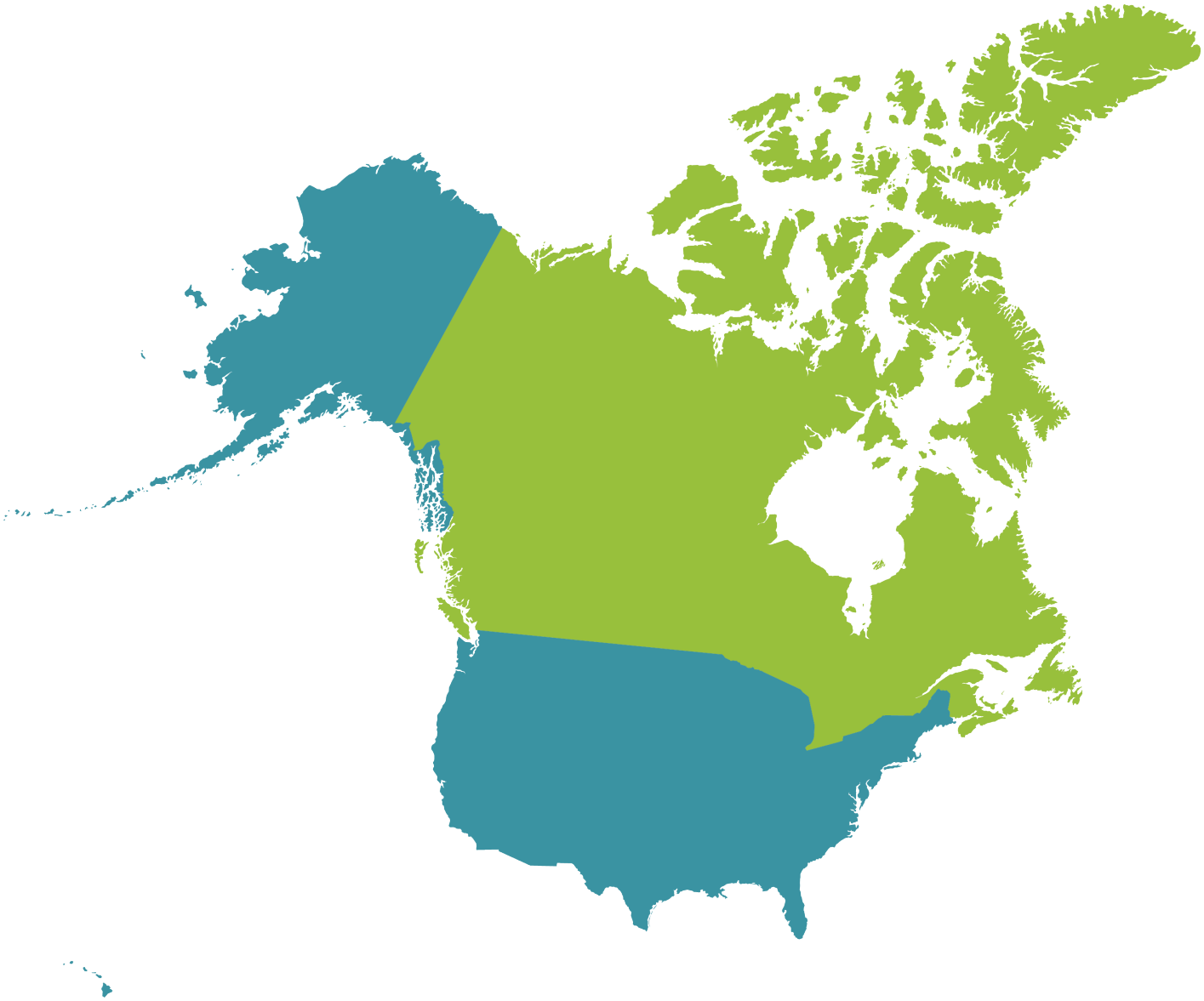

# RECRUITMENT RULES: COUNTRIES OF EMPLOYMENT

## THE RECRUITMENT OF MIGRANTS IN THE MEXICO AND CENTRAL AMERICA REGION FOR TEMPORARY WORK IN THE UNITED STATES AND CANADA

# RECRUITMENT RULES: COUNTRIES OF EMPLOYMENT

## THE RECRUITMENT OF MIGRANTS IN THE MEXICO AND CENTRAL AMERICA REGION FOR TEMPORARY WORK IN THE UNITED STATES AND CANADA



For more information or to obtain additional copies of this report:

Global Workers Justice Alliance
789 Washington Avenue
Brooklyn, NY 11238
+1 (646) 351 – 1160

info@globalworkers.org

www.globalworkers.org

Connect:

## TABLE OF CONTENTS

## ACKNOWLEDGEMENTS

Nan Schivone authored this report, conceived by Cathleen Caron and Omar Angel. Special credit is also due to Professor Dalia Gesualdi-Fecteau and her students at the University of Quebec-Montreal's law school for their preliminary research and editorial support, and to Andrea Galvez with the United Food and Commercial Workers Union-Canadá for adding her expertise reviewing this report. Carmen Cruz translated the report from English to Spanish. Yadira Huerta designed and formatted the report and Matthew Erle coordinated logistics for its publication.

Thanks to the MacArthur Foundation, the Public Welfare Foundation, CAMMINA, General Service Foundation and Catholic Relief Services-Mexico for supporting this report's development and publication.

## EXECUTIVE SUMMARY

Migrants from Mexico and Central America face a variety of abuses while laboring in low wage jobs in the United States and Canada under temporary foreign worker programs. Less attention has been paid to abuses during the actual recruitment process in Mexico and Central America.

Despite the fact that the U.S. and Canadian temporary foreign worker paradigm contemplates recruitment of foreign workers, laws that govern the employment relationship in the U.S. and Canada do not always apply to the unlawful conduct during recruitment. The programs themselves have no rules prohibiting discrimination while hiring abroad. Fraud, discrimination, document theft and extortion persist, and in fact flourish, due to structural problems in both temporary foreign work programs. Neither the United States nor Canada regulates international recruitment at the federal level. Employers are not always required to identify every link in their recruiter chain. Even though employers are required to provide a written disclosure about the jobs during recruitment, there is little government oversight of this requirement. Foreign recruiters are not required to have a federal license. There is still no public foreign recruiter registry. With one notable exception in Canada, prospective workers and government officials in countries of origin simply have no way to connect the recruiter to a bona fide and government approved employer before accepting the job opportunity. Evaluating offers to work abroad has thus become a game of chance.

None of the temporary work programs have an established mechanism for workers to enforce their rights or denounce abuses after they return to their countries of origin once the approved work period ends. This structural shortsightedness undermines the right and ability of workers to enforce the protections afforded them.

Global Workers Justice Alliance prepared this report primarily for stakeholders in Mexico and Central America. It focuses on the legal framework of the temporary work programs in the United States -- the H-2A agricultural and H-2B nonagricultural nonimmigrant visas -- and in Canada -- the Temporary Foreign Worker Program and its bilateral Special Agricultural Worker Program with Mexico and Caribbean nations -- and details the scant rules applying to international labor recruitment. The purpose of this report is not to highlight worker abuse. Rather, the aim is to provide stakeholders in the region with the legal context for U.S. and Canadian temporary work programs. With more profound understanding, policy makers in Mexico and Central America will be better equipped to meaningfully improve how the system operates in their own territories.

## UNITED STATES

In the United States, federal statutory law sets out many types of nonimmigrant visas allowing for temporary stays in the United States. Each nonimmigrant visa has its own rules. Some offer a pathway to permanent immigration and some authorize employment.
The most common nonimmigrant visas used for temporary unskilled work are the H-2A and H-2B visas (also known as “guestworker visas”). The H-2A nonimmigrant visa is for temporary agricultural work. The H-2B nonimmigrant visa is for temporary or seasonal non-agricultural work, most commonly in landscaping, amusement parks, housekeeping, forestry, construction and restaurants.

Both the H-2A and H-2B visas are only available after a specific employer has received approval from the U.S. Department of Labor (USDOL) and the U.S. Department of Homeland Security

(DHS) to hire foreign workers. As such, once the individual worker is admitted to the United States after screening by DHS at the border, both visas only allow work with a certain employer in a specific position, for the fixed period of time that was approved by USDOL and DHS for the job. There is no path to citizenship or permanent legal status associated with either H-2 visa. If the worker quits his or her job or is fired, the visa is no longer valid and the worker must leave the United States.

Employers, employer associations, and labor contractors initiate and control the H-2 visa process by applying to the U.S. government for permission to hire foreign workers for the temporary jobs. The employer may begin lining up foreign workers at the same time it is applying for job certification and permission to hire them. Once the U.S. government gives its approval to the employer, the workers apply for the actual visa and personally appear at the designated U.S. consulate abroad for an interview. Usually, the employer will use a hiring agent, third party recruiter, or another entity to help the workers with the workers' individual visa applications.

How foreign workers connect with U.S. employers varies within job markets, industries and regions. Employers who want to hire foreign workers initiate the process with the U.S. government and then the employers figure out on their own how to find the workers. The U.S. government plays no role in locating or hiring foreign workers, or matching employers with recruiters and does not regulate foreign recruiting companies or individuals. There is no federal registry, no federal license, and presently there is no federal list of recruiters who are authorized to find workers. There is simply no way for a prospective worker to know if the recruiter who offers a job actually has one to offer.

Because employers who hire H-2 workers must first apply to the U.S. Department of Labor for temporary labor certification, and because they must attempt to recruit U.S. workers as a prerequisite, basic information from those certification applications is published. That information is publically available through the public job registry on the iCert website maintained by the U.S. Department of Labor, see https://icert.doleta.gov/. While DHS also issues an approval notice to U.S. employers showing authorization to hire a certain number of foreign workers from a certain country for specific time period, that document is not published.

H-2A and H-2B workers are entitled to receive a written disclosure of all the terms of the job before they apply for their visa, while they are still in their countries of origin. For H-2A workers, this written document definitively constitutes an employment contract that is enforceable in court in the United States. H-2B program regulations, on the other hand, do not specify that the written disclosure with job terms always constitutes an employment contract. Whether an employment contract exists between H-2B workers and their employers depends on the facts of each particular case and state law in the jurisdiction where the case is presented.

Neither H-2A nor H-2B workers should pay any recruitment fees. Likewise, H-2A and H-2B workers should not ultimately incur the expense of their visa applications and travel costs to the United States. If an employer require that workers pay for the visa application fee, the employer must reimburse the worker for that expense in their first paycheck. If an employer requires that workers pay for their inbound travel expenses, workers must be reimbursed for their total inbound travel costs upon completion of half of the approved job period.

In many instances, employers must reimburse workers for a portion their travel costs in their first paycheck depending on the amount of travel expenses and the wages they earn during the first

week of work. This requirement comes from the federal wage and hour law (the Fair Labor Standards Act).

Employers also must pay for outbound, or return, travel for H-2A workers once the contract period is complete and for H-2B workers whether they complete the contract or are dismissed from the job early.

Both H-2A and H-2B workers should pay for their own personal passports.

## CANADA

In Canada, temporary labour migration to Canada in low-skilled occupations falls under either the Temporary Foreign Worker Program (TFWP) or the Seasonal Agricultural Worker Program (SAWP). TFWP covers workers in various industries, including farmworkers and other low-skilled occupations, from all over the world whereas SAWP is only for farmworkers from Mexico and various Caribbean nations. In both programs, migrants come to Canada for a predetermined, limited period and work for a single employer that has been approved by the Canadian government. There is no path to citizenship or permanent legal status associated with either TFWP or SAWP and if the workers quit or are fired, their work permit is no longer valid and they must leave Canada.

The Canadian and U.S. temporary work programs are strikingly similar in many respects. Much like in the United States, employers in Canada initiate and control the temporary work hiring process and must first show that the domestic labor market will not be adversely affected before being allowed to import foreign workers. The federal Employment and Social Development Canada (ESDC) reviews the Labor Market Impact Assessments (LMIA) in Canada. Citizenship and Immigration Canada adjudicates work permits for the individual workers in their countries of origin, operating out of the Canadian diplomatic posts. Finally, the Canada Border Service Agency screens all incoming workers at the Canadian port of entry and either allows or denies admission.

While the basic administrative process is similar for both TFWP the SAWP, they in practice operate very differently. While TFWP is a relatively recent creature of the Canadian federal immigration system, SAWP has been developed over the past five decades through a series of bilateral agreements between the federal governments of Canada and Mexico, and Canada and twelve Caribbean nations. All participating countries agree on rules outlined in Memorandums of Understanding (MOU), Operational Guidelines, and Employment Agreements. The Mexican and Caribbean federal governments are in charge of locating and recruiting their citizens through federal agencies in their territories, and designate one of their diplomatic officials as the foreign government's representative in Canada.

Because of the bilateral nature of SAWP, foreign recruitment is quite different than both TFWP and the U.S. programs. Under the SAWP, the Mexican labor department recruits workers and manages their applications for work permits, and coordinates placing the workers with LMIA-approved employers and arranging travel logistics (often in conjunction with a Canadian not for profit agency funded and controlled by farm owners). In contrast, with the TFWP, much like the H-2 programs in the United States, employers often use a private recruiter or recruitment agency to find workers and then assist them with their work permits and logistics.

There are no federal regulations pertaining to recruitment of foreign workers for these temporary jobs in Canada. There is no federal recruiter license or registry. There are no rules about who

may be a recruiter. And like in the United States, Canadian employers are not required to disclose each and every link in the recruiter chain. Some provinces in Canada have developed their own provincial laws requiring recruiters to register with provincial agencies and prohibiting recruiters from charging workers a recruitment fee. Several of the provinces, such as British Columbia and Manitoba, either require licensing or maintain a registry, and have provincial rules about who may be a recruiter and consequences for employers who do not use authorized recruiters. However, no Province explicitly or definitively reaches the actions of foreign recruiters abroad. While the ESDC requests the name of third party recruiters, this does not necessarily include foreign recruiters, and in any case ESDC does not publish that information.

Information on employers who hire foreign workers through TFWP and SAWP is not available either. Although ESDC requires an LMIA for all employers under both of these programs as a prerequisite, it does not make either the LMIA requests or their approvals public. There is no federal online job registry, as there is in the United States, in order to effectuate the positive recruitment of Canadian workers.

Canadian federal agencies in charge of the TFWP require an employment contract signed by the employer to process both the labor market impact assessment and the work permit. There are no set requirements, however, mandating that workers receive a written disclosure of job terms at the moment the job is offered during recruitment in their countries of origin. MOUs creating the SAWP program do not require written disclosure of job terms at the moment of recruitment either. The MOUs do dictate, however, that SAWP workers must be provided with an employment contract at least by the first date they begin to work.

