had no enforcement authority of the H-2B program, as Congress vested this authority with DHS in 2005.¹¹⁷ The mission of DHS, however, has been national security, and migrant workers' rights have not been its priority, nor its expertise. As a result, this issue over authority led to insufficient monitoring and oversight of the program for several years.¹¹⁸ DHS has since delegated its authority to DOL, which assumed this responsibility in January 2009.

Regardless of which federal agency has this authority, it is the responsibility of the U.S. government to ensure proper enforcement of the relevant labor laws.

¹¹⁴ UNDP, "Human Development Report 2000," 94.

¹¹⁵ DOL, Strategic Plan, 45.

¹¹⁶ UN Economic and Social Council, The right to work General Comment 18
[http://www.unhchr.ch/tbs/doc.nsf/0/493bee38093458c0c12571140029367c/\\$FILE/G0640313.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/493bee38093458c0c12571140029367c/$FILE/G0640313.pdf).

¹¹⁷ DOL, Federal Register Final Rule, Dec. 19, 2008: 78046,
<http://www.foreignlaborcert.doleta.gov/pdf/H2BFinalRule.pdf>.

¹¹⁸ SPLC, "Close to Slavery," 8.

Enforcement speaks to the government's accountability, and whether laws that are on the books are being enforced in practice. Accountability is at the very heart of a rights-based approach.¹¹⁹

But all data indicate a failure of the federal agencies to adequately enforce employment laws. Following his 2007 U.S. visit, the special rapporteur called for greater monitoring and enforcement of state and federal labor policies.¹²⁰ Many reports have identified problems with DOL's enforcement efforts, including a 2009 undercover Government Accounting Office investigation of DOL's Wage and Hour Division, which is responsible for enforcement of most laws related to wages and working conditions. The report found sluggish response times, a poor complaint intake system, and instances of investigators lying to complaining workers.¹²¹ Another study found that the number of wage and hour investigations by DOL declined by 14% between 1974 and 2004, while the number of workers covered by relevant laws increased by more than a half, to 87.7 million, during this period.¹²²

Budgeting must also be examined, as budgets are among the most important tools governments have in promoting human rights.¹²³ But despite the growth of guest worker programs, there have been no substantial increases in the federal budget for DOL or OSHA to ensure these workers are being protected.¹²⁴ Some studies have found that enforcement of workplace laws tends to be particularly weak in migrant-heavy industries, as they do not receive as much attention and funding as those employing citizens.¹²⁵ This is particularly problematic in forestry, which is both a migrant-heavy industry and a dangerous occupational field. Hispanic workers have also been found to have above-average fatality rates, and Hispanic workers take up most H-2B forestry jobs.

DOL has also not met its responsibility to fulfill, as it has not taken the steps needed for H-2B forestry workers to realize their rights. General Comment 18 on the

¹¹⁹ Uvin, *Human Rights and Development*, 131.

¹²⁰ UN Economic and Social Council, Report of the Special Rapporteur on human rights of migrants, March 5, 2008, 27.

¹²¹ GAO, Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft, March 25, 2009, <http://www.gao.gov/new.items/d09458t.pdf>.

¹²² SPLC, "Close to Slavery," 27.

¹²³ Fukuda-Parr, "Human Rights and National Poverty Reduction Strategies," 42.

¹²⁴ SPLC, "Close to Slavery," 28.

¹²⁵ Ghosh, *Elusive Protection*, 11.

right to work says that “state parties should adopt appropriate legislative, administrative, budgetary, judicial and other measures” to ensure full realization of rights.¹²⁶ A key aspect of this is adequate monitoring and enforcement, which is not taking place.

Duty-bearers’ Obligations to Follow Legal Norms

As already mentioned, running through the government’s duties to respect, protect and fulfill are certain legal norms that should be adhered to for all human rights, including adequate progress, effective remedy, implementation of human rights norms, non-discrimination, true participation and indivisibility and interdependence of rights. While these principles are clearly interrelated, I will take a closer look at the U.S. government’s obligations in relation to each concept. Such an examination is particularly helpful in illustrating the government’s obligations to fulfill rights, but is also revealing about its duties to respect and protect.

