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Beauty and the H-2Beast: How the Equality State Fails its Female Guest Workers

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COMMENT

**Beauty and the H-2Beast:
How the Equality State Fails its Female Guest Workers**

*Catherine DiSanto**

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INTRODUCTION

[T]he defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.¹

In the spring of 2017, Congress faced a troublesome and pressing problem: the statutory cap—a limit on the number of temporary, non-agricultural guest workers admitted annually—had been reached earlier than expected.² Pressure

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¹ Pollock v. Williams, 322 U.S. 4, 18 (1944).

² USCIS Reaches the H-2B Cap for Fiscal Year 2017, U.S. CITIZENSHIP & IMMIGR. SERV. (Mar. 16, 2017), <http://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2017>.

built for an emergency expansion of the cap.³ People representing restaurants, hotels, construction companies, and ski resorts claimed they would suffer enormous losses if they could not rely on temporary workers, specifically H-2B visa-holders, to meet their labor needs.⁴

Wyoming participated in the national conversation.⁵ Employers, especially in Teton County, asserted an inability to fill positions with U.S. workers and urged Congress to expand the number of available temporary non-agricultural guest worker visas.⁶ On June 19, 2017, Congress released an additional 15,000 H-2B visas as a one-time exception.⁷ Employers who wished to apply for temporary laborers under one of these emergency visas were required to show that they would suffer irreparable harm without additional H-2B workers.⁸ Due to the cumbersome, lengthy procedure to acquire the visas, however, many businesses did not receive help until after the end of the busiest summer months, rendering the relief largely insufficient.⁹

Congress's "one-time exception" response to industry's loudest voices only marginally alleviated an open wound: the U.S. non-agricultural guest worker program.¹⁰ The burgeoning program annually funnels tens of thousands of low-skilled laborers into jobs American laborers will not or cannot perform for short periods of time; after the job ends, workers are supposed to return to their

³ Fred Bever, *With Fewer Available H-2B Visas, Employers Struggle To Find Seasonal Workers*, NPR (Mar. 28, 2017), <http://www.npr.org/2017/03/28/520254684/with-fewer-available-h-2b-visas-employers-struggle-to-find-seasonal-workers>; Miriam Jordan, *Visa Shortage Spurs Vacancies, for Jobs, at a Tourist Getaway*, N.Y. TIMES (June 8, 2017), http://www.nytimes.com/2017/06/08/us/summer-jobs-visas.html?_r=0.

⁴ Jennifer McDermott, *Visa Crackdown Threatens Seasonal Help at US Resorts*, U.S. NEWS (May 2, 2017, 11:06 AM), <http://www.usnews.com/news/best-states/maine/articles/2017-05-02/with-visas-tight-us-resorts-struggle-to-find-seasonal-help>.

⁵ *Demand for Seasonal Foreign Workers Increases in Wyoming*, CASPER STAR TRIB. (July 14, 2017), http://trib.com/news/state-and-regional/demand-for-seasonal-foreign-workers-increases-in-wyoming/article_10ca634f-3c6b-50de-92a6-a0212f03746f.html.

⁶ Letter from H-2B Workforce Coal. to John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec. (May 10, 2017) (on file with U.S. Chamber of Commerce).

⁷ *One-Time Increase in H-2B Nonimmigrant Visas for FY 2017*, U.S. CITIZENSHIP & IMMIGR. SERV. (Sept. 20, 2017), <http://www.uscis.gov/working-united-states/temporary-workers/one-time-increase-h-2b-nonimmigrant-visas-fy-2017>.

⁸ *Id.*

⁹ See, e.g., Jason Blevins, *Colorado's resorts, hurting for workers, applaud one-time increase in visas but push for complete overhaul*, DENVER POST (July 17, 2017, 6:29 PM), <http://www.denverpost.com/2017/07/17/resort-industry-colorado-applauds-one-time-increase-worker-visas-pushes-overhaul-h2b-program/>.

¹⁰ Daniel Costa, *Frequently Asked Questions about the H-2B Temporary Foreign Worker Program*, ECON. POL'Y INST. 7 (June 2, 2016), <http://www.epi.org/files/pdf/108237.pdf> [hereinafter Costa, *Frequently Asked Questions*] (criticizing the DOL's acknowledgement that its effort to protect workers have "been under constant attack from powerful industry groups.").

countries of origin.¹¹ Congress's expansion of the program in 2017 barely relieved American businesses even temporarily, and what relief the expansion brought came at the expense of vulnerable migrants, particularly women, who are not afforded the protections of other temporary work visas.¹² By enacting provisional measures, Congress allowed the H-2B visa program to continue without addressing its deeper flaws.¹³ Additionally, between the insufficiency of the current statutory cap and recent reform to the program that increases the financial burden on participating employers, employers' dissatisfaction with the program may shift this type of work to another class of low-skilled workers, J-1 "cultural exchange" students.¹⁴

This comment first summarizes the historical and legislative context of the temporary guest worker program and its split in 1986 into the H-2A and H-2B categories.¹⁵ Next, it discusses the differences between the categories and examines the gender-based problems inherent in the H-2B visa.¹⁶ Part IV analyzes the H-2B visa program's effects on Wyoming and its unique economy.¹⁷ Part V examines the intersection of the H-2B system with the J-1 visa program and the unintended consequences of the 2015 reform that effectively replaced one disposable labor pool with another.¹⁸ Finally, this comment proposes fundamentally reforming the H-2B program rather than sporadically expanding it, and advises Wyoming employers against replacing their labor needs with under-regulated J-1 exchange visitors.¹⁹ By expanding the length of the visa, creating an option for portability, and constructing a pathway to citizenship, the H-2B could better serve guest workers, U.S. workers, and U.S. employers alike—a change likely to have positive impacts on the use of foreign labor in Wyoming.²⁰

¹¹ *Foreign Labor Certification News*, U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN., <http://www.foreignlaborcert.doleta.gov/news/cfm> (last visited Apr. 9, 2018).

¹² 29 C.F.R. § 503.16 (2018).

¹³ Daniel Kowalski, *H-2B Visas and the Making of an 'Ultra Vires' Regulation*, LAW360 (July 25, 2017, 1:51 PM), <http://www.law360.com/articles/947267/h-2b-visas-and-the-making-of-an-ultra-vires-regulation>.

¹⁴ Sabrina Balgamwalla, *Jobs Looking for People, People Looking for their Rights: Seeking Relief for Exploited Immigrant Workers in North Dakota*, 91 N.D. L. REV. 483, 487–89 (2015) [hereinafter Balgamwalla, *Jobs Looking for People*]; Telephone Interview with Ali Stabler, Human Res. Dep't., Jackson Hole Mountain Resort (Jan. 12, 2018); Email from Maximilian Weber, Human Res. & Safety Compliance, Grand Targhee Resort (Jan. 10, 2018, 10:25 AM MST) (on file with author).

¹⁵ See *infra* notes 22–39 and accompanying text.

¹⁶ See *infra* notes 40–151 and accompanying text.

¹⁷ See *infra* notes 152–64 and accompanying text.

¹⁸ See *infra* notes 165–210 and accompanying text.

¹⁹ See *infra* notes 211–31 and accompanying text.

²⁰ See *infra* notes 211–31 and accompanying text.

II. “CLOSE TO SLAVERY:” A HISTORY OF TEMPORARY GUEST WORKER PROGRAMS²¹

The long history of temporary labor programs in the U.S. is fraught with abuse and marginalization.²² The Bracero program, enacted during World War II to alleviate domestic labor shortages, reflected the traditional notion of male-initiated family migration and placed men in agricultural laborer positions, despite the reality that “[r]ural Mexican women . . . almost always work in the fields, with livestock, and/or in crop-cleaning after the harvest.”²³ Under that program, which ended in 1964, more than 450,000 Mexican laborers—all men—entered the U.S. annually for temporary work, and filled over 4.5 million jobs in the U.S. economy over the duration of the program.²⁴ Braceros suffered abuse at the hands of their employers, including squalid living conditions, repressed wages, long hours, and unsafe working conditions.²⁵ Indeed, the Department of Labor (DOL) likened the program to “legalized slavery.”²⁶ Unfortunately, modern guest worker programs, such as the H-2B visa program, perpetuate the same issues that plagued the Braceros.²⁷

President Ronald Reagan enacted the modern temporary guest worker program in 1986 under the Immigration Reform and Control Act (IRCA).²⁸ IRCA identifies temporary laborers as either agricultural (H-2A) or non-agricultural (H-2B), and details the multi-agency application and certification process for acquiring workers.²⁹ Both visas allow a temporary laborer to enter the U.S. to

²¹ MARY BAUER & MEREDITH STEWART, S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUEST-WORKER PROGRAMS IN THE U.S. 1 (Feb. 18, 2013), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

²² Dorothy E. Hill, *Guest Worker Programs are no Fix for our Broken Immigration System: Evidence from the Northern Mariana Islands*, 41 N.M. L. REV. 131, 146–47 (2011) (describing abuses under the Bracero program such as poor working conditions, depressed wages, and squalid living conditions).

²³ Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107, 112–13 (2016); Tamar D. Wilson, *Review: Mexican Women’s Migration to the United States and the Politics of Patriarchy*, 24 LATIN AM. PERSPECTIVES no. 5, 132–36 (1997).

²⁴ Maddali, *supra* note 23, at 109 n.14; Hill, *supra* note 22, at 144–45.

²⁵ See Hill, *supra* note 22, at 144–47 (including a succinct overview of the Bracero program).

²⁶ Bauer & Stewart, *supra* note 21 (quoting Lee G. Williams in THEO J. MAJKA & PATRICK H. MOONEY, FARMERS’ AND FARM WORKERS’ MOVEMENTS 152 (1995)).

²⁷ See, e.g., Daniel Costa, *Modern-day Braceros: The United States has 450,000 Guestworkers in Low-Wage Jobs and Doesn’t Need More*, ECON. POL’Y INST. (Mar. 31, 2017, 12:01 AM), <http://www.epi.org/blog/modern-day-braceros-the-united-states-has-450000-guestworkers-in-low-wage-jobs/>.

²⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301, 100 Stat. 3399 (1986).