Temporary foreign workers should not pay any recruitment fees under either TFWP or SAWP. Responsibility for worker fees and travel costs, however, depends on the program. Under TFWP, workers may be required to pay for the work permit application, medical exam, and for their own personal passports. However, employers must pay for travel to and from Canada. Under SAWP, employers must pay the fee for the work permit up front but they may recover that fee through payroll deductions from Mexican workers (but not from Caribbean workers). Employers must make the arrangements for round-trip travel from the workers' countries of origin to Canada and back again. However, employers may recover a portion of those costs through payroll deductions once the workers begin work. (Employers in British Columbia may not recoup travel costs at any time.)

## RECOMMENDATIONS

The structure of temporary work programs has enabled migrant worker exploitation during recruitment in their countries of origin. Vulnerability to exploitation is exacerbated by the utter lack of transparency allowed by the design of the programs. The fact that neither the United States nor Canada regulates international recruitment continues this structural inadequacy. The following recommendations are detailed in the report as opportunities for both the United States and Canada to enact laws and promulgate regulations – at the federal level – to reduce fraud and abuse during foreign recruitment and improve temporary work programs.

1. Employers who initiate the hiring process should reveal every link in the recruiter chain and provide names of all individuals who may be in contact with potential workers to advertise or offer a job. The information should be collected at the federal level and made publically available worldwide, be updated in real time and searchable by employer and recruiter, and

clearly delineate who is authorized by which employer to locate foreign workers, offer them jobs, and where.

2. U.S. and Canadian federal agencies charged with protecting the domestic labor force should publish all approved temporary employment certifications, applications to hire nonimmigrants, and positive labor market impact assessments.

3. Employers and recruiters should assume the expense of recruiting workers from abroad, including immigration application fees and travel costs. U.S. and Canadian agencies should strictly enforce these rules and have whistleblower protections for workers who reveal they were made to incur any expense during their recruitment.

4. Employers should provide to all prospective workers, at the time of their recruitment, a detailed job offer disclosing all terms and conditions of the job, in writing and in a language understood by the worker, and the acceptance of those terms should create a binding, enforceable employment contract in each instance.

5. U.S. and Canadian laws prohibiting discrimination in hiring should be amended so that they expressly apply to employers and recruiters who recruit workers on foreign soil for temporary jobs in the U.S. and Canada.

6. U.S. and Canadian Embassies and consular posts should encourage workers to report recruitment fraud and abuse as well as receive and process complaints about labor conditions while working under either of the H-2 visa programs, SAWP and TFWP.

7. U.S. and Canadian Embassies and consular posts should be available to support portable justice, that is, logistics when temporary workers return to their countries of origin but have pending legal claims in either the U.S. or Canada.

## INTRODUCTION

Global Workers Justice Alliance's mission is to promote portable justice for migrant workers, including workers who have worked in the United States and Canada with temporary work visas: visas that allow workers into the country for a specified period of time then require that the workers leave. Through our work on behalf of migrants from Mexico and Central America, we have seen that the structure of the temporary foreign worker programs in both the United States and Canada has enabled worker exploitation.[1] In March 2015, the U.S. Government Accountability Office released a report for the U.S. Congress on the H-2A and H-2B visa programs, calling for increased protections for foreign workers, in large part based on vulnerability that starts during the recruitment phase.[2]

Such recruitment abuses and their potential remedies, however, are not the subject of this report. Rather, the focus is on the rules of the game that enable abuse from the get-go. It is important for all stakeholders in the Mexican and Central American region to understand the U.S. and Canadian legal framework and regulatory context for temporary visas, and international labor recruitment in particular, in order to meaningfully engage in the process and more readily craft informed responses to prevent worker exploitation and advance portable justice.

In both the United States and Canada, worker exploitation is enabled the design of the temporary foreign work programs. Generally, nonimmigrant visas allow work only temporarily, for a specific employer. For the most part, nonimmigrant visas are managed unilaterally[3] by the country of employment, whether the United States or Canada, in systems that lack transparency. To make matters worse, the system seriously undermines workers' ability to have their day in court when their rights are violated. Neither the United States nor Canada have established and sure mechanisms in place allowing foreign workers' whose rights are violated to stay in the country of employment to pursue legal claims against their employer.

These basic and inherent problems of the current temporary foreign worker systems are compounded by the fact that neither the United States nor Canada regulates international recruitment on the federal level. With no federal registry of foreign recruiters in either country,

---

[1] There have been various reports documenting these issues. See, e.g., Fay Faraday, Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers, Metcalf Foundation (April 2014), available at http://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf; Global Workers Justice Alliance, Confiscación de Títulos de Propiedad en Guatemala: Por Parte de Reclutadores en Programas de Trabajadores Temporales con Visas H-2B (July 2013), available at http://globalworkers.org/sites/default/files/Confiscacion%20de%20Titulos_Informe_Final.pdf; International Labor Recruitment Working Group, The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse (February 2013), available at http://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf; Southern Poverty Law Center, Close to Slavery: Guestworker Programs in the United States (February 2013), available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf; Centro de los Derechos del Migrante, Inc., Recruitment Revealed (January 2013), available at www.cdmigrante.org; Proyecto Jornaleros Safe, Mexicanos en EU con visa: Los Modernos Olivados (November 2012), available at http://www.globalworkers.org; and Ashwini Sukthankar, Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Temporary Foreign Labor System, Global Workers Justice Alliance (2012), available at http://www.globalworkers.org/our-work/publications/visas-inc.; UFCW, The Status of Migrant Farm Workers in Canada 2010-2011 (2011), available at http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf.

[2] Government Accountability Office, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers, GAO-15-154 (March 2015), available at http://www.gao.gov/assets/670/668875.pdf

[3] The exception is Canada's Seasonal Agricultural Worker Program, a bilateral program between Canada and Mexico, discussed below.

and no public information about every link in the recruiter chain, workers and government officials in countries of origin have little information available to them when evaluating job offers to work abroad. The regulatory framework of foreign recruitment leaves United States and Canadian diplomats in the countries of origin with limited abilities to effectively manage problems when they occur.

The first section of this report covers the H-2 temporary work visa system in the United States, specifically the process employers and workers follow when using the H-2A agricultural and H-2B nonagricultural visa programs and the regulatory context for foreign recruitment. The second section reviews the process in Canada, focusing on the Temporary Foreign Worker Program and its bilateral Special Agricultural Worker Program with Mexico. The third section recommends policy objectives to improve the temporary visa programs to reduce abuse during the recruitment process.

## U.S. TEMPORARY WORK VISAS

The Immigration and Naturalization Act ("INA"), a federal statute enacted in 1952 and amended many times since, created the modern immigration system in the United States.[4] Along with provisions relating to who is allowed to immigrate permanently, the INA sets out many types of nonimmigrant visas allowing for temporary stays in the United States. Each nonimmigrant visa is commonly referred to with a letter and number. The letters and numbers correspond to the section of the INA where the visa classification or subclassification is created.

Each nonimmigrant visa has its own rules. For example, whether it offers a pathway to permanent immigration (lawful permanent residence and citizenship) or authorizes the individual to work depends on the type of visa. Rather than developing a coherent system, the U.S. has responded piecemeal to employer demands; this has created fragmentation and a wide divergence in worker protections.[5] The system lacks transparency and coordination among government agencies and has resulted in the abuse of both foreign and U.S. workers.[6]

### H-2 NONIMMIGRANT VISAS FOR TEMPORARY WORK

The most common nonimmigrant visas used for temporary work in the United States are the H-2A and H-2B visas, commonly known as guestworker visas. The H-2A nonimmigrant visa is for temporary agricultural work.[7] The H-2B nonimmigrant visa is for temporary or seasonal non-agricultural work, most commonly in landscaping, amusement parks, housekeeping, forestry, construction and restaurants.[8] In 2013, just over 130,000 H-2A and H-2B guestworker visas were issued to temporary workers from 74 different countries.[9] More than 90% of H-2A workers and 70% of H-2B workers are from Mexico.[10] Jamaica, Guatemala, South Africa and Great Britain are the next largest countries of origin for H-2 workers.[11] There is no limit on the number of H-2A visas that are available each year, but there is an annual limit of 66,000 for H-2B visas.[12] In 2015, it the demand for H-2B visas exceeded the limit.[13]

---

[4] 8 U.S.C. § 1101(a)(15).

[5] As a follow up to Visas, Inc., in April 2014, Global Workers launched Visa Pages, see http://globalworkers.org/visa-pages. Each "page" contains detailed information on nine nonimmigrant visas that are susceptible to abuse and includes, for each visa, its history, hiring process, enforcement mechanisms, data, and summaries of issues related to portable justice.

[6] In July 2014, a bill was introduced in the U.S. House of Representatives to address the lack of transparency in nonimmigrant visa programs in terms of the data that is collected and reported by the U.S. government. See United States. Cong. House, Transparency in Reporting to Protect American Workers and Prevent Human Trafficking Act 113th Cong. (2013-2014) H.R. 5197, available at https://www.congress.gov/bill/113th-congress/house-bill/5197; see also GAO-15-154, supra note 2.

[7] 8 U.S.C. § 1101(a)(15)(H)(ii)(a); and 20 C.F.R. § 655.90(a)(1).

[8] 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(1)(ii)(D), (6)(i)(A); see U.S. Department of Labor, Office of Foreign Labor Certification, H-2B Temporary Non-Agricultural Visa Program - Selected Statistics, FY 2012 YTD.

[9] U.S. Department of State, FY2013 NIV Detail Table, available at http://travel.state.gov/content/visas/english/law-and-policy/statistics/non-immigrant-visas.html (last visited March 2015).

[10] Id.

[11] Id.

[12] Immigration Act of 1990, Pub. L. 101-649, § 205(a), 104 Stat. 4978, 5019, 8 U.S.C. § 1184(g)(1)(B). In December 2015, an appropriations bill was passed which essentially raised the annual cap for H-2B visas for FY 2016 by creating an exception for returning workers. See Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. (2015-2016), Pub. L. No. 114-113 (Division F, Title V, Sec. 565) (Dec. 18, 2015; see also https://www.uscis.gov/news/alerts/h-2b-returning-workers-exempted-h-2b-cap-fiscal-year-2016 (February 5, 2016).

[13] See http://www.natlawreview.com/article/h-2b-cap-reached-first-half-fiscal-year-2015 (February 2, 2015).

Both the H-2A and H-2B visas are only available after a specific employer has received approval from the U.S. Department of Labor and the U.S. Department of Homeland Security to hire foreign guest workers. As such, both visas only allow work with a certain employer in a specific job position, for a fixed period of time that has been approved by the U.S. government.[14] For H-2A visas, this time period is initially less than one year.[15] And for H-2B visas, the time period is less than ten months.[16]

It is possible for an employer to apply for an extension to the worker's H-2 visa for up to three years.[17] If a worker wants to change employers, the new employer must go through the hiring process.[18] The worker may not begin the new job until the federal government approves the change. After the approved work period ends, the worker must leave the United States.[19] There is no path to citizenship or permanent legal status associated with either H-2 visa. If the worker quits his or her job or is fired, the visa is no longer valid and the worker must leave the United States.

Employers, employer associations, and labor contractors initiate and control the H-2 visa process by applying to the U.S. government for permission to hire foreign workers for the temporary jobs. From start to finish the process may take several months. The employer may begin lining up foreign workers at the same time it is applying for job certification and permission to hire them. Once the U.S. government gives its approval to the employer, the workers apply for the actual visa and personally appear at the designated U.S. consulate abroad for an interview. Usually, the employer will use a hiring agent, third party recruiter, or another entity to help the workers with the workers' individual visa applications.

## Foreign Worker Recruitment

How foreign guestworkers connect with U.S. employers varies within job markets, industries and regions.[20] Typically, an employer hires a recruiter – or hires an agent who hires a recruiter – to find workers in their countries of origin.[21] Some employers may themselves travel abroad to find their own workers, or recruit through their migrant workforce already in the United States. As detailed below, employers who want to hire foreign workers initiate the process with the U.S. government and then the employers figure out on their own how to find the workers. The U.S. government plays no role in locating or hiring foreign workers, or matching employers with recruiters. It does not regulate foreign recruiting companies or individuals unless the recruiters are the direct employers of the workers.

---

[14] 8 C.F.R. §§ 214.2(h)(5)(viii)(B), (9)(iii)(B)(1).
[15] 8 C.F.R. § 214.2(h)(5)(iv)(A).
[16] 8 C.F.R. § 214.2(h)(6)(ii).
[17] 8 C.F.R. §§ 214.2(h)(5)(viii)(C), (15)(ii)(C); see also 20 C.F.R. § 655.103(d).
[18] 8 C.F.R. § 214.2(h)(2)(i)(D). Employers must go through all the regular hiring steps, first filing a temporary labor certification with USDOL and then filing a Form I-129 petition for H-2B approval and an extension of the worker's stay in the United States.
[19] The time to depart after expiration of the approved petition or contract period depends on the type of visa. See 8 C.F.R. § 214.2(h)(5)(viii)(B) (30 days for H-2A workers); 8 C.F.R. § 214.2(h)(10) (10 days for H-2B workers); and 8 C.F.R. § 214.2(h)(2)(v) (special rules apply to H-2A workers).
[20] GAO-15-154, supra note 2, p. 25-28; Centro de los Derechos del Migrante, Inc., Recruitment Revealed (January 2013), available at www.cdmigrante.org; Proyecto Jornaleros Safe, Mexicanos en EU con visa: Los Modernos Olivados, (November 2012), available at http://www.globalworkers.org.
[21] Id., see also Jurado-Jimenez, et al. v GLK Foods, Civil Action No. 12-cv-209, Second Amended Complaint (E.D. Wis., filed Dec. 11, 2013) (on file with author).

New H-2B rules (issued in 2015) require H-2B employers to inform U.S. Department of Labor of the identity and location of any individuals who are used to recruit foreign workers.[22] That same rule also requires the agency to maintain a publicly available list of agents and recruiters who are revealed during the temporary labor certification process.[23] However, as of April 2016, no list of H-2B recruiters is publicly available. These new rules do not apply to H-2A employers.

Both H-2A and H-2B employers are required to disclose the name of the recruiting agents to U.S. Department of Homeland Security (DHS) on one of the application forms. However, the question on that form does not require the employer to name each link in the recruitment supply chain, but rather only the principal recruiter.[24] Most importantly, these forms are not publically available and are difficult to access through public disclosure requests, because DHS does not collect the information electronically in a database but rather maintains them on paper forms.

There is no federal registry, no federal license, and as of April 2016, no federal list of recruiters who are authorized to find workers. Generally, even recruiters who have been found criminally or civilly responsible for violating workers' rights may continue to act as labor recruiters for H-2 employers, because only employers are directly regulated by this process. This is problematic for workers who do not have the means to ensure the reliability – or legitimacy -- of recruiters and their job offers.

