

# ARTICLES

## EGALITARIANISM AND EXCLUSION: U.S. GUEST WORKER PROGRAMS AND A NON-SUBORDINATION APPROACH TO THE LABOR-BASED ADMISSION OF NONPROFESSIONAL FOREIGN NATIONALS

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### ABSTRACT

Comprehensive immigration reform has been a top legislative priority for the last several years, and recent bills have contemplated the expansion of guest worker programs to adjust the status of undocumented immigrants and to control the future migrant flow. While there is a broad consensus that the current immigration system is broken, there is sharp disagreement about whether it is wise public policy to expand labor-based admissions in order to provide nonprofessional foreign nationals with an authorized means to migrate. This Article contributes to this debate by examining current guest worker programs, and recommends their reform through a “non-subordination” approach that balances the interests of nonprofessional foreign nationals and U.S. workers. Analyzing the current work visa programs, this Article determines that there exist worker disincentives to complain about or to leave exploitative workplaces, illusory visa-based rights and exemptions from and under-enforcement of key workplace protections, and caps and other limitations on guest worker programs that do not approach the migration demand,

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resulting in increased unauthorized migration and the expansion of the underground economy. These conditions create formal and informal systems of inequality that subordinate guest workers in the workplace, and fail to provide a meaningful avenue to engage in authorized migration. Small and restricted guest worker programs also harm nonprofessional U.S. workers, who cannot compete with a captive guest workforce or undocumented workers in the underground economy.

This Article proposes a “non-subordination” approach to labor-based admissions that would reduce the centrality of individual employers in guest workers’ recruitment and authorized presence in the U.S., equalize the workplace rights of nonprofessional foreign nationals with U.S. workers, expand authorized admissions, and permit the circular migration and the eventual permanent settlement of visa holders. This approach would balance the nonprofessional foreign national interests in authorized migration and in equality in the workplace, and the nonprofessional U.S. worker interests in controlling the migrant flow and in preserving workplace standards. Finally, this approach would not be objectionable to employers, who could employ foreign nationals with reduced government restriction and delay. This Article concludes that while this approach would better control the migrant flow and preserve workplace standards, it would not fully address unauthorized migration, which would require a shift in foreign policy to address global inequality.

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#### INTRODUCTION

Foreign nationals have fulfilled the United States' shifting demand for temporary labor for over sixty years. There are over a million visas issued to foreign nationals authorized to perform temporary or seasonal work in United States workplaces,<sup>1</sup> making the United States' temporary work-based

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1. According to the Department of Homeland Security, in fiscal year 2006 the U.S. granted nearly 400,000 J-1 visas for nonprofessional work in cultural exchange programs, over 350,000 C-1 transit visas for ship and air crew, over 430,000 H-1B visas for professional workers, about 320,000 L-1 visas for inter-company transfers of professional workers, 134,000 H-2B and H-2R visas for temporary non-agricultural workers, 46,000 H-2A visas, and several thousand A-3 and G-5 visas for

admission system not only the longest-running, but also the largest such program in the world.<sup>2</sup> Many of these visas call for temporary work in nonprofessional occupations inside U.S. borders, which I will call “guest worker programs,” and the holders of these visas “guest workers.”<sup>3</sup> While modest in size compared with the U.S. workforce,<sup>4</sup> guest workers labor in an increasing scope of occupations, including in agriculture, forestry, domestic work, hotels and resorts, landscaping, seafood processing, and on cruise liners.<sup>5</sup>

Guest worker programs have recently received attention as a potential solution to control unauthorized migration.<sup>6</sup> There are approximately eleven million unauthorized immigrants in the United States, over five million of whom are undocumented workers in nonprofessional occupations,<sup>7</sup> and around 750,000 unauthorized migrants enter the U.S. per year, many of whom are low-skilled workers.<sup>8</sup> Congress, with support from the White

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domestic workers for domestic servants of diplomats, consular officers, and other staff of international organizations. See U.S. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2006 TEMPORARY ADMISSIONS (NONIMMIGRANTS) 2007 available at <http://www.dhs.gov/ximgtn/statistics/publications/YrBk06NI.shtm> (last visited September 17, 2007) [hereinafter DHS NONIMMIGRANT STATISTICS]. For the J-1 visa, in 2004 there were about 89,500 summer work travel and trainee exchange visitors, U.S. GEN. ACCOUNTING OFFICE, STRONGER ACTION NEEDED TO IMPROVE OVERSIGHT AND ASSESS RISKS OF THE SUMMER WORK TRAVEL AND TRAINEE CATEGORIES OF THE EXCHANGE VISITOR PROGRAM 3 (2005) [hereinafter GAO, J-1 REPORT], and over 15,000 au pairs. See Sue Shellenbarger, *Number of Au Pairs in U.S. Jumps 37% After Rules Change*, CHICAGO SUN-TIMES, Feb. 13, 2005, at 8.

2. GLOBAL COMM'N ON INT'L MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 83 (2005), available at <http://www.gcim.org/en/finalreport.html> [hereinafter GCIM REPORT].

3. Typically, the term “guest worker” applies only to holders of H-2A or H-2B visas. See Andorra Bruno, *Immigration: Policy Considerations Related to Guest Worker Programs*, CONG. RESEARCH SERVICE 1 (2006). For the purposes of this Article, I employ the term “guest worker” to mean all foreign nationals granted a nonimmigrant visa to perform nonprofessional labor in workplaces inside U.S. borders. This definition excludes both professional workers and C/D visa holders who work on ship or air crew.

4. There are nearly 150 million people in the U.S. workforce. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, THE EMPLOYMENT SITUATION: DECEMBER 2006 3, available at <http://www.bls.gov/news.release/pdf/empst.pdf>.

5. See, e.g., Julia Malone, *Immigration*, ATLANTA JOURNAL-CONSTITUTION, May 24, 2006, at 1C (describing many H-2A and H-2B workers used in agriculture, seafood processing, landscaping, and forestry industries); David A. Faherthold, *Seafood Plants Lack Shuckers: Processors Want Limits on Immigrant Workers Raised*, WASH. POST, Jan. 12, 2005, at B2 (describing how 90% of Maryland crab meat is picked by H-2B workers); Douglas Hanks, *Tourism Industry Looking Abroad for Workers*, MIAMI HERALD, Mar. 1, 2007, at A1 (noting that Florida hotels increasingly use H-2B and J-1 student visas); Paige St. John, *Foreign Workers Stuck in Worst U.S. Jobs*, THE NEWS-PRESS (Fort Myers, FL), Feb. 16, 2004, at 3A (reporting that large numbers of C and D visa holders are employed on cruise liners).

6. This article uses the terms “unauthorized immigrant” or “unauthorized migrant” to refer to all foreign nationals who reside in the U.S. without any official immigration status, and “undocumented workers” to refer to immigrants who perform unauthorized work.

7. PEW HISPANIC CENTER: THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S., Mar. 7, 2006, at i, 10-11 available at <http://pewhispanic.org/files/reports/61.pdf> (noting that about three fourths of the approximately 7.2 million undocumented workers work in low-skill occupations).

8. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, PEW HISPANIC CENTER 2 (2005); Jeffrey S. Passel and Roberto Suro, *Rise, Peak and Decline: Trends in U.S. Immigration 1992-2004*, PEW HISPANIC CENTER (2007), available at <http://pewhispanic.org/reports/report.php?ReportID=53>.

House,<sup>9</sup> has considered legislation that would expand guest worker programs to control migration and address the presence of undocumented workers.<sup>10</sup>

Arguments in the debate on whether to expand guest worker programs implicate the welfare of nonprofessional foreign nationals and U.S. workers, whose interests are seen as divergent. Commentators in favor of expanding guest worker programs argue that they would provide needed opportunities for nonprofessional foreign national workers to engage in authorized migration, and provide a needed supply of nonprofessional workers to U.S. employers under more humane working conditions than undocumented work offers.<sup>11</sup> Critics of guest worker programs, on the other hand, see their expansion as formalizing a two-tier labor force in which guest workers labor under extraordinarily exploitative conditions,<sup>12</sup> and as jeopardizing the livelihoods of nonprofessional U.S. workers who cannot compete with the wages and work conditions that foreign nationals are willing to accept.<sup>13</sup> Organized labor, the primary voice of U.S. nonprofessional workers in national legislative initiatives, and which over the past decade has increasingly embraced foreign born workers, has historically opposed guest worker programs,<sup>14</sup> and is conflicted over whether an acceptable legislative compro-

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9. See THE WHITE HOUSE, FACT SHEET: FAIR AND SECURE IMMIGRATION REFORM (2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-1> (proposing a guest worker program as “[a] more compassionate system—to protect all workers in America with labor laws, the right to change jobs, fair wages, and a healthy work environment.”).

10. For example, the Agricultural Job Opportunity, Benefits, and Security Act of 2003 (H.R. 3142/S. 1645, 108th Cong. (2003) (“AgJobs”)), and the Secure America and Orderly Immigration Act of 2006 (S. 1033/H.R. 2330, 109th Cong. (2005) (“McCain-Kennedy”)), would have expanded guest worker programs to adjust the status of currently undocumented workers and to provide an authorized means for nonprofessional workers to temporarily work in the U.S. See AgJobs § 101(a)(1) (conferring temporary resident status to any agricultural worker who could establish 575 hours or 100 days of agricultural employment in the U.S.); McCain-Kennedy §§ 218A(a)-(c) (creating H-5A temporary worker visa for newly arrived unauthorized migrants). While AgJobs and McCain-Kennedy did not become law, they have shifted the discourse to situate guest worker programs as a central element in proposals for comprehensive immigration reform. See, e.g., S. 1348, 110th Cong. (2007) (proposing H-2C guest worker visas).

11. Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1190-98 (1997) [hereinafter Chang, *Liberalized Immigration*]; MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICA’S FUTURE: A NEW CHAPTER, 31-41, 64-67 (2006) [hereinafter MPI, IMMIGRATION AND AMERICA’S FUTURE] (recommending expansion of work-based immigration through temporary and “provisional” visas, and safeguards for workers, including charging employers fees for guest worker applications, allowing guest workers to change jobs, and establishing the same workplace rights for U.S. and guest workers).

12. SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2007), available in <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>; Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers As A Centerpiece of Immigration Reform*, 10 N.Y.U.J. LEG. & PUB. POLICY (forthcoming Oct. 2007); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575 (2001).

13. See AFL-CIO EXECUTIVE COUNCIL STATEMENT (2006), available at <http://www.aflcio.org/aboutus/thisistheafcio/ecouncil/ec02272006e.cfm> (“To embrace . . . the creation of a permanent two-tier workforce, with non-U.S. workers relegated to second-class “guestworker” status, would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.”).

14. LEAH HAUS, UNIONS, IMMIGRATION, AND INTERNATIONALIZATION: NEW CHALLENGES AND CHANGING COALITIONS IN THE UNITED STATES AND FRANCE 101-3 (2002).

mise can include a guest work expansion.<sup>15</sup>

The current political stalemate on comprehensive immigration reform highlights the tension between U.S. workers and foreign nationals on how to control the migrant flow of nonprofessional foreign nationals to the U.S. This Article contributes to this debate by examining the extent to which current guest worker programs satisfy the interests of nonprofessional foreign nationals and U.S. workers, and by recommending measures that would balance their interests in a labor-based admissions program to regulate the migrant flow. This Article will draw upon the laws and regulations of temporary work-based visas and decisional law grappling with the application of workplace protections to guest workers, to identify areas in which current programs violate the core interests of nonprofessional foreign national and U.S. workers. This Article will then recommend a “non-subordination” approach that balances the interests of foreign-born and U.S. nonprofessional workers in U.S. work-based admission programs. Any approach developed from a study of current guest worker programs in the U.S. is limited in its ability to predict the impact of a large work-based visa expansion, because these programs are relatively small and operate in few sectors. Furthermore, this Article will not address critical immigration issues raised in recent legislative proposals, including temporary visas for foreign professional workers, family reunification, and humanitarian immigration programs. Nevertheless, an examination of U.S. guest worker laws and regulations offers important insights for whether and how the interests of nonprofessional foreign nationals and U.S. workers might be balanced through a work-based admission program.

This Article shall proceed as follows: Part I will introduce the primary interests of nonprofessional U.S. workers and foreign nationals in immigration reform, which this Article will label “liberty,” “equality,” and “sovereignty,” discuss scholarship that has developed frameworks to address the tension between foreign national and U.S. nonprofessional workers, and map what I term a “non-subordination” approach to balance these interests. Part II will provide a summary of the major visa programs for nonprofessional workers and of the governmental agencies that regulate them. Part III will evaluate guest worker programs, thematically presented as employer central-

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15. The AFL-CIO opposed the proposal for an expanded guest worker program contained in McCain-Kennedy, and supported AgJobs, while some of the largest member unions of the Change to Win labor coalition backed McCain-Kennedy. See Steven Greenhouse, *Unions Back New Immigration Policy*, N.Y. TIMES, March 1, 2006, at A3 (reporting that the AFL-CIO proposed increasing permanent resident work visas instead of guest worker program visas, stating that “admitting workers with . . . green cards, was fairer than admitting guest workers who are often treated like second-class workers.”); Sergio Bustos, *Bill Would Give Legal Status to Undocumented Farm Workers*, Gannett News Service, Feb. 11, 2005; U.S. FED. NEWS, *Business Leaders Applaud Sens. McCain-Kennedy Plan to Fix Our Broken Immigration System*, Oct. 18, 2005 (listing Service Employees International Union, UNITE-HERE, and United Farm Workers as among the supporters of McCain-Kennedy). For an overview of organized labor’s increasing support for immigration expansion, see HAUS, *supra* note 14, at 73-103.

ity in the programs, gaps in the workplace rights of guest workers, and immigration restrictions and exclusionary measures. Part IV will propose a non-subordination approach to balance the core liberty, sovereignty, and equality interests of nonprofessional foreign nationals and U.S. workers. Part V will raise and address a critique of this approach from the view of U.S. employers. I will conclude with a critique centering foreign nationals outside the U.S. and undocumented workers that implies that it is impossible to fully reconcile the tensions between foreign nationals and U.S. workers without contemplating broader U.S. foreign policy measures to address global inequality.

#### I. THE LIBERTY, SOVEREIGNTY, AND EQUALITY INTERESTS OF U.S. AND FOREIGN WORKERS, AND A NON-SUBORDINATION APPROACH

This section discusses the worker-centered concerns raised in proposals to expand authorized migration generally, and guest worker programs in particular. In this section I introduce the labels “liberty,” to describe the interest of foreign nationals in the freedom of movement, “equality” to identify the interest of nonprofessional foreign nationals in equality in the U.S. workplace, and “sovereignty” to describe the concern of nonprofessional U.S. workers that immigration depresses workplace standards, causes job replacement, and erodes the rule of law. Understanding that these terms, decontextualized, could stand for a variety of positions, they are defined here to disentangle worker-centered arguments for and against labor-based admissions into separate themes, and to show how each theme resolves in a way that would violate another core interest. Lastly, this section will discuss scholarly attempts to reconcile these conflicting views, and introduce the concept of a “non-subordination” approach.

##### A. *Nonprofessional Foreign Nationals*

###### 1. *Liberty*

“Liberty” stands for the interests of foreign nationals in the freedom of movement.<sup>16</sup> Foreign nationals outside the U.S. seek the free movement across territorial borders, to travel, for job opportunities, for learning experiences, to reunite with family, and to escape political persecution, humanitarian crises and poverty. Work authorized foreign nationals seek the freedom to return home and engage in circular migration, and to permanently settle with their families in the place of their choosing. Undocumented workers already in the U.S. seek all of these freedoms, and to do so without risking arrest,

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16. Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND MONEY* 25 (Brian Barry & Robert E. Goodin, eds., 1992).

detention and deportation. A liberty-based critique of U.S. immigration policy would view an “open borders” system – in which citizenship is not fixed to territorial boundaries or to a particular nation-state – as the ideal.

This liberty view is dissatisfying because it fails to acknowledge how boundaries are a necessary condition to establish egalitarian principles within the bounded community.<sup>17</sup> It does not address legitimate concerns that an unrestricted influx of nonprofessional foreign nationals would increase joblessness and lower workplace standards for those nonprofessional workers already within the U.S.<sup>18</sup>

In the alternative, a foreign national might argue that guest worker programs, while less desirable than permanent migration, are a “second-best” policy to advance the liberty interests of foreign nationals that is preferable to complete exclusion from the U.S. or unauthorized migration.<sup>19</sup> Yet, a guest worker program can restrict foreign nationals in ways that sacrifice key liberty interests, such as temporarily returning to the sending country to visit one’s family, and leaving an exploitative job. Further, to the extent that guest worker programs create a vulnerable sub-class of workers who work in particular industries, these programs raise the concern that guest workers depress workplace standards in these industries.<sup>20</sup>

## 2. Equality

An equality view of foreign nationals inside the U.S., both authorized and unauthorized, asserts that the right to formal equality in the workplace exists irrespective of immigration status.<sup>21</sup> In Advisory Opinion OC-18, issued in 2003 by the Inter-American Court of Human Rights, the court considered whether the denial of domestic law rights to undocumented workers violates international law.<sup>22</sup> The court held that “the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*[, or a norm that cannot be violated by any state].”<sup>23</sup> Countries “may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be,

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17. *Id.* at 25; DANIEL TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 288-89 (2002); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31 (1983); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 95 (1980).