²⁹ *Id.*

work for a single employer for a designated period of time, with no opportunity for adjustment of status to lawful permanent residency.³⁰

Temporary guest workers are placed with employers who have demonstrated temporary need by showing either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need—categories defined by the nature, seasonality, and duration of the workload.³¹ The employer must show that the necessity for the guest worker will end in the “near, definable future” to qualify for certification of a “temporary” visa.³² Frequently, H-2B guest workers fill positions in logging, ski area work, crop harvesting, and amusement parks and carnivals—all non-agricultural work that demands a temporary labor pool, or work that simply does not exist outside of the designated season.³³ Employers seeking H-2B workers must also verify that “there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work” and that hiring H-2B workers “will not adversely affect the wages and working conditions of similarly employed U.S. workers.”³⁴ For many small or seasonal towns, or areas that do not have a stable labor supply based on geographical remoteness, foreign labor is essential to economic viability.³⁵

Currently, the Department of Homeland Security (DHS), the DOL, and United States Citizenship and Immigration Services (USCIS) work together to handle visa applications, labor certifications, and overall compliance with the program.³⁶ Although the H-2A category does not have a statutory cap, DHS confines the H-2B visa category to 66,000 entrants annually.³⁷ Until recently, returning H-2B visa-holders were not included when calculating the statutory

³⁰ *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERV. (Feb. 15, 2018), <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (explaining that H-2B visas are currently valid for up to one year and may be renewed each year for up to three years, at which point the guest worker must leave the country for at least three months before reapplying); Hill, *supra* note 22, at 133–34.

³¹ U.S. CITIZENSHIP & IMMIGR. SERV., GUIDANCE ON “TEMPORARY NEED” IN H-2B PETITIONS (2016).

³² ANDORRA BRUNO, CONG. RESEARCH SERV., R44849, H-2A AND H-2B TEMPORARY WORKER VISAS: POLICY AND RELATED ISSUES 9 (2017).

³³ OFFICE OF FOREIGN LABOR CERTIFICATION, ANNUAL REPORT 45–48 (2016), http://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf.

³⁴ *H-2B Temporary Non-Agricultural Workers*, *supra* note 30.

³⁵ See, e.g., *Operating Hours and Seasons*, NAT’L PARK SERV., <http://www.nps.gov/yell/planyourvisit/hours.htm> (last updated Apr. 2, 2018); Jordan, *supra* note 3.

³⁶ ASHWINI SUKTHANKAR, GLOB. WORKERS JUST. ALL., VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM 29–31 (May 30, 2012) (outlining the roles different agencies play and criticizing the government’s oversight as “uncoordinated and inefficient.”).

³⁷ Immigration and Nationality Act § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B) (2015).

cap.³⁸ In 2016, Congress began counting returning H-2B workers towards the cap, a decision that drastically reduced the flow of non-agricultural guest workers into the U.S. and contributed to the worker shortages in 2017.³⁹

A. H-2A and H-2B: Ripe for Abuse

Procedurally, an employer must generally go through the same certification process whether she is seeking H-2A or H-2B visas.⁴⁰ The H-2B visa, however, has far fewer procedural worker safeguards than those afforded to the H-2A visa, despite reform to the H-2B program in 2015.⁴¹ Both categories of the H-2 visa have been and continue to be broadly criticized; the DOL and the U.S. Government Accountability Office (GAO) have acknowledged fundamental flaws, likening the temporary guest worker program to a system of indentured servitude.⁴² Structural deficiencies and lack of oversight contribute to the framework of exploitation, and reports of abuse are likely far underrated.⁴³

³⁸ ANDORRA BRUNO, CONG. RESEARCH SERV., R44306, THE H-2B VISA AND THE STATUTORY CAP: IN BRIEF 4 (2015) [hereinafter BRUNO, THE H-2B VISA AND THE STATUTORY CAP] (noting the provision had been implemented for fiscal year 2005 and 2006 and exempted H-2B workers who had been counted in the cap in any of the previous three years).

³⁹ Miriam Jordan, *U.S. to Release Up to 15,000 New Visas for Seasonal Workers*, N.Y. TIMES (July 17, 2017), http://www.nytimes.com/2017/07/17/us/homeland-security-to-release-up-to-15000-new-seasonal-visas.html?_r=0; U.S. DEP'T OF STATE, FY 2016 NONIMMIGRANT VISAS ISSUED (stating the Department of State issued 84,627 total H-2B visas in 2016 and 61,128 of which came from Mexico).

⁴⁰ U.S. CITIZENSHIP & IMMIGR. SERV., *supra* note 31; *see supra* notes 31–39 and accompanying text.

⁴¹ *Compare Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEP'T OF LABOR (Dec. 2016), <http://webapps.dol.gov/elaws/elg/taw.htm#RRN> (stating employers sponsoring H-2A workers may be responsible for employee safeguards “concerning recruitment, wages, housing, meals, transportation, workers’ compensation insurance, tools and supplies, certification and recruitment fees, labor disputes, and other conditions”), *with Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2B Visas)*, U.S. DEP'T OF LABOR (Dec. 2016), <http://webapps.dol.gov/elaws/elg/tnw.htm> (stating employers sponsoring H-2B workers are not responsible for housing or workers’ compensation insurance); BRUNO, THE H-2B VISA AND THE STATUTORY CAP, *supra* note 38.

⁴² 20 C.F.R. § 655.22(g) (*rev'd* Apr. 23, 2012) (“The Department is concerned that workers who heavily indebted themselves to secure a place in the H-2B program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.”); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, H-2A AND H-2B PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS (2015).

⁴³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 37.

1. *Framework of Exploitation*

The widespread commodification of foreign labor in the U.S. often results in exploitation of guest workers before they even leave their countries of origin.⁴⁴ This occurs because abusive recruitment tactics by “brokers” abroad, acting as middlemen for U.S. employers, fall outside the purview of U.S. oversight.⁴⁵ Brokers may charge exorbitant fees to connect often destitute workers with desperate American employers, plunging workers into debt cycles that perpetuate worker subjugation.⁴⁶ Guest workers seeking jobs in the U.S. frequently borrow money to arrange for travel, and, often, brokers require them to leave behind “collateral” to ensure compliance with their job contracts while abroad.⁴⁷ Reports of brokers threatening to charge workers financial penalties if they violate their employment contracts are not uncommon.⁴⁸ Unfortunately, the quest for cheap foreign labor is now so entrenched that the 2015 reform, which attempted to broaden oversight and limit reliance on recruiters, falls short of disrupting current migratory patterns and domestic dependencies.⁴⁹

Because the H-2B system allows employers to exploit foreign labor and reap inequitable economic benefits, many employers prefer it despite its regulatory

⁴⁴ BAUER & STEWART, *supra* note 21, at 34; Hill, *supra* note 22, at 188 (“[G]uest worker programs treat migrants as commodities by design.”).

⁴⁵ CENTRO DE LOS DERECHOS MIGRANTE, RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE (2013), http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf; POLARIS PROJECT, LABOR TRAFFICKING IN THE U.S.: A CLOSER LOOK AT TEMPORARY WORK VISAS 3 (2015), http://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf; JUSTICE IN MOTION, U.S. TEMPORARY FOREIGN WORKER VISAS: H-2B 18–20 (2016), http://static1.squarespace.com/static/57d09e5c5016e1b4f21e9bd3/t/58c32927db29d6bfd8cb56a4/1489185065974/VisaPages_H2B_2015update.pdf (noting that recruiter information is not public and the government does not have a system in place to monitor H-2B recruiters at the national level).

⁴⁶ COLLEEN OWENS ET AL., URBAN INST., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES 12 (2014), http://www.urban.org/research/publication/understanding-organization-operation-and-victimization-process-labor-trafficking-united-states/view/full_report; FREEDOM NETWORK, HUMAN TRAFFICKING AND TEMPORARY H-2 WORKERS 2–3 (2012), <http://perma.cc/87PH-XLQB> (addressing the issue of job contractors hiring out workers by fraudulently obtaining certification and the lack of government oversight into job brokers).

⁴⁷ 29 C.F.R. § 503.16(j) (2015); OWENS ET AL., *supra* note 46, at 13.

⁴⁸ BAUER & STEWART, *supra* note 21, at 11 (“It is almost inconceivable that a worker would complain in any substantial way while a company agent holds the deed to the home where his wife and children reside.”).

⁴⁹ *Foreign Labor Certification News*, *supra* note 11 (describing the numbers of employers filing for certification of H-2B workers as “unprecedented.”). The 2015 Final Wage Rule attempts to improve transparency by requiring employers to disclose the use of foreign recruiters, but the lack of communication between agencies render this provision largely inadequate. *See* 20 C.F.R. § 655.9 (2015).

burdens.⁵⁰ As a result, employers may intentionally misclassify employees as H-2B workers.⁵¹ One reason employers might prefer the H-2B over the H-2A is that the H-2B requires less ongoing financial obligation from the employer to the employee.⁵² Furthermore, employers often misclassify the type of work H-2B workers will perform, allowing them to pay workers at a lower prevailing wage rate.⁵³ Even so, “it’s hard to imagine that any business would go through such a bureaucratic, expensive hassle unless they truly had a shortage of willing workers,” or were incentivized by the promise of a cheap labor source.⁵⁴ In any event, intentional misclassification of workers as H-2Bs places otherwise qualified individuals in a less-regulated and frequently less lucrative category.

Upon arrival in the U.S., the vulnerability of the foreign guest worker reappears at the contract signing between worker and employer.⁵⁵ Workers sometimes are not allowed to review the job contract or do not understand it.⁵⁶ Sometimes, employers exaggerate or simply cannot accurately predict their seasonal labor needs so, when workers arrive, they do not receive the work they were promised.⁵⁷ Until recently, H-2B workers did not have the “three-fourths guarantee” that H-2A workers enjoy, which provides that employers must guarantee employment for a total number of work hours equal to at least three-fourths of the workdays in specific periods for both H-2B workers and workers in corresponding employment.⁵⁸

⁵⁰ Jessica Garrison et al., *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015, 9:47 AM), <http://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.ngYzvAXWB2> (“Kalen Fraser, a former investigator for the Labor Department’s Wage and Hour Division who specialized in H-2 visa cases, said that while some companies stumble over complex rules, a substantial portion ‘maliciously’ violate worker protection laws.”).

⁵¹ BAUER & STEWART, *supra* note 21, at 9–13.

⁵² *The H-2B Temporary Foreign Worker Program: Hearing Before the Subcomm. on Immigration & the Nat’l Interest of the S. Comm. on the Judiciary*, 114th Cong. 11–13 (2016) [hereinafter *Hearing*] (including the statement of Daniel Costa, Dir. of Immigr. Law and Pol’y Res., Econ. Pol’y Inst.).