***State of California recruiter registration law***

Beginning on July 1, 2016, any person acting as a foreign labor contractor who recruits workers for eventual employment in California must register with the California State Labor Commissioner.[25] As of August 1, 2016, the commissioner will post on its public web site the names and contact information for all registered foreign labor contractors and a list of the names and contact information for any foreign labor contractors denied renewal or registration.[26]

***Recruitment fees are prohibited in H-2 programs by federal regulation***

Since 2008, federal regulations prohibit employers from requiring foreign workers to pay fees to a labor recruiter in order to obtain any H-2 job position in the United States.[27] Employers must declare under penalty of perjury that they have contractually forbidden recruiters and contractors from charging recruitment fees.[28] Even though recruitment fees are banned, in reality many prospective H-2 workers are still asked to pay them, with or without the employer's knowledge.[29]

---

[22] 20 C.F.R. § 655.9(a), (b).
[23] 20 C.F.R. § 655.9(c).
[24] Global Workers Justice Alliance, Why Transparency in the Recruiter Supply Chain is Important in the Effort to Reduce Exploitation of H-2 Workers (September 2011), available at http://www.globalworkers.org/sites/default/files/recruiter_supply_chain_disclosure_gwja_sept_2011.pdf.
[25] Cal. BPC Sec. 9998.1.5(a); The California Foreign Labor Recruitment Law was passed in September 2014 as SB 477 but as of April 2016 the state regulations are not yet in effect. A full copy of the Senate Bill is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB477
[26] Id.
[27] 20 C.F.R. §§ 655.20(o), and 655.135(j).
[28] 8 C.F.R. § 214.2(h)(6)(i)(B), 20 C.F.R. §§ 655.20(p) and 655.135(k). Of course, contractual prohibitions are not always followed and for workers, they have the unfortunate effect of shielding employers' from liability for their recruiters' actions.
[29] See generally GAO-15-154, supra note 2, p. 25-34.

The recruiter may simply call the recruitment fee by another name or tell the worker to keep it secret.[30]

***Written disclosure of job terms***

Employers must provide H-2 workers with a written copy of the job order with the terms and conditions of the job– in a language understood by the worker – by the time the worker applies for his or her visa.[31] The work contract is usually the same form as the employer submits to the U.S. Department of Labor to apply for temporary employment certification (see discussion following).[32] The H-2A work contract serves as a legally binding employment contract enforceable by either the U.S. Department of Labor or by the workers themselves in civil court.[33] This is not the case for H-2B workers.[34] Whether H-2B workers are able to enforce the job terms as part of an enforceable employment contract in court is a matter of state law and workers have had varying results in litigation.[35]

## H-2 Hiring Process Details

Employers apply to the federal government for permission to employ H-2 workers. Three government agencies are involved: the U.S. Department of Labor (USDOL), the U.S. Department of Homeland Security (DHS), and the U.S. Department of State (DOS). There are four steps from when the employer initiates the process to when the worker enters the United States.

- USDOL reviews applications for temporary labor certification (the USDOL subagency Employment and Training Administration, Office of Foreign Labor Certification manages this process).

If approved, then:

- DHS reviews petitions for permission to hire nonimmigrant workers (the DHS subagency U.S. Citizenship and Immigration Services manages this process).

If approved, then:

---

[30] U.S. State Department, Trafficking in Persons Report, June 2011, at 377 (noting that after the ban was put in place, "recruiters adjusted their practices by charging fees after the workers had obtained their visas and levying charges under the guise of 'service fees.'"), available at http://www.state.gov/documents/organization/164458.pdf.
[31] 20 C.F.R. §§ 655.20(l), and 655.122(q).
[32] Id. The clearance order, or ETA Form 790, is what is usually translated to Spanish and provided to H-2A workers when they are recruited in their countries of origin. If no contract is provided, the required terms in the ETA 790 and the employer's temporary employment certification application are considered to be the work contract.
[33] 29 C.F.R. Supbart B – Enforcement of Work Contracts. See also Villalobos v. North Carolina Growers Association Inc. I, 42 F.Supp.2d 131 (D.R.R. 1999), Centeno-Bernuy v. Becker Farms, 2008 WL 2483285 (WDNY 2008). Whether workers can bring state law contract claims in federal or state court depends on the facts of each particular case. Usually, federal courts exercise supplemental jurisdiction over state law contract claims if there are other federal issues involved in the litigation.
[34] Compare the H-2A regulations that explicitly state job orders and certified job orders rise to the level of a binding work contract. 20 C.F.R. §§ 655.102(b)(14), 655.122(q); see also 29 C.F.R. § 501.10(d).
[35] See Cuellar-Aguilar v. Deggeller Attractions, Inc., 812 F.3d 614 (8th Cir. 2015) r'hring denied at 2016 U.S. App. LEXIS 2357 (8th Cr. 2016); Moodie v. Kiawah Island Inn Co., 124 F. Supp. 3d 711, 725-28 (D.S.C. 2015); De Leon-Granados v. Eller & Sons Trees, Inc., 581 F.Supp.2d 1295, 1302 (N.D. Ga. 2008) and Garcia v. Frog Island Seafood, Inc., 644 F. Supp. 2d 696, 716-19 (E.D.N.C. 2009).

- DOS reviews visa applications from individual prospective H-2 worker beneficiaries during personal interviews at the consular processing posts in the workers' countries of origin.[36]

If approved, then:

- DHS reviews whether H-2 workers who present for admission at the U.S. border or port of entry are admissible and allow entry into the United States (the DHS subagency U.S. Customs and Border Patrol manages this process). Workers then proceed to the job site.

Employers may either navigate these steps themselves or hire an attorney or staffing company to handle the process for them as an agent.[37] Labor contractors must list the name and location of each employer where the nonimmigrants will work.[38] The location of each actual worksite must be listed with as much geographic specificity as possible.

***U.S. Department of Labor – Temporary Employment Certification***

The first step is labor certification through the U.S. Department of Labor (USDOL). Employers must seek a temporary labor certification from the USDOL's subagency, the Employment and Training Administration (ETA) through filing a petition for a labor certification. Agents or attorneys may petition for the employer.[39] The petitioner must identify either as an individual employer, or labor contractor, or association.

#### 1) H-2A Temporary Employment Certifications

The temporary employment certification process is slightly different for H-2A and H-2B visas. In general, the H-2A process contains more requirements for employers to attempt to recruit U.S. workers. The purpose of this first stage of the process is to certify the job positions to be filled with foreign workers. USDOL does not require the employer to name the workers, the country they come from or who will recruit them. If a labor contractor is filing, it must state the name and location of each employer where the H-2A workers will be placed.[40] The petitioner must specify and explain the number of workers needed and demonstrate that (1) there are not enough qualified individuals in the U.S. who are available to fill the positions and (2) employment of the foreign temporary workers will not adversely effect the wages and working conditions of U.S. workers holding similar jobs.[41] The employer and location of each actual worksite should be described with as much geographical specificity as possible.

[36] U.S. consulates, embassies and visa processing locations abroad are all part of the State Department consular affairs, see http://www.state.gov/documents/organization/187423.pdf.
[37] 8 C.F.R. § 214.2(h)(2)(i)(F) and (6)(iii)(B).
[38] 8 C.F.R. § 214.2(h)(2)(i)(F)(2). The supporting documentation should include a complete itinerary of services or engagements. "The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed." Id.
[39] 20 C.F.R. § 655.130.
[40] 20 C.F.R. § 655.132.
[41] 8 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.103(a).

*a) Job Contractors for H-2A applications*

Farm labor contractors may apply for temporary certification for H-2A workers to work for an employer at a fixed-site.[42] These farm labor contractors are called "H-2ALCs" and are treated as employers for purposes of the H-2A hiring process.[43] There is a federal law called the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) that requires farm labor contractors to register with USDOL.[44] The AWPA does not offer any protections for H-2A workers, however.[45]

Because the H-2A program requires employers to recruit U.S. workers for the agricultural jobs as a prerequisite to getting permission to hire foreign workers, and U.S. workers are protected by the AWPA, H-2ALCs must be registered as farm labor contractors with USDOL. The USDOL's Wage and Hour Division manages the farm labor contractor registration process under the AWPA and publishes a list of all registered individuals.[46] H-2ALCs must submit a copy of their registration certificate to USDOL with their application for temporary labor certification.[47]

*b) H-2A clearance order submitted to state workforce agencies*

The employer must submit the Agricultural and Food Processing Clearance Order ETA Form 790 to the appropriate State Workforce Agency (SWA) about three to four months before an H-2A employee begins work.[48] The SWA is usually the state department of labor or employment service. The SWA reviews the clearance order for compliance with both state and federal regulations.[49] Within a short time period, the SWA will notify the employer of any problems, and the employer will have a short window to correct them.[50] In essence, this step is about circulating an announcement about the job through the state-level labor departments.[51]

*c) Application filed with USDOL*

After submitting the clearance order to the SWA and no less than 45 days before the date of need, the employer must file the H-2A Application for Temporary Employment Certification, ETA Form 9142A.[52] The application solicits information on the employer, the nature of the temporary need, basics of the job offer, minimum job requirements, the place of employment, rate of pay,

---

[42] 20 C.F.R. § 655.132(a) ("An Application for Temporary Employment Certification filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees."); see also ETA Form 9142A.
[43] 20 C.F.R. § 655.103(b).
[44] 29 U.S.C. §§ 1802(7) (defining farm labor contractor) and 1811 (registration requirement).
[45] 29 U.S.C. §§ 1802(8)(B), (10)(B). The AWPA specifically excludes farmworkers who have H-2A visas from the definitions of migrant and seasonal farmworkers.
[46] U.S. Department of Labor, Migrant and Seasonal Agricultural Worker Protection Act Registered Farm Labor Contractor Listing, available at http://www.dol.gov/whd/regs/statutes/FLCList.htm.
[47] 20 C.F.R. § 655.132(b). H2ALCs are also required to post a surety bond and copies of fully-executed work contracts with each fixed-site agricultural business.
[48] 20 C.F.R. § 655.121(a)(1); U.S. Department of Labor, Agricultural and Food Processing Clearance Order ETA Form 790 (version current March 2015), available at http://www.foreignlaborcert.doleta.gov/pdf/Revised_ETA_Form_790.pdf.
[49] 20 C.F.R. § 655.121(a)(3), see also 20 C.F.R. § 653.501, et seq. (regulations pertaining to interstate clearance system) and 20 C.F.R. § 655.122 (contents of job offers).
[50] 20 C.F.R. § 655.121(b)(1).
[51] Unemployed U.S. workers who are looking for jobs routinely search for jobs through their state agency.
[52] 20 C.F.R. § 655.130(b); U.S. Department of Labor, H-2A Application for Temporary Employment Certification, ETA Form 9142A (version current March 2015), available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A.pdf, and H-2B Application for Temporary Employment Certification, ETA Form 9142A – Appendix A (version current March 2015), available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142A_Appendix.pdf.

and recruitment. The USDOL will notify the employer of any problems with the application and provides an opportunity to correct any deficiencies and file an amended application.[53] A decision is made usually within a week and employers may appeal denials or partial certifications.[54]

*d) Recruiter information obtained by USDOL*

The H-2A temporary employment certification application does not require the employer to inform USDOL how the foreign workers will be recruited and by whom. Form 9142A's Section H "Recruitment Information" Box 6 provides space for the applicant to list recruitment activities, including the "source of recruitment, geographic location(s) of recruitment and the date(s) on which the recruitment was conducted."[55] However, this section of the form is commonly understood to refer to the applicant's obligation to recruit U.S workers rather than the foreign H-2A workers.

*e) Recruitment fee ban declaration*

The Appendix A to ETA Form 9142A requires the employer to make two declarations under penalty of perjury. First, the employer must declare it has not "sought not sought or received payment of any kind from the H-2A worker for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor."[56] Second, the employer is required to declare that it "has and will contractually forbid any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payment from prospective employees."[57]

*f) U.S. worker recruitment required until foreign workers depart*

The employer must actively recruit U.S. workers for the positions until the foreign workers depart for the jobs.[58] H-2A program regulations require employers to actively recruit U.S workers in a manner similar to how non-H-2A employers in the region recruit their workers, for example, newspaper and/or radio advertising, contacting local unions, and posting a job notice in customary locations.[59]

### 2) H-2B Temporary Employment Certifications

Employers apply for H-2B temporary nonagricultural job positions from USDOL's Employment and Training Administration (ETA) by submitting an application for temporary labor

[53] 8 U.S.C. § 1188(c)(2)(A); 20 C.F.R. § 655.141(a), (b)(3).
[54] 20 C.F.R. § 655.141(b)(3), (4) and § 655.171.
[55] ETA Form 9142A, page 5, section H, box 6.
[56] ETA Form 9142A, Appendix A, page A.2, declaration 10; 20 C.F.R. § 655.135(j).
[57] Id., declaration 11; 20 C.F.R. § 655.135(k).
[58] 20 C.F.R. §§ 655.150-655.154, and 655.158 ("the obligation to engage in positive recruitment . . . shall terminate on the date H-2A workers depart for the employer's place of work. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H-2A workers departed for the employer's place of business.").
[59] 20 C.F.R. § 655.154(b); 75 Fed. Reg. 6884, 6912 (Feb. 12, 2010); 20 C.F.R. §§ 655.150-158.

certification.[60] The job opportunity listed on the application must be for a bona fide, full-time temporary position.[61] Temporary means 9 months or less and either for a one time-occurrence or for seasonal, peak load or intermittent need.[62] Full time is defined as 35 or more hours of work per week.[63] The employer must pay at least the prevailing wage for the position.[64] USDOL approves a high proportion of temporary labor certification applications.

*a) Job Contractors for H-2B applications*

Job contractors may apply for temporary labor certification for H-2B workers when they are joint employers with their employer-clients and they both sign the application for temporary employment certification.[65] There is no separate federal law that requires labor contractors to register when they recruit for non-agricultural jobs. However, in cases where H-2B workers are working in jobs that are considered to be agricultural employment covered by the AWPA, those job contractors must be registered as farm labor contractors with USDOL.[66]

*b) H-2B Prevailing Wage Determination*

The first step in the H-2B hiring process for employers is to obtain a Prevailing Wage Determination (PWD) from USDOL through ETA Form 9141.[67] USDOL determines the prevailing wage based on a specific methodology involving a survey of the average wages for that occupation in the area of intended employment.[68] H-2B employers must pay the prevailing wage rate that is approved by USDOL.

