



**Universal Periodic Review (UPR) of United States of America  
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**NGO Submission by:**

**Edmund Rice International**

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## **Submission Concerning H-2 Guestworker Programs in USA**

1. This submission arises from a concern that the fundamental human rights set forth in the UDHR (Article 23) concerning the right to work, to just and favorable conditions of work, the right to equal pay for equal work, the right to just and favorable remuneration, and the right to form and join a union, are seriously compromised under Guestworker Programs in the USA.

### **I. Federal laws and regulations protecting guest workers from abuse must be strengthened**

2. The United States currently has two guestworker programs under which employers can import unskilled labor for temporary or seasonal work lasting less than a year: the H-2A program for agricultural work and the H-2B program for non-agricultural work.

3. Both programs permit the guestworker to work only for the employer who petitioned the Department of Labor (DOL) for his or her services. If the work situation is abusive or not what was promised, the worker has little or no recourse other than to go home. In practical terms, it means that an employee is much less likely to complain about workplace safety or wage issues.

**4. Recommendation: a) Guest workers should be able to obtain visas that do not tie them to a specific employer. The current restriction is at the heart of many abuses they face.**

5. The H-2 visas used by guestworkers are for individuals only and generally do not permit them to bring their families to the United States. This means that guestworkers are separated from their families, including their minor children, for periods often lasting nearly a year.

**6. Recommendation: b) Congress should provide a process allowing guest workers to gain permanent residency, with their families, over time. Large-scale, long-term Guestworker programs that treat workers as short-term commodities are exploitative and an affront to human dignity.**

7. US employers almost universally rely on private agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America. These labor recruiters usually charge fees to the worker — sometimes thousands of dollars — to cover travel, visas and other costs, including profit for the recruiters. The workers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract.

8. The entirely unregulated recruiting business can be quite lucrative. With more than 121,000 such workers recruited in 2005 alone, tens of millions of dollars in recruiting fees are at stake. This financial bonanza provides a powerful incentive for recruiters and agencies to import as many workers as possible — with little or no regard to the impact on individual workers and their families.

9. Typically, guestworkers arriving in the United States face a fee-related debt ranging from \$500 to well over \$10,000. Many pay exorbitant interest rates on that debt. When that's the case, they have virtually no possibility of repaying the debt by performing the work offered by the employer during the term of the contract.

10. Overwhelming debt is a chronic problem for guestworkers. Although US laws do provide some obligation for employers to reimburse workers for their travel and visa costs, in practice it is rare that guestworkers are fully reimbursed. Most struggle to repay their debt, while interest accrues. These obstacles are compounded when employers fail to offer as many hours of work as promised — a common occurrence.

11. The story told by Alvaro Hernandez-Lopez is typical of guestworkers recruited from Guatemala. In 2001, at age 45, he came to the United States to work for Express Forestry Inc. in the Southeast. He continued coming for two more planting seasons. "What I earned planting trees in the States was hardly enough to pay my debt," he said. "It was really hard for us to fight to get to the States legally and then not earn any money. We were told we had to leave our deeds to get the job. On a blank paper we had to sign our names and hand over our deeds. They said that if we didn't sign this paper they wouldn't bring us to the States to work."

**12. Recommendations: c) Employers should be required to bear all the costs of recruiting and transporting guestworkers to the USA. Federal regulations should be consistent with the 11th US Circuit Court of Appeals decision in *Arriaga v. Florida Pacific Farms*. Requiring guest workers to pay these fees encourages the over-recruitment of guest workers and puts them in a position of debt peonage that leads to abuse.**

**d) Entities acting as labor brokers for employers that actually use the guest workers should not be allowed to obtain certification from the Department of Labor to bring them in. Allowing these middlemen to obtain certification shields the true employer from responsibility for the mistreatment of guest workers.**

13. H-2A workers are legally entitled to:

- Receive at least three-fourths of the total hours promised in the contract, which states the period of employment promised. (This is called the "three-quarters guarantee.")
- Receive free housing in good condition for the period of the contract.
- Receive workers' compensation benefits for medical costs and payment for lost time from work and for any permanent injury.
- Be reimbursed for the cost of travel from the worker's home to the job as soon as the worker finishes 50 percent of the contract period. The expenses include the cost of an airline or bus ticket and food during the trip. If the guestworker stays on the job until the end of the contract the employer must pay transportation home.
- Be protected by the same health and safety regulations as other workers.
- Be eligible for federally funded legal services for matters related to their employment as H-2A workers.

14. To protect US workers in competition with H-2A workers, employers must abide by

what is known as the "fifty percent rule." This rule specifies that an H-2A employer must hire any qualified US worker who applies for a job prior to the beginning of the second half of the season for which foreign workers are hired.

15. The fundamental legal protections afforded to H-2A workers do not apply to guestworkers under the H-2B program.

16. Though the H-2B program was created two decades ago by the Immigration Reform and Control Act (IRCA) of 1986, the DOL has never promulgated regulations enacting substantive labor protections for these workers. IRCA, in fact, does not explicitly require such regulatory safeguards, providing only the guidance that the importation of H-2B workers must not adversely affect US workers' wages and working conditions.

**17. Recommendations: e) Congress should require the Department of Labor to promulgate labor regulations for H-2B workers that are comparable to the H-2A regulations.**

**f) Congress should require employers to pay at least the "adverse effect wage rate" in all Guestworker programs to protect against the downward pressure on wages. Guestworker programs should not be a mechanism to drive wages down to the minimum wage.**

18. Guestworkers toil in some of the most dangerous occupations in the United States. Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are more than 10 times the national average. Unfortunately, when H-2 workers suffer injuries on the job, all too often they are denied access to appropriate medical care and benefits. Those who are seriously injured face enormous, often insurmountable obstacles to obtaining workers' compensation benefits.