⁵³ BAUER & STEWART, *supra* note 21, at 23–24.

⁵⁴ Alexia F. Campbell, *Many Americans Want Work, but They Don’t Want to Mow Lawns*, THE ATLANTIC (July 11, 2016), <http://www.theatlantic.com/business/archive/2016/07/why-the-guys-mowing-your-lawn-are-probably-foreign/490595/>.

⁵⁵ 29 C.F.R. § 503.16 (2015).

⁵⁶ BAUER & STEWART, *supra* note 21, at 23. Such deficiencies in the formation of these contracts raise additional issues related to their validity, such as undue influence, capacity, and duress. See *id.* However, a discussion of their legality is beyond the scope of this paper.

⁵⁷ *Id.* at 22 (“The DOL’s inspector general found in 2004 that the North Carolina Growers Association overstated both its need for workers and the length of the period of employment.”).

⁵⁸ 29 C.F.R. § 503.16(f).

The reform in 2015 attempted to address the wage and hour abuses that have consistently plagued the H-2B visa category.⁵⁹ Although many of these provisions will protect guest worker wages, employers still retain disproportionate control over those wages.⁶⁰ For example, according to the 2015 Final Wage Rule, employers must pay H-2B workers the “calculated rate” based on DOL data for that occupation.⁶¹ However, employers may easily substitute independent surveys to establish the mean wage for the occupation in their relevant geographical location if they meet several minimal criteria.⁶² Thus, the Final Wage Rule allows employers to pay workers rates that are lower than rates based on DOL data.⁶³ On top of that, some employers frequently discriminate based on race, paying different wages to H-2B workers depending on their country of origin.⁶⁴ Underpaying H-2B workers not only increases debt servitude, but also undermines domestic laborers by incentivizing employers to look to foreign guest workers rather than the U.S. labor force.⁶⁵

Compared to workers in other visa categories, H-2B workers lack significant health and safety protections and are at a significantly greater risk of trafficking.⁶⁶ The use of noncitizen labor in dangerous workplaces shifts the costs of health

⁵⁹ Save Our Small and Seasonal Businesses Act, S. 2225, 114th Cong. (2015); Roy Maurer, *New Rules Revamp H-2B Visa Program*, SOC’Y FOR HUM. RES. MGMT. (May 6, 2015), <http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/new-rules-revamp-h2b-visa-program.aspx> (noting that employers are now required to increase the number of hours per week required for full time employment, adhere to the three-fourths guarantee, pay visa and related fees of H-2B workers, and provide employees with copies of the job order and earnings statements, including deductions); BAUER & STEWART, *supra* note 21, at 18; Jimenez v. GLK Foods LLC, No. 12-CV-209, 2016 WL 2997498, at *15–17 (E.D. Wis. May 23, 2016); Rosiles-Perez v. Super. Forestry Serv., Inc., 250 F.R.D. 332, 339, 345–47 (M.D. Tenn. 2008).

⁶⁰ Maurer, *supra* note 59.

⁶¹ 20 C.F.R. § 655.10 (2015).

⁶² DANIEL COSTA, ECON. POL’Y INST., *THE H-2B TEMPORARY FOREIGN WORKER PROGRAM: FOR LABOR SHORTAGES OR CHEAP, TEMPORARY LABOR?* 26 (2016) [hereinafter COSTA, LABOR SHORTAGES]; *Hearing, supra* note 52, at 13–16 (noting how use of private wage surveys was a systematic response by H-2B employers to undermine wage rules and keep H-2B wages low).

⁶³ *Interim Final Rule: Temporary Non-agricultural Employment of H-2B Aliens in the United States*, U.S. DEP’T OF LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm> (last visited Apr. 11, 2018); Maurer, *supra* note 59.

⁶⁴ INT’L LABOR RECRUITMENT WORKING GRP., *THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE* 14 (2013) (citing *Castellanos-Contreras v. Decatur Hotels*, 622 F.3d 393 (5th Cir. 2010)) (revealing a hotel’s application to the DOL that sought to pay Bolivians \$6.02 per hour, Dominicans \$6.09 per hour, and Peruvians \$4.49 per hour).

⁶⁵ Maurer, *supra* note 59.

⁶⁶ BAUER & STEWART, *supra* note 21, at 25; Stephen Greenhouse, *C.J.’s Seafood Fined for Labor Abuses*, N.Y. TIMES (July 24, 2012), <http://www.nytimes.com/2012/07/25/business/cjs-seafood-fined-for-labor-abuses.html> (describing gross health and safety violations); POLARIS PROJECT, *supra* note 45, at 1.

services from the employer onto the community.⁶⁷ H-2B's workers' compensation depends on state law, which often precludes non-immigrants from seeking redress for job-related injuries.⁶⁸ Similarly, unlike H-2A workers, H-2B workers are not eligible for many federally-funded legal services, such as legal aid.⁶⁹

Additionally, in contrast to H-2A workers, H-2B workers have no federal housing protection, leading some employers to view housing as a potential "profit center."⁷⁰ Often, available housing for H-2B workers is in remote locations; sometimes it is guarded.⁷¹ In a recent case, hundreds of Indian H-2B workers sued their employer alleging, *inter alia*, violations of the Fair Labor Standards Act and the Trafficking Victims Protection Act after paying between \$11,000 and \$25,000 in recruitment fees to live in "man camps" guarded by armed soldiers.⁷² Housing sometimes lacks beds, cooking facilities, and adequate restrooms.⁷³ The lack of DOL regulations means that nothing prevents an employer from charging unreasonable rent to H-2B workers, the imposition of which may significantly reduce workers' promised wages and increase their indebtedness to the employer.⁷⁴

Most importantly, because the H-2B visa is linked to a sponsoring employer, workers cannot quit or find other employment if their jobs are unsuitable, and they are much less likely than a citizen at-will employee to file a complaint with their sponsoring employers.⁷⁵ This lack of portability traps vulnerable guest workers in potentially abusive work environments with no opportunity for

⁶⁷ Anne T. Gallagher, Note, *Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1015 (2013).

⁶⁸ BAUER & STEWART, *supra* note 21, at 25; *see also* WYO. STAT. ANN. § 27-14-102(a)(vii) (2017) (allowing a broad definition of "employee" that could easily exclude H-2B workers by categorizing them as aliens).

⁶⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 43.

⁷⁰ *See supra* note 45 and accompanying text; BAUER & STEWART, *supra* note 21, at 36.

⁷¹ *Id.* at 32, 37.

⁷² *David v. Signal Int'l*, 37 F. Supp. 3d 822 (2014); Rachel Luban, *Jury Awards Guestworkers Over \$14 Million in Landmark Human Trafficking, Forced Labor Case*, IN THESE TIMES (Feb. 19, 2015, 10:27 AM), http://inthesetimes.com/working/entry/17657/guestworkers_new_orleans.

⁷³ Luban, *supra* note 72 (noting that workers alleged their trailers were overcrowded and lacked sufficient toilets and sanitation); Jessica Garrison et al., "All You Americans Are Fired.," BUZZFEED NEWS (Dec. 1, 2015), http://www.buzzfeed.com/jessicagarrison/all-you-americans-are-fired?utm_term=.bpbAq1Y9y#.oxPgGWEJo_ (describing workers paying nearly \$300 a month to live in rotting school buses with no plumbing).

⁷⁴ Garrison et al., *supra* note 73; BAUER & STEWART, *supra* note 21, at 35.

⁷⁵ 8 C.F.R. § 214.2(h)(2)(i)(D) (2016); *see* SUKTHANKAR, *supra* note 36, at 47 (describing how quitting will lead to deportable status); Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 443 (2007) (acknowledging that lack of portability is "one of the most severe problems of the existing H-2A and H-2B programs.").

alternative employment.⁷⁶ An employer can threaten to deport the guest worker or call Immigration and Customs Enforcement (ICE), and employers frequently hold workers' documentation, including passports and social security cards.⁷⁷ The vulnerability of being tied to a single employer also increases guest worker susceptibility to human trafficking; one recent study of guest worker trafficking victims found that coercion in the form of document seizure was present in 64% of cases.⁷⁸

2. *A Department's Duty, Disregarded*

The lack of DOL oversight amplifies the risks faced by H-2B workers.⁷⁹ Between 1975 and 2004, DOL enforcement activities and resources “either stagnated or declined” as the workforce grew.⁸⁰ Even after the DOL hired 250 new Wage and Hour Department (WHD) investigators in 2010, only 1,200 WHD agents are currently tasked with “protecting the labor and employment rights of 150 million workers—which includes all H-2B workers and Americans who work in H-2B occupations.”⁸¹ Moreover, the H-2B program receives far less attention than the H-2A program. The Government Accountability Office (GAO) reported that between 2009 and 2013, over 90% of DOL investigations involved the H-2A category rather than the H-2B category, despite the H-2B program having twice the number of reported labor violations as the H-2A.⁸²

Financial and budgetary constraints alone, however, do not justify the lack of oversight; policy concerns and institutionalized gender bias regarding noncitizens may contribute to the lack of attention and funding in this area. Despite reporting to the correct authority, a victim of H-2B abuse may be considered a mere “gray-area” case—subject to labor abuse but not rising to the level of “severe” trafficking.⁸³ As such, “the government’s approach has been to treat the gray-

⁷⁶ Read, *supra* note 75, at 443. The problem is not limited to the H-2 visa program, but also extends to other temporary guest worker programs. See FREEDOM NETWORK, *supra* 46, at 2 (“Although the recruitment or mode of entry of the temporary worker to the U.S. is not necessarily conducted illegally, the manner in which the H-2 visas tie the employee’s livelihood and legal status to their employers can easily create situations of subordination and exploitation, often found in cases of trafficking involving undocumented workers.”).

⁷⁷ POLARIS PROJECT, *supra* note 45, at 4; OWENS ET AL., *supra* note 46, at 89–90; BAUER & STEWART, *supra* note 21, at 2; U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 42, at 37–38.

⁷⁸ OWENS ET AL., *supra* note 46, at vii, 70 (reporting in one survey that 71% of trafficking victims entered the U.S. on temporary visas).

⁷⁹ Garrison et al., *supra* note 50 (“The Labor Department noted . . . that it has limited resources, with only about 1,000 investigators to enforce protections for all 135 million workers in the U.S.”).

⁸⁰ Hill, *supra* note 22, at 154.