1. Adequate Progress

Recognizing that states have limited resources and that change takes time, the Committee on Economic, Social and Cultural Rights provided guidance about what constitutes adequate progress. State parties must achieve progressive realization, which is subject to the use of maximum available resources. In order to achieve full realization of rights, states need to take steps that are “deliberate, concrete and targeted.” Additionally, state efforts should not lead to retrogressive measures. Finally, states have certain core obligations that must be met immediately, including the assurance of non-discrimination.¹²⁷

Considering the United States is the world’s leading economic power and has many resources at its disposal, it can be argued that the principle of progressive realization should not apply in this case, and that obligations should be met immediately. But the U.S. government has failed to adequately protect the rights of people in its territory, as required by international law. According to one indicator, the United States

¹²⁶ UN Economic and Social Council, The Right to Work, General Comment 18, 7.

¹²⁷ OHCHR, The Nature of States parties obligations, General Comment 3, 1990.

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/94bdbaf59b43a424c12563ed0052b664?OpenDocument>.

ranks 24th out of the 24 high-income OECD countries in regards to protection of economic and social rights.¹²⁸ In regards to migrants' rights, the United States has not taken the steps needed to achieve adequate progress, as has been shown in its failure to protect workers' labor rights, and will also be exemplified in its failure to protect workers from abusive recruiters.

Governments have many tools they could use to meet their obligations, but what is being accomplished elsewhere can help judge whether a government is making adequate progress.¹²⁹ A number of countries have recognized the susceptibility of migrant workers to abuse and followed ILO's guidelines to protect them. For example, the Philippines has strict rules against workers paying recruitment fees.¹³⁰ There is a great deal of oversight, as indicated by the fact that between 2003 and 2004, licenses were cancelled for 142 recruitment agencies and suspended for another 800.¹³¹ Recruitment is not allowed for certain countries where workers' rights have not been respected, and an incentive system exists for recruiters who meet criteria for good performance. ILO has also referred to the bilateral agreement between Mauritius and China as an example of best practices, as it includes the exchange of information on abusive recruiters.¹³²

The United States has not taken any similar steps to protect migrant workers. U.S. employers almost always use private agencies, which operate under an "entirely unregulated business."¹³³ The U.S. government did recently take a step to address this issue, albeit a minor one. DOL said that "it can and should do as much as possible in the U.S. to protect workers from unscrupulous recruiters."¹³⁴ Consequently, the department said it was requiring employers applying for certification under the H-2B program to commit to contractually forbidding recruiters from charging prospective employees. This is a positive step, but it is not comparable to efforts undertaken by other countries. Additionally, while problems of abuse involving recruiters have been documented since

¹²⁸ Susan Randolph et al., "Economic and Social Rights Fulfillment Index: Country Scores and Rankings," 21.

¹²⁹ UNDP, "Human Development Report 2000," 98.

¹³⁰ ILO, "Multilateral Framework," 73.

¹³¹ Abella, "Policies and Best Practices for Management of Temporary Migration," 50.

¹³² ILO, "Multilateral Framework."

¹³³ SPLC, "Close to Slavery," 9.

¹³⁴ DOL, Final Rule, 78037.

the Bracero program decades ago, the government did not put this rule into effect until January 2009.

With the recent turnover in the U.S. Administration, however, a number of changes that may help the government achieve adequate progress have started. In January 2009, the transfer of enforcement authority over the H-2B program from DHS to DOL took place, which could lead to greater emphasis on workplace laws. DOL has also implemented several new requirements, including a rule that mandates H-2B employers specify that wages and working conditions that will be provided to migrant workers will be comparable to those given to others in similar positions.¹³⁵ This year, DOL also started a campaign that places more compliance responsibility on employers, and launched an awareness campaign designed to inform the most vulnerable workers about their rights.¹³⁶ As a result of a 2008 law, recent efforts also include publications of pamphlets in English and Spanish that inform migrants of their rights. Realizing that Hispanic workers have higher fatality rates, OSHA also started broadening its outreach efforts, which in April 2010 resulted in the first National Action Summit for Latino Worker Health & Safety.¹³⁷

It is too early to assess the impact of such recent changes, but they appear to be steps in the right direction. Such policy adjustments, awareness campaigns and information-sharing may help the U.S. government meet obligations it has not been meeting as a duty-bearer.