18. TICHENOR, *supra* note 17, at 296; ACKERMAN, *supra* note 17, at 93-95.

19. See Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 775 (2003) [hereinafter Chang, *The Immigration Paradox*].

20. GCIM REPORT, *supra* note 2, at 33-34; Philip L. Martin, *GATS, Migration, and Labor Standards*, INT’L INST. LABOUR STUDIES, DP/165/2006 (2006).

21. Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers*, Advisory Opinion OC-18/03, 99 AM. J. INT’L L. 460, 463 (2005).

22. Although Advisory Opinion OC-18 came at the request of Mexico, which did not explain why it sought the ruling, the request came a month and a half after the Supreme Court issued *Hoffman Plastic Compounds Inc., v. Nat’l Labor Relations Bd.*, 535 U.S. 137 (2002), and is generally considered to be a response to that decision. See Cleveland, *supra* note 21, at 460.

23. 2003 ANNUAL REPORT OF THE INTER-AMERICAN COURT ¶ 425, available at <http://www.cidh.org/annualrep/2003eng/chap3k.htm#Advisory>.



including those of a migratory character."<sup>24</sup>

International law thus directs on equality grounds that nations extend to transnational migrants the same workplace rights enjoyed by nationals, and an equal ability to petition courts and government agencies to vindicate these rights. However, Advisory Opinion OC-18 does not address two questions by those who would seek to internalize this equality norm in U.S. domestic law. First is whether alienage discrimination is really akin to other forms of social subordination. As Linda Bosniak writes, while a legal disability imposed as a condition of entrance "shares some characteristics with other forms of social subordination. . . [it is] an instance of constitutive boundary maintenance, a necessary condition for preservation of the community *within which* the struggle against social subordination takes place."<sup>25</sup> Immigration restrictions are not always illegitimate, even if they have the effect of subordinating transnational workers, if they are necessary to combat other forms of social subordination. For example, guest worker programs encounter objections that they disadvantage "second class" citizens, such as racial minorities, for whom international labor competition threatens the ability to achieve equality in the workplace.<sup>26</sup> Thus, some immigration restrictions may not only be consistent with egalitarianism, but may be in fact required to preserve it.

Secondly, the equality principle only applies to migrants *inside* the territorial borders of the nation-state. From a global perspective, it seems arbitrary that some foreign nationals who obey immigration law can suffer total exclusion, while others who engage in unauthorized migration enjoy equal rights. One might respond that transnational migrants inside the U.S. have a greater stake to equality because they are members of the community, and that formal inequalities inside U.S. workplaces threaten egalitarianism more than general policies of exclusion.<sup>27</sup> However, one might imagine a situation in which the excluded foreign national has a greater stake in joining the polity than the unauthorized migrant inside the U.S., and yet suffers a greater harm.<sup>28</sup>

### B. *Nonprofessional U.S. Workers*

The term "sovereignty" is deployed here to represent the interests of nonprofessional U.S. workers in self-preservation.<sup>29</sup> In the sovereignty view, U.S. immigration policy should primarily advance the existing U.S. polity,

24. *Id.*

25. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 11 (Princeton 2006).

26. *Id.* at 113, 118-19.

27. WALZER *supra* note 17, at 33.

28. *Id.* at 48.

29. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 11 (Princeton 2004) (discussing how sovereignty is "the nation's self-proclaimed, absolute right to determine its own membership, a right believed to inhere in the nation-state's very existence, in its 'right of self-preservation'").

which for nonprofessional U.S. workers would entail deterring unauthorized migration and limiting authorized migration to maintain a high demand for U.S. workers.<sup>30</sup> In industries such as agriculture and forestry, where guest workers and undocumented workers are hired at minimal wages, nonprofessional U.S. workers credibly claim that guest worker recruitment has suppressed workplace standards.<sup>31</sup> In this view, nonprofessional U.S. workers would benefit from the elimination of guest worker programs, or by their limitation to workplaces with a true labor demand that cannot be satisfied by U.S. workers.<sup>32</sup>

A sovereignty view that would rely on exclusion to preserve workplace standards in low-skill occupations fails to acknowledge that the U.S. has a long-term need for nonprofessional foreign nationals to supplement the domestic workforce and to support an aging population. New immigrants accounted for half of the labor force growth in the U.S. during the 1990's.<sup>33</sup> Between 2000 and 2020, the native-born population aged 25 to 54 is expected to remain flat, while the number of older residents is predicted to nearly double in size.<sup>34</sup> Though some of the workers needed to close this gap must be professional, many are nonprofessional.<sup>35</sup> Moreover, while the migration of nonprofessional foreign nationals may have lowered wages modestly in some specific occupations and regional labor markets,<sup>36</sup> nonpro-

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30. See WALZER, *supra* note 17, at 63.

31. See Rebecca Boone, *Migrant Workers Claim Idaho Company Violated Wage and Safety Laws*, ASSOCIATED PRESS, Apr. 15, 2005 (quoting former owner of forestry firm sued for owed back wages who acknowledged "a great deal of misuse" by firms of guest workers, and that firms "all call the same agencies to get the same guidelines that we follow"); Leah Beth Ward, *Desperate Harvest*, CHARLOTTE OBSERVER (N.C.), at 1A (Oct. 31, 1999) [hereinafter Ward, *Desperate Harvest*]; Ned Glascock, *Foreign Labor on Home Soil*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 29, 1999, at 1A (discussing the North Carolina Grower's Association, which grossed five million dollars in 1999 for recruiting and assembling H-2A workforces for growers); Tom Knudson, *Contractors Rip Rivals for Pineros' Plight: A U.S. Senate Panel Takes Up Wage and Safety Issues Today*, SACRAMENTO BEE, Mar. 1, 2006, at A1 (quoting two forestry firms citing "a few bad actors" as the reason why they are unable to compete). See generally Vanessa Casanova and Josh McDaniel, "No Sobra Y No Falta": *Recruitment Networks and Guest Workers in Southeastern U.S. Forest Industries*, 34 URBAN ANTHROPOLOGY AND STUDIES OF CULTURAL SYS. AND WORLD ECON. DEV'T 45 (2005) (discussing preference by employees in Alabama forestry industry for H-2B workers over U.S. nationals).

32. See Kimi Jackson, *Farmworkers, Nonimmigration Policy Involuntary Servitude, and a Look at The Shepherding Industry*, 77 CHI.-KENT. L. REV. 1271, 1299-1300 (2000); Lorenzo A. Alvarado, Comment, *A Lesson from My Grandfather, The Bracero*, 22 CHICANO-LATINO L. REV. 55, 73 (2001).

33. ANDREW SUM ET AL., IMMIGRANT WORKERS AND THE GREAT JOB MACHINE: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO NATIONAL AND REGIONAL LABOR FORCE GROWTH IN THE 1990's 16 (2002).

34. DAVID ELLWOOD, THE ASPEN INSTITUTE DOMESTIC STRATEGY GROUP, "HOW WE GOT HERE," IN GROW FASTER TOGETHER. OR GROW SLOWLY APART (2002); DAVID DIXON, AMERICA'S EMIGRANTS: U.S. RETIREMENT MIGRATION TO PANAMA AND MEXICO (2006), cited in MPI, IMMIGRATION AND AMERICA'S FUTURE, *supra* note 11, at 3-4.

35. LOWELL, GELATT, AND BATALOVA, MIGRATION POLICY INSTITUTE, IMMIGRANTS AND LABOR FORCE TRENDS: THE FUTURE, PAST, AND PRESENT (2006), cited in MPI, IMMIGRATION AND AMERICA'S FUTURE, *supra* note 11, at 6 (noting that eleven of the fifteen occupations that will require an influx of labor require less than a bachelor's degree).

36. See ANDREW SUM ET AL., *supra* note 33, at 29; John M. Broder, *Immigrants and the Economics of Hard Work*, N.Y. TIMES, Apr. 2, 2006, (Week in Review), at 3.

fessional U.S. workers as a whole appear not to have lost job prospects or wages due to immigration.<sup>37</sup> Thus, the migration of nonprofessional foreign nationals is overall a benefit to U.S. workers that requires effective regulation to protect vulnerable U.S. workers, rather than a problem that can be “fixed” by exclusion.

The sovereignty view is further problematic in that by assuming the validity of restrictions on foreign nationals in the U.S., the sovereignty view does not address whether there are some rights that inhere to physical presence in order to preserve egalitarian ideals,<sup>38</sup> and does not give respect to the special relationships that some countries have with the U.S. based on social, political, and economic ties.<sup>39</sup> Sovereignty can also be animated by an illiberal tendency to exclude those seen as different.<sup>40</sup> Thus, legitimate concerns regarding the preservation of the polity can be conflated with nationalist opposition to immigration based on racial or ethnic preference.<sup>41</sup>

### C. Existing Scholarship and A Non-Subordination Approach

Recognizing the tensions between nonprofessional U.S. and foreign national workers in immigration law and policy, immigration scholars Howard Chang and Jennifer Gordon have developed frameworks to balance the interests of U.S. and foreign workers in proposing work-based immigration arrangements. Howard Chang proposes a Pareto principle that would admit aliens and extend workplace rights to foreign nationals in a manner that maximizes utility for one class of workers without decreasing the utility of another.<sup>42</sup> This principle would reject an allocation of rights that attempted to advance one group through the subordination of another group.<sup>43</sup> In this

37. See Giovanni Peri, IMMIGRANTS' COMPLEMENTARITIES AND NATIVE WAGES: EVIDENCE FROM CALIFORNIA 18-19 (2006), available at [http://www.econ.ucdavis.edu/faculty/gperi/Papers/california\\_wp\\_dec06.pdf](http://www.econ.ucdavis.edu/faculty/gperi/Papers/california_wp_dec06.pdf) (examining wage data for natives and foreign born in California between 1960 and 2004 and concluding that immigration increased wages for natives as a whole by four percent, including a slight wage increase for native high school drop-outs); Howard F. Chang, *Immigration and The Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT. L. REV. 291, 305 (2003) [hereinafter Chang, *Immigration Restrictions*] (“Studies of the effects of immigration in U.S. labor markets . . . have shown little evidence of effects on native wages or employment.”); Rakesh Kochhar, *Growth in the Foreign Born Workforce and Employment of the Native Born*, PEW HISPANIC CENTER, 23-24 (2006), available at <http://pewhispanic.org/files/reports/69.pdf> (offering Census data that shows no relationship between the growth of nonprofessional foreign workers and the job prospects of nonprofessional U.S. workers).

38. BOSNIAK, *supra* note 25, at 124.

39. See *id.* at 10-11; MASSEY, DURAND, AND MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 145 (Russel Sage 2003).

40. NGAI, *supra* note 29, at 57-58; see generally Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 559-67 (1996).

41. Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 381-84 (2002).

42. Neoclassical economists describe an allocation of rights as “Pareto optimal” if it can make one individual better off without making any other individual worse off. See Chang, *Immigration Restrictions*, *supra* note 37, at 304-11.

43. See Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 185 (2000).

framework, exclusion is a greater harm to immigrants than inclusion is to U.S. workers, who would gain as consumers from immigrants' lower price for services.<sup>44</sup> In this model, the only disadvantages of immigration, the potential cost of social services for immigrants and the lowering of wages of U.S. workers, can be offset by excluding immigrants from government benefits and through government assistance to low-wage U.S. workers.<sup>45</sup> I will term this approach "globalist," because its framework equally applies to foreign nationals and the native born.

Chang's framework rightly asserts that the U.S. cannot be blind to global inequality and to the economic value of authorized migration. However, the use of a Pareto principle is problematic as a normative tool where there is a vastly unequal allocation of rights at the outset. As any condition of entrance is preferable to complete exclusion, a Pareto principle can justify restrictions on foreign nationals that would violate core liberty, equality, and sovereignty interests. Further, privileging the economic utility of immigration ignores non-economic interests, such as of foreign nationals in visiting family periodically in the sending country, and of U.S. workers in the uniform application of employment laws. Thus, while Chang's globalist framework has added valuable insight to the discussion of how immigration reform might advance the interests of U.S. and foreign workers, it has not adequately addressed the concerns raised in this Article.

Jennifer Gordon would balance the interests of foreign nationals in immigration and U.S. workers to decent workplace standards through a "transnational labor citizenship" framework in which foreign nationals could obtain visas by joining a transnational worker organization in the sending country, and by promising not to work for less than the minimum wage or to undermine a union contract.<sup>46</sup> In this manner, immigration status would be tied "to membership in organizations of transnational workers rather than to a particular employer, and that would provide services, benefits, and rights that cross borders just as the workers do."<sup>47</sup>

A constellation of private, worker-controlled transnational organizations to regulate the flow of migration and set minimum working conditions, if successful, would satisfy the foreign national interest in authorized migration and the U.S. worker interest in a means to prevent migration from depressing workplace standards. Nonprofessional foreign nationals lack capital, skills and education, without which a nonprofessional foreign national is limited in her ability to obtain decent workplace standards, even assuming formal equality.<sup>48</sup> Transnational labor citizenship would address the lack of non-

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44. Chang, *The Immigration Paradox*, *supra* note 19, at 763-64.

45. Chang, *Liberalized Immigration*, *supra* note 11, at 1192, 1241.

46. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 564-70 (2007).

47. *Id.* at 509.

48. See Douglas S. Massey, *Do Undocumented Migrants Earn Lower Wages Than Legal Immigrants? New Evidence from Mexico*, 21 INT'L MIGRATION REV. 267 (1987) [hereinafter Massey,

professional worker bargaining power through concerted activities, a key element in preventing the subordination of nonprofessional foreign nationals in the workplace. However, for this model to work on a large scale, it would require multilateral agreements with each participating sending country, and the creation of a massive network of democratic, worker-run organizations in the U.S. and in participating sending countries.<sup>49</sup> Since these conditions are unlikely in the near future, the transnational labor citizenship model should be viewed as a long-term strategy to reconcile nonprofessional U.S. workers and foreign nationals in a worker-centered labor-based admissions policy rather than an immediate recommendation for reform.<sup>50</sup>

This Article proposes an approach, which I term “non-subordination,” that identifies how current guest worker programs violate core liberty, sovereignty, and equality interests, and recommends reforms aimed at balancing these interests. This approach draws from Chang’s and Gordon’s work a concern for how the U.S. balances the interests of foreign nationals and U.S. workers in its immigration laws. At the same time, it would make recommendations aimed at immediate reform, rather than a long-term reconfiguring of immigration policy that fully reconciles liberty, sovereignty, and equality interests. This approach acknowledges that the interests of U.S. and foreign workers cannot be fully reconciled in the short term, and would tolerate the least subordination of each group necessary to achieve their core interests.

## II. A SUMMARY OF U.S. GUEST WORKER PROGRAMS AND RELEVANT LAWS AND ADMINISTRATIVE AGENCIES

Immigration law provides for a range of full-time, nonprofessional, nonimmigrant workers in U.S. worksites,<sup>51</sup> falling under one of four categories: (1) seasonal agricultural workers, eligible for H-2A visas; (2) seasonal or other temporary non-agricultural workers through H-2B visas; (3) domestic workers, through an H-2B visa, au pairs through a J-1 visa, or servants, attendants of diplomatic, consular and other international organization personnel, who work pursuant to an A-3 or G-5 visa; and (4) cultural exchange work

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*New Evidence from Mexico*] (finding that “the low wages typical of undocumented migrants stem primarily from their background characteristics rather than their legal status”); Mary G. Powers and William Seltzer, *Occupational Status and Mobility Among Undocumented Immigrants by Gender*, INT’L MIGRATION REV., 21, at 47-48 (concluding that undocumented “women become locked into household service jobs where no mobility is likely”).

49. Gordon, *supra* note 46, at 565-70.

50. See *id.* at 570 (“I offer the transnational labor citizenship proposal in its full form even as I recognize its achievement is not currently feasible.”).

51. This definition of guest workers excludes C and D visas for air and sea crew because these employees do not work in the territorial U.S., and the F-1 visa for work authorized international students because they are not eligible to work full time.

programs for trainees, camp counselors, and summer work for international students through a J-1 visa.<sup>52</sup>

Of current nonprofessional guest worker programs, H-2A and H-2B visas are the most general, defining guest workers as “having a residence in a foreign country which [s/]he has no intention of abandoning who is coming temporarily to the United States to perform” services in agriculture or some other temporary service for which there are no available U.S. workers.<sup>53</sup> H-2A and H-2B programs are jointly administered by the Department of Labor (“DOL”), which “certifies” employer applications through its Employment and Training Administration (“ETA”),<sup>54</sup> in conjunction with the State Workforce Agency (“SWA”) in the employer’s state,<sup>55</sup> and the United States Citizenship and Immigration Services (“CIS”), which approves or denies the application and issues the visa. The DOL Wage and Hour Division (“WHD”) enforces wage and hour standards under federal law, including the wage provisions for some guest workers.

By contrast, the J-1 visa<sup>56</sup> is administered solely by the Department of State (“DOS”) pursuant to regulations governing U.S. foreign relations,<sup>57</sup> as an Exchange Visitor Program<sup>58</sup> that furthers “the foreign policy objectives of the United States.”<sup>59</sup> DOS delegates most administrative responsibilities for J-1 visas to “sponsors,” or entities (government agencies, international agencies, or private U.S. organizations) that act as intermediaries between the J-1 visa holder and the employer.<sup>60</sup> Those non-professional workers eligible for J-1 visas may participate in exchange programs as trainees, au pairs, camp counselors, and students in a summer work program.<sup>61</sup>

A-3 and G-5, the narrowest of these visas, are solely for domestic work for personnel of consular, diplomatic, or other international organizations. CIS issues A-3 and G-5 nonimmigrant visas pursuant to the INA for domestic workers of diplomatic or consular officers<sup>62</sup> and of foreign governments and international organizations<sup>63</sup> defined by the International Organizations Immunities Act,<sup>64</sup> respectively. A-3 and G-5 visas only authorize the nonimmi-

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52. 8 U.S.C. § 1101 *et seq.*; see U.S. CITIZENSHIP AND IMMIGRATION SERVICES: IMMIGRATION CLASSIFICATIONS AND VISA CATEGORIES, available at <http://www.uscis.gov/graphics/services/visas.htm> (last visited Sept. 21, 2007).