---

[60] 20 C.F.R. § 655.15; 8 C.F.R. § 214.2(h)(6)(iii)(A). ETA is the USDOL subagency that houses the Office of Foreign Labor Certification and the National Processing Center (NPC).
[61] 20 C.F.R. § 655.18(b)(2).
[62] 20 C.F.R. § 655.6(b). In FY 2016, the definition of temporary is ten months, as it was prior to the new H-2B regulations promulgated in 2015. See Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. (2015-2016), Pub. L. No. 114-113 (Division H, Title I, Sec. 113) (Dec. 18, 2015).
[63] 20 C.F.R. §§ 655.5.
[64] 20 C.F.R. § 655.20(a) ("The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage.")
[65] 20 C.F.R. § 655.19 sets out filing requirements for job contractors. A job contractor is "a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers." 20 C.F.R. § 655.5.
[66] The AWPA's definition of "agriculture" is broader than the H-2A program's definition of "agriculture." It is thus possible for H-2B workers to be covered by the AWPA. See Dagoberto Morante-Navarro, et al. v. T&Y Pine Straw, Inc., 350 F.3d 1163 (11th Cir. 2003) (H-2B pine straw workers covered by AWPA) and U.S. Department of Labor, Administrator's Interpretation No. 2012-1 (December 12, 2012), available at http://www.dol.gov/whd/opinion/adminIntrprtn/Agrcltr/2012/AG2012_1.pdf.
[67] 20 C.F.R. § 655.10; U.S. Department of Labor, *Application for Prevailing Wage Determination, ETA Form 9141* (March 2015), available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141.pdf.
[68] 20 C.F.R. § 655.10(b). If the job opportunity is not covered by a collective bargaining agreement, the prevailing wage is the arithmetic mean of the wages of workers similarly employed in the area of intended employment using the wage component of relevant surveys. The way USDOL determines the prevailing wage has changed in recent years and the use of surveys been the subject of litigation by worker advocates and employer groups. See CATA v. Solis, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) and 2013 WL 1163426 (E.D. Pa. March 21, 2013); 78 Fed. Reg. 24047 (April 24, 2013); and CATA v. Perez, 774 F.3d 173, 191 (3d Cir. 2014) (vacating portion of wage rule that permitted the use of employer-provided surveys to set the prevailing wage). For FY 2016, the appropriations bill passed by Congress instructs USDOL to accept private employer wage surveys even in instances where the agency has other data to support a higher wage. See Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. (2015-2016), Pub. L. No. 114-113 (Division H, Title I, Sec. 112) (Dec. 18, 2015).

*c) Application filled with USDOL*

After obtaining a prevailing wage determination, the employer files the temporary labor certification application.[69] The application includes the ETA Form 9142B, the appropriate appendices and a valid PWD.[70] The USDOL will review the application for errors and compliance with H-2B program criteria, and will either issue a final decision about the application or send the employer a Request for Further Information (RFI). In any case, the USDOL will make a decision within 60 days of the date of need for the workers or within 7 days of an employer's response to an RFI, whichever is sooner.

*i) Recruiter information obtained by USDOL*

Employers and agents must provide to USDOL, along with the application for temporary employment certification, a copy of all agreements or contracts it has with any agent or recruiter whom it engages to recruit prospective foreign workers for the H-2B job opportunities offered.[71] Additionally, the employer must provide to USDOL the identity and location of every individual recruiter and agent, as well as any sub-recruiter or sub-agent engaged by the recruiter, who will be involved with recruiting the workers internationally.[72] This rule was promulgated in 2015 and is implemented through the employer declarations on the Form 9142B appendix. As of April 2016, there is no standard form on which an employer should report the information on every link in the recruiter chain.

*ii) Publicly available list of agents and recruiters*

The 2015 H-2B rule also – and for the first time -- requires the USDOL to maintain a publicly available list of the identity and location of all agents and recruiters revealed by the employer during the temporary employment certification process.[73] However, as of April 2016, USDOL has not set up this publicly available list.

*iii) Recruitment fee ban declarations*

The Appendix B to ETA Form 9142B requires the employer to declare under penalty of perjury that neither it nor its agents, attorneys, and/or employees have "sought or received payment of any kind from the worker for any activity related to obtaining certification or employment, including but not limited to payment of the employer's attorney or agent fees, application or petition fees, or recruitment costs."[74] The employer must also declare that it has contractually forbidden any agency or recruiter from receiving payments or compensation for recruitment, from the workers.[75]

---

[69] 20 C.F.R. § 655.15.

[70] 20 C.F.R. § 655.15(a); U.S. Department of Labor, *H-2B Application for Temporary Employment Certification, ETA Form 9142B* (April 2016), available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B.pdf, and *H-2B Application for Temporary Employment Certification, ETA Form 9142B – Appendix B* (April 2016), available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_APPENDIX.pdf.

[71] 20 C.F.R. § 655.9; ETA Form 9142B – Appendix B, page B.3, section B, declaration 23.

[72] Id.

[73] 20 C.F.R. § 655.9(c).

[74] ETA Form 9142B – Appendix B, page B.2, section B, declaration 9. The form specifies that payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

[75] ETA Form 9142B – Appendix B, page B.3, section B, declaration 23.

*d) U.S. worker recruitment for H-2B jobs*

Employers are required to try to recruit U.S. workers once USDOL accepts the temporary labor certification.[76] This includes submitting a job order to the State Workforce Agency (SWA) (usually the state department of labor or employment service) that covers the geographic area of employment, publishing advertisements, contacting former U.S. employees and the bargaining representative, if there is one at the worksite.[77] The employer-conducted recruitment must occur within 14 calendar days from the date of the USDOL's notice of acceptance.[78] The employer must prepare and sign a report summarizing its recruitment efforts and their effect.[79] The report must identify each U.S. worker (if any) who applied for the job, the disposition of each worker's job application, and the lawful job-related reason each U.S. worker was not hired (if any).[80]

### 3) Interstate system and electronic job registry

In order to ensure that U.S. workers know about job opportunities, upon accepting an application for temporary employment certification for either the H-2A or an H-2B program, the state workforce agency (SWA) enters the job for circulation within the interstate employment service system to recruit U.S. workers in the area.[81] In order to further facilitate U.S. workers access to these jobs, USDOL maintains an online public job registry called iCert, at https://icert.doleta.gov/.[82] Each job that is listed shows the employer's name, the location of the worksite (city, county and state), the type of visa, wages and dates of employment. In practice, both H-2A and H-2B jobs are usually posted after approval. For H-2A jobs, each clearance order should be available online through the first half of the period of employment.[83] For H-2B jobs, the clearance order should be listed in the public registry until 21 days before the date of need.[84]

***Department of Homeland Security – Permission to hire nonimmigrants***

Once the USDOL's final decision approving the temporary labor certification comes through, the next step is for the employer to petition the Department of Homeland Security's subagency, the U.S. Citizenship and Immigration Services (USCIS), for permission to hire nonimmigrant workers.[85] The employer must submit to USCIS the Petition for Nonimmigrant Worker, Form I-129, along with the H Classification Supplement, the approved ETA Form 9142A or 9142B from USDOL, and the petition fee of $325 USD.[86]

---

[76] 20 C.F.R. § 655.40.
[77] 20 C.F.R. § 655.41-46.
[78] 20 C.F.R. § 655.40(b).
[79] 20 C.F.R. § 655.48.
[80] Id.
[81] 20 C.F.R. §§ 655.34, 655.143(a) and (b)(1); 8 U.S.C.A. § 1188(b)(4).
[82] U.S. Department of Labor, *iCert Visa Portal System*, available at https://icert.doleta.gov/; see 75 Fed. Reg. 6884, 6927 (Feb. 12, 2010); 20 C.F.R. § 655.144.
[83] 20 C.F.R. §§ 655.121(d), and 655.144.
[84] 20 C.F.R. §§ 655.34(b), and 655.40(c).
[85] 8 C.F.R. § 214.2(h)(6)(iii)(E).
[86] U.S. Department of Homeland Security, *I-129 Petition for a Nonimmigrant Worker and H Classification Supplement* (March 2015 current version), available at http://www.uscis.gov/sites/default/files/files/form/i-129.pdf. There is a $150 USD fraud detection and prevention fee mandated by 8 U.S.C. 1184(c)(13)(A). Premium processing (to speed up the review time) is available for $1,225 USD. The Form I-907, Request for Premium Processing Service must be completed and submitted as well if the petitioner needs a quicker review process.

### 1) Authorization to hire foreign workers - The Form I-129 and I-797

Petitioners may file for more than one worker on a single Form I-129 if all workers will perform the same services for the same period of time and in the same location.[87] The petitioner must list the countries of citizenship for any foreign workers it intends to hire. Each year DHS decides from which countries petitioners may import foreign workers.[88] For the year 2015, DHS has designated 68 countries whose nationals are eligible to participate in the H-2A and H-2B programs.[89]

Generally, the workers do not need to be named individually on the Form I-129. There are exceptions for workers who are currently in the United States, or whose country of citizenship is not a DHS-designated participating country.[90] The total number of unnamed worker beneficiaries requested must be specified and must not exceed the number of positions certified by USDOL.

The Form I-129 may not be filed or approved more than 120 days before the date of need, (the day the job commences).[91] After petitions are adjudicated, the decision is entered into the computer tracking system so that the U.S consulates know that the petition is approved when workers apply for the visas.

Once approved, the USCIS provides the employer with the I-797, Notice of Action, the form notifying the employer has that it is authorized to hire foreign workers. Form I-797 shows how many workers are approved and their countries of origin. The notice of approval is also entered in DHS's computer database tracking system, accessible by the Department of State's consular offices abroad.

#### *a) Recruiter and fee payment information obtained by DHS - USCIS*

Durante DHS requests limited information on foreign recruitment during this stage of the process. On the existing Form I-129, H-Classification Supplement, Section 2 the petitioner must list the countries of citizenship of the H-2 workers that it intends to hire and whether a "staffing, recruiting, or similar placement service or agent" will be used to locate the foreign workers and if so, the name and address of the recruiter.[92]

Also on the Form I-129, the petitioner must answer the following questions related to recruitment fees.[93]

> 8.a. Did any of the H-2A/H-2B workers that you are requesting pay you, or an agent, a job placement fee or other form of compensation (either direct or indirect) as a condition of the employment, or do they have an agreement to pay you or the

[87] 8 C.F.R. § 214.2(h)(2)(ii).
[88] The Department of Homeland Security specifies the countries from which employers are permitted to recruit H-2 workers. The list of H-2 eligible countries is published on a rolling basis and is valid for one year from publication. 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. See 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).
[89] 79 Fed. Reg. 74735 (Dec. 16, 2014).
[90] 8 C.F.R. § 214.2(h)(2)(iii).
[91] 8 C.F.R. § 214.2(h)(9)(i)(B).
[92] Form I-129, H Classification Supplement, page 15, questions 4, 7.a.
[93] Id., page 16.

service such fees at a later date? The phrase "fees or other compensation" includes, but is not limited to, petition fees, attorney fees, recruitment costs, and any other fees that are a condition of a beneficiary's employment that the employer is prohibited from passing to the H-2A or H-2B worker under law under U.S. Department of Labor rules. This phrase does not include reasonable travel expenses and certain government-mandated fees (such as passport fees) that are not prohibited from being passed to the H-2A or H-2B worker by statute, regulations, or any laws.

8.b. If yes, list the types and amounts of fees that the worker(s) paid or will pay.

8.c. If the workers paid any fee or compensation, were they reimbursed?

8.d. If the workers agreed to pay a fee that they have not yet been paid, has their agreement been terminated before the workers paid the fee? (*Submit evidence of termination or reimbursement with this petition.*)

The petitioner must state whether it has made reasonable inquiries to determine that the recruiter "has not collected, and will not collect, directly or indirectly, any fees or other compensation from the H-2 workers of this petition as a condition of the H-2 workers' employment[.]"[94] The petitioner must also state whether it has ever had a petition denied or revoked "because an employee paid a job placement fee or other similar compensation as a condition of the job offer or employment."[95]

This information is not published. It should be available through a Freedom of Information Act request. However, it is not easily accessible because DHS does not input the answers to these questions in an electronic/searchable database, but rather maintains the paper forms in a central office.

### 2)When DHS finds out workers have paid recruitment fees

If DHS finds out that the worker has paid a recruitment fee and that the employer either collected the fee or knew or should have known that an "agent, facilitator, recruiter or similar employment service" has collected a fee, the H-2 petition will be denied unless the petitioner shows that the beneficiary was reimbursed.[96]

If the H-2 worker who has paid a recruitment fee makes it through the visa application process but DHS finds out once the worker is here, the petition may still be revoked. If this happens, the worker's stay will be authorized for 30 days "for the purpose of departure" and the employer will have to pay for the workers' travel home.[97] If the worker finds another H-2 job, the 30-day period can tide him over until the new employer's application is approved.[98]

---

[94] Id., page 16, question 9.

[95] Id., page 16, question 10a. The petitioner must also state whether the workers were reimbursed and submit evidence showing the reimbursement. If the workers were not reimbursed, the petitioner must include evidence of all efforts to do so.

[96] 8 C.F.R. § 214.2(h)(6)(i)(B), see also Form I-129, H classification supplement page __, Question 9 "NOTE: If USCIS determines that you knew, or should have known, that the workers requested in connection with this petition paid any fees or other compensation at any time as a condition of employment, your petition may be denied or revoked."

[97] 8 C.F.R. § 214.2(h)(6)(i)(C).

[98] Id.

Before hiring H-2 workers within one year of the revocation, an employer will have to demonstrate that "the petitioner or agent, facilitator, recruiter, or similar employment service" reimbursed each worker for the prohibited fee that was collected or that the worker was not able to be located despite the petitioner's reasonable efforts to locate them.[99] If the employer either waits more than a year or chooses not to re-enter the H-2 program, there is no regulation requiring the employer to reimburse the worker for the unlawful fees charged.

***U.S. Department of State – The Visa Application***

After DHS approves the employer's petition to hire nonimmigrant workers (Form I-129) the workers may apply for the visas from the Department of State (DOS) at the U.S. consulate or visa processing location in their country of origin.[100] Usually an agent of the employer or recruiter will assist the workers with this process. The visa application is $190 USD. The additional fees are $85 USD for fingerprints/biometrics and $26 USD for the interview.[101]

H-2A program regulations require employers to pay for these fees.[102] If the individual H-2A worker applying for the visa pays these fees out of pocket before or at the interview despite the prohibition, the employer must reimburse the worker for these expenses in the worker's first paycheck.[103] H-2B program regulations do not require employers to pay for these fees. However, the federal Fair Labor Standards Act require that all expenses incurred by workers which are for the benefit of the employer (which courts have held to include visa fees) must be reimbursed in the first paycheck insofar as the expenses dip into the workers' minimum wage earnings during that first pay period.[104]

At the visa interview, the workers must persuade the DOS official that they will return home after the job ends. H-2 nonimmigrants must maintain a residence abroad and have no intention of abandoning it.[105] During the visa interview, DOS consular officers may inquire into the worker's connections to their countries of origin and their intention to return home after the job ends. The DOS may look at work history and ties to their home country.

By mandating a preliminary petition process, the U.S. Congress has placed the primary responsibility and authority to DHS to determine whether the foreign worker meets the required qualifications for "H" status. Because DHS regulations governing adjudication of H petitions are complex and petition adjudication is a DHS-mandated activity, DOS personnel at the consular processing posts abroad are expected to "rely on the expertise of DHS in this area."[106] The operations manual for consular officers states: "You may not question the approval of H petitions

---

[99] 8 C.F.R. § 214.2(h)(6)(i)(D).