2. Implementing International Human Rights Norms and Standards

Many legal instruments, reports by the special rapporteur and human rights advocacy groups stress the importance of incorporating international human rights norms into national policies; protecting people is primarily about altering national practices that are not in line with international standards.¹³⁸

Following his 2007 U.S. visit, the special rapporteur concluded that the United States “failed to adhere to its international obligations” to make migrants’ rights a

¹³⁵ Ibid., 78035.

¹³⁶ DOL, Regulatory Agenda Narrative, <http://www.dol.gov/regulations/2010RegNarrative.htm>.

¹³⁷ National Action Summit for Latino Worker Health & Safety, April 14-15, 2010, Houston, Texas. <http://www.osha.gov/latinosummit/2010latino-summit.html>,

¹³⁸ Donnelly, *Universal Human Rights*, 176.

priority, and said the country lacks a strategy to improve their rights.¹³⁹ His recommendations included a call for the U.S. government to ratify ICPMW.¹⁴⁰

The United States has not ratified ICPMW or the other major conventions on migrants' rights. U.S. agencies have not incorporated ILO's framework into national policies, as has been illustrated in regards to the failure to protect workers from unscrupulous recruiters and employers.

That the United States has not integrated human rights norms can also be seen in regards to the right to health. While the focus of this case study is labor-related rights, the right to health is closely linked to these and many other rights. Article 5 of the Migration for Employment Convention says states should ensure migrants "enjoy adequate medical attention."¹⁴¹ But the H-2B program does not require employers to provide health insurance, except for emergency medical treatment. This clearly restricts their access to non-emergency but necessary medical care. The special rapporteur has said that states are obligated to provide all migrants with "essential primary health care, including preventative and palliative care," and that a commitment to emergency care alone is inadequate from a human rights perspective.¹⁴² In the forestry field, where injury and illness are common, lack of access to medical care can be particularly problematic. Other countries have taken more appropriate steps in this area, including Canada, which waives the usual three-month wait for provincial health insurance for seasonal migrant workers.

The lack of ratification of international treaties and resistance to bringing its national policies up to international standards illustrate the U.S. government's lack of commitment to protecting migrants' rights. This is an important shortcoming, because national commitment can be the single biggest contributor to a strong human rights regime.¹⁴³

3. Effective Remedy

¹³⁹ UN Economic and Social Council, Report of the Special Rapporteur on the human rights of migrants, March 5, 2008, 2-3.

¹⁴⁰ Ibid., 7.

¹⁴¹ ILO, Migration for Employment Convention, Article 5, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>

¹⁴² UN Economic and Social Council, Report of the Special Rapporteur, Sept. 17, 2010, 20 and 8.

¹⁴³ Donnelly, *Universal Human Rights*, 152.

People must have access to effective remedy, a right that has been identified in the UDHR, and is a key legal norm running through all human rights obligations. Remedies need not only be judicial, as states can also provide “other appropriate remedies.”¹⁴⁴

H-2B workers are barred from being represented by legal service programs that receive any support from Legal Services Corporation, the nation’s largest provider of civil legal aid for the poor.¹⁴⁵ As a result, most do not have access to lawyers or legal information about their rights, and it is “unrealistic to expect that they would be able to take action to enforce their own legal rights.”¹⁴⁶ The Brennan Center for Justice, which has filed a complaint over the issue, pointed to an example of H-2B workers from Panama who were paid as little as \$1 an hour.¹⁴⁷ DOL and DHS did not take steps to protect their rights, and the prohibition against federally funded legal aid meant the workers were “unable to effectively enforce their own rights,” particularly because forestry workers typically work in remote areas, with no or few attorneys available.¹⁴⁸