53. 8 U.S.C. § 1101(a)(15)(H).

54. See 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) (H-1B); *id.* § 214.2(h)(1)(ii)(D) (H-2B); see also DOL Employment Law Guide: Temporary Nonagricultural Workers (H-2B Visas), available at [www.dol.gov/asp/programs/guide/tnw.htm](http://www.dol.gov/asp/programs/guide/tnw.htm).

55. 20 C.F.R. § 653.501(d)(2) (H-2A); *id.* § 655.200 (H-2B).

56. 8 U.S.C. § 1101(a)(15)(J).

57. 22 C.F.R. Part 62.

58. 22 C.F.R. § 62.2.

59. 22 C.F.R. § 62.1(a).

60. *Id.* §§ 62.2, 62.3(a).

61. *Id.* §§ 62.31(a), 62.32, 62.5(c), 62.5(h)(3).

62. 8 U.S.C. § 1101(a)(15)(A)(iii).

63. *Id.* § 1101(a)(15)(G)(v).

64. 79 Cong. Ch. 652, 59 Stat. 669.

grant to work as domestic workers for the employers listed in the visa application.<sup>65</sup>

In 1986 Congress passed the Immigration Reform and Control Act ("IRCA"),<sup>66</sup> which provides for sanctions against employers who knowingly employ undocumented workers, and prohibits of the use of false documents to establish work authorization.<sup>67</sup> The Immigration and Customs Enforcement ("ICE") enforces immigration law through border control, employer sanctions, and workplace raids.

### III. A WORKER-CENTERED EVALUATION OF U.S. GUEST WORKER PROGRAMS

From the vantage point of foreign nationals and U.S. workers, guest worker programs violate core liberty, sovereignty, and equality interests. Guest worker programs are driven by the demands of individual employers, who recruit, certify, and have the sole power to hire and fire guest workers, while guest workers are generally unable to leave their employment. Employer centrality in guest work visas violate the liberty and equality interests of nonprofessional guest workers in free movement and equality in the workplace, and the sovereignty interests of nonprofessional U.S. workers in competing with a vulnerable sub-group of workers, and in deterring unauthorized migration. The workplace rights of guest workers do not satisfy the equality interest because they are easily violated and are difficult, and sometimes impossible, to enforce, and contain substantial legislative and regulatory gaps. Existing guest worker programs fail to meet liberty or sovereignty goals in free movement or in controlling migration because they are too small to offer significant opportunities for circular migration, and put in place restrictions that encourage unauthorized migration. This section will explore each of these themes, identify where core concerns are in tension, and produce outcomes at odds with each group's interests.

#### A. *Employer Centrality in Recruitment, Certification and Authorized Presence in the U.S.*

Currently, the employer is central to all guest worker programs. The employer initiates contact with the government, sponsor, and/or recruiter to solicit visas and workers, dictates the terms and conditions of the contract, terminates the guest worker at will, and determines whether to extend the work relationship. At the same time, guest workers typically undergo

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65. 8 C.F.R. § 274a.12(b)(2) (A-3), *id.* § 274a.12(b)(8) (G-5); *see also* Volume 9 of the State Department Foreign Affairs Manual ("9 FAM") 42.21N6.2(a)(3) (requiring A-3 and G-5 visa applicants to certify to the consular officer considering their application that they will not accept other employment in the U.S.).

66. Immigration Reform and Control Act of 1986, codified in 8 U.S.C. § 1324a.

67. 8 U.S.C. § 1324a. For a history of the legislative debates that resulted in the enactment of IRCA, *see* TICHENOR, *supra* note 17, at 258-67.

substantial indebtedness to work in the U.S. and cannot change their employment upon arrival in the U.S. The centrality of the employer in guest worker programs harms liberty, equality and sovereignty interests by imposing legal disabilities on guest workers that disadvantage them in the workplace, by heightening the coercive power an employer has over a nonprofessional worker not to complain about or leave an exploitative work relationship, and by creating incentives for employers to hire guest workers instead of U.S. workers.

### 1. *Employer-Centered Recruitment*

The first contact a foreign national has with a U.S. guest worker program is usually a recruiter in the sending country, who is paid by a U.S. employer to identify foreign nationals who the employer can sponsor for a guest work visa. There are few visa-based protections for guest workers prior to their arrival in the U.S. to protect them from recruitment fraud, and to regulate the recruitment and transportation fees paid by guest workers. For H-2A, H-2B, A-3, and G-5 visas - all visas discussed except for the J-1 program - there is no U.S. regulation of foreign recruiters. To the extent that the J-1 visa requires sponsors to register with DOS and to assume responsibility for the employers they contract with, the "U.S. Government Accountability Office" ("GAO") has criticized DOS for failing to provide staff to monitor compliance or to communicate its requirements to sponsors.<sup>68</sup> Moreover, the J-1 visa does not regulate the recruitment fees paid by visa holders.<sup>69</sup> Regarding transportation fees, only the H-2A visa has regulations requiring employers to reimburse guest workers for travel costs.<sup>70</sup> While the DOS Foreign Affairs Manual ("FAM") requires A-3 and G-5 employers to pay for travel expenses,<sup>71</sup> the FAM lacks the force of law; the H-2B and J-1 visas do not expressly require the reimbursement of travel costs.

Guest workers often arrive at the U.S. worksite in substantial debt due to recruitment and visa fees and costs associated with transportation from the sending country. Recruiters and labor contractors have been criticized for luring workers "with false promises of high wages and steady work,"<sup>72</sup> and for charging exorbitant fees that leave guest workers in debt before arriving at the U.S. worksite.<sup>73</sup> Upon arrival, guest workers must borrow additional

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68. GAO, J-1 REPORT, *supra* note 1, at 7.

69. *See, e.g.*, Hanks, *supra* note 5 (reporting that a J-1 hotel worker allegedly paid \$4,500 to a Korean employment firm for a one-year internship in the hotel).

70. The H-2A visa requires that employers reimburse farmworkers for transportation costs after one half of the job term is complete, 20 C.F.R. § 655.102(b)(5)(i), and for the worker's return to her home country after the work is complete. 20 C.F.R. § 655.102(b)(5)(ii).

71. 9 FAM 41.21 N6.2(d).

72. *See, e.g.*, Joe Gyan, *Immigrants Sue Hotel Owner*, THE ADVOCATE, Aug. 17, 2006, at B5 (reporting a lawsuit alleging that H-2B workers were lured by a hotel recruiters' false promises).

73. *See, e.g.*, Holley, *supra* note 12, at 296; Kevin Diaz, *Advocates Urge U.S. To Expand Guest-Worker Opportunities*, CHATTANOOGA TIMES FREE PRESS, Aug. 13, 2006, at A11 (quoting H-2B



funds to pay for living costs while waiting for their first paycheck, often at high interest rates.<sup>74</sup> This debt load pressures guest workers not to complain about substandard workplace conditions for fear of being terminated or banned from future guest work, and to increase productivity without regard for personal safety. Fatigue has been cited as a contributor to work-related accidents among guest workers in agriculture and agriculture-type occupations, where workers work long hours and are often responsible for the hours-long commute from the housing camp to remote worksites.<sup>75</sup>

There are also reports of extreme abuse during the recruitment and transportation phase of guest work, including recruiters charging exorbitant up-front fees that result in “virtual debt peonage,”<sup>76</sup> requiring guest workers to “pledge collateral in the form of a deed to their land as a condition of being hired,”<sup>77</sup> and recruiters and employers confiscating the guest worker’s visa and passport as a means to prevent the worker from leaving the worksite.<sup>78</sup>

guest worker alleging that a recruiter charged \$1,250 to select him for the position); Leslie Eaton, *Immigrants Hired After Storm Sue New Orleans Hotel Executive*, N.Y. TIMES, Aug. 17, 2006, at A1 (quoting an H-2B hotel worker who “said he borrowed \$3,000 to get the job and to pay for travel to and from the Dominican Republic”); Charles D. Thompson, Jr. and Benjamin Grob-Fitzgibbon, *Dream or Déjà Vu? The Debate Surrounding George W. Bush’s Proposed Immigration Reform*, 14 LATIN AMERICAN AND CARIBBEAN CENTER HEMISPHERE 32 (2004) (citing \$1,500 as a typical H-2A worker cost for transportation and costs).

74. See Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C.J. INT’L L. & COM. REG. 521, 522 (2002).

75. Editorial, *Indentured Servitude: Valuing Work in U.S. Forests*, SACRAMENTO BEE, Nov. 15, 2005, at B8. For example, the survivor of a van accident that killed fourteen forestry workers in Maine in 2002 recalled that the driver was speeding make up for lost wages due to inclement weather the day before. Knudson, *I Fought to Get Them Out of There, but I Couldn’t*, SACRAMENTO BEE, Nov. 15, 2005, at A10 [hereinafter Knudson, *I Fought to Get Them Out of There*].

76. Miriam Jordan and Evan Perez, *Hotelier Exploited Foreign Workers After Katrina, Suit Says*, WALL ST. J., Aug. 17, 2006, at B1 (alleging that individual H-2B worker’s expenses in reaching U.S. worksite reached as high as \$5,000). Workers who originate from sending countries that require significant air travel are especially reliant on income earned during the work term to recoup the costs of arriving in and departing the U.S. For example, H-2A workers from Thailand reported that they paid up to \$8,000 to work in the U.S. for temporary positions. Lornet Turnbull, *New State Import: Thai Farmworkers*, SEATTLE TIMES, Feb. 20, 2005, at A1.

77. *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355 Section “I”(3), 2006 U.S. Dist. LEXIS 2510, at \*5 (E.D. La Jan. 24, 2006) (H-2B forestry worker class action suit alleged that recruiters required pledging of collateral to prevent workers from leaving the U.S. before contract completed.); see also Tom Knudson, *It Was Like Slavery*, SACRAMENTO BEE, Nov. 13, 2005, at A11 [hereinafter Knudson, *It Was Like Slavery*] (reporting complaint by forestry worker that he “signed over his home” to secure a position).

78. See Nina Bernstein, *Suit to Charge That Nursery Mistreated Laborers*, N.Y. TIMES, Feb. 8, 2007, at B2 (reporting that twelve H-2B workers alleged that their employer confiscated their passports to prevent them from leaving the worksite) [hereinafter Bernstein, *Suit to Charge*]; Dana Harman, *Many ‘Guest Workers’ Vulnerable, Migrant Advocates Say; Abuse by Employers, Law Oversight Cited*, USA TODAY, Apr. 26, 2006, at 10A (interviewing a H-2A worker who reported that the employer confiscated his visa and passport); HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES, VOL. 13:2 13 (2001) [hereinafter HUMAN RIGHTS WATCH, HIDDEN IN THE HOME] (reviewing forty-three cases of employment relationships involving migrant domestic workers showed that nineteen or nearly half reported that their employers confiscated their passports, and in three others the employers initially took their passports and then agreed to return them).

These guest workers labor in circumstances that may approach or meet the legal definition of involuntary servitude.<sup>79</sup>

Lacking visa-based protections from pre-arrival costs, H-2B, A-3, G-5, and J-1 visa holders seeking reimbursement for fees and travel costs depend on the Fair Labor Standards Act ("FLSA")<sup>80</sup> prohibition on deductions of wages for costs that primarily benefit the employer.<sup>81</sup> Under FLSA, fees and transportation costs known by the employer as a necessity of the work arrangement must be paid by the employer by the first pay period, which has been held by the Eleventh Circuit in *Arriaga v. Florida Pacific Farms*<sup>82</sup> to include costs and fees known by employers that the guest worker bears in arriving in the U.S.<sup>83</sup> However, DOL declines to enforce this ruling.<sup>84</sup> The lack of legislative or administrative attention to recruitment practices and transportation costs permits many employers of guest workers to maintain a workplace practice of requiring workers to incur substantial debt to pay for recruitment and visa fees and travel costs,<sup>85</sup> while many recruiters in sending countries fail to disclose those costs as a condition of guest work.<sup>86</sup>

## 2. *Lax Standards for Guest Worker Certification and Approval of Employers*

Guest worker programs have formally safeguarded U.S. workers from job replacement and depressed work standards through visa-based requirements that guest workers not perform work that could be performed by U.S.

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79. See *United States v. Kozminski*, 487 U.S. 931 (1988). The *Kozminski* Court held that peonage, defined as coercion "by threat of legal sanction to work off a debt to a master," is an example of involuntary servitude violative of the Thirteenth Amendment, observed that threatening an immigrant worker with deportation might amount to a "threat of legal coercion," and the special vulnerabilities of a person may be relevant in considering whether a type of legal coercion is sufficient to hold a person in involuntary servitude. *Id.* at 942-43, 948. Thus, a guest worker unable to leave an employment relationship under threat of deportation and who incurs large debts as a condition of the job approaches the *Kozminski* standard of involuntary servitude. See *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002) (holding that a jury could find that a restaurant owner who threatened a worker that she recruited illegally from Thailand with, *inter alia*, deportation if she attempted to leave, violated the criminal prohibition against involuntary servitude); see also Free the Slaves and Human Rights Center of the University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 54 (2005) (discussing slavery case in which grower used transportation costs to create conditions of debt peonage).

80. 29 U.S.C. § 201 *et seq.*

81. 29 C.F.R. § 531.35; see *Brennan v. Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1369 (5th Cir. 1973).

82. *Arriaga v. Florida Pacific Farms, LLP*, 305 F.3d 1228 (11th Cir. 2002).

83. *Id.* at 1241-45.

84. See, e.g., *Luna-Guerrero v. North Carolina Grower's Association*, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005) (discussing DOL's current non-enforcement of the *Arriaga* ruling).

85. See Julia Malone, *As Big New Guestworker Plan Debated, Smaller Program Prompts Controversy*, COX NEWS SERVICE, May 23, 2006 (reporting that counsel to a forestry firm advised client that it was not responsible for reimbursing H-2B workers for transportation costs).

86. Boone, *supra* note 31 (quoting the Director of Idaho Migrant Council who reported that guest workers are not told about charges and then become indebted at the time that they are expecting their first paychecks).

workers, and by prohibiting employers with past violations from participating in guest worker programs. The H-2A and H-2B programs use a certification process to determine whether U.S. workers are available for the positions, and whether the guest worker's employment would adversely affect the wages and conditions of U.S. workers.<sup>87</sup> H-2A and H-2B certification requires the employer to demonstrate the need for foreign nationals through an analysis showing a lack of an available labor pool and proof of a suitable search for U.S. workers.<sup>88</sup> The J-1 program prohibits sponsors from placing trainees in positions "which are filled or would be filled by full-time or part-time employees,"<sup>89</sup> while the A-3 and G-5 programs have no requirement prohibiting the replacement of current employees with visa holders. Only the H-2A visa program bars employers with recent past violations from certifying guest workers, although the J-1 program permits DOS to sanction sponsors of employers who violate the J-1 regulations.<sup>90</sup>

Employer certification is an inadequate means to protect U.S. workers from job replacement or wage reduction by guest workers. The burden for showing employer compliance with certification requirements rests entirely on DOL, which would require considerable resources to adequately scrutinize applications before determining whether to approve them. DOL's ETA has been criticized for failing to adequately review certification requirements. DOL's Office of Inspector General ("OIG") reported that one DOL regional office approved applications within a day or two of receipt, despite notification from the corresponding SWA of fraud by the applicants.<sup>91</sup> Moreover, DOL certification enforcement is unlikely to improve given the limited resources of SWA's and DOL's Office of Foreign Labor Certification ("OFLC"). In 1996, budget cuts reduced SWA staffing for foreign labor certification by nearly half,<sup>92</sup> and in 2005 DOL eliminated seven of OFLC's nine offices.<sup>93</sup>

Despite the shortcomings of DOL's scrutiny of employer certification applications, the H-2 certification process is preferable to the other programs, which are virtually unregulated. DOL does not monitor the J-1, A-3, or G-5

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87. 8 U.S.C. § 1182(m)(2)(A)(ii)-(iii) (H-2A); 20 C.F.R. § 655.3; 8 C.F.R. § 214.2(h)(6)(iv)(A); DEPARTMENT OF LABOR, GENERAL ADMINISTRATION LETTER ["GAL"] No. 1-95 (1994) (H-2B).

88. 20 C.F.R. §§ 653.501(e), 655B (H-2A); GAL No. 1-95(II)(B), (IV)(E)-(F) (H-2B); *see also* DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION, FIELD MEMORANDUM No. 25-98 (2005).

89. 22 C.F.R. § 62.22(d)(2)(ii).

90. Under H-2A regulations, ETA must deny an H-2A certification if the employer has violated "a material term or condition of labor certification" in the previous two years. 20 C.F.R. § 655.90(b)(2)(A). J-1 sponsors that violate DOS regulations are subject to various penalties, including a written warning, sanction, and license suspension or revocation, 22 C.F.R. §§ 62.50(a), (c), (e). There are no sanctions for employers who violate the law.

91. OFFICE OF INSPECTOR GEN., DEP'T OF LABOR, SEMI-ANNUAL REPORT TO THE CONGRESS, Vol. 53, at 21-22 (Oct. 1, 2004 - Mar. 31, 2005).