⁸¹ Costa, *Frequently Asked Questions*, *supra* note 10.

⁸² U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 42, at 36, 47.

⁸³ Jennifer M. Chacon, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1623–24, 1628–29 (2010).

area case as one involving a voluntary migrant who is not eligible for the protections available to trafficking victims.⁸⁴ Thus, even if the DOL were to improve its reporting mechanisms, a lack of adequate judicial redress limits guest worker reporting.⁸⁵

Incentives for employees to report abuses are minimal, as are incentives for employers to comply with workplace and wage and hour regulations.⁸⁶ The DOL only loosely monitors H-2B employers and has failed to sanction known violators.⁸⁷ Employers are rarely suspended or prevented from continued participation in the guest worker program; in 2009, only five out of approximately 7,300 employers seeking to employ H-2B workers were temporarily barred from doing so.⁸⁸ Inadequate sanctioning by the DOL perpetuates the patterns of abuse endemic to the H-2B program and allows unscrupulous employers to continue using exploitative or illegal practices without any genuine fear of governmental reprimand.⁸⁹

B. Discrimination against U.S. Workers

Practices surrounding the H-2B visa affect individuals beyond afflicted foreign guest workers. U.S. employers, who have grown reliant on decades of steady, cheap labor in the form of temporary non-agricultural guest workers, have also become accustomed to the gaps in oversight and financial benefits of the program.⁹⁰ To preserve the status quo, employers are known to deter U.S. workers from applying for the positions they seek to have filled by H-2B visas.⁹¹ In contrast to H-2B workers, U.S. workers are typically more mobile, more aware of their rights, and protected by legislation that covers the workplace.⁹² As a result,

⁸⁴ *Id.*

⁸⁵ See *infra* note 148 and accompanying text.

⁸⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 34–38.

⁸⁷ BAUER & STEWART, *supra* note 21, at 38–39 (“According to a comprehensive list of DOL compliance actions, the Department cited only 27 H-2B employers for violations between 2007 and 2012. Given that the DOL certifies thousands of employers for H-2B workers each year, this indicates that the DOL is not likely conducting many investigations into program abuse.”); see also Ken Bensinger et al., *The Pushovers*, BUZZFEED NEWS (May 12, 2016 2:06 PM), http://www.buzzfeed.com/kenbensinger/the-pushovers?utm_term=.itxKpk31M#.fbGnGOQKP (“There is almost no work-place offense so extreme that the U.S. government will not reward employers with the opportunity to do it again.”); Hill, *supra* note 22, at 154.

⁸⁸ Hill, *supra* note 22, at 153.

⁸⁹ BAUER & STEWART, *supra* note 21, at 38–40.

⁹⁰ See SUKTHANKAR, *supra* note 36, at 39 (noting that the “economic displacement of U.S. workers . . . is now far too entrenched to reverse easily.”).

⁹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 51.

⁹² *Hearing*, *supra* note 52, at 16 (“American workers who have access to basic labor standards and the social safety net, and who can accept a job offer from an employer across town who offers a higher wage, are less appealing than workers who can't complain, look for another job, or demand a higher wage.”).

the GAO has found that some employers “preferentially hired H-2B workers over American workers in violation of federal law.”⁹³

The 2015 reform attempted to create more rigorous domestic recruiting requirements for U.S. employers, but such provisions are not difficult to bypass; in fact, “[a]dvertising for H-2B job orders is essential a formality.”⁹⁴ Although employers are required to advertise the job order in the U.S., many employers intending to import H-2B workers advertise in locations distant from the job site or advertise long before the job begins.⁹⁵ Others misrepresent the job requirements, schedule interviews at inconvenient times, or have applicants perform unnecessarily grueling physical labor during interviews, in attempts to deter the local workforce from applying.⁹⁶ Consequently, “American workers are overlooked in their own communities because of the H-2B program.”⁹⁷

H-2B regulations require employers to hire every qualified American worker who applies for the position before the DOL will certify their request for foreign labor.⁹⁸ However, employers use abusive recruitment tactics and partnerships with foreign recruiters who pick workers based on race, nationality, gender, and age, to effectively mask their efforts to weed out domestic workers and hire cheaper foreign laborers.⁹⁹ Additionally, after an employer has gone to the expense of filing an application for temporary labor certification with the DOL, it is unlikely that she will enthusiastically pursue recruitment efforts; if qualified Americans do apply, the employer’s application fees will be lost.¹⁰⁰ In the landscaping industry, for example, employers “saved an average of \$2.59 per hour in 2014 by hiring an H-2B worker rather than a U.S. worker earning the average wage for landscaping,” and almost all H-2B industries reflect similar savings.¹⁰¹ Faced with such savings,

⁹³ BAUER & STEWART, *supra* note 21, at 31.

⁹⁴ DAVID SEMINARA, CTR. FOR IMMIGR. STUDIES, *DIRTY WORK: IN-SOURCING AMERICAN JOBS WITH H-2B GUESTWORKERS* 13 (Jan. 15, 2010), <http://cis.org/Dirty-Work-InSourcing-American-Jobs-H2B-Guestworkers>.

⁹⁵ 20 C.F.R. § 655.40–.48 (2018); *In re Amsol, Inc.*, No. 2008-INA-00112, 2009 WL 2869970, at *8–9 (Bd. Alien Lab. Cert. App., Dec. 1, 2015); SEMINARA, *supra* note 94, at 12–14 (describing the ways employers circumvent the recruitment period).

⁹⁶ BAUER & STEWART, *supra* note 21, at 31.

⁹⁷ *Hearing*, *supra* note 52, at 16.

⁹⁸ 29 C.F.R. § 503.16(t) (2015).

⁹⁹ INT’L LABOR RECRUITMENT WORKING GRP., *supra* note 64, at 12–15 (detailing the extensive tactics employers and recruiters use to “sort workers into jobs and visa categories based on racialized and gendered notions of work.”); Gabriel Thompson, *The Big, Bad Business of Fighting Guestworker Rights*, *THE NATION* (July 3, 2012), <http://www.thenation.com/article/168715/big-bad-business-fighting-guest-worker-rights#>.

¹⁰⁰ Garrison et al., *supra* note 73.

¹⁰¹ Costa, *Frequently Asked Questions*, *supra* note 10, at 4–5.

employers' push for H-2B workers is understandable.¹⁰² Neither the DOL nor DHS allocates funds for oversight of the H-2B program, part of which could be directed toward recruitment efforts.¹⁰³ Because of this, qualified U.S. laborers face systemic disadvantages.

Moreover, employing noncitizens—whether H-2Bs, trafficked, or unauthorized workers—depresses wages, because employers do not have equivalent financial obligations to noncitizens as they do to citizens, and may legally underpay them.¹⁰⁴ Employers may save several dollars per hour by employing H-2B workers over citizens, making the citizen labor less valuable and reducing wages within the industry.¹⁰⁵ Furthermore, as wages decline because guest workers cannot advocate for better working conditions and benefits, the desirability of the work among U.S. workers wanes, creating a vacuum for even more non-citizen labor.¹⁰⁶ U.S. workers may also be subjected to more dangerous workplace environments.¹⁰⁷ If employers circumvent health and safety regulations, knowing that their temporary guest workers may be too afraid to speak up against violations, all employees suffer as a result.¹⁰⁸

C. The H-2B System and U.S. Employers

For those U.S. employers who choose not to exploit guest workers, navigating the regulations of the program is complicated, burdensome, and expensive.¹⁰⁹ Since the 2015 reform, however—laudable in its attempt to increase employer investment in the program—employers have retreated from the H-2B program.¹¹⁰ Employers in Teton County, Wyoming cited the financial burden of the program as the primary reason for shifting away from using H-2B workers to fill temporary low-skilled jobs.¹¹¹

¹⁰² *Id.*

¹⁰³ SEMINARA, *supra* note 94, at 14.

¹⁰⁴ Gallagher, *supra* note 67, at 1014–15; *Hearing*, *supra* note 52, at 1, 11, 16.

¹⁰⁵ Costa, *Frequently Asked Questions*, *supra* note 10, at 4–5.

¹⁰⁶ BAUER & STEWART, *supra* note 21, at 21 (noting that in 2011, “the DOL itself determined that the current H-2B wage rule degraded the wages of U.S. workers.”).

¹⁰⁷ Gallagher, *supra* note 67, at 1015.

¹⁰⁸ *Id.*

¹⁰⁹ Interview with Rosie Read, Esq., Trefonas Law, in Jackson, Wyo. (Jan. 3, 2018); *see also* JILL H. WILSON, BROOKINGS INST., IMMIGRATION FACTS: TEMPORARY FOREIGN WORKERS (2013), <http://www.brookings.edu/research/immigration-facts-temporary-foreign-workers/>; Campbell, *supra* note 54.

¹¹⁰ SUKTHANKAR, *supra* note 36, at 9 (noting that as one visa becomes more burdensome, employers tend to shift to other labor sources to fill that deficit).

¹¹¹ Interview with Rosie Read, *supra* note 109 (noting that the new timeline and truncated windows for applying for the visas create uncertainty for employers and may lead to lost costs if applications are not certified); Telephone Interview with Ali Stabler, *supra* note 14; Telephone

The instability of the temporary guest worker program contributes to employers' dissatisfaction.¹¹² The politicization of the program subjects it to the whims of different industry leaders, leaving many business owners struggling to keep up with the ever-changing deadlines, caps, and processes for securing temporary low-skilled labor.¹¹³ Moreover, employers usually cannot predict how quickly the statutory cap will be met, creating a seasonal "scramble" to file petitions by deadlines with no guarantee that the petitions will be approved.¹¹⁴ The time and investment an employer may direct to applications, recruitment efforts, and visa processing may be for naught if the statutory cap is reached before her request for temporary labor has been reviewed by the DOL.¹¹⁵

III. GENDER-BASED PROBLEMS WITH THE H-2B VISA

In addition to being at risk of the generalized abuses of the H-2B program, female guest workers experience further discrimination based on their gender.¹¹⁶ Despite recent reform, the non-agricultural guest worker program remains the least-protected of the H-2 visa categories and abuses against women are well-documented.¹¹⁷ Often forced into the lesser-paying H-2B category based on the feminization of household work, women lose out on the better wages and additional safeguards of the H-2A visa.¹¹⁸ "Whereas the [B]racero program selected men and ignored women, flexible industrialization in the United States has created a demand for women's labor."¹¹⁹ Both H-2 visas, reflecting roots in the Bracero program, presumed men would be the primary migrants, but this structure has outgrown its mold.