SPLC has also found that when H-2 workers are seriously injured, they often face insurmountable obstacles in claiming workers’ compensation benefits, an important part of effective remedy. The report pointed out that there are no clear rules in the H-2 policy that guarantee remedies after workers return to their home country; some insurance carriers specifically prohibit such coverage. States also take various steps to minimize compensation for foreign nationals, such as limiting the amounts their beneficiaries can receive, restricting who is eligible to be their beneficiary, and setting coverage limits based on the cost of living in the worker’s home country. Some states also require workers to appear in person for hearings, which is an obstacle for temporary workers who have already left the United States.¹⁴⁹

Human Rights Watch has found that H-2 visa holders are often unaware of their rights and scared to enforce them while on their visas, and taking such steps gets even

¹⁴⁴ The Right to Work General Comment 18, 12.

¹⁴⁵ Legal Services Corporation, What is LSC? <http://www.lsc.gov/about/lsc.php>.

¹⁴⁶ SPLC, “Close to Slavery,” 31.

¹⁴⁷ Brennan Center for Justice, Letter to Secretary of Labor Hilda L. Solis.

¹⁴⁸ Ibid.

¹⁴⁹ SPLC, “Close to Slavery,” 25-26.

harder once they leave the country. This prompted the organization to recommend that their visas be extended until any legal claims for workplace violations are resolved.¹⁵⁰

While the U.S. government is within its rights to restrict federal services such as legal aid to non-citizens, this does not free it of its responsibility to provide effective remedy, which applies to all human beings. If federal legal aid is restricted, the government could take other steps to ensure low-income migrants have access to legal aid, whether it be through special budget allocations, fee waivers or other methods. But if migrant workers do not have access to effective remedies – as the examples above indicate – then the government has failed to meet its obligations to provide effective remedy. A failure in this area can lead to violations in other areas because of the interdependence of rights. Likewise, if workers do not have access to effective remedy when their rights are violated, the alleged violators may not get punished, thus contributing to the persistence of human rights violations.

4. Non-discrimination

Numerous international legal treaties prohibit discrimination on grounds such as race, color, sex, religion, political or other opinion, and national or social origin, including the UDHR, ICESCR, ICCPR, and CERD. The Civil Rights Act of 1964 covers migrant workers in its prohibition against discrimination based on national origin, as do other U.S. local, state and federal laws. The non-discrimination principle vis-à-vis migrants is also reinforced in the ICPMW and other treaties that protect migrants' rights. Yet there exist misconceptions about the applicability of non-discrimination to non-nationals, thus impeding the implementation of some rights.¹⁵¹

Eliminating discrimination is a core obligation states must undertake with “immediate effect” in regards to all economic and social rights, which include rights related to working conditions.¹⁵² Yet discriminatory practices continue to affect migrants. Pew Hispanic Center has found that in 2010, 61% of Latinos said discrimination against Hispanics is a “major problem,” up from 54% who said that in 2007, which was already a

¹⁵⁰ Human Rights Watch, “Tough, Fair and Practical,” 7.

¹⁵¹ Special Rapporteur, Report of Sept. 17, 2010, 5.

¹⁵² Committee on Economic, Social and Cultural Rights, General Comment 3, 1990.

high number.¹⁵³ Human Rights First has pointed to growing anti-immigrant discourse and anti-Mexican rhetoric that has led to immigrants being denigrated, dehumanized, and demonized.¹⁵⁴ The special rapporteur has said discrimination against migrants has increased in the United States since Sept. 11, 2001,¹⁵⁵ and that xenophobia and discrimination against migrants have also been on the rise due to the global economic crisis.¹⁵⁶ Discrimination against migrants comes in many dimensions, which can impact the severity of discriminatory practices.¹⁵⁷ Following his 2007 U.S. visit, the special rapporteur said the United States has “failed to adhere to its international obligations” to protect migrants’ rights.¹⁵⁸

The United States lacks a clear, consistent, long-term strategy to improve respect for the human rights of migrants. Although there are national laws prohibiting discrimination, there is no national legislative and policy framework implementing protection for the human rights of migrants against which the federal and local programmes and strategies can be evaluated to assess to what extent the authorities are respecting the human rights of migrants.¹⁵⁹

Many of the duty-bearers’ failures discussed in the previous section can be linked to discriminatory practices. For example, the unregulated recruitment business means recruiters use practices that undermine anti-discrimination laws, as employers can request workers based on characteristics such as age and nationality. As SPLC has said, “When employers are permitted to shop for workers as though they were ordering from a catalog, discrimination is the likely, perhaps inevitable result.”¹⁶⁰ Furthermore, since employers know where their sponsored workers come from, discrimination based on nationality, race and other factors often continues in the workplace.

¹⁵³ Pew Hispanic Center, “Illegal Immigration Backlash Worries, Divides Latinos,” Oct. 28, 2010. <http://pewhispanic.org/reports/report.php?ReportID=128>.

¹⁵⁴ Human Rights First, “Violence Based on Racism and Xenophobia,” <http://www.humanrightsfirst.org/our-work/fighting-discrimination/2008-hate-crime-survey/usa/ii-violence-based-on-racism-and-xenophobia/>

¹⁵⁵ Special Rapporteur, March 5, 2008, 2.

¹⁵⁶ Special Rapporteur, April 16, 2010, 5.

¹⁵⁷ Special Rapporteur, Dec. 30, 2005, 13.

¹⁵⁸ Special Rapporteur, March 5, 2008, 3.

¹⁵⁹ Ibid., 2.

¹⁶⁰ SPLC, “Close to Slavery,” 36.

5. True Participation

States must enable people to take part in decisions that affect them, and this can include information-sharing and allowing people to participate in policy-making.¹⁶¹

The roots of the H-2B policy seem to undermine these principles. Unlike the sister H-2A program, the procedures governing the certification system for H-2B employers were not established through regulation – which requires a public review process – but through a DOL memo.¹⁶²

A key component of information-sharing is taking care that rights-holders are aware of their rights. But low-skilled migrants are often unaware of human rights laws and practices. It can be particularly challenging to inform them of their rights because they are only in the country temporarily, and often dispersed in rural areas.¹⁶³ Workers are often unfamiliar with labor laws, and do not know they can only be fired for “just cause.”¹⁶⁴ This can constrain their ability to seek vindication for wrongful termination, which is linked to effective remedy.

Aside from the recent publication of brochures on workers’ rights, the U.S. government has not been taking proactive steps to ensure workers are informed of their rights. It has not been following ILO’s principles, nor has it been sending officials to meet migrants upon arrival – a step other countries, including Canada, Mauritius and Spain have taken. Non-governmental agencies have stepped in to fill this void. For example, the Illinois Coalition for Immigrant and Refugee Rights sometimes works with the state government to conduct multilingual workshops on labor rights for migrants. Such efforts are welcome, but do not fully address the federal government’s deficit in ensuring H-2B workers know and understand their rights.

In the case of migrants, ensuring true participation can be particularly important, as they are not eligible to vote and, as the special rapporteur has noted, have little opportunity to hold public officials and the private industry accountable.¹⁶⁵ While such obstacles are a part of international migration, they do not relieve the government of its

¹⁶¹ UNDP, “Human Development Report 2000,” 100.

¹⁶² SPLC, “Close to Slavery,” 8.

¹⁶³ Martin, “Managing Labor Migration,” 26.

¹⁶⁴ Human Rights Watch, “Tough, Fair and Practical,” 9.

¹⁶⁵ Special Rapporteur, March 5, 2008, 21.

obligations to inform migrants of their rights. The special rapporteur has also referred to the need to publicize information about migrants and their contributions, including acknowledgement of the demand for migrant labor.¹⁶⁶

6. Interdependence and Indivisibility of Rights

Human beings are entitled to a range of economic, social, cultural, political and civil rights, which are interdependent and indivisible. Rights augment each other and should not be treated as a menu from which one can pick and choose.¹⁶⁷ Human dignity and freedom depend on the realization of all rights, which reinforce each other.¹⁶⁸

The violations of human rights taking place under the H-2B visa help illustrate interdependence. The U.S. agencies' failure to guarantee certain working conditions can have profound effects on employees' enjoyment of other rights. If workers are not being paid according to law, this can interfere with many other rights, such as the right to adequate food, clothing and housing. Violations of labor laws can also have an impact on one's ability to access opportunities such as legal services, which in turn helps ensure the right to effective remedy.