[100] See generally 9 FAM [Foreign Affairs Manual] 41.53; Bureau of Consular Affairs, *Temporary Worker Visas*, U.S. State Department, available at http://travel.state.gov/visa/temp/types/types_1271.html#5. There is an exception to this for workers from Caribbean nations who do not require a visa. See 8 C.F.R. § 212.1(b)(i). Workers from Jamaica, Barbados, Grenada, Trinidad and Tobago, or British, French or Netherlands citizens who live in their Caribbean territories do not pass through the Department of Homeland Security or the Department of State procedures.

[101] U.S. Department of State, *Fees for Visa Services*, available at http://travel.state.gov/visa/temp/types/types_1263.html

[102] 20 C.F.R. § 655.135(j).

[103] 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010).

[104] U.S. Department of Labor Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* (Aug. 21, 2009); 29 U.S.C. § 203(m), 29 C.F.R. Part 531.

[105] 9 FAM 41.53 N3.2.

[106] 9 FAM 41.53 N2.1.

without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. A large majority of approved H petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the H petition was filed."[107]

DOS personnel are instructed to notify DHS if any information comes to light during the visa application process that leads them to believe the worker has paid a prohibited fee or agreed to pay such a fee and has not been reimbursed or the agreement to pay the fee has not been terminated.[108]

The primary responsibility of DOS in visa adjudication is to carry out the requirements of U.S. immigration law. However, when officers discover indications of possible violations of U.S. labor law, they should report them to the Department of Labor (DOL).[109] DOS officials are instructed to only report violations that occurred in the United States within the 12 months prior to the visa application.[110] Examples of labor violations that are worthy of reporting include evidence of underpayment of the required wage and when the worker is required to pay prohibited fees.[111] Consular officers report violations by emailing the fraud prevention unit at the Kentucky Consular Center, including a "Consular Report of Labor Violation" memo and supporting documents identified as evidence for a Labor Violation.[112]

The federal anti-trafficking law requires consular officers to ensure that all individuals applying for H visas are made aware of their legal rights under Federal immigration, labor, and employment laws.[113] This includes information on the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation in the United States and the legal rights of immigrant victims of such crimes. At the time of the nonimmigrant visa interview each worker must be given a pamphlet ("Certain Employment or Education-Based Nonimmigrants") prepared by the Department detailing this information has been received, read, and understood by the applicant.[114]

Before issuing a visa, posts must verify that the petition has been approved through the electronic information management service that is maintained by the Department of State.[115] The employer may provide Form I-797, Notice of Action, the proof that the U.S employer is authorized by DHS to hire foreign workers, to the prospective employee for the purpose of making his or her H visa appointment.[116] The notice of approval is also entered in the computer database tracking system. An approved Form I-129, Petition for a Nonimmigrant Worker, and the Form I-797 may be used as sufficient proof to schedule an appointment, but only the electronic verification provides the evidence forming the basis for H visa issuance.[117] If DOS denies the visa application there is no

---

[107] 9 FAM 41.53 N8.2.
[108] 9 FAM 41.53 N2.2 ("[Y]ou should return the petition to DHS for reconsideration following current procedures outlined below in 9 FAM 41.53 N2.3 after consulting with your liaison in the Advisory Opinions Division of the Visa Office.").
[109] 9 FAM 41.53 N27.
[110] 9 FAM 41.53 N27.1.
[111] Id.
[112] 9 FAM 41.53 N27.2.
[113] 9 FAM 41.53 N28. Consular officers must enter a mandatory case note stating the pamphlet was provided and that the applicant indicated he or she understood its contents.
[114] Id.; see 9 FAM 41.21 N6.8 for information about enforcement of federal anti-trafficking law and consular officer responsibilities.
[115] 9 FAM 41.53 N8.1.a.
[116] 9 FAM 41.53 N7.2.
[117] 9 FAM 41.53 N8.1.b.

appeal, but the worker may reapply. Refusal rates have increased, especially in specific consulates with heightened concerns about fraud. Still, in 2013 the adjusted refusal rate for H-2A visas was just under 8% and for H-2B, the refusal rate was only 9%.[118]

#### 1) Recruiter information obtained by Department of State

There is no statute, regulation, or official policy that requires DOS officials to either seek or collect information about recruiters during the worker's visa application process.[119] However, some U.S. embassies in the region have nonimmigrant visa fraud units that are beginning to maintain a list of recruiters who are being investigated or are known to have committed visa fraud.

#### 2) When DOS finds out workers have paid recruitment fees

If the DOS discovers that a worker has been made to pay a recruitment fee during the hiring process, the visa application may be denied.[120]

***U.S. Department of Homeland Security – Admission***

Once the workers receive the H-2 visa stamp in their passport, the workers must pass immigration inspection at the border or port of entry. The fact that the visa has been issued in and of itself does not guarantee entry to the United States.[121] DHS's Customs and Border Protection will either permit or deny entry after their own inspection at the border, and will determine the permitted time allowed in the United States, which may be less time than what is listed on the visa itself.[122]

#### 1)Recruiter information obtained by DHS – CBP

There is no statute, regulation, or official policy that requires CBP to seek or collect information about recruiters or recruitment during the worker's admission process at the border. It is possible that some interviewing border patrol officers may inquire about the presenting workers' recruitment, but it is not part of any official government procedure to do so.

## Background to April 2015 Regulatory Changes to H-2B Program

On March 4, 2015, the U.S. District Court in the Northern District of Florida found that the USDOL had no authority to issue rules governing the temporary labor certification process for H-2B

---

[118] U.S. Department of State, *Calculation of Adjusted Visa Refusal Rate Guidelines*, available at http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf (March 2015); and *Nonimmigrant Visa Statistics, FY 2013 NIV Workload by Visa Category,* available at http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2013NIVWorkloadbyVisaCategory.pdf (March 2015).

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

[120] 9 FAM 41.53 N2.2.c. (The agency guidance instructs consular officials as follows: "If you suspect that the alien-beneficiary has paid a prohibited fee and he or she has not been reimbursed or the agreement to pay the fee has not been terminated, you should return the petition to DHS for reconsideration.").

[121] 8 C.F.R. § 235.1(f)(1).

[122] 8 U.S.C. § 1225; 8 C.F.R. Part 235, Inspection of Persons Applying for Admission.

petitions.[123] The case, *Perez v. Perez*, brought by a U.S. worker complaining of irreparable harm because of the process, has, as of March 16, 2015, brought the H-2B visa program to a halt.[124] In *Perez*, the court followed its reasoning in a previous decision finding that USDOL has no authority to issue regulations with regard to the H-2B program.[125]

The question of whether USDOL has authority to regulate the H-2B program is complicated. By statute, DHS is the federal agency in charge of immigration matters and may consult with other "appropriate agencies" before adjudicating an H-2B petition.[126] Employers must petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant before the worker may obtain an H-2B visa or be granted H-2B status.[127] In this vein, DHS has determined that it should consult USDOL because of USDOL's ability to advise whether "unemployed persons capable of performing such service or labor cannot be found in this country."[128] According to DHS, the best way to accomplish this is to require the employer, prior to filing an H-2B petition, to first apply for a temporary labor certification from USDOL.[129]

However, the court in the Northern District of Florida found that although the statute directs DHS to consult with other agencies in deciding whether to grant H-2B visas, the statute does not clearly indicate Congressional intent for those agencies to have rulemaking authority or to allow DHS to delegate its rulemaking authority to them.[130] Because of the decision in *Perez*, DHS suspend adjudication of H-2B petitions for a short time in order to consider the "appropriate response."[131]

In April 2015, the USDOL and DHS jointly issued new rules to govern the H-2B program.[132] The 2015 rules contained significant changes to the H-2B program, including many more protections

---

[123] Perez v. Perez, No. 3:14-cv-682 (N.D. Fla. Mar. 4, 2015), available at http://www2.bloomberglaw.com/public/desktop/document/PEREZ_v_PEREZ_et_al_Docket_No_314cv00682_ND_Fla_Dec_19_2014_Court.

[124] U.S. Department of Labor, *H-2B Program Alert: Cessation of Electronic Filing* (March 6, 2015) (because of the Perez decision USDOL "can no longer accept or process requests for H-2b prevailing wage requests or applications for temporary labor certification in the H-2B program"), available at https://icert.doleta.gov/; Vin Gurieri, *Judge Vacates 2008 DOL Rule Over H-2B Labor Certification*, Law 360 (March 5, 2015), available at http://www.law360.com/articles/627990/judge-vacates-2008-dol-rule-over-h-2b-labor-certification; and Bloomberg BNA, *DOL Halts All H-2B Labor Certifications After Federal Judge Enjoins Regulations* (March 5, 2015), available at http://www.just-pay.org/news/article.554848-DOL_Halts_All_H2B_Labor_Certifications_After_Federal_Judge_Enjoins_Regulati.

[125] Bayou Lawn & Landscape Servs. v. Solis, No. 3:12-cv-00183-MCR-CJK, (N.D. Fla. Apr. 26, 2012) (issuing preliminary nationwide injunction), 713 F.3d 1080 (11th Cir. 2013) (affirming injunction), and 2014 WL 7496045 (N.D. Fla. Dec. 18, 2014) (granting summary judgment to the plaintiff employer).

[126] 8 U.S.C. § 1184(c)(1).

[127] Id.

[128] 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

[129] 8 C.F.R. § 214.2(h)(6)(iii)(A); see also 78 Fed. Reg. 24047, 24048-49 (April 24, 2013).

[130] See Bayou Lawn, 2014 WL 7496045, at *4-5 (comparing Congress's express grant of rulemaking authority to USDOL with respect to the H-2A visa program in the statute and finding no such express grant for H-2B visa program). The Third Circuit Court of Appeals has decided the USDOL authority question differently, see Louisiana Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor, 745 F.3d 653, 669-675 (3d Cir. 2014) (USDOL did have rulemaking authority for 2011 H-2B regulations pertaining to prevailing wage methodology).

[131] U.S. Citizenship and Immigration Services, *USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order* (March 9, 2015), available at http://www.uscis.gov/news/uscis-temporarily-suspends-adjudication-h-2b-petitions-following-court-order.

[132] 80 Fed. Reg. 24041 (April 29, 2015).

for foreign workers and U.S. workers alike.[133] These were supported by many advocates as going a long way towards curbing H-2B worker abuse, in part because of the changes to promote transparency in the recruitment process.[134] In December 2015, the U.S. Congress rolled back some of the new rules for fiscal year 2016, during the budget appropriations process.[135] The future of the H-2B program is unclear.

## LACK OF PORTABLE JUSTICE

As with other nonimmigrant visa programs, the H-2A and H-2B programs do not set up a way for workers to enforce their rights or denounce abuses when they return home as the terms of their visa require after the work period ends.[136] Still, lawyers who represent H-2A and H-2B workers routinely continue advocating for their clients even after the workers return to their countries of origin. However, transnational litigation is wrought with challenges.[137] For example, foreign workers who are plaintiffs in lawsuits and need to return to the U.S. to give testimony at trial must apply for a visitor visa or humanitarian parole. The same is true for workers who are injured on the job and require continuing medical treatment in the United States. The process of seeking this sort of immigration relief is complicated and costly, oftentimes itself preventing access to justice for employment and civil rights suffered while working in the United States.

## SUMMARY – UNITED STATES

### INFORMATION COLLECTED ON RECRUITERS

There is no federal recruiter license or registry and there are no rules about who may be a recruiter for the H-2 program. Under new regulations in 2015, H-2B employers must reveal to USDOL every link in the recruiter chain during the temporary employment certification process; those same regulations require USDOL to maintain a publicly available list of all H-2B recruiters. However, there is no such list as of April 2016.

Beginning in summer 2016 there will be a state foreign labor recruiter registry in the State of California and there are now state law rules in California.

---

[133] For an explanation of of the changes see U.S. Department of Labor, *WHD H-2B Side-by-Side comparison of the 2009 and 2015 Rules*, available at http://www.dol.gov/whd/immigration/h2bfinalrule/h2bsidebyside.htm (last visited May 2016).

[134] See Global Workers Justice Alliance, *Comments regarding Interim Final Rule* (June 2015), available at http://www.globalworkers.org/sites/default/files/GWJA%20comments%20RIN%201205-AB76.pdf.

[135] Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. (2015-2016), Pub. L. No. 114-113 (Dec. 18, 2015). Pertinent changes included lengthening the definition of temporary to ten months, removing the annual cap for returning H-2B workers, not allowing USDOL to use funds to enforce the three-quarter guarantee, and allowing the use of private employer surveys to set the prevailing wage. Worker advocates and some members of the U.S. Senate vehemently opposed the changes. See Centro de los Derechos del Migrante, *U.S. Senators Take Action to Protect H-2B Workers' Rights during Appropriations* (December 2015), available at http://www.cdmigrante.org/u-s-senators-take-action-to-protect-h-2b-workers-rights-during-appropriations/.

[136] 8 C.F.R. §§ 214.2(h)(5)(viii)(B) (30 days for H-2A workers to depart the U.S. after the job ends), and 214.2(h)(13)(i)(A) (10 days for H-2B workers to depart).

[137] See generally Global Workers Justice Alliance, *Challenges in Transnational Litigation: Representing Absentee Workers in U.S. Courts, 4th Ed.* (November 2014); Global Workers Justice Alliance, *Promoviendo la Justicia Móvil: Guia Básica de derechos laborales e inmigración relevante a migrantes transnacionales en los EE.UU.* (September 2014), available at http://www.globalworkers.org/sites/default/files/Promoviendo_Justicia_Movil-Guia.pdf.

The Department of Homeland Security (DHS) requests the name of any foreign recruiters for both the H-2A and H-2B programs, but does not request the entire recruitment supply chain. Moreover, DHS does not publish that information and it is hard to obtain through public disclosure requests because of the way the forms are maintained.

The Department of State (DOS) may have information on foreign recruiters if officers at the U.S. embassy and consulates abroad inquire about it during the individual worker's visa application interviews. DOS's Nonimmigrant Visa Fraud units within some U.S. embassy likely maintain a list of problem recruiters, but it is not published.

## Employer Public Information

Because employers who hire H-2 workers must first apply to the Department of Labor for temporary labor certification, and because they must attempt to recruit U.S. workers, basic information from those certification applications is published. That information is publically available through the public job registry on the iCert website maintained by the U.S. Department of Labor, see https://icert.doleta.gov/. There is a map of the United States, and current jobs are accessed through clicking through a particular state. There are also advanced search options. While the I-797, Notice of Action, is a key document showing that U.S. employer is authorized to hire a certain number of foreign workers from a certain country for specific time period, that document is not published.

## Written Disclosure of Job Terms and Employment Contract

All H-2 workers are entitled to receive a written disclosure of all the terms of the job before they apply for their visa, while they are still in their countries of origin. For H-2A workers, this written document constitutes an employment contract that is enforceable in court in the United States. Whether an employment contract exists between H-2B workers and their employers depends on the facts of each particular case and the law of the jurisdiction where the breach of employment contract case is presented.