Interview with Claudia Palzkill, Human Res. Dep't, Teton Mountain Lodge (Jan. 11, 2018); Email from Colleen Dubbee, Wyo. Dep't of Workforce Servs. (Jan. 17, 2018, 11:35 AM MST) (on file with author).

¹¹² Costa, *Frequently Asked Questions*, *supra* note 10, at 3–4, 7 (critiquing the practice of changing H-2B policy through appropriations riders, which can alter the requirements for employers without their notice and input).

¹¹³ *Foreign Labor Certification News*, *supra* note 11; Email from Colleen Dubbee, *supra* note 111.

¹¹⁴ Telephone Interview with Keith Pabian, Esq., Keith Pabian Law, LLC (Jan. 22, 2018).

¹¹⁵ *Foreign Labor Certification News*, *supra* note 11.

¹¹⁶ JAYESH RATHOD & ADRIENNE LOCKIE, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS MIGRANTE, INC., *PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY* 15 (2010).

¹¹⁷ OWENS ET AL., *supra* note 46, at 8 (summarizing years of studies that show victims of labor abuses tend to be "female, racial and ethnic minorities, and born outside the United States.").

¹¹⁸ RATHOD & LOCKIE, *supra* note 116, at 23–26.

¹¹⁹ Wilson, *supra* note 23, at 132–36.

A. Guest Worker Gender Discrimination on a National Scale

Procedurally, discrimination may first appear through intentional misclassification of women as H-2Bs.¹²⁰ Employers often seek workers in the H-2B category because it requires less of the employer than the more stringent H-2A regulations.¹²¹ But women are further targeted as more “suited” for H-2B work, and some companies systematically place men in H-2A jobs while putting women in H-2B jobs.¹²² In 2010, women workers in the higher-paying H-2A category reflected just 3.7% of the labor pool despite representing roughly 40% of the applicant pool.¹²³ The institutionalized bias inherent in the H-2B visa that places men in more standardized, higher-paying jobs relegates women to more dangerous and often underpaid positions.¹²⁴

Immigrant women are already the lowest-paid demographic in the American workforce.¹²⁵ By steering women away from H-2A visas, employers avoid paying women the higher wages associated with H-2A visas along with other perks required by law, such as housing, further adding to this compensation imbalance.¹²⁶ Such categorical exclusion creates downward pressure on wages, as the guest worker program establishes an extremely low floor for pay.¹²⁷ Wage and tip theft, denial of breaks, and minimum wage violations in the hospitality and restaurant industries occur more frequently to women, people of color, and undocumented immigrants.¹²⁸ A Hispanic female, then, is truly at the bottom of the barrel; her situation only worsens if she falls out of immigration status.¹²⁹

¹²⁰ BAUER & STEWART, *supra* note 21, at 31–33.

¹²¹ RATHOD & LOCKIE, *supra* note 116, at 5.

¹²² *Id.*; BAUER & STEWART, *supra* note 21, at 32 (citing *Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211 (N.D. N.Y. 2004)) (finding the likelihood that gender-based granting of visas was due to chance was less than one in 10,000); Michelle Chen, *How Temporary Work Visas Hurt Migrant Women*, THE NATION (Nov. 7, 2017), <http://www.thenation.com/article/how-temporary-work-visas-hurt-migrant-women/>.

¹²³ SUKTHANKAR, *supra* note 36, at 9.

¹²⁴ Chen, *supra* note 122; *see also* Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT’L & COMP. L. REV. 47, 75 (1998).

¹²⁵ AM. IMMIGR. COUNCIL, IMMIGRANT WOMEN IN THE UNITED STATES: A PORTRAIT OF DEMOGRAPHIC DIVERSITY 8 (2014).

¹²⁶ *Olvera-Morales*, 322 F. Supp. 2d. at 214–15; *Jimenez v. GLK Foods LLC*, No. 12-CV-209, 2016 WL 2997498, at *11, 17 (E.D. Wis. May 23, 2016); *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 403–04 (5th Cir. 2010).

¹²⁷ Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 928, 930 (2007).

¹²⁸ OWENS ET AL., *supra* note 46, at 14.

¹²⁹ AM. IMMIGR. COUNCIL, *supra* note 125, at 8 (noting Mexican women comprised more than a quarter of all female immigrants and had the lowest wages of all female immigrant groups in 2012).

Female guest workers are also at greater risk of sexual harassment and assault while on the job, although both male and female H-2Bs experience such violations.¹³⁰ Further, sexual abuse is more likely to be directed at female domestic workers than females employed in other H-2B industries, a factor that warrants scrutiny given the heavy reliance on housekeepers and maids in Wyoming.¹³¹ Gaps in documentation of harassment are compounded by language barriers and, in some cases, the difficulty of less acculturated women understanding sexual harassment as a concept, including how to report it and a lack of understanding of legal rights.¹³² Psychological pressure to remain in a job, combined with the shame of an assault and fear of retaliation, create difficulty in accurately compiling data on the subject.¹³³ For their part, employers have demonstrated a continual failure to address sexual harassment and sexual assault complaints of H-2B women.¹³⁴

The lack of portability inherent in the H-2B visa also has special implications for women.¹³⁵ If a woman's employment is unsuitable, her "options" are limited: she may either remain in the U.S. to try to find another job, illegally, or return home.¹³⁶ Women cannot find reasonably remunerative, non-degrading jobs in the informal economy.¹³⁷ This current model not only exposes women to the risks associated with being an undocumented female in an unregulated economy but also contributes to greater numbers of immigrants present in the U.S. without documentation.¹³⁸

By leaving an abusive employer and entering the informal sector, a woman's labor rights do not improve except that she may have more discretion in choosing

¹³⁰ Irma M. Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237 (2010) (stating that 80% of 150 women interviewed reported some form of sexual harassment while on the job); Kristi L. Graunke, "Just Like One of the Family": *Domestic Violence Paradigms and Combating On-The-Job Violence Against Household Workers in the United States*, 9 MICH. J. GENDER & L. 131, 152–56 (2002).

¹³¹ OWENS ET AL., *supra* note 46, at 90; *see infra* note 155 and accompanying text.

¹³² BAUER & STEWART, *supra* note 21, at 33; OWENS ET AL., *supra* note 46, at 201 (noting "very few" women understood their labor rights).

¹³³ RATHOD & LOCKIE, *supra* note 116; *see* Balgamwalla, *Jobs Looking for People*, *supra* note 14, at 489–90; Michael Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 679 (2003).

¹³⁴ BAUER & STEWART, *supra* note 21, at 34–35.

¹³⁵ Graunke, *supra* note 130, at 154–56.

¹³⁶ Ontiveros, *supra* note 127, at 927–28 (quitting may be a non-option due to concerns regarding time spent in deportation processing, the dangers of an illegal border crossing, and the possibility of abuse from "coyotes" or guides); FREEDOM NETWORK, *supra* note 46.

¹³⁷ Fitzpatrick & Kelly, *supra* note 124, at 49 ("The result is economic vulnerability and exposure to violence and sexual exploitation.").

¹³⁸ *See id.* at 102–09; Hill, *supra* note 22, at 186.

her employer.¹³⁹ Working as an undocumented migrant, of course, is not without risk.¹⁴⁰ 87.9% of workers who enter the private sector as domestic servants face employer documentation seizure, as opposed to 37.6% of agricultural workers.¹⁴¹ Furthermore, a woman who leaves her sponsoring employer may face additional barriers related to housing: “[a]lthough it may appear that there are more shelter options for women, these shelters are usually designated for victims of domestic violence, and female victims of labor trafficking may be turned away.”¹⁴² If a woman falls into undocumented status by leaving an abusive H-2B employer, her only option for shelter might be an immigration detention facility.¹⁴³ A woman lucky enough to access a local shelter may face retaliation from her former employer or trafficker in the form of stalking and harassment, especially if her job site was in a remote location, as many H-2B placements are.¹⁴⁴

B. Immigration Law’s Outdated Mold and Wyoming’s Modern Reality

The assumption that women are exclusively beneficiaries of their spouses’ visas and would not apply themselves for temporary guest worker visas—or visas of any kind, beyond the H-4 dependent spouse visa—has pervaded U.S. immigration policy since its inception.¹⁴⁵ Female agency as it relates to economic or non-domestic labor traditionally has been subsumed under notions of coverture, which terminated a woman’s legal personhood upon marriage to a male, who would also serve as the legal head of household.¹⁴⁶ The progression of women’s rights and women’s firm advancement in the American workforce have catapulted women far beyond this notion. Unfortunately, the immigration realm has been slow to catch up.¹⁴⁷ In the rare instances where the law has drawn near to modern

¹³⁹ Hill, *supra* note 22, at 185–86. Indeed, some commentators have suggested that “unauthorized workers, who have more job mobility, are less vulnerable to abuse than guest workers.” *Id.*

¹⁴⁰ OWENS ET AL., *supra* note 46, at 9 (reporting that 85% of undocumented immigrants who encountered problems with their working conditions in the prior twelve months did not complain because they feared their immigration status would be used against them).

¹⁴¹ *Id.* at 70–71.

¹⁴² *Id.* at 125.

¹⁴³ *Id.* at 126.

¹⁴⁴ *Id.* at 127–28; *see also, e.g.*, RATHOD & LOCKIE, *supra* note 116, at 17–18.

¹⁴⁵ 8 C.F.R. § 214.2(i)(F)(9)(B)(iv) (2018) (describing the H-4 visa, which allows a primary H visa holder to bring an eligible accompanying family member to the U.S.); Wilson, *supra* note 23, at 132–36; Sabrina Balgamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY J. GENDER L. & JUST. 25, 36 (2014) [hereinafter Balgamwalla, *Bride and Prejudice*].

¹⁴⁶ Balgamwalla, *Bride and Prejudice*, *supra* note 145, at 25, 36.