The interdependence of rights can also be seen through the example of confiscation of migrants' visas and passports, which is prohibited under Article 21 of ICPMW. Violations of this right may lead to non-realization of other rights, including the right to liberty of movement within a territory, the right to leave a country, and the right to enter one's home country.¹⁶⁹ Confiscation of these documents or the mere threat of confiscation can also weaken workers' ability to join unions, assert their labor-related rights, or have access to effective remedy.

Lessons Learned from a Human Rights-based Analysis

A human rights-based analysis demanded an identification of migrants' rights; treated H-2B migrant workers as rights-holders; and examined the U.S. government's performance regarding obligations needed to realize these rights. The approach sought an

¹⁶⁶ Special Rapporteur, Dec. 30, 2005.

¹⁶⁷ Donnelly, *Universal Human Rights*, 23 and 27.

¹⁶⁸ Fukuda-Parr, "Human Rights and Politics in Development," 166.

¹⁶⁹ Article 12 of ICCPR and Article 13 of UDHR.

examination of a nation-state's budgeting and resource allocations, agency goals and priorities, institutional policies and social arrangements – all of which can contribute to wrongdoing or help eliminate it.

In this case study, the theme of the disregard of migrants' rights emerged frequently, and that disregard can create a system ripe for abuse. The analysis exposed many gaps in the H-2B policy that impede migrants' rights, including:

- absence of policies and oversight of recruitment practices
- policy regulations that contribute to exploitation, including the prohibition to switch employers
- weak monitoring and enforcement of workplace laws, including wage laws, adequate time off, and safe and healthy work conditions
- failure to provide effective remedy in case of violation, including access to legal services
- lack of incorporation of human rights norms into national policies, leading to discriminatory and abusive practices

A human rights-based framework also revealed alternative policies that U.S. federal agencies could be implementing to help carry out their responsibilities, such as the Philippines' system of overseeing recruiters; the Mauritius government's expansive efforts to enforce migrants' labor rights; and Canada's policy of having consular officials meet migrants upon arrival and inform them of their rights. Many lessons could be drawn from these best practices, including the importance of proactive government efforts, the role of government accountability through adequate monitoring and enforcement, and the significance of ensuring rights-holders understand their rights.

The framework also illuminated the importance of key principles that should be embedded in all policies, such as access to effective remedy, non-discrimination, and the implementation of human rights norms. It also demonstrated how interrelated human rights are, as are the legal norms needed to advance their realization.

A human rights-based approach to development can therefore be a powerful one, as it works to inform individuals, the government and civil society about how to not only

eliminate human suffering, but also how to prevent it. It can serve as an empowerment tool for individuals, and provide governments with a blueprint for action to strengthen policies, institutions and practices. Such a framework could ensure that human rights do not get neglected, but get the attention they deserve.

Conclusion

The U.S. government has failed to respect, protect and fulfill the rights of H-2B forestry migrant workers. U.S. federal agencies – specifically DOL and DHS – have not taken the necessary steps to ensure these individuals’ rights related to working conditions and other interrelated rights were realized, leading to multiple human rights failures. As a nation-state and therefore the primary duty-bearer, the United States has avoided its responsibilities towards migrant workers despite a steady flow of reports of abuse, calls for ratifications of migrants’ rights conventions, and the fact that countries with fewer resources have implemented better alternatives.

The United Nations has recognized migrant workers as a vulnerable group because of their susceptibility to abuse. Instead of proactively addressing these individuals’ complex needs, the U.S. government put in place a visa policy that aggravates their vulnerabilities and has since mostly failed to address the policy’s deficiencies. Thanks to widespread reports of abuse and some successful advocacy efforts, U.S. federal agencies have recently started to take some much-needed steps. But progress will be slow unless international human rights norms are embedded in national policies and embraced in practice.

This change cannot come soon enough. There is never an excuse for a human rights failure, but when it takes place in the world’s leading economic power due to the government’s lack of political will, such a failure is especially abhorrent.

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