## Workers Fees and Travel Costs

Neither H-2A nor H-2B workers should pay any recruitment fees. If H-2A and H-2B workers pay for their visa application fees, the employer must reimburse to the worker that full amount in the first paycheck.[138] Both H-2A and H-2B workers may be required to pay for their own personal passports.

H-2A and H-2B workers may be asked to pay for their travel costs to the United States. Depending on the amount of travel expenses compared to the wages they earn during the first week of work, the Fair Labor Standards Act may require that employers reimburse some of that expense in the first paycheck. In any case, workers must be reimbursed for their total inbound travel costs upon completion of half of the approved job period.[139] Employers also must pay for outbound, or return, travel for all H-2B workers, and any H-2A workers who completes the contract period.

[138] 20 C.F.R. §§ 655.20(j)(2) and 655.135(j); see also U.S. Department of Labor, WHD Field Assistance Bulletin No. 2011-2 (May 2011), available at https://www.dol.gov/whd/FieldBulletins/fab2011_2.htm.
[139] 20 C.F.R. §§ 655.20(j)(1) and 655.122(h).

## CANADA TEMPORARY WORK VISAS

In Canada, the legal framework of temporary foreign work visas exists on both the federal and provincial levels. And with the exception of Quebec, the programs themselves are created and managed federally.[140] The two sources of federal immigration law in Canada are the Immigration and Refugee Protection Act (IRPA) and the Immigration and Refugee Protection Regulations (IRPR).[141] Part of the IRPA's stated purpose is "to facilitate the entry of […] temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities."[142]

With respect to labor migration in low-skilled occupations, there are two programs: the Temporary Foreign Worker Program (TFWP) and the Seasonal Agricultural Worker Program (SAWP). TFWP covers workers in various industries, including farmworkers and other low-skilled occupations for workers from all over the world. SAWP is a program specifically for farmworkers from Mexico and several Caribbean nations. In 2013, the number of low-skill temporary foreign workers entering Canada grew to just over 55,000.[143] Viewing all temporary agricultural jobs and other low-skilled occupations together, it appears that the largest countries of origin for workers in these programs are Mexico and Guatemala.[144]

Much like in the United States, employers in Canada initiate and control the hiring process for temporary foreign workers. TFWP and SAWP have similar administrative schemes. Employers who want to hire foreign workers apply first to the Canadian federal agency Employment and Social Development Canada (ESDC)[145] for a Labor Market Impact Assessment (LMIA).[146] Once the Canadian government issues a positive LMIA, the workers apply for the actual work permit from Citizenship and Immigration Canada (CIC) at the Canadian embassy or consular post abroad. In either case, once the work permits are granted, workers travel to Canada and endure a final screening by Canadian Border Service Agency at the port of entry.

Foreign recruitment varies dramatically between the TFWP and SAWP. Under the TFWP, employers often use a private recruiter or recruitment agency to find workers and assist them

---

[140] In Quebec there is a provincial agency that regulates immigration: the ministere d l'Immigration, de la deiversite et de l'Inclusion (MIDI).

[141] Immigration and Refugee Protection Act, RSC 2001, c 27; and Immigration and Refugee Protection Regulations, SOR/2002-227.

[142] IRPA, Art 3(1)g).

[143] ESDC, *Overhauling the Temporary Foreign Worker Program*, Table 2: Canada – Entries of Temporary Foreign Worker work permit holders by sub-status 2002-20013, page 3 (February 25, 2015), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/index.shtml [hereinafter "Overhaul"]; see also Joe Friesen, *Numbers of low-skilled temporary foreign workers rose despite push to curtail program*, The Globe and Mail (October 27, 2014), available at http://www.theglobeandmail.com/news/national/temporary-foreign-workers-numbers-rose-despite-push-to-curtail-program/article21311277/.

[144] See, e.g., UFCW, *The Status of Migrant Farm Workers in Canada 2010-2011*, available at http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf [hereinafter "UFCW Report"]. The Canadian government apparently does not publish numbers of individuals granted entry to Canada under SAWP and TFWP, disaggregated by nationality. See Statistics Canada, website available at http://www.statcan.gc.ca/start-debut-eng.html (last accessed April 2015).

[145] The federal agency "Employment and Social Development Canada" was previously known as the "Human Resources and Skills Development Canada/Service Canada."

[146] The specific hiring process depends on the province where the job and employer are located. For example, in Quebec, the employers must submit a copy of the LMIA to the provincial agency ministere d l'Immigration, de la deiversite et de l'Inclusion (MIDI), along with additional declarations and fees. See MIDI's website, available at http://www.immigration-quebec.gouv.qc.ca/fr/employeurs/embaucher-temporaire/recrutement-travailleurs-agricoles/travailleurs-agricoles-saisonniers.html (last accessed March 2015).

with their work permits and logistics. Under the SAWP, the federal government in the country of origin (in Mexico, this is the Mexican federal labor department) recruits workers, manages their applications for work permits, coordinates placing the workers with LMIA-approved employers, and arranges travel in conjunction with a Canadian not for profit agency funded and controlled by farm owners.[147]

There are no federal regulations pertaining to recruitment of foreign workers for these temporary jobs in Canada. Labour and employment law – including the subject of labour recruitment -- is a matter of provincial jurisdiction.[148] As discussed below, several Canadian provinces have laws that pertain to labour recruitment generally, and recruitment of foreign workers in particular.

## PROVINCIAL RECRUITMENT REGULATIONS

Several provinces in Canada regulate labour recruiters, and some, including British Columbia, Manitoba and explicitly reach foreign recruitment. Even so, there are questions about whether provincial regulations reach foreign conduct.[149] While the provincial government in Nova Scotia maintains a list of licensed recruiters on their website,[150] it is unclear if the rest of the provinces that require registration also publish that information. The consequences for employers who use unregistered recruiters is usually a fine. The following provinces with the largest numbers of foreign workers have laws that regulate labour recruitment.[151]

### BRITISH COLUMBIA

In British Columbia, recruitment agencies must obtain a license and maintain records of every employer served and each worker sent to each employer.[152] It does not appear that these records are public, however. Recruiters are also prohibited from charging fees to workers.[153]

> [A] foreign worker cannot be required to pay for immigration assistance as a condition of being placed in a job. . . a foreign worker cannot be required to post a bond or pay a deposit to ensure they will finish a work term or employment contract, or to pay a penalty if they do not" and "a foreign worker cannot be required to pay back any costs the employer paid to an employment agency or anyone else to recruit the worker.[154]

---

147 This depends on the province in Canada where the workers will be placed. For example, in Ontario, the organization is Foreign Agricultural Resource Management Services (FARMS). For more information, see their website, available at http://www.farmsontario.ca/ (last accessed March 2015). In Quebec, the similar nonprofit organization is FERMES.
148 Overhaul, *supra* note 143, at 26. Unlike in the United States, Canada's federal labor law, the Canada Labour Code, only applies to employers who are federally regulated. See Labour Program, *Standards and Equity*, available at http://www.labour.gc.ca/eng/standards_equity/index.shtml (last accessed April 2015).
149 Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 200-203 (provincial regulation regulating labour law usually has no extraterritorial effect).
150 See http://novascotia.ca/lae/employmentrights/FW/LicensedRecruiters.asp
151 These provinces were chosen because they are the provinces where there are the most temporary foreign workers in Canada. See *Number of TFWs in Canada Tripled Between 2002 and 2012, PBO Report Says*, The Huffington Post Canada (March 12, 2015), available at http://www.huffingtonpost.ca/2015/03/12/number-of-foreign-workers_n_6854776.html.
152 *Employment Standards Act*, RSBC 1996 c 113 at art 12(1) and Employment Standards Regulation, part 2.
153 Id. at art 11(1).
154 Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, Employment Standards for Foreign Workers, 2014, online: Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, available at http://www.labour.gov.bc.ca/esb/facshts/foreign_workers.htm.

## Quebec

In Québec, section 18 of Quebec's Charter of Human Rights and Freedoms states that placement offices cannot exercise discrimination in the reception, the classification or the treatment of an employment request.[155] The Act Respecting Labour Standards, however, does not regulate labour recruitment and does not mention recruitment agencies.[156]

## Ontario

Ontario prohibits recruitment agencies from charging workers a fee or otherwise imposing costs on them.[157] If an employment standards officer in Ontario finds that a recruiter has charged fees, the worker will be refunded.[158]

## Manitoba

In Manitoba, recruiters must register with the province and obtain a license.[159] A special license is required to recruit temporary foreign workers – these recruiters must show proof of solvency.[160] Recruiters must also provide detailed information when registering, including the name, address, and business identification number of their clients (the employers), the name and address of every worker recruited for each employer, and details about the job filled.[161] Recruitment fees are also banned: "an individual who is engaged in foreign worker recruitment must not directly or indirectly charge or collect a fee from a foreign worker for finding or attempting to find employment for him or her."[162]

Employers of temporary foreign workers must also register with the provincial government: "No employer shall recruit a foreign worker without first registering with the director."[163] It is unclear whether Manitoba publishes this information on their website in a way that is easily searchable by prospective workers in their countries of origin.

## Alberta

El Foreign worker recruitment for temporary jobs in Alberta is covered by the Employment Agency Business Licensing Regulations (also known as the Fair Trading Act).[164] This law prohibits charging workers recruitment fees.[165]

> (1) No business operator may directly or indirectly demand or collect a fee, reward or other compensation (a) from a person who is seeking (i) employment, or (ii)

[155] Charter of Human Rights and Freedoms, RLRQ c C-12.
[156] An Act Respecting Labour Standards, RLRQ c N-1.1.
[157] Jean Bernier, *L'industrie des agencies de travail temporaire. Avis sur une proposition d'encadrement*, 2011 at p 34.
[158] Employment Standards Act, LO 2000, c. 41 at Art 74.8(1) and 74.14(1).
[159] The Worker Recruitment and Protection Act, C.C.S.M. c. W197. Section 2(1). In Manitoba, recruiters are defined as persons "engaging in placement activities."
[160] Id. at Section 2(4) and Art 5.
[161] Id. at Art 11(3).
[162] Id. at Art 15(4).
[163] Id. at Art 11(1).
[164] Employment Agency Business Licensing Regulation, Alta Reg 189/1999 (EABLR).
[165] On its website, the provincial government of Alberta states that "[a]n agency cannot charge a worker a fee for finding a job in Alberta."Government of Alberta, *Using Recruitment or Employment Agencies*, 2014, online: Alberta Canada http://www.albertacanada.com/opportunity/immigrating/recruitment-employment-agencies.aspx.

information respecting employers seeking employees, or (b) from a person (i) for securing or endeavouring to secure employment for the person, or (ii) for providing the person with information respecting any employer seeking an employee.[166]

Employers are not permitted to recoup their recruitment costs through wage deductions either.[167]

## THE TEMPORARY FOREIGN WORKER PROGRAM

En In Canada, the Temporary Foreign Worker Program (TFWP) structures temporary labour migration of workers from all over the world for a predetermined and limited period based on employer demand to fill specific jobs.[168] The TFWP is administered by the federal agency Employment and Social Development Canada (ESDC) and includes both a low-wage category and a primary agricultural stream. The low-wage category is for positions that pay below the provincial/territorial median wage, regardless of occupation. The primary agricultural stream is for jobs related to "on-farm primary agriculture such as general farm workers, nursery and greenhouse workers, feed lot workers and harvesting labourers."[169] In June 2014, the Canadian government decided to overhaul the program and changes are being implemented through the end of 2015.[170]

Employers may apply to hire workers for low-wage positions for a maximum initial period of one year when Canadian workers are not available.[171] On-farm primary agriculture jobs are exempt from this limit.[172] Employers must pay the round trip travel costs, ensure affordable housing, pay for health insurance, provide an employment contract, and register the foreign worker with the province's workplace safety board.[173] TFWP agricultural employers must offer housing that meets local health and safety standards for a maximum charge of $30 CSD per week.[174]

Most foreign workers are selected and hired for TFWP through recruitment agencies.[175] These entities are essential to the program as it is currently managed because they have the contacts with employers and provide access to the job opportunities.[176] Some recruiters are multinational

---

[166] EABLR, at Art 9.
[167] Id.
[168] Overhaul, *supra* note 143, at 1, 8.
[169] Overhaul, *supra* note 143, at 8. IRPR section 315.2 defines primary agriculture as work that is performed within the boundaries of a farm, and e nursery or greenhouse and involves: the operation of agricultural machinery; the boarding, care, breeding, sanitation or other handling of animals, other than fish, for the purpose of obtaining animal products for market, or activities relating to the collection, handling and assessment of those products; or the planting, care, harvesting or preparation of crops, trees, sod or other plants for market. Excluded activities include: the activities of agronomists or agricultural economists; landscape architecture; the preparation of vegetable fibers for textile use; activities related to commercial hunting and trapping; or veterinary activities.
[170] ESDC, *Timeline of Measures Coming into Force*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/timeline.shtml (last accessed April 2015).
[171] Overhaul, *supra* note 143, at 12. This change became effective in 2015. Previously, TFWP work permits could be valid for up to 24 months.
[172] Id. at 26.
[173] ESDC, *Stream for Lower-Skilled Occupations: Transportation Costs*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml#des (last accessed April 2015).
[174] See Human Resources and Skills Development Canada, *Temporary Foreign Workers: Your rights are protected* (2012), available at http://www.cic.gc.ca/english/pdf/pub/tfw-rights-english.pdf. The housing costs may be deducted from wages.
[175] UFCW Report, *supra* note 144, at 16 ("recruiters are integral to the TFW program.")
[176] Dalia Gesualdi-Fecteau, 'Les droits au travail des travailleurs étrangers temporaires « peu spécialisés » :(petit) voyage à l'interface du droit du travail et du droit de l'immigration (2013) Redéfinir la gouvernance publique, Actes de la XXe Conférence des juristes de l'État, Cowansville, Yvon Blais 219 at page 245.

corporations with offices located both in Canada and in the countries of origin, while others are individuals.[177] While Canadian federal law does not regulate foreign recruitment, ESDC mandates that employers pay for recruitment fees.[178]

## Recruitment Fees Prohibited By Employer Contract

ESDC requires employers to sign and execute employment contracts as part of the labour market assessment and work permit application processes. ESDC publishes templates of contracts for employers to use when hiring temporary foreign workers.[179] The sample contracts prohibit the employer from recouping recruitment costs from the workers, through payroll deductions or any other means.[180] It is unclear whether employers always use these particular contract templates and if so, if they are made available in a language the workers understand and if the workers ever see them.

## Hiring Process Details

Employers apply to the federal government for permission to employ foreign workers. Three government agencies are involved: Employment and Social Development Canada (ESDC), Citizenship and Immigration Services Canada (CIC), and the Canadian Border Service Agency (CBSA). There are three steps from when the employer initiates the process to when the worker enters Canada.