¹⁴⁷ Fitzpatrick & Kelly, *supra* note 124, at 50 (lamenting academia’s treatment of female migrants as “passive reactors who simply follow a male migrant” rather than “active participants who seek to shape their own destinies and better their lives.”).

trends that reflect present female migrants' reality, such developments take the form of casting women as victims.¹⁴⁸

"In many ways, debates over immigration reform have been about conceptualizing female immigrants beyond their role as wives (or later on, as victims)."¹⁴⁹ Immigration law today does not align with the steady trend of women actively seeking H-2B visas and leaving their home countries, with or without a male partner.¹⁵⁰ The vestiges of a system that marginalizes women only serve to hinder women's agency in making migratory decisions and devalue their economic contributions to U.S. communities.¹⁵¹

Wyoming exemplifies the new reality, where migrant women—far from being passive bystanders—are productive and active participants in the state's workforce. Wyoming's unique economy makes the H-2B visa an attractive, and often necessary, option for employers seeking laborers to perform the "3-D jobs: dirty, dangerous, and difficult."¹⁵² But the women who fill these positions in the tourist hubs of the state face the same discriminatory measures that plague the H-2B program nationally.¹⁵³ In 2015, the top five occupations certified by the DOL's Employment and Training Administration (ETA) included landscaping and groundskeeping workers, forest and conservation workers, amusement and recreation attendants, maids and housekeeping cleaners, and construction laborers.¹⁵⁴ In Wyoming, however, maids and housekeeping cleaners are the most common H-2B visa occupations and, in 2015, filled 131 of 351 H-2B visa positions certified statewide.¹⁵⁵ Wyoming is the fifth-largest sponsor of H-2B

¹⁴⁸ See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 807, 127 Stat. 54 (2013) (providing a path to citizenship for women who can show abuse at the hands of a citizen or lawful permanent resident spouse); 8 C.F.R. § 214.14(b) (providing a path to citizenship for victims of certain crimes).

¹⁴⁹ Balgamwalla, *Bride and Prejudice*, *supra* note 145, at 54.

¹⁵⁰ Fitzpatrick & Kelly, *supra* note 124, at 52 n.17; Maddali, *supra* note 23, at 116.

¹⁵¹ Balgamwalla, *Bride and Prejudice*, *supra* note 145, at 54–55 (commenting that even modern immigration law's "vener" of gender-neutral terms "does not disguise the fact that these roles are cast according to the doctrine of coverture and the traditional role of women as wives").

¹⁵² Hill, *supra* note 22, at 134 n.13 (citing PHILIP L. MARTIN ET AL., *MANAGING LABOR MIGRATION IN THE TWENTY-FIRST CENTURY* 83 (2006)).

¹⁵³ Donna Playton & Stacey L. Obrecht, *Wyoming Energy Symposium: High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYO. L. REV. 295, 301–02 (2007) (describing Wyoming's wage gap as one of the worst in the nation); OFFICE OF FOREIGN LABOR CERTIFICATION, 2015 ANNUAL REPORT 49 (2015) (identifying the top three cities in Wyoming that host H-2B visas as Jackson, Teton Village, and Cody, where wages range between \$22,554.13 and \$31,548.40); NEW AM. ECON., *THE CONTRIBUTIONS OF NEW AMERICANS IN WYOMING* 7 (2016), <http://research.newamericaneconomy.org/report/the-contributions-of-new-americans-in-wyoming/>.

¹⁵⁴ OFFICE OF FOREIGN LABOR CERTIFICATION, *supra* note 153, at 49.

¹⁵⁵ *Id.* at 106; NEW AM. ECON., *supra* note 153, at 9.

housekeeping workers nationally, reflecting an enormous shortage of citizen labor in the state's top tourist destinations.¹⁵⁶ Although no federal agency disaggregates H-2B data by gender, 95% household workers in the U.S. are women.¹⁵⁷

Wyoming employers save \$1.04 in hourly wages for every housekeeper certified under the H-2B visa.¹⁵⁸ Given the high cost of living in Teton County, finding a labor source that requires no housing coverage and involves little governmental oversight may capture the attention of businesses who have the means to go through the bulky certification process. Yet in this race to the bottom, H-2B housekeeping workers in Wyoming may cease to exist as “guests” and may instead only be viewed as a savvy method to cut employer costs.

Because “immigrants frequently gravitate toward sectors in which employers may struggle to find enough interested U.S.-born workers,” in Wyoming, noncitizens represent a disproportionate segment of the low-skilled industry.¹⁵⁹ Foreign-born maids and housekeepers represent 27% of Wyoming's entire housekeeping industry; foreign-born dishwashers represent 37% of the industry.¹⁶⁰ Wage withholding and unsafe working conditions, therefore, may impact not just visa-holders, but domestic American workers in the industry as well.¹⁶¹ Additionally, noncitizens in Wyoming are six times more likely than natives to have less than a high-school education—a factor that further compounds the potential for exploitation, especially for women, who are already marginalized in the workforce.¹⁶²

In contrast to Wyoming's sluggish state population growth, Wyoming's immigrant population has grown by 41% in just four years.¹⁶³ Immense economic benefits have followed: in 2014, the immigrant population wielded \$449 million in spending power, paid \$30.2 million in Wyoming state taxes, and contributed over \$74 million to Social Security and Medicaid.¹⁶⁴ To ignore the financial contributions that women undoubtedly supply to Wyoming's economy and workforce is to devalue not just their labor, but also their inherent agency.

¹⁵⁶ COSTA, LABOR SHORTAGES, *supra* note 62, at 38.

¹⁵⁷ JUST. IN MOTION, U.S. TEMPORARY FOREIGN WORKER VISAS: H-2B, *supra* note 45, at 38; LINDA BURNHAM & NIK THEODORE, NAT'L DOM. WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC LABOR 41 (2012).

¹⁵⁸ COSTA, LABOR SHORTAGES, *supra* note 62, at 38.

¹⁵⁹ NEW AM. ECON., *supra* note 153, at 7–8.

¹⁶⁰ *Id.* at 9.

¹⁶¹ See *supra* notes 90–108 and accompanying text.

¹⁶² COSTA, LABOR SHORTAGES, *supra* note 62, at 6.

¹⁶³ NEW AM. ECON., *supra* note 153, at 1.

¹⁶⁴ *Id.* at 4–5.

IV. UNINTENDED BURDEN-SHIFTING TO THE J-1 VISA PROGRAM

The bipartisan reform introduced in 2015 addressed several longstanding deficiencies of the H-2B program and was praised for its pro-worker approach.¹⁶⁵ After the reform, H-2B workers now enjoy the three-fourths guarantee, an important measure in advancing wage protection.¹⁶⁶ Employers must pay H-2B workers the highest of the prevailing wage or the federal, state, or local minimum wage, and are now required to cover transportation costs of the guest worker to and from her country of origin and the job site.¹⁶⁷ Although the reform left many issues unresolved, such as gender discrimination and lack of adequate redress in the face of abuse, the reform at least facially acknowledged some of the program's many flaws.¹⁶⁸

However, the 2015 reform fails to strike a balance between affording greater protection to guest workers and incentivizing or streamlining the process for employers.¹⁶⁹ In fact, the protracted timeline, complex procedural requirements, and financial burden in application and certification has deterred some employers, including those in Teton County, from using the program.¹⁷⁰ When one visa becomes less accessible, employers turn to other easily exploitable visa categories to fill labor needs.¹⁷¹ Through the backlash it created, the reform prompted employers to seek out seasonal, temporary labor from other disposable pools of migrants.¹⁷² Chief among these alternatives is the J-1 visa program.

A. Burden-Shifting in a New Era of Labor Reform

The J-1 Visa, housed under the purview of the Department of State (DOS), includes fifteen different categories intended to foster “global understanding through educational and cultural exchanges.”¹⁷³ Created in 1961 in an effort to

¹⁶⁵ Save Our Small and Seasonal Businesses Act, S. 2225, 114th Cong. § 4(b)(F)(i), (c), (e) (2015); Laura D. Francis, *DHS, DOL Issue Interim H-2B Rule, Add More Worker Protections, Transparency*, BLOOMBERG LAW (Apr. 29, 2015), <http://www.bna.com/dhs-dol-issue-n17179925907/>.

¹⁶⁶ See *supra* note 58 and accompanying text; see also BRUNO, *THE H-2B VISA AND THE STATUTORY CAP*, *supra* note 38, at 2.

¹⁶⁷ BRUNO, *THE H-2B VISA AND THE STATUTORY CAP*, *supra* note 38, at 2.

¹⁶⁸ See *supra* notes 120–44 and accompanying text.

¹⁶⁹ See *supra* notes 109–15 and accompanying text.

¹⁷⁰ 29 C.F.R. § 503.16 (2015); *Foreign Labor Certification News*, *supra* note 11; Telephone Interview with Ali Stabler, *supra* note 14; Telephone Interview with Claudia Palzkill, *supra* note 111; Email from Colleen Dubbee, *supra* note 111.

¹⁷¹ SUKTHANKAR, *supra* note 36, at 34.

¹⁷² Telephone Interview with Ali Stabler, *supra* note 14; Telephone Interview with Claudia Palzkill, *supra* note 111; Balamwalla, *Jobs Looking for People*, *supra* note 14, at 487–88.

¹⁷³ *Common Questions*, U.S. DEP'T OF STATE, <http://j1visa.state.gov/basics/common-questions/> (last visited Apr. 12, 2018).

improve diplomacy and goodwill abroad, the J-1 program allows participants to work and study in the U.S. for a temporary period before returning to their home countries.¹⁷⁴ J-1 visitors pay a fee to a private “sponsor agency” approved by the DOS, which then handles the logistics of work placement and travel.¹⁷⁵

The program has enjoyed an overwhelmingly positive response from students, their U.S. coworkers, and employers alike.¹⁷⁶ Over 300,000 “foreign visitors” enter the U.S. on the J-1 visa annually, 86% of whom are under the age of thirty.¹⁷⁷ In 2017, just over 1,800 Summer Work Travel (SWT) participants entered Wyoming; of those, 1,454 worked in Teton County or Yellowstone National Park.¹⁷⁸ However, the J-1 program is not without its critics, and reports of employer and recruiter abuses are not uncommon.¹⁷⁹ Since the program is overseen by the DOS rather than the DOL, however, labor concerns, including wage and hour abuses and other violations of U.S. labor law, are frequently overlooked.¹⁸⁰ Employers have taken advantage of the loose oversight by ignoring the flimsy guidelines of the J-1 program, overworking and underpaying their young “ambassadors.”¹⁸¹

As the procedural guidelines for obtaining H-2B workers have tightened, Wyoming employers have begun considering the J-1 program as a substitute

¹⁷⁴ EUREKAFACTS, SUMMER WORK TRAVEL (SWT): PROGRAM REVIEW 1, 9 (2017); *J-1 Visa Basics*, U.S. DEP’T OF STATE, <http://j1visa.state.gov/basics/> (last visited Apr. 12, 2018).

¹⁷⁵ 22 C.F.R. §§ 62.3, 62.9, 62.11 (2015).

¹⁷⁶ EUREKAFACTS, *supra* note 174, at 5–7; Telephone Interview with Phil Simon, Vice President, Work Exch. Programs, Council on Int’l Educ. Exch. (Jan. 18, 2018).

¹⁷⁷ *Facts and Figures*, U.S. DEP’T OF STATE, <http://j1visa.state.gov/basics/facts-and-figures/> (last visited Apr. 12, 2018). Almost one third of J-1 participants enter the U.S. through the SWT program. *Id.*

¹⁷⁸ *SWT-Participants-by-Zip-Code-2017*, U.S. DEP’T. OF STATE (Sept. 1, 2017, 9:22 PM), <http://j1visa.state.gov/swt-participants-by-zip-code-2017/>.

¹⁷⁹ JERRY KAMMER, CTR. FOR IMMIGR. STUDIES, CHEAP LABOR AS CULTURAL EXCHANGE: THE \$100 MILLION SUMMER WORK TRAVEL INDUSTRY 20–21 (2011), <http://cis.org/sites/cis.org/files/SWT-Report.pdf>; Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES (Aug. 17, 2011), <http://www.nytimes.com/2011/08/18/us/18immig.html> (detailing the strike of 400 J-1 students after being subjected to brutal working conditions, sub-minimum wages, wage withholding, and complete lack of cultural exchange); Yuki Noguchi, *U.S. Probes Abuse Allegations Under Worker Visa Program*, NPR (Mar. 18, 2013, 3:21 AM), <http://www.npr.org/2013/03/18/174410945/u-s-probes-abuse-allegations-under-worker-visa-program>.

¹⁸⁰ U.S. DEP’T OF STATE, OFFICE OF INSPECTOR GEN., NO. ISP-I-12-15, 24 (2012) (“The OIG team questions the appropriateness of allowing what are essentially work programs to masquerade as cultural exchange activities. If categories of the J visa program are not primarily cultural exchange programs, they should have a different visa designation and either be transferred to another Federal agency that has the requisite expertise or be discontinued altogether.”).

¹⁸¹ Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 290–93, 298–99 (2013); Nicole Durkin, Note, *All Work and Not Enough Pay: Proposing a New Statutory and Regulatory Framework to Curb Employer Abuse of the Summer Work Travel Program*, 81 GEO. WASH. L. REV. 1294, 1311–13 (2013).

source of labor. But using a cultural program to replace the demand for low-skilled, seasonal foreign workers puts both the J-1 program and the H-2B program at risk.¹⁸² The J-1 program is not designed to fill the labor needs that Teton County demands. As a cultural exchange meant to cultivate goodwill, placing students in traditional “back of house” positions, where they have little to no interaction with other Americans or visitors, subverts the goals the program purports to achieve.¹⁸³ Even the nomenclature of the two visa categories—J-1 exchange “visitors” and H-2B guest “workers”—reflects the fundamental differences in the aims of each program. To replace one model with the other is to warp the meaning of the J-1 program and to simultaneously subordinate the interests of Wyoming employers, Wyoming workers, and foreign guest workers alike.

*B. The J-1 Program: Equally Ripe for Abuse, with Even Fewer Protections*¹⁸⁴

The J-1 program is not designed for or capable of handling U.S. employers’ demand for labor.¹⁸⁵ The DOS’s aim with the J-1 program is to grant students cultural experiences rather than to protect them against labor abuses.¹⁸⁶ As such, students are not afforded even the tenuous guarantees of the H-2B program.¹⁸⁷ Even though sponsor agencies have a stake in ensuring J-1 visitors have positive experiences, their funding derives from payments from the J-1s themselves, creating an incentive for sponsors to overlook complaints and maintain a steady stream of paying participants.¹⁸⁸ Risk of employer abuse, compounded by the consistent, urgent need for seasonal workers, puts J-1 visitors in a vulnerable position, especially when the sponsor agency exists in a constant conflict of interest.¹⁸⁹

¹⁸² Balmawalla, *Jobs Looking for People*, *supra* note 14, at 487–88. In 2016, oil field employers in North Dakota turned to J-1 workers when importation of H-2B workers became too expensive. *Id.* The DOS, in a rare intervention, suspended the J-1 program there, stating it was inconsistent with the nature of the program’s goals. *Id.*

¹⁸³ OWENS ET AL., *supra* note 46, at 1–14 (noting back-of-house “bad” jobs are usually given to non-white employees); MEREDITH B. STEWART, S. POVERTY LAW CTR., *CULTURE SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS* 11 (2014), <http://www.splcenter.org/20140201/culture-shock-exploitation-j-1-cultural-exchange-workers>.

¹⁸⁴ THE INT’L LABOR RECRUITMENT WORKING GRP., *supra* note 64, at 27.

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 11, 13–15. In fact, the loose program guidelines do not prohibit placing participants in industries where they will be at heightened risk of human trafficking. *See* 22 C.F.R. 62.32(g)(8). The rules recommend only that sponsors use “extra caution” when placing participants in these industries. *Id.*

¹⁸⁷ THE INT’L LABOR RECRUITMENT WORKING GRP., *supra* note 64, at 4–5.

¹⁸⁸ *Id.* 12–13; *Proposed Rule Changes Won’t End Abuses of Cultural Exchange Program*, S. POVERTY L. CTR. (Feb. 27, 2017), <http://www.splcenter.org/news/2017/02/27/splc-proposed-rule-changes-won't-end-abuse-cultural-exchange-program>.

¹⁸⁹ Stewart, *supra* note 183, at 12.

Sponsor agencies that act as proxies for the DOL in overseeing the J-1 program often fail to protect participants and employers.¹⁹⁰ By shifting responsibility for disputes that may arise over the course of the visa to the sponsor agencies, the DOS deters J-1 visitors from filing formal complaints directly with the government.¹⁹¹ But “weak regulations undermine oversight,” and between 2006 and 2012, the Bureau of Educational and Cultural Affairs (ECA) only sanctioned twenty-one sponsor agencies—five agencies per year.¹⁹² When higher sanctions were recommended by the immediate reviewing sub-agency, they were often overruled.¹⁹³ The government has admitted that the DOS’s lack of funding and personnel “renders ongoing, systematic oversight of sponsor compliance virtually impossible.”¹⁹⁴ Furthermore, employers, even if sanctioned by the DOS, are not precluded from continued participation in the Summer Work Travel program.¹⁹⁵ In 2009, fifteen of the major thirty-nine sponsors were in violation of program rules, including failing to perform criminal background checks on placement sites.¹⁹⁶ The DOS acknowledged that allowing offending sponsors to continue with the program led to secondary-school and college-aged students being placed with known sex offenders, convicted murderers, and other felons.¹⁹⁷

Although, on paper, the J-1 visa is portable, logistical concerns regarding the feasibility of transferring job placements, such as the short length of the program and unequal bargaining power between J-1 visitor and employer, make transfer unrealistic.¹⁹⁸ As with the H-2B program, this lack of realistic portability decreases the likelihood of a J-1 participant speaking up or reporting labor abuses.¹⁹⁹ In some categories of the J-1 visa, such as the au pair program, which places an

¹⁹⁰ *Id.* at 13–14.

¹⁹¹ *Id.* at 4. Even the sponsor agencies, however, show reluctance to intervene in the face of a dispute between the J-1 visitor and the placement. *Id.* One au pair sponsor’s “suggestion” in the face of a dispute was: “Talking really helps! Many problems and misunderstandings can be avoided if host families and au pairs talk things over right from the start.” *Changing Host Families*, AU PAIR WORLD, http://www.aupairworld.com/en/au_pair/change_family (last visited Apr. 12, 2018).

¹⁹² U.S. DEP’T OF STATE, OFFICE OF INSPECTOR GEN., *supra* note 180, at 23. The Office for Private Sector Exchange (EC), housed under the Bureau of Educational and Cultural Affairs (ECA), is directly responsible for monitoring the J-1 program. *Id.* at 22.

¹⁹³ *Id.* at 22–23.

¹⁹⁴ *Id.* at 24.

¹⁹⁵ *Id.* at 26.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 23–24.

¹⁹⁸ Zach Kopplin, *They Think We Are Slaves*, POLITICO (Mar. 27, 2017), <http://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956>; POLARIS PROJECT, *supra* note 45, at 9.

¹⁹⁹ JUST. IN MOTION, U.S. TEMPORARY FOREIGN VISA WORKERS: J-1 11 (2015), http://static1.squarespace.com/static/57d09e5c5016e1b4f21c9bd3/t/58c3298bc534a58f937f057d/1489185167093/VisaPages_J1_2015update.pdf.

exchange visitor in a home as a nanny for the family's children, a visa holder can ask to be "reassigned."²⁰⁰ However, power dynamics often leave young workers uncomfortable or incapable of speaking up, especially if the placement is their first formal job.²⁰¹

Importantly, J-1 visitors bear the burden of all travel and arrangements to live and work in the United States.²⁰² In 2012, J-1 summer work travel participants spent an average of \$1,100 in arranging for the program, but anecdotal evidence indicates that many exchange visitors pay exorbitant rates between three and ten times this amount.²⁰³ Thus, wage and hour abuses of the J-1 visa are especially egregious when coupled with these onerous travel and arrangement costs, and may result in students going into crushing debt in the name of "cultural exchange."²⁰⁴ Such financial pressures additionally subject J-1 participants to trafficking.²⁰⁵ Indeed, at highest risk for trafficking among housekeepers are foreign women who entered the U.S. on H-2B or J-1 visas.²⁰⁶ From an employer's perspective, acquiring a cheap supply of labor that is exempt from Medicaid, Social Security, and unemployment taxes provides strong financial incentive to rely on J-1 visitors.²⁰⁷

"[E]mployers treat these visas interchangeably, substituting reliance on one for another as circumstances—such as increased oversight here, or additional fees there—dictate."²⁰⁸ Employer needs may get the best of the J-1 program, which would replace one vulnerable population (H-2B guest workers) with another (J-1 exchange visitors).²⁰⁹ Such a shift in reliance on temporary worker visas will overwhelm the J-1 program, which already exposes participants to abuse. The program should not be expanded before guaranteeing that J-1 participants have

²⁰⁰ 22 C.F.R. § 62.42 (2016) (governing the transfer of J visas).

²⁰¹ Chuang, *supra* note 181, at 305–08.

²⁰² 22 C.F.R. § 62.32(b) (2018). Unlike the H-2B program, wherein the sponsoring employer absorbs the costs. 29 C.F.R. § 503.16 (2015).

²⁰³ KAMMER, *supra* note 179, at 1 (noting that J-1 participants generate over \$100 million yearly for sponsor agencies, and millions for the State Department through visa fees); STEWART, *supra* note 183, at 3, 8; JUST. IN MOTION, *supra* note 199, at 30–31.

²⁰⁴ Sayoni Maitra, Note, *The Sweetest Visa on Earth? Protecting the Rights of J-1 Students in the U.S. Summer Work Travel Program*, 44 COLUM. HUM. RTS. L. REV. 859, 878 (2013).

²⁰⁵ Patricia Medige & Catherine G. Bowman, *The U.S. Anti-Trafficking Policy and the J-1 Visa Program: The State Department's Challenge from Within*, 7 INTERCULTURAL HUM. RTS. L. REV. 103, 137 (2012).

²⁰⁶ POLARIS PROJECT, *supra* note 45, at 43, 45.

²⁰⁷ SUKTHANKAR, *supra* note 36, at 22.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 34–35.

at least the same labor rights as other temporary work visa categories.²¹⁰ Wyoming employers should not be tempted to exploit another class of nonimmigrants and should instead encourage national reform of the H-2B program so that it becomes a more portable program that could strike an appropriate balance between meeting employer needs and protecting foreign workers' rights.

V. PROPOSALS FOR REFORM

One-time expansions of the H-2B visa ceiling, as Congress enacted in 2017, do not remedy the systemic discriminatory issues endemic to the temporary non-agricultural guest worker program and, instead, focus only on maintaining human supply flows to needy employers.²¹¹ To enact meaningful reform, the entire temporary guest worker program must be replaced rather than expanded. In its place, Congress should enact a program that acknowledges the contributions of women beyond the domestic realm. Such a program should relax the absolute requirement that the visa be tied to one employer, hold employers accountable by enforcing meaningful penalties for violations, and offer a provisional pathway to citizenship.²¹² Doing so would strengthen local economies and reduce the likelihood of employers turning to the under-regulated J-1 program to supplant valid labor needs.

First, revamping the H-2B visa so that it offers even minimal portability would protect guest workers, pressure employers to treat their workers better, and would also be more responsive to fluctuating labor needs. Several scholars describe such a model as a "provisional visa."²¹³ A provisional visa, for example, could be valid for up to three years and portable after twelve months, with the understanding that the worker may be interested in long-term immigration.²¹⁴ Tethering guest workers to their sponsoring employer for twelve months allows employers to recoup their expenditures in the visa process.²¹⁵ It also encourages

²¹⁰ *Id.* at 34 (noting that "in spite of advocacy efforts, [the problem] is that the visas are essentially interchangeable, and employers are able to shift easily from reliance on one category to another.").

²¹¹ *Foreign Labor Certification News*, *supra* note 11. Labor shortages are an ongoing and persistent problem. *Id.*

²¹² Fitzpatrick & Kelly, *supra* note 124, at 74 n.118; J. WILSON, *supra* note 109 (outlining the 2013 "W-visa" proposal); NEW AM. ECON., *supra* note 153, at 26.

²¹³ DEMETRIOS G. PAPADEMETRIOU ET AL., MIGRATION POL'Y INST., ALIGNING TEMPORARY IMMIGRATION VISAS WITH US LABOR MARKET NEEDS: THE CASE FOR A NEW SYSTEM OF PROVISIONAL VISAS 13 (2009).

²¹⁴ *Id.*

²¹⁵ *See id.* USCIS could waive this requirement if an employee could show mistreatment by an employer. *See id.*

paying laborers well enough to dissuade them from quitting for an employer who may offer better wages or working conditions at the end of the one-year period.²¹⁶

After years of insufficient oversight of employers by the DOL, the H-2B program needs an alternative method to ensure compliance. Harnessing internal pressure within an industry, a pressure that would come from allowing guest workers to change employers, has the potential to encourage employers to treat workers better. Increased portability would provide agency to an abused guest worker and would channel employers into compliance in a way that the empty threats of DOL sanctions or penalties never have.²¹⁷ Although calling for increased staff and higher budgets within the DOL may improve oversight, the DOL has admitted its susceptibility to industry lobbyists and its reluctance to enforce meaningful sanctions against offending employers.²¹⁸ Since the DOL has demonstrated ineptitude in managing H-2B employers, calling for increased oversight is optimistic yet futile; however, reform in the way of a provisional visa may serve as a substitute for an effective enforcement entity.

Next, offering a pathway to citizenship for nonimmigrants who arrive on the H-2B visa would have a significant impact on women.²¹⁹ Remedial visas, valuable as they may be, cast women as victims of specific crimes, are frequently delayed and rarely granted, and are not particularly suited to H-2B women's experiences.²²⁰ Reforming the H-2B visa to provide a long-term option for citizenship should be contingent on the same strict qualifications as other green card categories.²²¹ Offering an affirmative option for stable immigration status would be especially valuable as an honest reflection of migrant women in the 21st century: agents of their own lives and capable of making decisions regarding their citizenship without having to wait for a paternalistic state to intervene and retroactively offer relief for an assault or other crime.²²²

Furthermore, a pathway to citizenship would legitimize the already-substantial social and cultural contributions that temporary guest workers bring to the U.S.

²¹⁶ PAPADEMETRIOU ET AL., *supra* note 213, at 14.

²¹⁷ See *supra* notes 79–89 and accompanying text.

²¹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 42, at 53. The DOL's current "inability to consider disbarment as a remedy" is unacceptable. See *id.*

²¹⁹ Ontiveros, *supra* note 127, at 929–30. Current exclusion from any type of civic engagement means that women are seen only as "guests," not as humans. *Id.* Allowing enriched community and civic participation would have positive democratic-based outcomes. *Id.* at 929–30, 939.

²²⁰ OWENS ET AL., *supra* note 46, at 211.

²²¹ See Immigration and Nationality Act, 8 C.F.R. § 214 (2016), 8 U.S.C. § 1184 (2018). Examples include requiring a clean criminal background, spending a requisite amount of time in the U.S., and so forth. See *id.*

²²² See Balgamwalla, *Jobs Looking for People*, *supra* note 14 (including a proposal of how T and U visas might remedy abuses against noncitizen workers).

To begin, many H-2B visa holders lucky enough to find non-exploitive employment in the U.S. return annually—including H-2B workers in Wyoming.²²³ Offering a pathway to citizenship would reduce the likelihood of H-2B workers entering the stream of undocumented immigrants by overstaying their visas or leaving abusive employers and remaining in the U.S.—a problem precipitated by the structure of the current visa.²²⁴ Such a shift would raise the floor for U.S. employees as well, who would no longer be undercut by debt-ridden foreign workers.²²⁵

The knowledge that attaining a green card is possible would also reduce familial strain and could lead to “long-term investment” in communities, such as home-buying, entrepreneurship, vocational classes, and other ways of exercising individual mobility.²²⁶ Bringing certainty to immigration status would promote social and civic integration. For example, there would be greater incentive to learn English, which might otherwise seem futile for a guest worker whose temporary status is always in flux.²²⁷

For Wyoming, providing a pathway to citizenship would bring immense economic benefits.²²⁸ Immigrants currently eligible to naturalize in Wyoming, not including current H-2B workers, could earn an additional \$18 million in aggregate yearly wages, as naturalization raises an average worker’s wage 8-11%.²²⁹ With increased wages comes higher contribution to state and federal taxes, money that would be reapportioned into municipal services that raise the standard of living for all Wyoming residents.²³⁰ Higher earning power also translates into increased spending power, which would benefit local businesses and improve job and educational opportunities for new citizens.²³¹

²²³ PAPADEMETRIOU ET AL., *supra* note 213, at 11; Telephone Interview with Beth Casey, Human Res. Dir., Yellowstone Nat’l Park Lodges (Jan. 29, 2018).

²²⁴ *See* NEW AM. ECON., *supra* note 153, at 26. The burden of assimilation could also be adjusted. *Id.* (“Provisions within immigration reform requiring that undocumented immigrants pay any back taxes before normalizing their status would temporarily boost U.S. tax revenues still further.”).

²²⁵ *See supra* notes 90–108 and accompanying text.

²²⁶ PAPADEMETRIOU ET AL., *supra* note 213, at 11.

²²⁷ *Id.* at 4.

²²⁸ AM. IMMIGR. COUNCIL, FACT SHEET: IMMIGRANTS IN WYOMING 19 (2017), <http://www.americanimmigrationcouncil.org/research/immigrants-in-wyoming>.

²²⁹ NEW AM. ECON., *supra* note 153, at 19.

²³⁰ *Id.* at 26.

²³¹ *Id.*

VI. CONCLUSION

Wyoming applies for a large number of temporary guest worker visas annually; the inability to find a local workforce willing to take low-skilled, low-paying jobs has created a true dependence on the H-2B visa.²³² Wyoming employers are at the mercy of an already-broken system and often turn to H-2B visas in the face of labor and housing shortages, despite the H-2B's cumbersome bureaucratic requirements.²³³ Such reliance subjects female workers to disproportionate risks.²³⁴ Allowing for a pathway to citizenship would sever the dependent relationship Wyoming employers have on the fickle visa certification system and would provide a more stable labor pool.²³⁵ In return, H-2B workers would finally enjoy the health, safety, and wage protections that are so severely lacking or ignored in the current system.²³⁶ Finally, a pathway would reduce the temptation for employers to turn to the J-1 exchange program as an easily exploitable source of labor.²³⁷ Increasing protections and flexibility of the H-2B program will prevent a new class of vulnerable workers from experiencing the same abuses as the H-2B.

²³² *Id.* at 18 (“Given that it is expensive and cumbersome for employers to obtain labor certs—and similarly daunting to formally apply for an H-1B visa—the large interest in all these visa categories indicates Wyoming employers likely were having real trouble finding the workers they needed on U.S. soil.”).

²³³ Email from Colleen Dubbee, *supra* note 111.

²³⁴ *See supra* notes 116–64 and accompanying text.

²³⁵ *See supra* notes 165–72 and accompanying text.

²³⁶ *See supra* notes 44–89 and accompanying text.

²³⁷ *See supra* notes 196–202 and accompanying text.