19. There are no clear rules in the H-2 regulations guaranteeing that workers' compensation benefits will continue after an injured worker returns to his home country. Indeed, the insurance carrier of one large company employing substantial numbers of guestworkers has a policy of affirmatively cutting off workers when they leave the United States, which they inevitably must do. This inhibits the workers' ability to gain access to benefits and provides a financial incentive for employers to rely on guestworkers.

**20. Recommendation: g) Congress should eliminate the barriers that prevent guest workers from receiving workers' compensation benefits. Workers currently must navigate a bewildering state-by-state system that effectively blocks many injured workers from obtaining benefits.**

## **II. Federal agency enforcement of guestworker protections must be strengthened:**

21. The rights of guestworkers can be enforced in two ways: through actions taken by government agencies, mainly the DOL, and through lawsuits filed by private attorneys, federally funded Legal Services (H-2A workers only) or non-profit legal organizations.

22. Government enforcement has proven largely ineffective. The DOL actively

investigates only H-2A workplaces. In 2004 the DOL conducted 89 investigations into H-2A employers.

23. Today, there are about 6,700 businesses certified to employ H-2A workers. There are currently about 8,900 employers certified to hire H-2B workers, but there do not appear to be any available data on how many investigations the DOL conducts of these employers. Evidence suggests it is far fewer than the number of H-2A employers investigated, particularly given the DOL's stance that it is not empowered to enforce the terms of an H-2B worker's contract.

24. Though violations of federal regulations or individual contracts are common, DOL rarely instigates enforcement actions. And when employers do violate the legal rights of workers, the DOL takes no action to stop them from importing more workers. The Government Accountability Office reported in 1997 that the DOL had never failed to approve an application to import H-2A workers because an employer had violated the legal rights of workers.

**25. Recommendations:** a) **Congress should require that all employers report to the Department of Labor, at the conclusion of a guest worker's term of employment and under penalty of perjury, on their compliance with the terms of the law and the guest worker's contract. There currently is no mechanism allowing the government to ensure that employers comply with Guestworker contracts.**

b) **Employers using guest workers should be required to post a bond that is at least sufficient in value to cover the workers' legal wages. A system should be created to permit workers to make claims against the bond. Guest workers, who must return to their country when their visas expire, typically have no way of recovering earned wages that are not paid by employers.**

c) **There should be a massive increase in funding for federal agency enforcement of guestworker protections. Guest workers are the most vulnerable workers in the USA, but there is scant government enforcement of their human rights.**

d) **The Department of Labor should be authorized to enforce all Guestworker agreements. The DOL takes the position that it does not have legal authority to enforce H-2B Guestworker contracts.**

e) **The Department of Labor should create a streamlined process to deny Guestworker applications from employers that have violated the rights of guest workers. Employers who abuse guest workers continue to be granted certification by the DOL to bring in new workers.**

### **III. Congress must provide guest workers with meaningful access to the courts:**

26. The DOL takes the position that it cannot enforce the contractual rights of workers, and it has declined to take action against employers who confiscate passports and visas.

27. Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses. Unfortunately, filing lawsuits against

abusive employers is not a realistic option in most cases. Even if guestworkers know their rights — and most do not — and even if private attorneys would take their cases — and most will not — guestworkers risk blacklisting and other forms of retaliation against themselves or their families if they sue to protect their rights.

28. While H-2A workers are eligible for representation by federally funded Legal Services lawyers, these lawyers are prohibited from handling class actions lawsuits. Given workers' enormous fears of retaliation and blacklisting, any system that relies on workers asserting their own legal rights is unlikely to bring about systemic change. Having access to class action litigation would at least permit cases to be brought by one or two workers brave enough to challenge the system.

29. In addition, H-2A workers are specifically exempted from the major statute designed to protect agricultural workers in the United States from abuse and exploitation — the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Adopted in 1983, it replaced the Farm Labor Contractors Registration Act of 1963, which was enacted in the wake of the Edward R. Murrow film about farmworkers, *Harvest of Shame*, aired by CBS during Thanksgiving in 1960. Among other things, the AWPA provides migrant farmworkers a legal mechanism to enforce the terms of the promises made to them and the other terms of their agreement in federal court. But the powerful protections of that law are not available to H-2A workers.

30. For H-2B workers, the situation is perhaps even more dire. Although they are in the U.S. legally and are financially eligible, they are ineligible for federally funded legal services because of their visa status. As a result, most H-2B workers have no access to lawyers or information about their legal rights at all. Because most do not speak English and are extremely isolated, usually both geographically and socially, it is unrealistic to expect that they would be able to take action to enforce their own legal rights. Moreover, many of these workers have few rights to enforce.

**31. Recommendations:** a) Congress should make all guest workers eligible for federally funded legal services. H-2B workers are currently not eligible for legal aid services.

b) Because of the unique challenges faced by guest workers, the restriction on federally funded legal services that prohibits class action representation should be lifted.

c) Congress should provide a civil cause of action and criminal penalties for employers or persons who confiscate or hold guestworker documents. This common tactic is designed to hold guest workers hostage.

d) Congress should provide a federal cause of action allowing all guest workers to enforce their contracts.

**Reference :** 'Close to Slavery' a report of the *The Southern Poverty Law Center*  
<http://www.splcenter.org>