- ESDC reviews the Labor Market Impact Assessment (LMIA) application and supporting documentation, including the employment contract

If a positive finding is issued, then . . .

- CIC reviews individual work permit applications presented by the workers (or their recruiters) in the workers' country of origin at the Canadian Embassy.

If approved, then . . .

- CBSA reviews whether workers who present for admission at the Canadian border or port of entry are admissible. If granted, the Border Security Officer gives the worker his or her actual work permit and the worker enters Canada and proceeds to the job site.

Employers may go through this process by themselves or hire an attorney or representative to handle the process for them as their agent.

---

[177] Fay Faraday, *Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers*, Metcalf Foundation (April 2014) at page 29.
[178] ESDC, *Stream for Lower-skilled Occupations, Recruitment and Advertisement*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml#ar (last accessed April 2015).
[179] ESDC, *Temporary Foreign Worker Program: Annex 2* available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/employment_contract.pdf, and ESDC, *Agricultural Stream: Instruction Sheet to Accompany the Employment Contract*, 2014, available at http://www.servicecanada.gc.ca/eforms/forms/esdc-emp5510%282012-07-004%29e.pdf.
[180] Id. at art 4.3. and *TFWP: Annex 2*, at art 11.

### *Employment and Social Development Canada - Labor Market Impact Assessment*

The first step is the Labour Market Impact Assessment through ESDC. The process is set up to analyze whether hiring foreign workers will negatively impact the domestic job market.[181] Employers must provide information about "the number of Canadians that applied for the available job, the number of Canadians the employer interviewed, and explain why those Canadians were not hired."[182] The specifics of the application process may depend on the province where the job is located.[183] In general, the employer must agree to comply with each province's wage and working condition requirements. Other necessary documents include the employment contract, copies of advertisements used to recruit local workers, and documents relating to migrant housing (including an inspection report signed by the local authorities).

Employers who wish to use the services of a representative, paid or unpaid, to help them with the LMIA process must complete and submit the Form Schedule A – Appointment of a Third-party Representative.[184] Usually the Form Schedule A is used only to name entities that will represent the employer before the Canadian government. However, the ESDC explains that recruiters named on Schedule A may assist employers by providing services such as: "placing job advertisements for the recruitment of foreign workers; screening potential employees; making travel arrangements; and negotiating wages/salaries on behalf of the employer."[185] If the third party recruiter is also the employer's representative during the LMIA application process, the employer must use Schedule A to name it.[186]

The LMIA processing fee is $1000 per low-wage position.[187] Employers are responsible for this fee. ESDC notes that "under no circumstances[] can employers and third-party representatives recover the LMIA processing fees from temporary foreign workers."[188] There is no fee for the agricultural stream employers.[189]
ESDC reviews employer eligibility[190] and looks at various other factors including whether the employer is actively engaged in the business related to the job offer, if the employer is currently in compliance with applicable law, and whether the employer has made sufficient efforts to

---

[181] ESDC, *Implementation of the New Hight and Low-wage Streams: Implications for Employers: New Forms*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/highlights.shtml#new-streams (last accessed April 2015).
[182] Overhaul, *supra* note 143, at 9. As of April 22, 2015, the ESDC/Service Canada is still in the process of updating the TFWP manual, which is intended to assist the federal agency staff in assessing LMIA applications. Once completed, it will be available on the ESDC website, see http://www.esdc.gc.ca/eng/jobs/foreign_workers/manual/index.shtml (last accessed April 2015).
[183] Quebec has additional procedures, see ESDC, *Hiring Temporary Foreign Workers in Quebec*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/quebec.shtml (last accessed April 2015).
[184] Schedule A – Appointment of a Third-party Representative, available at http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=emp5575&ln=eng.
[185] ESDC, Third Party Representatives and Recruiters: Recruiters available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml.
[186] ESDC, *TFW Web Service – Third Party Registration Guide* (April 2012), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/webservice/tp_guide.shtml.
[187] ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml#des (last accessed March 2015).
[188] Id.
[189] Id.
[190] The list of ineligible employers appears on Citizenship and Immigration Canada's (CIC) web site, available at http://www.cic.gc.ca/english/work/list.asp.

recruit Canadian workers.[191] Approval rates for LMIAs are not readily available but worker advocates report that anecdotal evidence suggests LMIAs are usually approved.[192] ESDC confirms approval by sending a letter to the employer.[193] Once the positive LMIA letter is received, it is the employer's responsibility to send a copy of this letter and the employment contract, signed by the employer, to the worker.[194] A positive LMIA is valid for 6 months.[195]

***Citizenship and Immigrant Services Canada – work permit application***

After the worker receives the notice of LMIA approval from the employer, the next step is for the individual worker to apply for a work permit from CIC, located at the Canadian embassy or consular post abroad in the worker's country of origin.[196] According to CIC, the work permit application should include a copy of the positive LMIA letter as well as an employment contract.[197] Also required is proof of identity, a valid passport, photo, and the processing fee of $100 to $155 Canadian dollars. The length of time it takes to process work permit applications and issue approval letters may vary.[198]

#### 1) Medical Examinations

Medical examinations are generally only required for jobs that will last at least six months.[199] The visa office at the Canadian embassy will give worker the necessary forms and a list of local medical practitioners authorized to provide the exam. Workers are responsible for paying the fee for the examination directly to the medical practitioner.[200]

#### 2) Issues at the Canadian Embassy in Guatemala

With regard to prospective TFWP workers in Central America, recruiters typically mail the individual work permit applications in bulk to CIC at the Canadian embassy in Guatemala City.[201] Advocates report that CIC has denied work permits to individuals affiliated with recruiters who are unknown to personnel at the Canadian embassy. Moreover, when workers have questions or a

---

[191] Overhaul, *supra* note 143, at 9. In 2014, Canada began implementing a new job matching service in conjunction with the LMIA process. See ESDC Better and More Labour Market Information: New Job Matching Service (June 23, 2014), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/improve.shtml.
[192] UFCW Report, *supra* note 144, at 16.
[193] In Quebec, there is a provincial agency, MIDI, involved that must jointly issue the LMIA acceptance.
[194] Id. According to the ESDC website, "[f]or privacy reasons, the letter will not include the names of the TFWs. However, it provides specific details about the job offer, such as the wages, working conditions and occupations as well as a system file number. The names of the workers will appear in Annex B, which is intended for the employer's records only, and is NOT to be shared with the TFW as it is not required for the purposes of applying for a work permit."
[195] ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/six_month_lmo_validity.shtml
[196] Each Canadian visa office abroad may have different procedures. See http://www.cic.gc.ca/english/information/offices/apply-where.asp
[197] IRPR R200(5)(5b) requires CIC to asses that the offer is consistent with the reasonable needs of the employer. According to CIC, in order to make this assessment, the worker may show a "contract/job offer or letter from employer on official company letterhead, describes job duties, duration and wage." See Operational Bulletin 275-C, Annex A – Document List Tool (April 1, 2011), available at http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob275C.asp#annex-A (last accessed March 2015).
[198] For a list of processing times, see the CIC website, available at http://www.cic.gc.ca/english/information/times/temp/workers.asp
[199] A medical examination is required in occupations where protection of public health is essential, or if the job period is greater than six months or if the workers' country of origin is on the list of countries where medical exams are required. For more details, see CIC, available at http://www.cic.gc.ca/english/information/medical/dcl.asp
[200] CIC website, available at http://www.cic.gc.ca/english/resources/publications/tfw-guide.asp#a6
[201] Interviews with various workers, advocates, recruiters and government officials (2012-2014).

complaint about the recruitment process or their work permit applications, they are simply referred to the Canadian embassy's website.[202]

***Canada Border Service Agency screening at port of entry***

If CIC approves the work permit application, they will issue an approval letter – not the actual work permit. The foreign worker must present that letter to the Canada Border Service Agency (CBSA) at the border or airport when seeking admission to Canada. CBSA screens incoming temporary workers at all ports of entry. When the workers arrive, they must show a CBSA officer the CIC work permit approval and the medical certificate, if a medical exam was required. Starting in 2015, "[a]ll temporary foreign workers coming into Canada will receive an information package" from CBSA which outlines basic worker rights and contact information about resources if they believe their rights are violated.[203] It remains to be seen whether CBSA officers will inquire during the admission process about recruitment issues generally and whether workers were charged illegal fees.

If CBSA decides that the worker is admissible, at that moment the officer will provide the actual work permit document to the worker and allow entry into Canada.[204] The permit is valid to work for a specific employer for a particular duration. Once the worker arrives at the job side destination, the employer must check the work permit to verify that the name of the worker, authorized employer and duration are correct.

### Four-Year Cumulative Duration Limit

There is a limit on how long a foreign worker may participate in TFWP. In 2011, CIC issued a regulation establishing a four-year cumulative duration limit.[205] As individuals close in on the four-year limit they may not be granted a new work permit or any extension. Once a worker reaches this limit he or she will have to wait four years before being eligible to work in Canada again under TFWP.

## THE SEASONAL AGRICULTURAL WORKER PROGRAM

The Seasonal Agricultural Worker Program (SAWP) is open only to Mexican and Caribbean farmworkers workers who come to Canada for a predetermined, limited period and work for a single agricultural employer.[206] SAWP began in 1966 and has continued for almost five decades

---

[202] See http://www.canadainternational.gc.ca/guatemala/visas/work_temp_travailler.aspx?lang=eng
[203] Overhaul, *supra* not 143, at 25.
[204] Operational Bulletin 275-C, at 1.3
[205] See R200(3)(g)(i) and Operational Bulletin 275-C (April 1, 2011), available at http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob275C.asp#duration. The 4-year cumulative duration limit will only be counted starting from April 1, 2011, which means that as a result of this regulation, refusals of work permits will begin April 1, 2015. See also Les Whittington, *Temporary foreign workers warned to leave Canada as required*, Toronto Star (April 1, 2015), available at http://www.thestar.com/news/canada/2015/04/01/foreign-workers-warned-not-to-dodge-deportation.html.
[206] The Caribbean nations are Anguilla, Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago. See ESDC website available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml (last accessed March 2015). See also UFCW, *The Status of Migrant Farm Workers in Canada 2010-2011*, at page 9-10, available at http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf "All Canadian provinces but Newfoundland and Labrador participate in the program.")

"providing Canadian agricultural employers access to migrant farmworkers."[207] To qualify, the job must relate to production of specific agricultural commodities and the activity considered "primary agriculture."[208] Workers under the SAWP are allowed to work in Canada for a maximum of 8 months out of 12 months.[209] There is no limit on the number of years -- either consecutive or cumulative -- that a foreign worker may participate in SAWP.[210]

SAWP has been developed over many years through a series of bilateral agreements between Canada and Mexico, and Canada and twelve Caribbean nations.[211] All the participating countries agree on rules that are outlined in Memorandums of Understanding (MOU), which references Operational Guidelines, and Employment Agreement templates.[212] The MOUs do not rise to the level of international treaties and are not legally binding.[213] While neither the Immigration and Refugee Protection Act (IRPA) nor the Immigration and Refugee Protection Regulations (IRPR) themselves mention the SAWP, the mechanisms described in the MOUs must comply with their provisions and procedures.

Thus, the three federal agencies involved with TFWP administration are also involved with SAWP. Employment and Social Development Canada (ESDC) reviews the Labor Market Impact Assessments (LMIA) in Canada. Citizenship and Immigration Canada (CIC) adjudicates work permits for the individual workers in their countries of origin, operating out of the Canadian diplomatic posts. The Canada Border Service Agency (CBSA) screens all incoming workers at the Canadian port of entry and either allows or denies admission. However, with SAWP, foreign governments are also involved with program administration. The Mexican and Caribbean federal agencies are in charge of locating and recruiting their citizens in their territories.[214] Additionally, the foreign governments designate diplomatic officials as the SAWP representative in Canada.

## Foreign Worker Recruitment

As noted, the foreign governments participating in SAWP are in charge of recruiting their workers for the agricultural jobs in Canada. "Canada will not process workers under the CSAWP through private contractors or private means."[215] Indeed, engaging foreign governments in recruitment

---

[207] See UFCW Report, *supra* note 144, at 9.
[208] See IRPA § 315.2 (defining primary agriculture as work on a farm, nursery or greenhouse that involves "the operation of agricultural machinery; the boarding, care, breeding, sanitation or other handing of animals, other than fish, for the purpose of obtaining animal products for market, or activities relating to the collection, handling and assessment of those products; or the planting, care, harvesting or preparation of crops, trees, sod or other plants for market"). See ESDC's website for a list of agricultural commodities.
[209] Employment and Social Development Canada, *Hiring Seasonal Agricultural Workers, Description*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml (last accessed March 2015). There is a minimum work period of 6 weeks and at least 240 hours of paid work is guaranteed.
[210] The four-year maximum rule that went into effect on April 1, 2011 for temporary foreign workers has an exception for foreign nationals who work under an international agreement, "including an agreement concerning seasonal agricultural workers." See IRPR, R200(3)(g)(iii). See also Overhaul, page 26.
[211] For a detailed history of the SAWP's evolution and expansion, see Veena Verma, *The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization*, The North-South Institute, at pages 4-12 (December 2003).
[212] Id. at 13, and note 32 (explaining that these documents are customarily in force for five year periods).
[213] Id.
[214] In Mexico, the agency in charge is the Ministry of Labour, including its network of official representatives throughout the country.
[215] Id. at 20; see also ESDC website, *Hiring Seasonal Agricultural Workers: Recruitment and advertisement*, noting that under the SAWP, "employers cannot use the services of a private recruiter to select workers."), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml (last accessed March 2015). CSAWP is another common acronym for SAWP.

was intentionally designed to protect workers during the process. As one commentator notes: "the need for government actors to develop an institutional and regulatory framework for the migration of agricultural workers in Canada is also recognized as necessary in order to prevent the exploitation of migrant workers that may result from illegal migration, the use of labour contractors, or private recruitment."[216] Even though the SAWP's governing structure (the MOUs and attending operating guidelines) explicitly dictates that foreign recruitment be the responsibility of the foreign governments, the provincial rules still apply.

The employer, worker and foreign government official must all sign an employment contract.[217] The contract template is available on the ESDC website.[218] The contract must be submitted to ESDC along with the LMIA. In situations where the LMIA is submitted on behalf of unnamed foreign workers, the employer must provide the contract to those workers for their signature on their first day of work.[219]

## Hiring Process Details

The SAWP hiring process has three steps. First, employers submit the Labor Market Impact Assessment (LMIA) application along with all the required supporting documentation to Employment and Social Development Canada (ESDC). Second, once the LMIA is approved, the employer sends a copy of the approval letter and the employment contract (signed by the employer), to the foreign government agency. The foreign governments are in charge of recruiting workers for the LMIA-approved jobs and helping the workers apply for the work permit from the Citizenship and Immigration Services Canada (CIC) at the Canadian Embassy. Third, if the work permit is approved, the worker presents at the Canadian port of entry and receives the actual work permit from the Canada Border Service Agency (CBSA) upon admission to Canada.

