



VISAS, INC.

CORPORATE CONTROL AND POLICY INCOHERENCE
IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM

GLOBAL WORKERS JUSTICE ALLIANCE

BY ASHWINI SUKTHANKAR

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About Global Workers Justice Alliance

Global Workers Justice Alliance (Global Workers) combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. Global Workers believes that portable justice, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is a key, under addressed element to achieving justice for today's global migrants.

Global Workers' core work involves training and supporting a Defender Network, comprised of human rights advocates in the migrant-sending countries. The Network educates workers on their rights before they migrate, partners with advocates in the countries of employment on specific cases of labor exploitation, and advocates for systemic changes. Global Workers' U.S. legal staff trains U.S. advocates on representing clients abroad, and provides advice and referral, for case support work, outside of the Defender Network area. Increasingly, Global Workers is engaging in policy work, both nationally and internationally, drawing from its unique advocacy insight into both countries of employment and sending countries, to improve conditions for migrants. We currently operate programs in the United States, Canada, Mexico, and Central America.

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About the Author

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Executive Summary

According to the best guess of the U.S. government, somewhere between 700,000 and 900,000 foreign citizens enter the United States every year on temporary visas.¹ They work in every field, from low-skilled, low-wage jobs in agriculture, to specialty occupations in health care or information technology. They may be in the public sector, employed as teachers in an under-served school district, or in the most private sphere of the private sector, as domestic workers living in their employer's home.

The temporary foreign labor system that brings in these workers consists of dozens of visa categories and sub-categories, for apparently distinct purposes – cultural and educational exchange, employee relocation by multinational enterprises, U.S. based training programs and more. But the problems become apparent when we examine the structure as a whole – and in particular, its vulnerability to extreme misuse by employers eager to use foreign labor in ways that undermine established wages and working conditions in the U.S. As far as many of these employers are concerned, the entire framework is one undifferentiated avenue to source cheaper and more easily controlled labor:

- U.S. employers have substantial economic incentives, built into the visa framework, to hire foreign workers in place of a potential or existing U.S. workforce. These incentives may be embodied in regulations that exempt employers of certain visa workers from payroll taxes, for example – or a lack of regulation, enabling employers to pay foreign workers far lower wages than established for U.S. workers.
- Foreign workers are wholly dependent on their employer for their fragile status in the U.S. As a general matter, if they are fired, they must leave the country quickly, or face deportation. Combined with other tools of control, this creates a culture of fear that effectively prevents workers from reporting any abuse or exploitation.

The size and reach of the temporary worker visa system is evidence that U.S. immigration policy has moved away from its roots in permanent labor migration. This has happened largely without public debate or political acknowledgment.

The temporary worker visa system is utterly chaotic, constantly metastasizing to develop more visa categories or carve-outs, in response to employer demands. While there is extensive evidence of self-interested employer lobbying to expand the system, or employer misuse of the existing system, the ultimate responsibility lies with the U.S. government. The United States made a deliberate choice to shape a foreign temporary labor system that is heavily privatized, with a minimal role for public regulation and oversight. The U.S. government's delegation of control over the temporary foreign labor scheme to employers – in spite of the many critical public interests at stake – has had dire consequences.

The U.S. government has long been aware of the enormity of the situation: for nearly every relevant visa category, internal governmental reviews document exploitation of foreign workers, and displacement of U.S. workers. Unfortunately, regulatory reforms have typically been meager, in proportion to the problems. For example, while the U.S. State Department has acknowledged that many foreign domestic workers entering the U.S. in the employ of diplomats have been exploited, and even enslaved, it has failed to address the core vulnerability of these workers through provisions for better enforcement and monitoring. Today, the State

¹ Estimates drawn from conversations with U.S. government agencies and secondary research. As detailed in the report, we have to rely on such crude estimates because essential data is not collected or shared by the U.S. government. See Footnote 5 for a list of sources.

Department merely requires that domestic workers have a written contract with the employer before they can be granted a visa to enter the U.S.

Governmental oversight is further hobbled by diffusion of responsibility. Regulation and enforcement is distributed among multiple agencies – the State Department, the Department of Homeland Security, and the Department of Labor – in seemingly haphazard ways that are not consistent across visa categories, and do not provide for coordination among the agencies. In the case of the majority of these visas, the one agency mandated to protect U.S. and foreign workers – the Department of Labor – has been excluded or pushed to the margins. The absence of clear data further undermines both coordination and public accountability. Under the current framework, no one within the U.S. government – let alone the U.S. public – is in a position to grasp the dimensions of the temporary foreign labor system, or to analyze its impact.

The fragmentation of oversight is linked intrinsically to the fragmentation of the framework. Rather than developing a coherent, unitary system, the U.S. government, responding piecemeal to employer demands, created a patchwork of visas subject to distinct rules. Although it is clear that employers have learned to exploit the interconnections between these visas, the government continues to treat them as entirely distinct of each other. This refusal to regulate the temporary foreign labor system in an integrated way is perhaps the most substantial obstacle to meaningful reform and oversight. In the absence of comprehensive attention, employers treat these visas interchangeably, substituting reliance on one for another as circumstances – such as increased oversight here, or additional fees there – dictate. Analysis and reform must therefore happen holistically, if abuse and misuse are to be reined in, with the recognition that these individual visas constitute a *de facto* temporary foreign labor system.

The abuse and misuse associated with temporary foreign labor are closely linked to the larger crisis of decent work in the U.S. The shift away from full-time, living wage jobs as the standard for American workers, to ever more precarious employment, is only accelerating. The use of temporary foreign labor is not responsible for the crisis, but it is both a contributing factor and an alibi. Allowing foreign workers in the U.S. is premised on the absence of willing, qualified and available U.S. workers. In reality, however, U.S. workers are actively edged out, as this report documents, in several ways:

- Individual U.S. workers are not hired, or are fired on a pretext. A foreign worker is then hired instead.
- Employers exploit visas that were intended for other purposes, and thus do not require a prior effort to hire U.S. workers. As a result, in many cases, U.S. workers may not even be aware of their exclusion.
- U.S. workers are pushed out of entire industries and regions by the systematic erosion of wages and underlying work conditions. This is followed by the recruitment of foreign workers.

Foreign workers, in turn, are vulnerable to abuse throughout their involvement with temporary work in the U.S. The problems begin prior to departure, and extend beyond their return to their home countries:

- Prior to departure, workers are in the power of recruiters, who promise them employment opportunities in the U.S. in exchange for a substantial fee. In the absence of U.S. government regulation of recruiters (through provisions holding U.S. employers liable for any abuses by their recruiters, for example), there is total impunity. Many workers have been defrauded by recruiters who take their fees and then disappear. Other problems include gross discrimination: women workers accounted for only 3.7% of visas issued for agricultural labor in 2010,² though advocate interviews suggested that women could represent up to 40% of the pool of job-seekers.
- On arrival, workers face economic exploitation at the hands of employers who know that individuals on temporary work visas have no recourse against either abuse or retaliation. Illegal deductions and wage theft are extremely common.
- While working, occupational health and safety violations are frequent, especially among “unskilled” workers. The problems arise, in part, from the very fact that the U.S. government allows risky work to be categorized as “unskilled.”³

² Website of Global Workers Justice Alliance, data on U.S. migration, available at http://www.globalworkers.org/migrationdata_US_more.html#DOS.

³ Interview with Bridgette Carr, director of the Human Trafficking Clinic at the University of Michigan Law School.

- The impact of exploitation and abuse in the U.S. can be life long. For example, injured workers find it nearly impossible to access workers' compensation benefits once they return to their home countries. The U.S. insistence on treating the temporary foreign labor framework as a series of private employment arrangements, rather than a governmental program, means that there are no agreements in place with foreign governments to enable social protection schemes, even though workers may have a legal entitlement.

There are several measures that the U.S. government should take to fix the system:

- There are short-term steps that could translate into immediate improvements in oversight and governance. The Department of Labor must be integrated into regulation and enforcement of all visa categories that enable temporary work in the U.S. It must have the resources and powers to assess the potential displacement of U.S. workers, as well as to enforce appropriate wages and working conditions for foreign workers. In order to promote greater accountability to the public, the U.S. must release consolidated and consistent data in a timely manner about the use of these visas, including the names of employers currently recruiting foreign workers.
- In the medium term, the U.S. government should undertake a systematic and sustained review of the temporary foreign labor visas to bring them in line with broader U.S. labor market policy. A helpful model would be the "permanent, independent Commission on Foreign Workers," proposed by former Secretary of Labor Ray Marshall and the Economic Policy Institute,⁴ to collect data on labor shortages, the use of temporary work visas, and the economic impact of temporary foreign workers in the U.S.
- The long-term goal of reform should be a single visa system with uniform oversight, to replace the current patchwork of visas, each subject to separate regulations. Consistent public administration, rather than the delegation of essential responsibilities to private entities, is critical. The U.S. should engage systematically with foreign governments whose citizens work here, and should conclude agreements that (1) provide for cooperation on preventing abuse, and (2) enable access to social security benefits and workers' compensation schemes.

The size and reach of the temporary worker visa system is evidence that U.S. immigration policy has moved away from its roots in permanent labor migration. This has happened largely without public debate or political acknowledgment. At a minimum, it is time to renew the national conversations related to broad issues of immigration and labor in the U.S.

⁴ Ray Marshall, *Value Added Immigration: Lessons for the United States from Canada, Australia and the United Kingdom*, Economic Policy Institute, 2011.

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Global Workers Require Global Justice