92. Testimony of John R. Hancock to the House Subcommittee on Immigration and Claims, Sept. 24, 1997 ("In the last year, budget cuts imposed on the State agencies have resulted in a reduction of staff designed for labor certification activities by 40 to 50 percent.").

93. 70 Fed. Reg. 41430 (July 19, 2005).

programs. The A-3 and G-5 programs have no certification requirement, and the GAO characterizes DOS's enforcement of the J-1 requirements as "minimal."<sup>94</sup> Different standards for permitting an employer to obtain a guest worker creates an incentive for employers to misclassify foreign nationals, from H-2A to H-2B in order to avoid the more stringent H-2A certification requirements, and from H-2B to J-1 to avoid DOL scrutiny entirely. At the same time, while safeguards for U.S. workers have focused on certification requirements, which are difficult to enforce because they require DOL to find inaccuracies in employer applications, there has been insufficient attention paid to the financial incentive to hire guest workers created by the exemption of H-2A and J-1 workers from federal taxes.<sup>95</sup>

In addition to the lack of safeguards protecting U.S. workers from replacement by guest workers, the sanctions provisions for employer violations of H-2A program requirements are not adequately enforced to meaningfully protect H-2A workers, and the other programs lack a sanctions provision for employer violations. Despite DOL's authority to sanction H-2A employers who violate the law, as one court found, "[t]he fact is, when worker's rights are violated, no one gets sanctioned."<sup>96</sup> Both the GAO and the OIG have reported that DOL had not sanctioned any employers for violating the law in the decade following the passage of IRCA.<sup>97</sup> The lack of sanctions for employers who violate visa-based regulations and employment laws has led to repeated and uncorrected abuse by unscrupulous employers in these programs. In one instance, farmworker advocates and the North Carolina Department of Labor in 2001 wrote several letters to the ETA certifying officer that questioned ETA's certification of a forestry company for H-2B workers in light of past violations, which were never answered.<sup>98</sup> The following year, the same company hired fourteen H-2B workers who all died when the company van, which was unregistered, and in which the driver lacked the appropriate license, sped off a bridge while covering a 90 mile

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94. GAO, J-1 REPORT, *supra* note 1, at 4.

95. H-2A and J-1 employment are exempt from FICA and FUTA. *See* 26 U.S.C. §§ 3121(b)(1), (b)(19) (exempting H-2A and J-1 work from FICA); 26 U.S.C. §§ 3306(c)(1)(B), (c)(19) (exempting H-2A and J-1 work from FUTA).

96. *Vega v. Nourse Farms, Inc.*, 62 F. Supp. 334, 342 (D. Mass. 1999) (citing an Inspector General report documenting that it could not identify one instance in which ETA had sanctioned an employer).

97. *See* U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 62-63 (1997) [hereinafter GAO, 1997 H-2A REPORT]; OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF LABOR, CONSOLIDATION OF LABOR'S ENFORCEMENT RESPONSIBILITIES FOR THE H-2A PROGRAM COULD BETTER PROTECT U.S. AGRICULTURAL WORKERS 17 (1998).

98. *See* Knudson and Hector Amezcua, *Forest Workers Caught in Web of Exploitation*, SACRAMENTO BEE, Nov. 21, 2005, at A1; interview with Lori Elmer, Staff Attorney, Legal Aid of North Carolina, Oct. 13, 2006 (interview and cited correspondence on file with author).

commute.<sup>99</sup> Even after this accident, the employer was able to obtain a labor certification for H-2B workers.<sup>100</sup>

### 3. *Employer Centrality in the Authorized Presence of Guest Workers*

A nonprofessional guest worker's present and future authorized presence in the U.S. is generally dependent on his or her recruitment and retention by U.S. employers. Only the J-1 visa permits guest workers to change employment during a visa term ("portability"),<sup>101</sup> which is at the discretion of DOS, and all programs subject guest workers to deportation upon the loss of work. No guest work visa allows for the permanent adjustment of status. To remain in the U.S. as a guest worker, foreign nationals must engage in circular migration by reapplying for visas from the sending country, each time after having been recruited by a U.S. employer.

Conditioning a guest worker's authorized presence in the U.S. on her relationship to a single employer sacrifices the liberty interest in the freedom to change employment, the equality interest disfavoring the placement of legal disabilities on foreign nationals in the workplace, and the sovereignty interest in promoting the rule of law and deterring unauthorized migration. Guest workers' liberty interest in the fundamental right to leave a workplace at will is substantially restricted by the extraordinary consequence of deportability upon exercising this right.<sup>102</sup> Lack of portability also establishes a system of formal inequality in the workplace, since it coerces guest workers not to complain about workplace violations or to engage in self-help to leave an abusive employer.<sup>103</sup> In addition to the lack of freedom to leave a workplace and the inequality that results from this legal disability, lack of portability adversely impacts the safety and welfare of guest workers. Injuries and fatalities of guest workers have resulted where guest workers' heightened fear of termination for complaints have caused dangerous work

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99. Tom Knudson, *I Fought to Get Them Out of There*, *supra* note 75.

100. Josie Huang, *Season of Change in North Woods*, PORTLAND PRESS HERALD (MAINE), July 6, 2003, at 1A.

101. 22 C.F.R. § 62.41(a), (b), (d). A J-1 visa holder denied permission to change categories must depart the country with thirty days of the denial or the expiration of the application, whichever is later. *Id.* § 62.41(e).

102. *See, e.g., Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333 (N.Y. 1987) (permitting employees to leave their employment at will is a fundamental protection in the common law at-will doctrine); Sam Quinones, *Many of Katrina's Migrant Workers Go Unpaid*, L.A. TIMES, Sept. 11, 2006, at A15 (reporting that a hotel H-2B worker complained that the hotel management had stated to him, "[Y]ou belong to the person who contracted you").

103. *See Ward, Desperate Harvest*, *supra* note 31 (reporting that because a group of H-2A workers walked off a job, allegedly to escape substandard workplace conditions, they immediately became subject to deportation and forfeited their transportation home and other H-2A pay guarantees).

environments because workers will only report health hazards when they are too injured or ill to work.<sup>104</sup>

Lack of portability also sacrifices sovereignty by undermining the ability of U.S. workers to compete with guest workers, eroding the rule of law, and encouraging undocumented work. For an employer, a guest worker might be preferable to a U.S. worker because of the former's loyalty: a guest worker who refuses to accept a term of employment risks termination before having paid her recruitment and arrival costs, immediate deportation and, often, an inability to find future authorized work in the U.S. U.S. workers, who by definition may leave employment at will, are at a competitive disadvantage against a "captive workforce"<sup>105</sup> that has such overwhelming incentives not to quit. Lack of portability also erodes the rule of law in nonprofessional workplaces by creating powerful incentives for guest workers not to complain about workplace conditions. The General Accounting Office ("GAO") concluded in a report that H-2A workers' fear of losing their jobs or of not being hired in the future make them unlikely to complain about worker protection violations.<sup>106</sup> For example, DOL received no complaints from H-2A workers in 1996, despite the GAO's analysis that suggests that H-2A workers during that period were not paid guaranteed wages.<sup>107</sup> Lack of portability also results in unauthorized work. Workers who flee exploitative work conditions or who leave the job site because no work is available must engage in unauthorized employment in the U.S. in order to earn sufficient income to return home.<sup>108</sup>

By conditioning entry and re-entry in the U.S. on recruitment by and approval of a U.S. employer, guest worker programs sacrifice the liberty interest in freedom of movement and the sovereignty goal of deterring unauthorized migration. While foreign nationals who obtain guest worker visas may initially intend to reside in the U.S. only for the term provided in the visa, as circular migration continues over time, migrant workers increas-

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104. *Id.* (A nurse practitioner at a health center in North Carolina reported treating twenty-seven H-2A tobacco workers who "had symptoms [of nicotine poisoning] early in the week but told her they were afraid to complain until it was too late.").

105. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 42, 74 (Routledge 1992) (linking lack of portability in Bracero program to exploitation of migrant workers during this period); *see also* TANYA BASOK, *TORTILLAS AND TOMATOES: TRANSMIGRANT MEXICAN HARVESTERS IN CANADA* 106-28 (McGill-Queen's University Press 2002) (criticizing lack of portability in Canadian guest worker program, which results in "captive labor" that employers value for its loyalty and reliability despite having to pay for the cost of transportation).

106. U.S. GEN. ACCOUNTING OFFICE, *H-2A AGRICULTURAL GUESTWORKERS: STATUS OF CHANGES TO IMPROVE PROGRAM SERVICES* 10 (2000) [hereinafter GAO, *STATUS OF CHANGES*]; *see also* Cleveland, Lyon, and Smith, *Inter-American Court of Human Rights Amicus Curiae Brief The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 811 (2003) (reporting that a DOL administrator linked worries of deportation to lack of complaints).

107. GAO, 1997 H-2A REPORT, *supra* note 97, at 9.

108. *See* Harman, *supra* note 78 (describing how a guest worker alleged that the hidden costs of coming to the U.S. and underpayment by the employer left him in debt, and that he left the job and worked "illegally, installing sprinklers for a few weeks to recoup some of his money before returning home").

ingly affiliate with the U.S. and wish to permanently settle.<sup>109</sup> However, only the H-2B program, which caps new H-2B visas but does not limit the rehiring of previous H-2B workers,<sup>110</sup> accommodates this liberty interest by providing an incentive for employers to rehire guest workers for the following work term. Those guest workers who are not rehired, and who wish to continue to engage in circular migration, are likely to remain in the U.S. after the visa expires as an undocumented worker. While the U.S. does not keep statistics about the proportion of guest workers who return at the end of a visa term, data from one major employer suggests that many H-2A workers remain in the U.S. as undocumented workers after their visas expire.<sup>111</sup> Thus, guest worker programs in conditioning re-entry on employer recruitment undermine liberty interests and the sovereignty interest in deterring unauthorized migration.

Lastly, by conditioning authorized presence in the U.S. solely on a prospective offer of employment, guest worker programs miss a key opportunity to target in its labor-based admissions countries from which unauthorized migration is the greatest, or where admissions might serve humanitarian or family reunification goals.

#### B. *Illusory Workplace Rights: Legislative Gaps, Administrative Nonenforcement, and the Difficulties of Enforcement*

Despite the fact that there are visa-based protections, employment laws with private rights of action, and governmental agencies charged with protecting the workplace rights of guest workers, nonprofessional guest workers labor under difficult and often dangerous circumstances,<sup>112</sup> and are

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109. See Mary M. Kritz, *International Migration Policies: Conceptual Problems*, 21 INT'L MIGRATION REV. 951, 951-52 (1987). A survey of unauthorized immigrants found that twenty-seven percent who arrived less than five years earlier believed they would stay in the U.S. less than two years, but only thirteen percent who arrived six to ten years earlier offered the same response. PEW HISPANIC CENTER, FACT SHEET: RECENTLY ARRIVED MIGRANTS AND THE CONGRESSIONAL DEBATE ON IMMIGRATION 2-3 (2006), available at <http://pewhispanic.org/files/factsheets/15.pdf>.

110. Congress has raised the H-2B cap to encourage circular migration through annual one-year extensions to the H-2R visa, which is reserved for returning H-2B workers. See, e.g., H.R. 5122, 109th Cong. (2006) (extending for one year the cap on H-2B visas for returning workers otherwise subject to H-2B numerical limitations).

111. GAO, 1997 H-2A REPORT, *supra* note 97, at 61 ("Data from a major employer showed that almost 40 percent of their H-2A workers (1,763 workers) left prior to the end of the contract, losing their right to both the three-quarters guarantee and transportation home."). Departure before the end of an H-2A contract suggests the worker's unauthorized presence because the worker relinquishes the right to free transportation home, presumably because the worker does not wish to return.

112. See BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES 13 (2005) (Forestry, agriculture, and construction rank two, six, and ten, respectively, in U.S. occupations by fatality rate; agriculture and forestry have fatality rates ten times over the national average.); Tom Knudson and Hector Amezcua, *Hidden Hazards*, SACRAMENTO BEE, Nov. 14, 2005, at A1 [hereinafter Knudson and Amezcua, *Hidden Hazards*] (reporting H-2B forestry workers killed in roadside accidents, crushed by fallen trees, blinded by branches, and cut by chainsaws); Ward, *Desperate Harvest*, *supra* note 31 (H-2A worker suffered permanent brain damage because of heat stroke in the field.); Leah Beeth Ward, *They Don't Want Their Men Coming to N.C. Anymore*,

often underpaid or are paid nothing at all for their work.<sup>113</sup> Guest worker programs are often utilized by employers to impermissibly discriminate in their employee selections,<sup>114</sup> and employer retaliation against guest workers have been found in reports and by courts and administrative agencies to include widespread practices of blacklisting,<sup>115</sup> and violence and false criminal allegations.<sup>116</sup>

Uniform workplace rights serve foreign nationals' interest in equality in the workplace and the sovereignty interest in preventing the creation of a vulnerable sub-class of workers that drives down wages and workplace conditions for U.S. workers. Courts analyzing guest workers' workplace rights have generally presumed the applicability of labor and employment laws to guest workers, on the grounds that these laws should be uniformly applied to effect their remedial purposes. For example, an immigration regulation permitting the revocation of work authorization of employed nonimmigrant workers when a strike was ratified by a minority of U.S.

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CHARLOTTE OBSERVER, Oct. 31, 1999, at A13 (reporting that an H-2A worker died from tobacco poisoning).

113. See, e.g., Nancy Cleeland, *Contractor Fined Over Treatment of Workers: An L.A. Company is Told to Pay Back Wages to Thai Laborers Hired on Agricultural Visas*, L.A. TIMES, May 23, 2006, at B1 (citing DOL investigation that concluded that an H-2A contractor must pay nearly \$300,000 in back wages to eighty-eight Thai workers); Knudson, *It Was Like Slavery*, *supra* note 77 (describing forestry workers' allegations of \$1.50 per hour payment); Boone, *supra* note 31 (H-2B forestry workers in suit against firm alleged payment of \$2.00 per hour.); HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME*, *supra* note 78, at 6-11 (interviewing domestic workers with A-3, B-1, and G-5 visas who reported making hourly wages between \$1 to \$2 per hour).

114. See, e.g., *Farm Workers Granted Certification in Labor Law Class Action: Perez-Farias v. Global Horizons*, No. 05-3061, (E.D. Wash. July 28, 2006), CLASS ACTION LAW MONITOR, Sept. 15, 2006 (H-2A workers sued farm labor contractor for race and national origin discrimination.); *Olvera-Morales v. Sterling Onions*, 322 F. Supp. 2d 211, 220 (N.D.N.Y. 2004). A suit by the Equal Employment Opportunities Commission ("EEOC") alleged that a farm in upstate New York subjected Jamaican guest workers to racial slurs and charged them for housing while other non-black and non-Jamaican migrant pickers received free housing. See *EEOC v. Porpiglia Farms*, Complaint, 06-CV-1124 (N.D.N.Y. Sept. 19, 2006); *EEOC v. Porpiglia Farms*, Consent Decree, 06-CV-1124 (N.D.N.Y. Dec. 20, 2006) (both on file with author).

115. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985) (noting that guest workers must "overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations"); Harman, *supra* note 78 (quoting Mexican migrant worker agency that guest workers "are scared to death their boss will report them to the consulate and they will be blacklisted and never get a visa again"); Holley, *supra* note 12, at 596-97 (describing a 1999 study of H-2A workers that found that blacklisting of workers "appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment process"); Thompson and Grob-Fitzgibbon, *supra* note 73 ("If a worker leaves before the end of the growing season, even because of illness, he is forbidden to return for three years. After the three years are up, he is placed at the bottom of the list, making it unlikely that he will get a return spot.").

116. See, e.g., *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995) (finding an employer to have physically assaulted a nonimmigrant domestic worker in response to a complaint about her living conditions); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355 Section "I"(3), 2006 U.S. Dist. LEXIS 2510, at \*23-\*24 (E.D. La Jan. 24, 2006) (finding credible allegations that after H-2B forestry workers sued an employer for owed back wages, the employer sent an agent to Guatemala to coerce the guest workers via their families to drop the suit); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 132, 137 (W.D.N.Y. 2003) (Defendant employer complained to state and federal agencies that H-2A workers were "terrorists" and members of "a sleeper cell" in order to have them removed from the U.S., after the workers sued him for owed back wages.).



workers in the firm<sup>117</sup> was held invalid, because the regulation squarely conflicted with the NLRA grant of "employee" status to nonimmigrant workers.<sup>118</sup> The district court rejected defendants' argument that enforcement of the regulation protects U.S. workers, in part because "the long term consequence of enforcement of the regulation would be detrimental to American labor."<sup>119</sup> In *Olvera-Morales v. Sterling Onions*,<sup>120</sup> a district court held that a female H-2B worker who alleged that defendant grower and recruiter steered her and other women into less remunerative H-2B occupations instead of H-2A occupations could file suit despite the fact that the alleged discriminatory conduct occurred before she obtained the H-2B visa. In holding that anti-discrimination law protections are triggered before the employee obtains authorization to work in the U.S., the court observed that a contrary rule "has the potential to invite abuse by employers and to undermine the goals of Title VII."<sup>121</sup> Thus, courts have recognized an interest of foreign nationals and U.S. workers in equal rights irrespective of immigration status in order to effectuate equality in the workplace and to avoid creating a vulnerable sub-class of foreign national workers.

However, the equality and sovereignty interests in uniform workplace rights are in tension with guest worker programs, which admit foreign nationals under two irreconcilable conditions: that they enjoy fewer rights than U.S. workers, yet their admittance cannot "adversely affect" workplace standards. While guest worker policies purport to justify workplace inequalities based on the sovereignty goal of protecting U.S. workers, the lack of enforceable workplace rights for guest workers harms U.S. workers by depressing the workplace standards where guest workers labor.

### 1. *Visa-Based Rights Are Often Illusory*

Nonprofessional guest work visas contain workplace protections independent from general employment laws. While special protections for guest workers would seem appropriate given the particular vulnerabilities of guest workers, these protections are often unenforceable, or, contrary to their stated purpose, operate to prevent guest workers from improving their terms and conditions of employment. Illusory visa-based rights undermine the sovereignty interest of avoiding the creation of a vulnerable sub-class of workers.

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117. 8 C.F.R. § 214.2(h)(14)(iv).

118. *WJA Realty Limited Partnership v. Nelson*, 708 F. Supp. 1268, 1277-78 (S.D. Fla. 1989).

119. *Id.* at 1278. Courts have also applied this reasoning to the question of whether employment laws apply to undocumented workers. See *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1998) (upholding right of undocumented workers to remedies in Fair Labor Standards Act because "if the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA").

120. 322 F. Supp. 2d 211 (N.D.N.Y. 2004).

121. *Sterling Onions*, 322 F. Supp. 2d at 220.

The most robust of visa-based protections are in the H-2A program. Employers applying for H-2A workers<sup>122</sup> must provide wages and benefits at or above a wage designated by DOL below which there would be an adverse effect on the wages in the industry ("Adverse Effect Wage Rate" or "AEWR"), or the applicable federal and state minimum wages, whichever is higher.<sup>123</sup> In addition, employers must guarantee three-fourths of the hours promised in the contract ("three-fourths rule"),<sup>124</sup> and provide housing and food.<sup>125</sup> However, since the three-fourths rule can only be violated after the contract is complete, after which the worker must immediately leave the country,<sup>126</sup> it is virtually impossible for DOL to enforce this rule.<sup>127</sup> Furthermore, the AEWR has been criticized for operating as a ceiling on wages, because a worker who demands a rate above the AEWR may be replaced with a new H-2A worker willing to accept the AEWR.<sup>128</sup> The fact that H-2A wages declined twenty percent between 1989 and 1998 suggests that the AEWR has been an ineffective tool at maintaining a wage floor.<sup>129</sup>

Unlike the H-2A program, DOL never promulgated regulations regarding the H-2B visa, instead administering the H-2B protections by General Administrative Letter 1-95 ("GAL 1-95"), which does not have the force of law.<sup>130</sup> Pursuant to GAL 1-95, the employer need only state the nature, wage and working conditions of the job, and assure that the wage and other terms meet prevailing conditions in the industry.<sup>131</sup> Unlike the H-2A AEWR, which DOL enforces as a minimum wage for H-2A workers, DOL declines to assert jurisdiction over the H-2B prevailing wage as a minimum wage floor,<sup>132</sup> and only utilizes the stated wage as a base to calculate overtime pay.<sup>133</sup> However, like the H-2A AEWR, the H-2B clearance order wage rate is part of an

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122. H-2B "logging" employment contains the same regulations as for H-2A employment. *See* 20 C.F.R. § 655.202.

123. 20 C.F.R. §§ 653.501(d)(2)(vi)-(viii), (x)-(xi), (xv); *id.* § 655.107 (H-2A); *id.* § 655.202(b).

124. 20 C.F.R. § 655.102(b)(6).

125. 8 U.S.C. § 1288(c)(4); 20 C.F.R. 655.102(b)(1).

126. GAO, 1997 H-2A REPORT, *supra* note 98, at 9-10.

127. *See* Jackson, *supra* note 32, at 1287.

128. Gordon, *supra* note 46, at 541. The AEWR is similar to the wage formula employed during the Bracero Era that was widely criticized for suppressing wages. *See* Ernesto Galarza, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 135-41 (1964).

129. RURAL MIGRATION NEWS, U.S. DEPARTMENT OF LABOR REPORT TO CONGRESS: THE AGRICULTURAL LABOR MARKET - STATUS AND RECOMMENDATIONS 16 (2000), available at [http://migration.ucdavis.edu/rmn/word-etc/dec\\_2000\\_labor.htm#\\_ftnref36](http://migration.ucdavis.edu/rmn/word-etc/dec_2000_labor.htm#_ftnref36).

130. *See, e.g., Sweet Life v. Dole*, 876 F.2d 402, 406 (5th Cir. 1989) ("DOL concedes that the guidelines, which were not promulgated pursuant to a notice and comment procedure, do not have the force of law.").

131. GAL No. 1-95 (IV)(D) (H-2B); *see* DOL ETA Form 750.

132. However, for H-2B workers who work in agricultural-type sectors, DOL has jurisdiction to enforce the Agricultural Migrant and Seasonal Worker Protection Act (AWPA), 29 U.S.C. § 1801, *et seq.*, which incorporates the clearance order as its minimum wage requirement. *See Donaldson v. DOL*, 930 F.2d 339, 349-350 (4th Cir. 1991) (concluding that the Wagner-Peyser requirements are incorporated in wage guarantee of the AWPA).

133. DOL Field Operations Handbook (dated June 30, 2000) § 32j08(c).

enforceable contract that may be enforced as a contract claim.<sup>134</sup>

By contrast, the J-1, A-3 and G-5 wage requirements are likely unenforceable. A-3 and G-5 nonimmigrants are only guaranteed under the FAM a “fair”<sup>135</sup> wage sufficient to ensure that the applicant will not become a public charge,<sup>136</sup> while J-1 visa holders must receive “pay and benefits commensurate with those offered to their American counterparts.”<sup>137</sup> DOL has no specific authority to enforce the FAM; while it could enforce the J-1 regulation generally, without any guidance on what “commensurate” means, it is not clear whether DOL does or can enforce this provision. Furthermore, if the visa holders are not provided express terms of employment, the general J-1, A-3 and G-5 wage requirements are only privately enforceable if they constitute a contract that a guest worker could enforce as a third party beneficiary. This would require a showing of a valid contract, intended to benefit the guest worker, of a “sufficiently immediate” nature to show an obligation to compensate the worker if she is not paid in accordance with requirement.<sup>138</sup> As the requirements in the A-3, G-5, and J-1 programs set forth generalized standards rather than a specific wage rate like the H-2A or H-2B clearance orders, these terms may not be enforceable. Thus, despite visa-based rights that would seem to provide special protections to guest workers, these rights often fail to establish significant legal protections against substandard wages, which undermines the sovereignty goal of avoiding the creation of a vulnerable sub-class.

## 2. Gaps in Uniform Workplace Protections

Lacking meaningful visa-based protections, guest workers rely on employment laws that provide universal protection to workers in U.S. workplaces. However, the effectiveness of these protections is substantially limited by statutory exemptions of guest workers and the occupations they work in, and by courts interpreting international law to limit the applicability of domestic

134. The Eleventh Circuit explains: “On a clearance order, an employer certifies that ‘this job order describes the actual terms and conditions of the employment being offered by me, and contains all the material terms and conditions of the job.’ Therefore, the clearance orders ultimately become the work contract between the employers and farmworkers.” *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1233 n.5 (11th Cir. 2002) (citation omitted).

135. See 9 FAM 41.21 N6.2(a).

136. 8 U.S.C. § 1182(a)(4)(B) (requiring consular officer to consider the “assets, resources, and financial status” of the nonimmigrant as a condition of admission). This includes submission with the application an employment contract signed by the employer and employee guaranteeing compensation at the “state or federal minimum or prevailing wage, whichever is greater[.]” taking into account deductions for food and lodging, and a promise by the employer not to withhold the passport of the employee, and not to require the employee to remain on the premises after working hours without compensation. 9 FAM 41.21 N6.2(a)(1), (3)-(4), (b).

137. 22 C.F.R. § 62.31(f).

138. See *Chen v. Street Beat Sportswear, Inc.*, 226 F. Supp. 2d 355, 365-66 (E.D.N.Y. 2002) (holding that DOL’s agreement with a garment retailer requiring it to ensure that its contractor’s employees are paid the minimum wage permitted the employees to sue for breach of contract as third-party beneficiaries).

law to foreign recruitment activities. In light of guest workers' inability to port and the unenforceability of visa-based protections, their exemption from uniform workplace rights not only violates the interest of nonprofessional foreign nationals in equality, but also substantially undermines the sovereignty goal of preserving workplace standards by removing any floor at all. Further, the exemption of undocumented workers from key workplace protections violates equality and sovereignty interests by creating an even more vulnerable sub-class of workers.

The primary wage protections for guest workers apart from visa-based contractual rights are FLSA and the Agricultural Migrant and Seasonal Worker Protection Act ("AWPA").<sup>139</sup> The AWPA applies to migrant workers in agricultural and related occupations,<sup>140</sup> and incorporates the clearance order wage guarantee.<sup>141</sup> Further, the AWPA requires farm laborer contractors to register themselves and their employees with the Secretary of Labor,<sup>142</sup> to provide a written disclosure detailing the terms and conditions of employment,<sup>143</sup> and to adhere to housing<sup>144</sup> and motor vehicle safety standards.<sup>145</sup> If an employer violates the AWPA, the DOL may assess a fine, revoke the employer's certification, and seek injunctive relief and/or remedy employer retaliation.<sup>146</sup> Covered workers may sue farm labor contractors, agricultural employers, agricultural associations or any "other person" in federal court to enforce all AWPA guarantees.<sup>147</sup> However, H-2A workers are exempt from AWPA;<sup>148</sup> the only guest workers who benefit from the protections of AWPA are those H-2B workers who work in agricultural-type occupations, such as forestry and pine straw gathering.<sup>149</sup>

While FLSA has no visa-based exemptions, occupational exemptions substantially limit the protections that the FLSA offers guest workers. Taken together, the H-2A, H-2B, A-3, G-5, and J-1 visas primarily employ nonprofessional laborers in (1) agriculture and related fields such as canning and packing, seafood processing, forestry and pine straw gathering; (2) domestic work; (3) landscaping; (4) construction; and (5) leisure and hospitality

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139. 29 U.S.C. § 1801, *et seq.*

140. AWPA broadly defines "agricultural employment" to include farms, ranches, canneries, packing, and processing, and forestry, and includes farm labor contractors. 29 U.S.C. §§ 1802(2)-(3). See Mark J. Russo, *Note: The Tension Between the Need and Exploitation of Migrant Workers: Using MSAWPA's Legislative Intent to Find a Balanced Remedy*, 7 MICH. J. RACE & L. 195, 204-6 (2001).

141. See *Donaldson v. DOL*, 930 F.2d 339, 349-50 (4th Cir. 1991).

142. 29 U.S.C. § 1811.

143. 29 U.S.C. § 1821(a).

144. 29 C.F.R. § 500.130(d). The Occupational Safety and Health Administration establishes housing safety and health standards. *Id.*

145. See DEP'T OF LABOR, WAGE AND HOUR ADVISORY MEMORANDUM NO. 2006-1, GUIDANCE ON MSPA VEHICLE SAFETY STANDARDS (2006).

146. 29 C.F.R. §§ 500.140(a)-(h) (listing DOL enforcement powers), 500.143 (listing factors that DOL must consider in assessing a monetary penalty).

147. 29 U.S.C. § 1854(a).

148. 29 U.S.C. § 1802(8)(A).

149. See, e.g., *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1169 (11th Cir. 2003) (finding that pine straw gathering is encompassed in AWPA's definition of "agriculture").

occupations.<sup>150</sup> Of employees in these industries, employees in seasonal recreational establishments and seasonal camp employees are entirely exempt from the FLSA,<sup>151</sup> and agricultural workers, live-in domestic workers, workers who work in resorts on public lands and employees of small forestry firms and mills are exempt from FLSA's overtime requirement.<sup>152</sup> Since the J-1 camp counselor program provides a short-term visa for "youth workers,"<sup>153</sup> and J-1 trainees are not "employed" under FLSA unless the work confers a benefit on the trainer and the trainee receives compensation,<sup>154</sup> most J-1 camp counselors and many J-1 trainees are likely exempt from FLSA wage guarantees. Furthermore, in agriculture, forestry, and construction, industries in which employers often subcontract work, firms that contract for guest worker labor may be insulated from FLSA liability if the "economic reality" does not reveal an employment relationship.<sup>155</sup>

Statutory exemptions and limitations have also limited the applicability of laws protecting the rights of guest workers to join a union, and to a healthy and safe workplace and compensation for work-related deaths. The National Labor Relations Act ("NLRA") exempts agricultural laborers, forestry workers, domestic workers, and some food processing workers.<sup>156</sup> The Occupa-

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150. While H-2B visas are not limited to particular industries or occupations beyond the general restriction to non-permanent jobs, DOL data on H-2B labor certifications suggest that "the top five H-2B occupations in FY 2004, in terms of the numbers of workers certified, were: (1) landscape laborer, (2) forestry worker, (3) maids and housekeeping cleaners, (4) construction worker, and (5) stable attendant." Bruno, *supra* note 3, at 5. Substantial numbers of J-1 visa holders work as domestic workers, camp counselors, and in the restaurant and hotel industries. See GAO, J-1 REPORT, *supra* note 1, at 3; Shellenbarger, *supra* note 1.

151. 29 U.S.C. § 213(a)(3) (defining a seasonal camp as an entity that operates for less than seven months per year or earns less than a third of its revenue during half of the year); *id.* at § 213(a)(15).

152. 29 U.S.C. § 213(b)(12); *DOL v. N.C. Growers Ass'n*, 377 F.3d 345, 348-49 (4th Cir. 2004) (regarding agricultural work); 29 U.S.C. § 213(b)(21); 29 C.F.R. § 552.109(c) (regarding live-in domestic workers); 29 U.S.C. § 213(b)(29); *Chessin v. Keystone Resort Mgmt, Inc.*, 184 F.3d 1188, 1194 (10th Cir. 1999) (exempting a ski resort in national park); 29 U.S.C. § 213(b)(28) (applying to forestry firms and mills with eight or fewer employees).

153. 22 C.F.R. § 62.30(b)(2), (h)(2).

154. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 293, 301-2 (1985) (concluding that volunteers for a for-profit business operated by a religious organization who performed work in return for food and board, clothing, transportation, and medical benefits were covered by FLSA because they worked for the expectation of compensation and conferred a benefit upon the employer).

155. See, e.g., *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1210-15 (11th Cir. 2003) (held that H-2B forestry workers were not employees of the paper manufacturer that contracted with a labor contractor for the H-2B worker's labor under the FLSA "economic realities test" because the manufacturer did not supervise the employees, lacked the power to hire or fire the workers, and only worked for the manufacturer for several weeks. Further, the work was not integrated in the manufacturer's overall business and the work was performed on multiple landowner's lands); *Gonzalez-Sanchez v. Int'l Paper Co.*, 346 F.3d 1017, 1021-23 (11th Cir. 2003) (granting summary judgment against H-2B forestry employee's FLSA claim on same basis).

156. 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . ."). The NLRA relies on the FLSA's broad interpretation of "agricultural" to exempt all employees of farms that cultivate the soil, raise livestock and poultry, dairy farms, and related work, including forestry and some food processing and transportation jobs. 29 U.S.C. § 203(f). See Michael H. LeRoy and Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded From The National Labor Relations Act*, 48 EMORY L.J. 489, 506 (1999).

tional Safety and Health Act ("OSHA")<sup>157</sup> excludes domestic workers from its coverage,<sup>158</sup> and Congress prohibits OSHA from inspecting farms with ten or fewer employees, a limitation that applies to nearly half of hired farmworkers.<sup>159</sup> Nine state-run workers compensation systems have restricted or precluded death benefits to nonresident alien beneficiaries, which acutely impacts guest workers, whose family members are far more likely than the beneficiaries of other workers to be nonresident aliens.<sup>160</sup>

International law has been construed by courts to limit the availability of domestic workplace rights to guest workers. Courts have held that the Vienna Convention grants absolute immunity to diplomats who violate the workplace rights of domestic workers,<sup>161</sup> which is a primary source of employment for A-3 and G-5 workers. In *Reyes-Gaona v. North Carolina Growers Association*,<sup>162</sup> the Fourth Circuit held that there is a presumption against the international application of anti-discrimination laws. In *Reyes-Gaona*, a foreign national filed suit under the Age Discrimination in Employment Act ("ADEA")<sup>163</sup> because a U.S. employer explicitly refused to hire him as an H-2A worker because he was over forty years old. The Fourth Circuit invoked a "presumption against extraterritorial application of a federal statute," based upon a Supreme Court decision holding that a U.S. law is not extraterritorial in reach unless Congress provides for it.<sup>164</sup> Since Congress did not specifically provide for extraterritorial coverage of the ADEA to foreign nationals, the court in *Reyes-Gaona* found that the plaintiff failed to overcome the presumption against extraterritorial application.<sup>165</sup> Some commentators have argued that the court in *Reyes-Gaona* misapprehended the presumption against extraterritoriality, since the international law principle at

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157. 29 U.S.C. § 651 *et seq.*

158. 29 C.F.R. § 1975.6.

159. Jack L. Runyan, SUMMARY OF FEDERAL LAWS AND REGULATIONS AFFECTING AGRICULTURAL EMPLOYERS, AGRICULTURAL HANDBOOK NO. 719, U.S. DEP'T OF AGRIC. 7 (2000). Congress has limited OSHA's jurisdiction over small farms through annual appropriation bills. *See, e.g.*, HR 2264, 105th Cong. (1998).

160. Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits . . . . Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Kentucky, Pennsylvania). Other states limit coverage based on: the length of time a migrant has been a citizen (Wisconsin), the laws of the alien resident beneficiary's home country (Washington), or the cost of living in the alien resident beneficiary's home country (Oregon). Alabama denied benefits to all foreign beneficiaries. Cleveland, Lyon, and Smith, *supra* note 106, at 819.

161. *See Tabion v. Mufti*, 73 F.3d 535, 538-39 (4th Cir. 1996) ("Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.").

162. 250 F.3d 861 (4th Cir. 2001).

163. 29 U.S.C. § 621 *et seq.*

164. *Reyes-Gaona*, 250 F.3d at 864 (citing *EEOC v. Arabian American Oil v. Filardo*, 9 U.S. 244, 248 (1991)).

165. *Id.* at 866-67.

stake is that “one country cannot impose its labor standards on another,”<sup>166</sup> and in this instance the application of anti-discrimination laws to guest workers would only impose liability for work performed inside the U.S. Nonetheless, a broad reading of *Reyes-Gaona* would insulate employers from liability under anti-discrimination laws for instructing guest worker recruiters to refuse to hire, for example, applicants of a particular age, gender, color, or race, because the recruitment takes place internationally.

Lastly, exempting undocumented workers from key workplace protections and from legal remedies for violations challenge equality in the workplace and further burdens the sovereignty interest in preserving workplace standards. In *Hoffman Plastic Compounds v. National Labor Relations Board* (“NLRB”),<sup>167</sup> the Court read IRCA to prohibit the NLRB from awarding post-termination back pay to an undocumented worker who uses false documentation to establish work authorization without the employer’s knowledge.<sup>168</sup> The Court’s questionable reading of IRCA<sup>169</sup> and its finding that permitting back pay in this context would violate “explicit statutory prohibitions critical to federal immigration policy,”<sup>170</sup> have not been extended much beyond the availability of post-termination backpay to remedy a violation of the NLRA. Courts attempting to apply *Hoffman Plastic Compounds* to laws intended to preserve workplace standards have generally held that unless explicitly directed by Congress, the remedial nature of workplace protections should be uniformly applied in order to preserve workplace standards.<sup>171</sup> However, the tension felt by courts attempting to balance the labor policy of

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166. Ruhe C. Wadud, *Allowing Employers to Discriminate in the Hiring Process Under the Age Discrimination in Employment Act: The Case of Reyes-Gaona*, 27 N.C.J. INT’L L. & COM. REG. 335, 342 (2001) (discussing cases that reject the *Reyes-Gaona* analysis).

167. 535 U.S. 137 (2002).

168. *Id.* at 151-52.

169. The IRCA House Committee Report states that:

It is not the intention of the Committee that the employer sanctions provisions of this bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. H.R. 682, 99th Cong., 2d Sess. pt. 1, at 58 (1986).

170. *Hoffman Plastic Compounds*, 535 U.S. at 151.

171. See *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 363 (N.Y. 2006) (“We therefore hold, on the records before us in these . . . [New York Labor Law] cases, and in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, that IRCA does not bar maintenance of a claim for lost wages by an undocumented alien.”); *Affordable Hous. Found. v. Silva*, 2006 U.S. App. LEXIS 28303, at \*\*29-\*\*78 (2d Cir. Nov. 14, 2006) (holding that IRCA does not preempt state laws that provide for compensatory damages to undocumented workers for workplace injuries); *Rivera v. NIBCO*, 364 F.3d 1057, 1069-70 (9th Cir. 2004) (finding that an undocumented worker is covered by Title VII and distinguishing from *Hoffman Plastic Compounds* because *Hoffman* involved a review of an administrative decision that did not consider the applicability of IRCA, and limited the damages the worker could receive under the NLRA, not the employer’s liability); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (N.D. Ill. 2002) (reasoning that a federal district court’s remedial power under Title VII differs from the NLRB’s power under the

uniform workplace rights with the immigration policy of restricting non-citizens is apparent in other contexts, such as state laws that disallow workers compensation benefits to undocumented workers.<sup>172</sup> Just as exempting guest workers from workplace rights undermines equality and sovereignty interests, the *Hoffman Plastic Compounds* reasoning further threatens U.S. workers by formally designating undocumented workers as a vulnerable sub-class in the workplace.

### 3. *Non-Enforcement of Workplace Protections*

In addition to the lack of rights of nonprofessional foreign nationals and U.S. workers in the workplace, most guest workers do not avail themselves of the workplace rights they have. This is partially a natural consequence of short term migration to non-professional occupations. Guest workers are in the U.S. for a short duration, and lack information about their rights and how to enforce them. The remoteness of common guest worker occupations, such as in agricultural fields, in forests, and in private homes, and the isolation of guest workers from the government and from the community at large, make it unlikely that a guest worker would access an attorney or contact a government agency except in extreme circumstances.<sup>173</sup> In addition, workplace rights are not enforced because of formal limitations to guest worker access to the judiciary, and because of a lack of administrative enforcement. The non-enforcement of workplace rights intensifies formal workplace inequalities and violates the sovereignty goals preventing the creation of a vulnerable sub-class and maintaining the rule of law in nonprofessional workplaces.

Most guest workers who might otherwise be able to sue to enforce contract terms are unable to because they cannot access legal services. Only H-2A visa holders are qualified for federally funded ("LSC") legal services.<sup>174</sup> All other nonimmigrant workers must retain a private attorney or a non-LSC organization in order to secure legal representation. Given guest workers' lack of information about how to find counsel, language and educational limitations that prevent them from representing themselves *pro se*, and their lack of funds to hire an attorney, preventing guest workers from obtaining

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NLRA, and thus that *Hoffman* was not "dispositive of the issues raised in the motion to compel" discovery of immigration status in a Title VII action).

172. See Cleveland, Lyon, and Smith, *supra* note 107, at 868-79 (listing cases and incidents from newspaper articles in which *Hoffman Plastic Compounds* was invoked as a justification to deny a right or benefit).

173. See, e.g., Bernstein, *Suit to Charge*, *supra* note 78 (reporting that H-2B worker stated that he only attempted to find help after the employer confiscated his passport, forced him to work 80 hours a week at far less than the minimum wage, denied him emergency medical care, and threatened to contact ICE to request his removal).

174. 45 C.F.R. § 1626.11. This regulation only permits LSC representation to enforce H-2A wage, housing, and transportation rights, and "other employment rights provided for in the worker's specific contract under which the nonimmigrant worker was admitted." *Id.*



free legal services virtually bars them from litigating claims in the court system.<sup>175</sup>

Because guest workers lack access to an attorney and legitimately fear that a complaint would jeopardize their ability to work in the U.S., their interest in workplace equality and U.S. workers' sovereignty interest in maintaining the rule of law in nonprofessional workplaces depend upon effective monitoring by government agencies. However, DOL inspects few workplaces prior to the filing of a complaint. DOL in 2004 conducted only 89 investigations into H-2A employers,<sup>176</sup> the only program that DOL monitors. The lack of government oversight over the workplace conditions of guest workers is particularly troubling for guest domestic workers, who often work in an isolated setting for an employer with heightened control over the worker. This concern is expressed in the Foreign Affairs Manual requirement that A-3 and G-5 employers provide a contract to employees at the prevailing wage, while simultaneously conceding that DOS and the "consular officers are not in a position to enforce behavior of employers or employees when in the United States[.]"<sup>177</sup>

To summarize this section, the lack of meaningful workplace protections, of free legal counsel and of effective government enforcement violate foreign nationals' interest in equality, and undermines the sovereignty interests in maintaining workplace standards and the rule of law. They also raise valid concerns that U.S. workers cannot compete with guest workers and undocumented workers because of the employer preference for workers who cannot complain about workplace conditions, and because of perverse incentives to hire them because they lack key workplace protections. Employers have the perverse incentive to hire H-2A workers over U.S. workers because they are exempt from AWP; employers in high risk industries have a perverse incentive to hire guest and undocumented workers because of limitations to the death benefits of guest worker beneficiaries; employers have a perverse incentive to hire undocumented workers because of restrictions on their workplace rights. Interpretations of international law that exempt guest worker from anti-discrimination laws create a perverse incentive for employers to hire guest workers in order to insulate themselves from liability for discriminatory hiring practices. These perverse incentives sacrifice the interest of nonprofessional foreign nationals in equality in the workplace, and the sovereignty interest in protecting U.S. workers from a vulnerable sub-class. Nor does the lack of meaningful workplace rights assist in the sovereignty

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175. Boone, *supra* note 31 (recounting a statement made by an H-2B plaintiff in back wages suit: "I came here expecting to work hard and make money to support my family. What I didn't expect was to risk my life, be cheated out of my earnings, and then learn that the legal-aid lawyers who U.S. citizens rely on in such cases couldn't help me").

176. See Lomet Turnbull, *New State Import: Thai Farmworkers*, THE SEATTLE TIMES, Feb. 20, 2005, at A1.

177. 9 FAM 41.21 N6.2(c).

goal of deterring unauthorized migration. On the contrary, limiting workplace rights based on immigration status heightens the employer demand for undocumented and guest workers as a source of exploitable labor.

C. *Immigration Restrictions, Exclusion and Enforcement*

Immigration policy attempts to control the flow of nonprofessional foreign nationals through the exclusionary measures of border control and interior enforcement, while managing migration through nonprofessional guest worker programs. However, combining small guest worker programs with heightened immigration enforcement has failed to meet the sovereignty goal of deterring unauthorized migration, and has severely restricted the liberty interests of nonprofessional foreign nationals, who lack a reasonable opportunity to engage in authorized migration. First, these measures have not controlled unauthorized migration, which has increased.<sup>178</sup> In fact, the increased difficulty of unauthorized border-crossing has disrupted the traditional Mexico-U.S. migrant flow and forced the settlement of previously temporary workers in the U.S.<sup>179</sup>

Second, guest worker programs are too small and under-utilized to reasonably accommodate the migration demand of nonprofessional foreign nationals, and are ill-suited for this purpose. While over a half million nonprofessional foreign nationals engage in unauthorized migration per year, only 89,000 H-2B visas are issued per year,<sup>180</sup> and the H-2A visa is underutilized because employers easily avoid the H-2A certification process by hiring undocumented workers.<sup>181</sup> All guest work visas are restricted in duration from one year to 18 months, with a maximum of ten years.<sup>182</sup> Nor are other nonprofessional work visas designed to control the migration flow: J-1 visas are contemplated for young, college-educated persons, while the A-3 and G-5 visas can only be used for employment with consular, diplomatic or international organization personnel, a small pool of employers.

By severely restricting the number of nonprofessional foreign nationals authorized to enter the U.S., guest worker programs fail to meet the liberty interest in freedom of movement, which undermines the sovereignty interest

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178. Wayne A. Cornelius, *Impacts of the 1986 U.S. Immigration Law on Emigration from Rural Mexican Sending Communities*, 15 *POPULATION & DEV. REV.* 689, 702 (1989); Richard C. Jones, *Immigration Reform and Migrant Flows: Compositional and Spatial Changes in Mexican Migration After the Immigration Reform Act of 1986*, 85 *ANNALS ASS'N AM. GEOGRAPHERS* 715, 725 (1995); David Griffith and Ed Kissam, *WORKING POOR: FARMWORKERS IN THE UNITED STATES* 260-62 (1995).

179. Durand, Massay, and Parrado, *The New Era of Mexican Migration to the United States*, 86 *J. AM. HISTORY* 518, 522 (1999).

180. Under current law, workers having completed an H-2B work visa may return as "H-2R" workers and has resulted in a total of 134,000 H-2B and H-2R visas issued in 2006. DHS *NONIMMIGRANT STATISTICS*, *supra* note 1.

181. See Hancock, *supra* note 92. Only 46,000 H-2A visas were issued in 2006. See DHS *NONIMMIGRANT STATISTICS*, *supra* note 1.

182. 22 C.F.R. § 41.112(b)(2).

in deterring unauthorized migration.<sup>183</sup> Guest worker visa caps and restrictions thus heavily rely on the immigration enforcement measures of border control, employer sanctions, and workplace raids to stem the migrant flow, prevent employers from hiring undocumented workers, and apprehend foreign nationals who engage in unauthorized work.

However, immigration enforcement undermines the sovereignty interest in the rule of law by facilitating the growth of the underground economy, and severely impacts nonprofessional foreign nationals' interests in liberty and equality. Interior enforcement funnels undocumented workers into a low-wage, "underground" economy of unregulated manufacturing and service industries that disregard immigration and employment laws.<sup>184</sup> Heightened militarization of the border has increased the physical risk of unauthorized migration,<sup>185</sup> and the incarceration of apprehended migrants.<sup>186</sup> Once inside, intensive interior enforcement contributes to the poverty of undocumented workers by driving them deeper into the underground economy.<sup>187</sup> When administrative priorities turn to apprehending undocumented workers through workplace raids, a "climate of fear"<sup>188</sup> pervades. Furthermore, interior enforcement directly harms the foreign national interest in equality in the workplace and the U.S. worker sovereignty interest in maintaining workplace standards, as

183. Kritz, *supra* note 109, at 957 (concluding that restrictive immigration policies result in increased unauthorized migration).

184. See VALENZUELA, THEODORE, MELÉNDEZ ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 12, 15 (2006) available at <http://www.sscnet.ucla.edu/issr/csuf/index.php> (providing the results of a national survey of day laborers that finds that 75% are undocumented, nearly half report nonpayment and underpayment of wages, and one in five has suffered a workplace injury); U.S. DEP'T OF LABOR, FY 2000 POULTRY PROCESSING COMPLIANCE REPORT (2000) (reporting that 100% of investigated poultry plants violated the federal wage and hour laws); U.S. Dep't of Labor, *Close to Half of Garment Contractors Violating FLSA*, Daily Lab. Rep. (BNA) 87 (1996) (reporting that half of New York City garment contractors could be described as "sweatshops."); U.S. DEP'T OF LABOR, COMPLIANCE HIGHLIGHTS 1, 3 (1999) (reporting that a survey of cucumber, lettuce and onion growers showed a lack of labor and employment law compliance); Susan Gonzalez Baker, *The "Amnesty" Aftermath: Current Policy Issues Stemming from the Legalization Programs of the 1986 Immigration and Reform Act*, 31 INT'L MIGRATION REV. 5, 20-21 (1997); J. Edward Taylor and Dawn Thilmany, *Worker Turnover, Farm Labor Contractors, and IRCA's Impact on the California Farm Labor Market*, 75 AM. J. AGRIC. ECON. 350, 359 (1993).

185. See Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POP'N & DEV. REV., 661, 669 (2001) (documenting that reported deaths of unauthorized border-crossers more than quintupled between 1996 and 2000, from 87 in 1996 to 499 in 2000).

186. James C. McKinley Jr., *Tougher Tactics Deter Migrants at U.S. Border*, N.Y. TIMES, Feb. 21, 2007, at A1 (reporting that migrants caught in the border are now immediately prosecuted for illegal entry, and sentenced to between two weeks and 180 days in jail).

187. Cobb-Clark, Shiells and Lowell, *Immigration Reform: The Effects of Employer Sanctions and Legalization on Wages*, 13 J. OF LABOR ECON. 472, 495-96 (1995); Julie A. Phillips and Douglas Massey, *The New Labor Market: Immigrants and Wages after IRCA*, 36 DEMOGRAPHY, 233, 244 (1999) (finding a 22% and 55% difference between the incomes of nonagricultural and agricultural incomes respectively for documented and undocumented immigrants); Massey, *New Evidence from Mexico*, *supra* note 48, at 267 (finding no wage disparity between documented and undocumented immigrants in data from 1982-83); JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 34 (2005), available at <http://pewhispanic.org/files/reports/46.pdf> (finding that unauthorized immigrants are twice as likely to live in poverty).

188. Bernstein, *Immigrants Go from Farms to Jail, and a Climate of Fear Settles In*, N.Y. TIMES, Dec. 24, 2005, at A21.

workplace raids often target workplaces that are the subject of a labor dispute,<sup>189</sup> and employer sanctions provide employers with an excuse to purge undocumented workers who support organized labor.<sup>190</sup>

To summarize, guest worker programs are largely controlled by U.S. employers with little governmental oversight, lack workplace protections to sufficiently protect guest workers, and are too small and restricted to meet the migration demand, resulting in a reliance on immigration enforcement as the primary response to nonprofessional foreign nationals who seek to migrate to the U.S. Employer centrality and a lack of workplace protections in guest worker programs violate nonprofessional foreign nationals' liberty and equality interests through recruitment abuses that create indebtedness, a lack of enforceable workplace rights, and their dependence on a single employer for their authorized presence in and ability to return to the U.S. These conditions also sacrifice U.S. worker sovereignty interests in preserving workplace standards and the rule of law by creating a vulnerable sub-class of workers who are preferred by employers because they cannot complain about violations and lack key workplace protections. Liberty, equality, and sovereignty interests are further harmed by the small size and utilization of guest worker programs. This results in an exclusive reliance on immigration enforcement to control the migrant flow, which burdens equality and sovereignty interests by creating a vulnerable sub-class of undocumented workers who work in an underground economy that routinely violates immigration and employment laws. Exclusively relying on immigration enforcement to manage the labor-based migrant flow also severely restricts liberty interests by preventing any meaningful opportunity to engage in authorized migration, by forcing migrants who seek to engage in unauthorized work to risk incarceration and physical well-being during their migration, and by having migrants live with the pervasive fear of detection by the government once inside the U.S.

#### IV. A NON-SUBORDINATION APPROACH TO WORK-BASED IMMIGRATION

There is an inherent tension in how to balance liberty, sovereignty, and equality interests in regulating the migration of nonprofessional foreign nationals. Guest worker programs have attempted to balance liberty and sovereignty interests by admitting foreign nationals to contract with U.S. employers for temporary work, while excluding undocumented workers, and restricting the number of guest work visas, and the nature and conditions of

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189. Michael Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390-92 (2004) (reporting that in a sample of 184 workplaces subject to an immigration raid in the New York area, over half had active labor complaints close in time to the raid).

190. HAUS, *supra* note 14, at 75-78; PETER BROWNELL, MIGRATION INFORMATION SOURCE, THE DECLINING ENFORCEMENT OF EMPLOYER SANCTIONS 6 (2005), available at <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

guest work. However, this Article has shown how an immigration policy of small, restrictive guest worker programs alongside an enforcement-driven approach to deterring unauthorized migration undermine the liberty, equality, and sovereignty interests of foreign born and U.S. nonprofessional workers, and are therefore an unsound foundation for comprehensive immigration reform.<sup>191</sup>

At the same time, expanding work-based visas for nonprofessional foreign nationals to balance the interests of nonprofessional U.S. workers and foreign nationals is preferable to ending temporary work-based programs entirely or maintaining the status quo, and may be more realistic and targeted than controlling the migrant flow by increasing permanent immigration quotas. First, the alternative to authorized migration is not an absence of immigration, but rather unauthorized migration. There will remain a high rate of unauthorized migration so long as developing countries lack sufficient employment opportunity and there are available jobs in the U.S.,<sup>192</sup> and the migrant flow cannot be contained by immigration enforcement alone.<sup>193</sup> The current unauthorized flow therefore presents a compelling need for expanding labor-based admissions to manage the migration of nonprofessional foreign nationals.

Further, responding to the failings of the current guest work system by ending labor-based admissions for nonprofessional foreign nationals would sacrifice liberty and equality gains that do not threaten, but rather complement, sovereignty goals. Given that authorized migration is generally beneficial for U.S. workers because it adds to the U.S. workforce and expands the U.S. economy,<sup>194</sup> labor-based admissions with meaningful measures to manage the migrant flow and to preserve workplace standards in nonprofessional occupations would be preferable from a sovereignty standpoint than immigration enforcement alone. As in the end of the Bracero Era, when undocumented immigration soared after its discontinuance as workers who

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191. For example, while AgJobs and McCain-Kennedy each contained important reforms to existing law, such as permitting the adjustment of status for undocumented workers and expanding authorized migration, they also suffered from over-reliance on the current programs' scaffolding: AgJobs, like H-2A, only applied to agricultural workers, would have maintained employer centrality, and had no portability or means to adjust status, AgJobs §§ 101(c)(1)(A), 218(a), and McCain-Kennedy would also have maintained the current certification system, and, like H-2B, would have capped the guest worker program at too few visas to provide a meaningful alternative to unauthorized migration. McCain-Kennedy § 218A.

192. Philip Martin, ECONOMIC INTEGRATION AND MIGRATION: THE MEXICO-U.S. CASE 20-21 (2002) (arguing that unauthorized migration from Mexico is a result of high joblessness rates in Mexico).

193. Even if border security deterred *all* unauthorized Mexico-U.S. border crossings, that would do nothing to prevent migrants from "overstaying" nonimmigrant tourist, business, and student visas and Border Crossing Cards, which account for nearly one half of unauthorized migration. See PEW HISPANIC CENTER, FACT SHEET, MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1-2 (2006), available at <http://pewhispanic.org/files/factsheets/19.pdf>.

194. Conservative estimates are that immigration into the United States has produced a surplus of \$7 billion per year. George J. Borjas, *The Economic Benefits from Immigration*, 9 J. ECON. PERSP. 3, 5 (1995), cited in Chang, *Immigration Restrictions*, *supra* note 37, at 305 & n.71.

established regular migration patterns as braceros found themselves shut out of authorized status,<sup>195</sup> ending guest worker programs entirely will likely increase unauthorized migration, violating a key sovereignty interest. Thus, ending labor-based admissions without providing a means for authorized migration would sacrifice liberty, equality, and sovereignty interests.

Second, the argument that the status quo is preferable to the expansion of guest worker programs because it would establish a formal subclass of workers does not acknowledge that U.S. currently maintains an informal labor migration policy of managing over seven million undocumented workers by relaxing or intensifying immigration enforcement. This informal policy allows U.S. employers to employ a sub-class of millions of workers during times of high labor demand, and permits their exclusion during times of economic anxiety.<sup>196</sup> While this informal policy serves the liberty interest of affording greater migration flow than a formal expansion of labor-based admissions might, it undermines the value of this liberty by causing fear by migrants of government institutions<sup>197</sup> and the public during economic downturns which are attributed to unauthorized migration.<sup>198</sup> It also violates key sovereignty goals of reducing unauthorized migration and maintaining the rule of law in nonprofessional workplaces, and the equality interest of nonprofessional foreign nationals who are undocumented workers, who face crushing debts from the expense of migration,<sup>199</sup> and often cannot access government-provided health care, public benefits, legal representation, or higher public education.<sup>200</sup> Given

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195. Philip Martin, *Guest Workers: Past and Present*, 880, 888 in *MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY, VOL. 3* (1998) (noting that apprehensions nearly doubled between 1964 and 1965, and nearly doubled again by 1971).

196. Gordon H. Hanson and Antonio Spilimbergo, *Political Economy, Sectoral Shocks, and Border Enforcement* 34, *CAN. J. OF ECON.*, 612, 636 (2001) (comparing border apprehensions to the price of goods produced in industries that employ undocumented workers over time "suggests that authorities relax border enforcement when the demand for undocumented workers is high. We also find that border enforcement rises when overall conditions in the United States tighten").

197. April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 *ALA. L. REV.* 1149, 1160 (2004); Muzaffar A. Chisti, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy*, 58 *N.Y.U. ANN. SURV. AM. L.* 371, 373-74 (2002).

198. Baker, *supra* note 4, at 22. This is often expressed in local laws that target foreign nationals for adverse treatment. See, e.g., Guadalupe T. Luna, *Immigrants, Cops and Slumlords in the Midwest*, 29 *S. ILL. U.L.J.* 61, 73-77 (2004) (discussing housing restrictions aimed at foreign-born Latinos); Jahana Berry, *Smuggling Verdict Tossed, Judge Cites Lack of Evidence on Migrant*, *AZ. REPUBLIC*, Dec. 6, 2006, at 1 (discussing use by Arizona prosecutors of state anti-smuggling law to prosecute unauthorized migrants).

199. See Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 *CALIF. L. REV.* 1729, 1754 (2004); Chris Paschenko, *Immigrants Prospering*, *THE DECATUR DAILY (ALA.)*, Nov. 16, 2006 (State and Regional News) (citing payment of \$15,000 for transportation from Mexico).

200. See Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 *N.Y.U. ANN. SURV. AM. L.* 283, 283 & n.1 and n.2 (2002); Andrew Stevenson, *Dreaming of an Equal Future for Immigrant Children: Federal and State Initiatives to Improve Undocumented Students' Access to Postsecondary Education*, 46 *ARIZ. L. REV.* 551, 553-54 (2004); Leslye E. Orloff & Janice V. Kaguyutan, *Offering A Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 *AM. U.J. GENDER SOC. POL'Y & L.* 95, 127-29 (2001) (discussing how LSC representation of unauthorized immigrants only permitted in cases of domestic violence).

these realities, expanding labor-based admissions would be preferable to the status quo if it adjusted the status of all currently undocumented workers, controlled the future migrant flow, and did not undermine workplace conditions in nonprofessional occupations.<sup>201</sup>

Lastly, expanding labor-based admissions is a more realistic and tailored approach to control migration than replacing guest worker programs with increased permanent residence. Permanent residence is limited to 140,000 people per year,<sup>202</sup> and the INA currently provides for adjusting the status of only 5,000 low-skilled workers per year to permanent legal resident status.<sup>203</sup> Even if the INA reserved *all* permanent residence visas for labor purposes, this would not approach the number of H-2A, H-2B, J-1, A-3, and G-5 visas, or the current unauthorized migrant flow of 750,000 per year. Inasmuch as permanent residence admissions currently privileges family-based admissions, reserving these admissions for labor purposes would sacrifice the considerable interest of foreign nationals in reuniting with family members. Thus, permanent residence is not a realistic alternative to replace the hundreds of thousands of guest worker visas, on top of additional visas necessary to control the migrant flow, and may sacrifice the interest of foreign nationals in family reunification.

A temporary labor-based admissions system that allowed for eventual adjustment of status would satisfy the liberty interests of those nonprofessional foreign nationals who seek entrance to the U.S. to engage in circular migration.<sup>204</sup> For transnational workers who do not wish to permanently settle in the U.S., a work-based visa that permitted circular migration to the U.S. to would be preferable to waiting for permanent migration.<sup>205</sup> For those desiring permanent settlement in the U.S., a temporary work-based visa that permitted adjustment of status would afford foreign nationals with a reasonable alternative to unauthorized migration. Given the liberty and sovereignty interests in maximizing authorized migration to manage the migrant flow, and the fact that many transnational workers seek to engage in circular migration rather than to permanently settle in the U.S., a labor-based admission program that offered eventual adjustment of status would be a more practical and targeted means to control the migrant flow than replacing

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201. See BASOK, *supra* note 105, at 96-98 (documenting a survey in which 565 Mexican guest workers in Canada, 158 of whom had been undocumented workers in the U.S., expressed preference for guest work over undocumented work because of better conditions, ease of border crossing, lack of transportation expenses, and secure and enforceable contract).

202. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATS., 2004 YEARBOOK OF IMMIGRATION STATISTICS 15 TBL.4 (2006), available at <http://uscis.gov/graphics/shared/statistics/yearbook/2004/Yearbook2004.pdf>.

203. U.S. DEP'T OF STATE, VISA BULLETIN FOR JULY 2006, cited in MPI, IMMIGRATION AND AMERICA'S FUTURE, *supra* note 11, at 23.

204. See, e.g., MASSEY, DURAND, AND MALONE, *supra* note 39, at 145; Manuel Pastor and Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 SOC. JUST. 92, 93 (2004).

205. MASSEY, DURAND, AND MALONE, *supra* note 39, at 145.

guest work visas with permanent migration.

Thus, a non-subordination approach to temporary work-based visas that accommodated core liberty, sovereignty, and equality concerns may be preferable to ending guest worker programs entirely or preserving the status quo, and may be more practical and tailored to controlling the migrant flow than increasing labor-based admissions through permanent migration.

#### A. *A Non-Subordination Approach*

This Article proposes a re-envisioning of work-based visa programs to balance the interests of foreign nationals outside the U.S. in free movement to and from the U.S. and in equality in the workplace, and of U.S. workers in deterring unauthorized migration and in preserving employment opportunities with meaningful workplace standards in nonprofessional occupations. This Article recommends expanding labor-based admissions and permitting visa holders the right to circular migration and eventual permanent settlement to satisfy the liberty interest in free movement, applying uniform workplace rights to establish formal equality between U.S. workers and foreign nationals, and allowing the least restrictive measures necessary to preserve workplace standards for U.S. workers. I term this balancing of interests a “non-subordination” approach.

This approach does not suggest an “optimal” labor-based admission policy for nonprofessional foreign nationals, whether a strictly work-based visa awarded by lottery, a “point” system like those in Canada, Australia, and New Zealand that would evaluate visa applicants based on their individual characteristics, or a European Union model of establishing a geographic common market, or some mix of these.<sup>206</sup> Given the U.S. history of guest worker programs and the likelihood of their continuance, it will apply this approach primarily to a strictly employment-based system, understanding that it could be applied to others. In recognition of the failure of guest worker programs to meet core liberty, equality, and sovereignty interests, I will call this program a “temporary work-based” visa rather than a “guest” work visa.

This approach would satisfy the liberty interests of foreign nationals outside the U.S. to engage in circular migration and permanent settlement in the U.S. at the point beyond which would exceed the U.S. economy’s ability to absorb new entrants into nonprofessional occupations. This approach would give respect to the sovereignty view of managing migration by limiting immigration to preserve workplace standards for U.S. workers. At the same time, this approach would permit far more nonprofessional foreign nationals to engage in authorized work in the U.S. than guest worker

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206. Chang, *Liberalized Immigration*, *supra* note 11, at 1148, 1182; Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U.L. REV. 148, 171-93 (2006). The Immigrant Accountability Act of 2007 would have used a point system in adjusting the status of unauthorized migrants in the U.S. See S. 1225, 110th Cong. (2007).



programs currently allow, because the work-based visa program would not be restricted to a particular industry, or to seasonal or otherwise temporary employment.

Second, this approach would de-link employers from the visa process, and permit porting to other worksites. It would reject a sovereignty-based critique that portability would undermine workplace standards where visa holders port, because that concern can be addressed by restricting portability to workplaces that are not subject to a labor dispute, and in other instances is outweighed by the liberty gain in freedom of movement, the equality interest in a uniform application of the at-will doctrine, and the sovereignty interest in avoiding the creation of a vulnerable sub-class that cannot engage in self-help to leave an exploitative workplace.

Third, a non-subordination approach would establish clear minimum allowable terms and conditions of employment equally applicable to workers in the U.S. regardless of immigration status, and provide for improved government monitoring over nonprofessional workplaces and access to the judiciary for nonprofessional foreign nationals. A non-subordination approach would reject a globalist critique that permitting foreign nationals to sell their services at rates below the legal minimum would advance their liberty interests, because that interest is outweighed by the equality and sovereignty interests in uniform workplace standards.

Lastly, in light of the liberty interest in freedom of movement without fear of apprehension and the sovereignty interest in preventing the creation of a vulnerable sub-class of workers, a non-subordination approach would adjust the status of current unauthorized migrants in the U.S. and would permit their adjustment of status from within the U.S., understanding that some level of immigration enforcement is necessary to control the future migrant flow.

The remainder of this Part shall discuss the three themes of reducing employer centrality, preserving workplace standards, and controlling the migrant flow in detail as they might be applied to immigration reform that involves a work-based visa program for nonprofessional foreign nationals.

## B. *A Non-Subordination Approach to Work-Based Visa Programs*

### 1. *Reducing Employer Centrality*

Labor-based admissions programs for nonprofessional workers condition authorization to work on recruitment by the individual employer who petitioned for the visa, and prohibit working for any other employer while in the U.S. Employer centrality in guest worker programs restricts the liberty of guest workers to seek their preferred work and to engage in self-help, establishes formal inequality in the workplace by placing a legal disability on guest workers that does not apply to other nonprofessional workers, and violates the sovereignty goal of preventing the creation of a vulnerable sub-class.

De-linking employers from the labor-based admissions process and removing the restrictions preventing visa holders from leaving their employment would advance liberty, sovereignty, and equality interests.<sup>207</sup> This could be achieved by regulating how foreign nationals obtain visas, and by replacing employer-driven labor market tests with government-run surveys of the ability of labor markets to absorb nonprofessional foreign nationals. Recruitment abuses could be deterred by changing the pre-departure focus from connecting workers to individual jobs to “qualifying” workers for work in high-demand occupations in the U.S. Foreign nationals would be qualified for an occupation through proof of prior work in the occupation, or by a training program run by private agencies, the sending country, or DOL. If the sending country were to play a role in qualifying applicants, the U.S. could enter multi-lateral agreements with sending countries to regulate private recruiters.<sup>208</sup> To diminish the importance of recruiters and to reduce migrant dependence on predatory lenders in traveling to the U.S., the U.S. could encourage the creation of international lending programs to provide migrant workers with access to credit.

To arrive at a number of annual visas that appropriately balances liberty and sovereignty interests, the U.S. could commission economic studies to determine the maximum number of new entrants into particular occupations by region above which workplace standards would be depressed. Preference could be given to foreign nationals who have previously completed visa terms on a seniority basis. In a point-based system, CIS could give preferences to visa applicants who come from regions with humanitarian crises, or who have family members in the U.S. In a regionally defined system, CIS could distribute those visas on a first-come, first-served, or a lottery basis to applicants in countries approved for labor-based migration, presumably those sending countries where the migrant flow originates.

In such a system, there would be no need for employer applications for visas. Rather, labor-based visas could be issued without restriction, or with reasonable occupational or regional restrictions to protect U.S. workers from local labor surpluses. Visas could be reissued by CIS to visa holders based upon proof of work in the approved occupation or region during the visa term. If the posting of job availability through clearance orders were continued, DOL could condition the approval of clearance orders upon a showing that the employer has the resources to meet the terms of the employment contract, has no significant workplace violation in the recent past, that the work terms meet or exceed the minimum standards, and that

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207. McCain-Kennedy would have permitted a 45-day grace period for the nonimmigrant to find other employment. McCain-Kennedy § 218A(d)(3). Instead of granting portability, AgJobs would have created a just cause contract for the duration of the visa and arbitration procedures to adjudicate terminations. AgJobs §§ 101(b)(2)(A)-(B).

208. As in the early Bracero Era, which has been credited with eliminating recruiter abuses in Mexico during that period. See GALARZA, *supra* note 128, at 254-55.

that the visa holder would not replace an existing employee. Upon approval of the clearance order, CIS could transmit it to the agency that regulates recruitment, up to the maximum allowable visas, with the clearance orders with the most generous terms receiving priority in distribution. Visa holders could select the positions they are qualified for on a first come, first serve basis, or based on a lottery system. Before departure, the foreign national would be provided with a copy of the contract and visa through the consulate.

If the visa holder obtained the position before arrival in the U.S., he or she would be reimbursed for travel and visa fees by the employer, and could leave employment with that employer to obtain employment elsewhere. Balancing the liberty interest of ensuring that portability does not reduce the demand for visa holders and the equality interest in preventing foreign national indebtedness upon arrival in the U.S., portability for work obtained internationally may be suspended for an initial period for the employer to recoup the cost of transportation and visa fees except for good cause, such as a workplace violation or a lack of work. If it were necessary to protect U.S. workers to restrict the employment that visa holders could port to, this approach would tolerate reasonable occupational and geographic restrictions that provided meaningful portability options. Further, to prevent the recruitment of foreign nationals to replace U.S. workers engaging in concerted activities, porting to firms that are the subject of an ongoing labor dispute could be prohibited.

Lastly, all nonprofessional foreign labor programs would be subject to these same basic requirements. This would prevent employers from “shopping” for visa programs with less stringent requirements, such as misclassifying agricultural workers as H-2B to avoid the H-2A requirements, or nonagricultural workers as J-1 instead of H-2B to avoid the statutory caps.

These recommendations would serve the liberty interest in increasing authorized migration and freedom of movement in the U.S. and the sovereignty interest in maintaining workplace standards. Eliminating the certification process and reducing employer control over selection of foreign nationals as guest workers would deter some of the more egregious recruitment practices, such as unreasonable fees, predatory loans, visa confiscation, fraud and intentional hiring discrimination. Clearance orders would no longer institute a wage ‘ceiling,’ because guest workers would gravitate towards jobs with higher wage rates. Portability would permit guest workers to find other work during periods of work shortage, common in sectors such as agriculture,<sup>209</sup> qualify them for unemployment insurance benefits during

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209. The unemployment rate in the agricultural sector is double the national average. See GAO, STATUS OF CHANGES, *supra* note 106, at 3-5.

temporary job loss,<sup>210</sup> permit self-help to quit abusive employers, and retaliation would no longer pose such a formidable weapon in deterring job-related complaints, because the worker could more easily secure her livelihood from another job.

## 2. *Preserving Workplace Standards*

To preserve workplace standards, a non-subordination approach would establish formal equality in the workplace for U.S. workers, guest workers, and undocumented workers, regulate common forms of foreign national abuse, and provide for full access to the courts and for strengthened DOL monitoring of nonprofessional workplaces. A non-subordination approach would amend AWP to include H-2A workers,<sup>211</sup> direct DOL to enforce the *Arriaga* ruling,<sup>212</sup> require that workers compensation insurance provide equal benefits to foreign nationals and their beneficiaries, and remove LSC immigration-based restrictions on access to free legal services.<sup>213</sup> Congress would overrule *Hoffman Plastic Compounds*, *Reyes-Gaona*, and other decisional law that precludes employer liability for violations of employment law based on immigration or transnational status. Workplace equality also requires the removal of financial incentives to hire foreign nationals, such as current tax exemptions for H-2A and J-1 employees. Amending the tax code to include temporary work-based visa holders would also serve the equality goal of qualifying these workers for tax-based government insurance programs. Having established uniform workplace rights, visa-based rights would be eliminated in a system in which visa holders could compete for any position, or granted in restricted settings only to the degree that they are enforceable and do not burden liberty interests. For example, the H-2A guarantee of three-fourths of the contract could be replaced with a just cause contract for guest workers for their duration of non-portability to equalize the employment relationship.<sup>214</sup>

Non-subordination also implies protections to remove disabilities intrinsic to a worker's transnationality. Common illegal forms of exploitation of guest

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210. Nonimmigrant workers who cannot change jobs through their visas are not "available to work," which is a universal requirement of state unemployment insurance laws. 26 U.S.C. § 3304(a)(14).

211. Under McCain-Kennedy, AWP would have covered H-5A workers. See McCain-Kennedy § 303(1).

212. Enforcement of the *Arriaga* ruling might raise the objection that requiring reimbursement for travel costs would restrict liberty by making foreign nationals from distant sending countries less attractive to employers. However, the inequality of exempting foreign nationals from this rule and subjecting them to extreme indebtedness at the beginning of the contract and the sovereignty interest in avoiding the creation of a vulnerable sub-class of nonprofessional workers justifies the application of the FLSA deduction rule to guest workers.

213. AgJobs would have carved "temporary" workers from the LSC restriction by defining these workers as aliens "lawfully admitted for permanent residence" for all laws (including the LSC exemption) except the INA. See AgJobs § 101(b)(1).

214. AgJobs would have created a just cause contract for the duration of the visa and arbitration procedures to adjudicate terminations. AgJobs §§ 101(b)(2)(A)-(B).

workers, including requiring the posting of collateral as a condition of hiring, confiscating guest workers' visas and passports, threatening employees with deportation, and blacklisting through employer associations would be prohibited by declaring them 'adverse employment actions' for the purposes of anti-retaliation and anti-discrimination laws, racketeering acts under anti-racketeering laws, and as indication of labor trafficking under anti-trafficking laws.<sup>215</sup>

To promote the enforceability of contract terms contained in clearance orders, a non-subordination approach would support an explicit federal right of action to enforce clearance order terms, and to recover funds for violations from recruiters.<sup>216</sup> It would also support regulations that would not add to the hiring cost of temporary work-based visa holders, such as joint employer liability of recruiters and employers, and a requirement that foreign recruiters register and post a bond.<sup>217</sup>

A non-subordination approach would further provide for administrative changes to enforce existing law, such as extensive DOL monitoring of workplaces in industries with a high density of transnational workers and in which pervasive employment law violations have been found,<sup>218</sup> enforcement jurisdiction over clearance orders and other visa-based protections, and federal and state government coordination to monitor the rights of temporary work-based visa holders.<sup>219</sup>

### 3. *Controlling Unauthorized Migration*

Given the high demand by nonprofessional foreign nationals to immigrate to the U.S., it is unlikely that the U.S. can admit all foreign nationals who would wish to participate in a temporary work-based program. As a result, unauthorized migration is a present and future reality for the U.S., whether or not immigration reform includes an expanded labor-based admissions system.

Reducing the number of undocumented workers is a critical sovereignty interest, both to manage migration and to preserve workplace standards by

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215. Confiscating immigration documents may constitute a violation of the racketeering offense 18 U.S.C. § 1951, the taking of property through robbery or extortion where the taking affects commerce, and is explicitly prohibited under some state anti-trafficking laws. *See, e.g.*, N.Y. Penal Law § 135.35(3) (declaring the labor trafficking of persons by "withholding, destroying, or confiscating" immigration documents to be unlawful).

216. *See* AgJobs § 218C(b) (providing federal private right of action to enforce all temporary worker rights).

217. *See* McCain-Kennedy § 304(i)(7)(B), (F) (requiring registration of foreign labor recruiters and permitting DOL to require foreign labor recruiters to post a bond).

218. *See* Alexandra Villarreal O'Rourke, *Embracing Reality: The Guest Worker Program Revisited*, 9 HARV. LATINO L. REV. 179, 194 (2006).

219. *See, e.g.*, *N. Carolina Growers' Ass'n, Inc. v. Employment Sec. Comm'n of N. Carolina*, No. 1-M-04, Employment Security of North Carolina, Consent Agreement (Sept. 11, 2006) (on file with author) (North Carolina SWA reached agreement with growers' association prohibiting employers from charging H-2A workers for recruitment, visa and border crossing fees, or transportation costs).

regulating the underground economy. To regulate currently unauthorized residents and to deter future unauthorized migration, the U.S. can adjust the status of current undocumented workers and offer work-based visa holders a right to return and an eventual means to adjust status, or it can rely solely on enforcement to exclude foreign nationals and to deport unauthorized migrants and work-based visa holders who overstay their visa.

From a non-subordination perspective, adjusting the status of undocumented workers and permitting temporary work-based visa holders the ability to return and adjust status are essential tools to regulate unauthorized migration.<sup>220</sup> The history of guest worker programs in the U.S. and abroad shows that no work-based admissions system can control the future flow unless it permits circular migration and eventual permanent settlement of undocumented and temporary work-based visa holders.<sup>221</sup> Permitting temporary work-based visa holders to engage in circular migration would advance the liberty interest in freedom of movement to and from the U.S., and the sovereignty interests in deterring unauthorized migration by removing the incentive to overstay the visa, and in avoiding the creation of a vulnerable sub-class unable to complain about workplace violations or to leave employment with abusive employers.<sup>222</sup> Providing for sufficient numbers of visas to adjust the status of currently undocumented workers and to present a reasonable alternative to unauthorized migration would serve the sovereignty interest in reducing the number of unauthorized migrants in the U.S., and the liberty interest in decreasing immigration enforcement. Unspent immigration enforcement funds could then be diverted to other sovereignty goals, such as DOL monitoring and job training for nonprofessional U.S. workers seeking skills that complement rather than compete with migrant workers.<sup>223</sup>

Allowing undocumented workers and temporary work-based visa holders

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220. This is especially true as more effective methods of employment authorization may force unregulated work further underground, and make this work more irregular, low-paying, and dangerous. See MPI, IMMIGRATION AND AMERICA'S FUTURE, *supra* note 11, at 52-53 (calling for a "secure, biometric, machine-readable Social Security card that allows citizens to easily establish both their identity and eligibility to work").

221. CALAVITA, *supra* note 105, at 38-39, 108-112 (discussing how the Bracero program controlled unauthorized migration by converting undocumented workers inside the U.S. into braceros); Nicole Jacoby, *America's De Facto Guest Workers: Lessons From Germany's Gastarbeiter for U.S. Immigration Reform*, 27 FORDHAM INT'L L.J. 1569, 1657 (2004) (providing historical background on U.S. and Germany guest worker programs to show that "immigrants are more likely to return to their countries of origin if they believe they will not be cut off from future economic opportunities in their host countries"). McCain-Kennedy and AgJobs aimed to manage unauthorized migration through adjustment of status. See McCain-Kennedy § 218A (providing for adjustment of status from unauthorized to temporary); AgJobs §§ 101(a), (c) (providing for initial adjustment of status from unauthorized to temporary, and from temporary to permanent).

222. The right to return would also advance the equality interest of conferring to visa holders rights under the Family and Emergency Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, to accrue "at least 12 months" of service, 29 U.S.C. § 2611(2)(A)(i), for those visa holders who seasonally work for the same employer.

223. MASSEY, DURAND, AND MALONE, *supra* note 39, at 162.

to adjust status and permanently settle would also advance the equality interest of providing foreign nationals in the U.S. with an equal ability to perform in the polity. Undocumented and guest workers are currently disenfranchised groups that have no political voice.<sup>224</sup> Given that undocumented and guest workers are often accused of harming U.S. workers, one can well imagine why a governmental agency might resist aggressively policing workplaces where undocumented and guest workers labor, and why labor associations might decline to invest scarce resources on guest workers.<sup>225</sup> Even if foreign nationals in an expanded labor-based admissions program would not themselves be permanent residents, their ability to remain in the U.S. and their potential to join the polity would improve their ability to petition employers, policymakers, the courts, and government agencies. Therefore, offering currently unauthorized immigrants and sufficient foreign nationals to control the future flow a temporary work-based visa, and providing all of these visa holders with a right to return and eventual citizenship, would serve the sovereignty interest of controlling unauthorized migration, the liberty interest in permitting the freedom of movement, and the equality interest in the right to petition.

Adjustment of status might be accomplished by allowing undocumented workers to adjust status while in the U.S. in return for payment of a fine, a practice that existed in the U.S. until 2001.<sup>226</sup> After adjusting all currently residing unauthorized migrants, either through a work-based visa or some other status, the number of annual work-based visas would have to be sufficiently large to present a reasonable alternative to unauthorized migration. The right to renew the visa may be made contingent on proof of employment history during the previous visa term. Adjustment of status may be denied for undesirable activities, such as violating the terms of an immigration restriction, or criminal conduct.<sup>227</sup> After a set period, temporary work-based visa holders would be automatically eligible for permanent immigration.

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224. See Holley, *supra* note 12, at 623 (“[A] guest worker has absolutely no political weight in the country where he or she works. A guest worker is a stranger in a strange land.”)

225. See HAUS, *supra* note 14, at 101-3; Leah Haus, *Openings in the Wall: Transnational Migrants, Labor Unions, and U.S. Immigration Policy*, 49 INT’L ORG. 285, 297 (1995) (arguing that unions will lobby against guest worker programs because temporary workers are difficult to organize and dependent on their employer-sponsor for legal status).

226. See Lenni B. Benson, *The Invisible Worker*, 27 N.C.J. INT’L L. & COM. REG. 483, 489 (2002) (citing 8 U.S.C. § 1255(i), a provision that permitted an unauthorized person to adjust status while in the U.S. by paying an additional \$1000 fine). This measure expired in 2001. See Karen Fleshman, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers’ Contributions to Its Economy by Allowing Them to Work Legally*, 18 N.Y.L. SCH. J. HUM. RTS. 237, 254 & n.121 (2002).

227. Immigration law already bars unauthorized immigrants from adjusting status and permits the deportation of lawful permanent immigrants convicted of an “aggravated felony.” See 8 U.S.C. §§ 1182(a)(9)(B)(i) (providing for three and ten year bars for unauthorized presence), 1101(a)(43) (defining “aggravated felony”).

#### V. U.S. EMPLOYER CRITIQUE OF THE NON-SUBORDINATION APPROACH

Employers may argue that a more regulated guest worker system would be worse than the existing system because there would be less demand for authorized migrants, and it would result in the increased use of undocumented workers. A U.S. employer might argue that de-linking employers from the recruitment and certification process and providing for job portability will lower employer demand and increase reliance on undocumented workers.

Not all reforms proposed in this Article will reduce employer demand for authorized foreign nationals, and some would increase demand. By eliminating visa-based rights, employers would be free to offer temporary work-based visa holders any work condition consistent with federal, state, and local laws. Replacing a certification system with a self-selecting placement system would increase the value of the program for employers by removing complicated application requirements and eliminating delays. Certainly, portability would reduce the value of work-based visa holders to employers, because a lack of portability ensures a loyal and dedicated workforce. However, this Article argues that lack of portability, in conjunction with arrival debts and unenforceable workplace rights, results in workplace conditions that often approach involuntary servitude. Whatever its value to employers, the formalization and expansion of a captive workforce is outweighed by the U.S.'s commitment to egalitarianism, and the liberty, equality, and sovereignty interests of nonprofessional foreign nationals and U.S. workers.

Regarding employer reliance on undocumented workers, the non-subordination approach presumes the adjustment of status of all currently undocumented workers, and a sufficiently large work-based visa program to ensure that the future undocumented population remains small. With a large pool of unauthorized workers to draw upon, no admission program can manage the migrant flow. Without this pool, employers would be more likely to obey immigration and labor law.

#### VI. CONCLUSION: THE INSOLUBILITY OF UNAUTHORIZED MIGRATION THROUGH COMPREHENSIVE IMMIGRATION REFORM

This Article has argued that a temporary work-based visa that eliminates employer certification and recruitment, grants nonprofessional foreign nationals formal equality in the workplace, and allows foreign nationals to engage in circular migration and permanent settlement would advance the interests of nonprofessional foreign nationals able to obtain visas, and the U.S. workers who compete with them. Yet, this allocation of rights would subordinate foreign nationals outside the U.S. who are unable to obtain a work-based visa, because it would exclude them from the U.S. unless they engaged in unauthorized migration. To the foreign national forced to engage



in unauthorized migration to arrive in the U.S., a more formalized immigration enforcement system may be inferior to the current U.S. immigration policy of turning a blind eye to undocumented workers in industries reliant on immigrant labor during periods of high labor demand. Thus, from the vantage point of excluded foreign nationals and future undocumented workers, any approach that would restrict the number of work-based visas is less desirable than the status quo.

Ultimately, a system that does not allow all foreign nationals seeking entrance to the U.S. an opportunity to engage in authorized migration cannot reconcile the liberty, sovereignty, and equality interests of foreign nationals and U.S. workers. This is the paradox of egalitarianism: any egalitarian system must define its community, which, in the context of an immigration policy that enforces national borders, necessarily implies exclusion. The impossibility of accommodating the global demand to immigrate to the U.S. is a symptom of global inequality, and a result of the U.S. role as a wealthy nation with a dynamic economy and a large presence in world relations. This conclusion suggests that controlling unauthorized migration would require U.S. trade policies that would expand access to credit and promote job creation for nonprofessional workers in sending countries.<sup>228</sup> By evaluating the impact of U.S. trade policies on nonprofessional foreign nationals, and adopting measures that tend to reduce the demand to migrate, the U.S. may simultaneously address global inequality and advance the sovereignty interest in managing the future migrant flow.

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228. See NGAI, *supra* note 29, at 296 (recommending “strategies aimed at altering the push-and-pull dynamics of migration from the developing world to the United States. Trade and investment policies that strengthen the economies of the sending nations would lessen pressures on emigration”); GCIM REPORT, *supra* note 2, at 20-22 (arguing that reducing domestic agricultural subsidies would lessen unauthorized migration); Pia M. Orrenius and Madeline Zavodny, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 DEMOGRAPHY 437, 446 (2003) (concluding that data from 1969 to 1996 show that a 10% increase of manufacturing wages in Mexico resulted in a lowering of border apprehensions by 3.3%); Jones, *supra* note 178, at US 725 (asserting that an increase in maquiladora jobs in Mexico was the likely cause for part of decline of immigration from Mexico during the 1980’s).



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