### *Employment and Social Development Canada - Labor Market Impact Assessment*

The LMIA process will assess how hiring foreign farmworkers will impact Canadian workers. The specifics of the LMIA process may depend on the province where the job is located. Employers file Form EMP5389, either online or with paper applications.[220] On the LMIA, employers specify the number of named and unnamed workers.[221] Named workers must be listed on the appendix to form EMP5389.[222]

---

[216] Id. at 17.

[217] Employment and Social Development Canada, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#ec (last accessed March 2015). The employment contracts detail terms and conditions of the job. The employment contract between the employer and the worker must comply with provincial labour standards. The foreign government official is not necessarily bound by those provincial standards.

[218] There are four different contract templates available on the ESDC website: (1) workers from Mexico (2) workers from Mexico who will work in British Columbia (3) workers from Caribbean nations and (4) workers from Caribbean nations who will work in British Columbia. See Id. There are different contracts for British Columbia because there are provincial laws regarding employer-incurred costs that may not be recouped through pay deductions. Mexico and the Caribbean nation programs have different rules for the steps that must happen when employers want to trade workers.

[219] See Employment and Social Development Canada, *Hiring Seasonal Agricultural Workers: Employment Contract*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#ec (last accessed March 2015).

[220] ESDC EMP5389, *Application for Labour Market Impact Assessment: Seasonal Agricultural Worker Program*, available at http://www.servicecanada.gc.ca/eforms/forms/esdc-emp5389(2014-08-014)e.pdf (last accessed March 2015).

[221] ESDC EMP5389, page 5.

[222] At the end of each season, if an employer wants a worker to return the next year, it will keep track of that worker's information and specifically name that worker in the next year's LMIA.

The LMIA describes the details of the job offer, including the duties, wages, and arrangements of any deductions for transportation, housing, meals and fees.[223] The employer must make a series of declarations on the form as well, including that it will comply with "all federal/provincial/territorial laws that regulate employment and the recruiting of employees, in the province/territory in which it is intended that the temporary foreign worker(s) work . . ."[224] The employer must also certify that "I acknowledge and understand that I will be held accountable for the actions of any third-party recruiting foreign workers on my behalf."[225]

If a third party representative (such as an approved immigration lawyer) will be assisting the employer, a form called Schedule A must also be submitted. Other necessary documents include the employment contract, copies of advertisements used to recruit domestic Canadian workers, certain documents relating to migrant housing, and proof of having paid the work permit fees.[226]

ESDC reviews each LMIA to verify employer eligibility and ensure that program requirements are met.[227] The agency will assess the "genuineness of the job offer" and whether the employer is currently in compliance with relevant federal-provincial-territorial law.[228] In addition, the agency looks at the impact of hiring a foreign farmworker on the local job market.[229]

ESDC confirms approval by sending a letter to the employer. A positive LMIA is valid for 6 months.[230] According to the ESDC website, "[f]or privacy reasons, the letter will not include the names of the TFWs. However, it provides specific details about the job offer, such as the wages, working conditions and occupations as well as a system file number. The names of the workers will appear in Annex B which is intended for the employer's records only, and is NOT to be shared with the TFW as it is not required for the purposes of applying for a work permit."[231] It is the employer's responsibility to send a copy of the LMIA approval letter and employment contract to the foreign government agency.

***Citizenship and Immigration Services Canada (CIC) - work permits***

The country of origin governments are in charge of recruiting and selecting workers for the LMIA-approved jobs. For jobs in Ontario and Quebec, placement is coordinated with one of two Canadian not for profit agencies that are funded and controlled by farm owners (FARM and FERME). Once the workers have a specific job lined up, their government agents assist with applying for the work permit from CIC at the Canadian consular post. Employers must pay up

[223] ESDC EMP5389, pages 3-4.
[224] ESDC EMP5389, page 6.
[225] ESDC, EMP5389, page 6
[226] ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#CoS (last accessed March 2015).
[227] The list of ineligible employers appears on Citizenship and Immigration Canada's (CIC) web site, available at http://www.cic.gc.ca/english/work/list.asp.
[228] ESDC website, Labour Market Impact Assessment process, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#CoS (March 2015).
[229] Id.
[230] ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/six_month_lmo_validity.shtml
[231] ESDC website, *Positive LMIA*, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#CoS (last accessed March 2015).

front the $155 fee for the work permit to CIC and may recover these fees through payroll deductions from Mexican workers, but not from Caribbean workers.[232]

Consular officials reviewing the work-permit applications are required to assess the genuineness of the job offer, its consistency with federal, provincial and territorial agreements, and the employer's compliance with commitments to their foreign national workers.[233] Once the work permit applications are approved, the workers plan their trips to Canada. For workers heading to Ontario and Quebec, FARM or FERME may assist the country of origin governments arranging travel logistics.

***Canada Border Service Agency screening at port of entry***

The Canada Border Service Agency (CBSA) reviews the incoming SAWP workers at the Canadian port of entry (airport). Workers present their work permit approval and the border officer reviews admissibility requirements.[234] If met, the officer will provide the actual work permit and grant entry to Canada. As with workers entering under the TFWP, SAWP workers will also receive a know your rights package from CBSA upon admission into Canada.[235] The work permit authorizes the SAWP worker for the specific employer indicated. The employer may choose to transfer the worker to a different employer as long as the worker consents and there is prior written approval from both the foreign government's representative in Canada and prior written approval from ESDC.[236]

## LACK OF PORTABLE JUSTICE

As with temporary foreign work programs in the United States, Canada has no established mechanism for workers to enforce their rights or denounce abuses when they return home as the terms of their visa require after the work period ends. The institutional framework of the SAWP program in particular raises access to justice issues. Under SAWP contracts, both the liaison agent of the foreign government and the Canadian government are supposed to guarantee full protection of these worker's rights. However, the contract does not specify the obligations of either. Furthermore, because of the provincial governments have jurisdiction over labour law and employment contract enforcement, neither has the capacity to in fact enforce the workers' rights.

Still with respect to both TFWP and SAWP, lawyers who represent temporary foreign workers attempt to continue representation when the job ends and workers return home. However, there are challenges to this effort. First and foremost, because provincial law in Canada sets out labor protections, each province has different procedures. There is no standard across Canada in terms of what may be required on a claimant or worker asserting his rights in court while the case is pending. Second, there is no special visa or immigration relief available for workers who want to return to Canada to participate in negotiations or testify at their evidentiary hearings.

---

[232] Participating Caribbean governments will reimburse employers for the workers' work permit fees within 30 days of the workers arriving in Canada. See ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#fees (last accessed March 2015).
[233] Operational Bulletin 275-C, at 1.2.
[234] Operational Bulletin 275-C, at 1.3
[235] Overhaul, *supra* note 143, at 25.
[236] CIC does not charge a new work permit fees when the worker transfers to a new employer. For SAWP workers from Caribbean nations, the employer and worker must both sign a transfer contract. For Mexican workers, a new contract is not required. See ESDC website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml (last accessed March 2015).

Workers would have to apply for a visitor visa from CIC at the Canadian consulates in their countries of origin. It is difficult for workers to navigate this process on their own and difficult for their lawyers to navigate the process remotely from Canada.[237]

## SUMMARY – CANADA

### Information Regarding Recruiters

There is no federal recruiter license or registry in Canada. There are no rules about who may be a recruiter. Several of the provinces, such as Manitoba, Ontario, Nova Scotia and Saskatchewan either require licensing or maintain a recruiter registry and have provincial rules about who may be a recruiter. However, none of them explicitly reach foreign recruiters. EDSC requests the name of third party recruiters on Schedule A, but does not publish that information and it is unclear whether the forms are maintained in a way that could be easily requested. The Canadian embassy and consulates abroad, may have information on foreign recruiters if they inquire about it on a case-by-case basis, but there are no rules about it.[238]

### Employer Public Information

Information on employers who hire foreign workers through SAWP and TFWP is not available. ESDC requires an LMIA for all employers under both of these programs as a prerequisite but does not make either the LMIA requests or their approvals public.

### Disclosure of Job Terms

MOUs creating the SAWP program do not require written disclosure of job terms at the moment of recruitment. The MOUs do dictate, however, that SAWP workers must be provided with an employment contract at least by the first date they begin to work. Canadian federal agencies in charge of the TFWP require an employment contract signed by the employer to process both the labor market impact assessment and the work permit. There are no set requirements, however, mandating that workers receive a written disclosure of job terms at the moment the job is offered during recruitment in their countries of origin. There is a process under SAWP for workers to transfer between employers, however, there is no such process under the TFWP.[239]

### Worker Fees and Travel Costs

Temporary foreign workers should not pay any recruitment fees under either SAWP or TFWP. Responsibility for worker fees and travel costs depends on the program. Under SAWP, employers must pay the $155 for the work permit. Employers may recover these fees through payroll deductions from Mexican workers, but not from Caribbean workers.[240] Under TFWP, workers may

---

[237] Interview with Canadian lawyer who tried to help her client apply for a visa in Guatemala (August 2014).
[238] Indeed, Canadian advocates report that they have not heard of CIC officials inquiring about recruiters during the work permit application process. Author interviews (March 2015).
[239] See IRPA§§ 124(1)(c) and 125, see also ESDC website ("Employers cannot informally transfer TFWs from one employer to another or share them between employers."), available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml (last accessed March 2015).
[240] Participating Caribbean governments will reimburse employers for the workers' work permit fees within 30 days of the workers arriving in Canada. See ESCD website, available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#fees (last accessed March 2015).

be required to pay for the work permit application, medical exam, and for their own personal passports.

Under SAWP, employers must make the arrangements for round-trip travel from the workers' countries of origin to Canada and back again.[241] However, employers may recover a portion of those costs through payroll deductions once the workers begin work. The only exception is workers who go to British Columbia. BC has a provincial law prohibiting employers from recouping any travel costs. Under the TFWP, employers must pay for all round trip travel expenses and may not recoup them from the workers pay at any time.

[241] ESDC website available at http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml#fees (last accessed March 2015).

## CONCLUSION & OPPORTUNITIES FOR IMPROVEMENT

The structure of temporary work visa systems has permitted worker abuse that begins during the recruitment process in migrants' countries of origin. Vulnerability to exploitation is aggravated by the total lack of transparency inherent in the design of these programs. The fact that neither the United States nor Canada regulates international recruitment allows this reality to continue.

On a federal level, both the United States and Canada should enact laws or promulgate regulations to improve these temporary foreign worker programs to reduce the rampant fraud and abuse endemic to the foreign recruitment process. The following recommendations should be considered:

1. All foreign recruiter information should be collected in the countries of employment, and made public. Workers and foreign governments need to know that recruiters hiring in the countries of origin are actually connected with or working for a U.S. or Canadian employer that has been approved by their respective governments to hire foreign workers. On a federal level, both the United States and Canada should enact laws or promulgate regulations requiring employers who initiate the hiring process to reveal every link in the recruiter chain, including any staffing agency, labor contractor, subcontractor, recruitment agency, or individual recruiter who may be in contact with potential workers to advertise or offer a job.

2. This recruiter information should be publically available worldwide and searchable by both the employer's name and location, as well as every link in the recruiter chain (including businesses and individuals) who may be operating in the migrants' countries of origin. The information should clearly delineate which recruiters are authorized by which employers to locate foreign workers and offer them jobs, and where. This information should be available via a publicly accessible website and should be updated in real time and in the various pertinent languages.

3. U.S. and Canadian federal agencies charged with protecting the domestic labor force already have an abundant amount of information on employers who are seeking temporary foreign workers. USDOLS should upload H-2A and H-2B temporary employment certifications to iCert in a timely fashion. DHS should upload to a publically accessible website all approved I-129 petitions or I-797 Notice of Action, which show the employer's name, the number of workers authorized, and the country of origin where they will be recruited. Likewise, in Canada, ESDC should post information pertaining to all employers who receive positive LMIA results and are approved to hire temporary foreign workers under both the SAWP and TFWP programs.

4. Both the United States and Canada should – at the federal level - prohibit employers and recruiters from passing any costs associated with the program through to the workers. Even though all of these programs have recruitment fee bans in place, cases have shown that workers are still paying fees. It is too simple to disguise a recruitment fee as a program cost.

The failure to require an itemization of every cost incurred by the worker, and the failure to robustly enforce these rules renders them meaningless. All costs – including transportation costs and visa application fees – should be incurred in the first instance by employers.

5. Both the United States and Canada should – at the federal level – require employers to provide to all prospective workers, at the time of their recruitment, a detailed job offer disclosing all terms and conditions of the job, in writing and in a language understood by the worker. The countries of employment should clarify that upon acceptance of this offer, the written disclosure should become a binding employment contract enforceable in any court or tribunal with jurisdiction under local or foreign law.

6. U.S. and Canadian laws prohibiting discrimination in hiring should be amended so that they expressly apply to employers and recruiters who recruit workers on foreign soil for temporary jobs in the U.S. and Canada.

7. U.S. and Canadian Embassies and consular posts should encourage workers to come forward and report recruitment fraud and abuse, and protect those workers from retaliation. Workers who pay unlawful costs during the recruitment process should not be afraid of telling the truth. Workers who disclose that fact during the visa application (U.S.) or work permit (Canada) process should not be denied a visa, but rather should receive visas to work for another suitable employer. If workers are at risk of losing their right to work, after they have incurred expense, they will be easily persuaded to cover up any illegality on the part of the recruiter or employer – this should not be encouraged.

8. U.S. and Canadian Embassies and consular posts should have personnel available to receive and process complaints from workers about labor conditions under either of the H-2 visa programs, SAWP and TFWP. These officials should have clear direction from either the federal (as in the United States) or provincial (as in Canada) labor standards enforcement agency as to how to manage these complaints. There are networks of lawyers in both the United States and Canada who are available to provide advice to workers who have questions about their labor rights being violated. All government stakeholders should work together to fill gaps in the access to justice system so that no one turns a blind eye and unwittingly encourages recruitment abuse.

9. U.S. and Canadian Embassies and consular posts should be available to support the logistics when temporary workers return to their countries of origin but have pending legal claims in either the U.S. or Canada. There are obligations during both civil litigation and administrative actions that require the personal participation of the temporary foreign worker, who may be unable to travel back to the U.S. or Canada due to the burdens of cost or the unavailability of immigration relief. For example, U.S. and Canadian diplomats should work with the workers' advocates to make their consular post meeting rooms and video-conference facilities available at low-or-no cost for remote depositions and evidentiary hearings which require the worker to provide testimony.


For more information or to obtain additional copies:

Global Workers Justice Alliance
789 Washington Avenue
Brooklyn, NY 11238
+1 (646) 351 – 1160

info@globalworkers.org

www.globalworkers.org

Find us on: