

# ¿VOLVER A “BRACERO”? LESSONS FROM SPAIN ON MIGRANT WORKER RECRUITMENT

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INTRODUCTION

Recruiting foreign laborers is a top concern for migrant-receiving countries such as the United States, where the guest worker program is always a lightning rod of controversy.<sup>1</sup> While recruitment in the United States is left to the private market, it was not always so, nor is it so in other countries. Spain is one of the top ten largest migrant-receiving countries in the world. In 2000, Spain experienced a massive influx of migrants and erected, in a short span of time, a state-controlled model for recruiting foreign laborers. This Article compares how these two major migrant-receiving countries recruit so-called “low-skilled” and agricultural guest workers, a population frequently vulnerable to fraud, exploitation, and human trafficking during recruitment.

The case of Spain highlights what is lacking in the U.S. model in order to protect these workers: a strong and dual state hand in recruitment. The federal government must ensure that certain recruitment tasks are performed by actors accountable to the workers they benefit (rather than to employers who may be indifferent to how well a worker understands the rights attendant to his visa and employment, as is the case now). Furthermore, a coordinated effort is needed to engage Mexico and ensure that the multiple bodies of law that regulate recruitment operate in concert. Failure to take such bold action will enable fraud and exploitation. Washington must act during the next round of immigration reform to ensure that it does not abandon this population of workers to exploitative recruiters and human traffickers.

I. THE UNITED STATES PROBLEM

In 2014, the United States imported 131,792 temporary foreign workers under the H-2A and H-2B visas to perform a variety of agricultural and non-agricultural jobs on farms and in the construction and hospitality industries.<sup>2</sup> The task of finding these candidates abroad to match with U.S. employment

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<sup>1</sup> This article draws from a prior working paper of the author, “The Recruitment Mechanism in Spanish and U.S. Guest Worker Programs: Preventing Fraud and Abuse in Worker Selection and Hiring,” for the GRITIM Working Paper Series by the University of Pompeu Fabra’s Interdisciplinary Research Group on Immigration.

<sup>2</sup> The U.S. State Department issued 57,600 H-2B visas and 74,192 H-2A visas in fiscal year 2013. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2013: TABLE XVI(B), NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWL-IST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2009-2013, available at <http://>

offers was left largely to private-market recruiters. Migrant worker advocacy organizations have produced dozens of reports, containing countless worker testimonials, about the kinds of fraud, abuse, and exploitation that flourish during this poorly-regulated initial phase of employment.<sup>3</sup> In some severe cases, workers fall victim to sophisticated human trafficking schemes. In recent years, momentum to protect these workers has grown.<sup>4</sup> In 2013, senators included a subtitle in S.744, the comprehensive immigration reform bill, which would have targeted the prevention of trafficking among workers recruited abroad.<sup>5</sup> Their efforts failed, however, and workers remain vulnerable.

Observers have proposed many reforms, ranging from discrete regulatory measures to ambitious proposals for a new bilateral agreement with Mexico—a bit of a throwback to the post-World War II era when the two countries collaborated on farm worker recruitment. Yet the complexity of the issue, its relation to human trafficking, and implications for broader global migration questions, demand more profound analysis. In Europe, where the resurgence of guest worker programs—or what is there known as temporary or circular migration, if the migrants leave and return several times—has generated significant scholarship on the subject, as well as various national experiments.

In the 1980s, in preparation for the major immigration reform of 1986 that created the modern iteration of the H-2 visa, then-senator Ted Kennedy commissioned a report that looked east, toward our European peers, to learn their approaches.<sup>6</sup> Inspired by this precedent, this Article looks to Spain, one of the top-ten migrant receiving countries in the world, and a country that

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travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf, archived at <http://perma.cc/EEY2-C5T8>.

<sup>3</sup> The International Labor Recruitment Working Group has collected nearly 40 reports from worker organizations detailing the abuses worker encounter during recruitment. See *Resources*, INT'L LABOR RECRUITMENT WORKING GROUP, <https://fairlaborrecruitment.wordpress.com/resources/> (last visited Aug. 5, 2015), archived at <https://perma.cc/MAW2-8G2D>; see also INT'L LABOR RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 6 (2013) [hereinafter AMERICAN DREAM FOR SALE], available at <https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf>, archived at <https://perma.cc/9H94-6SDT>.

<sup>4</sup> The following events, which will be discussed in greater detail in subsequent sections, demonstrate the growing momentum. Congress criminalized fraud in foreign labor contracting under the Trafficking Victims Reauthorization Act of 2008. Since then, the U.S. Department of Justice and worker groups have highlighted the successful prosecutions of several individuals for recruitment abuses and human trafficking of guest workers. See *Criminal Section Selected Case Summaries*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/criminal-section-selected-case-summaries#humantrafficking> (last visited Aug. 8, 2015), archived at <http://perma.cc/3H3H-PSZV>; *Anti-Slavery Campaign*, Coalition of Immokalee Workers, <http://ciw-online.org/slavery/> (last visited Aug. 8, 2015), archived at <http://perma.cc/X6W9-4Q2K>. In 2009, several workers testified before Congress about their experiences. In 2013, Congress commissioned a report from the GAO that was released in 2015.

<sup>5</sup> The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3601-12 (2013).

<sup>6</sup> See generally CONG. RESEARCH SERV., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES (1980) [hereinafter CRS 1980], available at <http://ufdc.ufl.edu/UF00087217/00001>, archived at <http://perma.cc/45GB-6NZ9>.

has a unique experience of both sending its nationals abroad in great quantities as guest workers, and also receiving migrants as guest workers since the turn of the millennium.<sup>7</sup> This Article is by no means a comprehensive evaluation of the Spanish program. The efficacy of its measures is largely unknown and how precisely they would translate here is untested. Nonetheless, examining its policies and comparing them to our own yields helpful insights.

Spain and other origin countries have signed bilateral agreements to directly conduct recruitment, sometimes in partnership with NGOs.<sup>8</sup> This model is reminiscent of the U.S. “Bracero” program, wherein the United States and Mexico signed a series of bilateral agreements to directly recruit Mexican workers after the Second World War. The “Bracero” government-to-government recruitment model experienced short-lived successes when it was properly enforced.<sup>9</sup> The modern-day Spanish model contains several elements—including collaboration with origin countries and NGOs to prepare and educate workers about their rights before departure—that have significant potential for empowering workers and decreasing their vulnerability to deceit and trafficking.

One must ask: should the example of Spain, a major modern-day immigration state conducting its own recruitment, induce the United States to return to its old ways? This Article’s answer is a partial yes. The United States must conceive of the H-2 program not only as a means of filling labor market demands and satisfying an immigration agenda, but as an integral component of a counter-trafficking strategy. The only way to achieve these goals is to engage Mexico, its top-sending country, and to coordinate the disparate efforts and bodies of law that regulate the recruitment phase under one federal plan. This is a task best left to the federal government. As for conducting recruitment activities, the private market can be trusted with some, but not all, tasks, particularly not ones that are for the benefit of workers. The federal government ought to intervene here as well.

From a humanitarian perspective, the problem is an urgent one. Worker testimonials, described in the following section, demonstrate the range of abuse they experience. In some cases workers are deceived about basic conditions, such as their work place and wages. In others, the deceit is merely the first step in forcibly enslaving them. Their tenuous legal status makes them particularly vulnerable to certain forms of legal, financial, and forcible compulsion. Early manipulation of information is a critical first step towards taking severe advantage of their situation. Given the many challenges to investigation and prosecution of these crimes, early prevention is critical. Here, in particular, Spain can inspire a Congress that will undoubtedly be

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<sup>7</sup> *Id.* at 85, 90. Germany and Spain entered into a labor recruitment agreement in 1960. See also Nieves Ortega Pérez, *Spain: Forging an Immigration Policy*, MIGRATION INFORMATION SOURCE, Feb. 1, 2003, available at <http://www.migrationpolicy.org/article/spain-forging-immigration-policy>, archived at <http://perma.cc/UM9H-ANAK>.

<sup>8</sup> See *infra* Part III.C.

<sup>9</sup> See *infra* Part IV.C.2.

confronted with the challenge of reforming this visa program whenever another comprehensive immigration bill is proposed.

### A. *Degrees of Abuse*

The following three cases illustrate the initial deceit and subsequent abuses that are inflicted on H-2 workers during the recruitment phase of employment. A Mexican man named Elizardo told a migrant rights organization that in 2007 he was offered construction work in California for \$15.00 per hour on an H-2B visa for temporary, nonimmigrant laborers.<sup>10</sup> He agreed and paid a \$200 fee to the recruiters who made him the offer. Only after payment did he learn that the offer was in fact for work at a Georgia carnival at \$250 per week. In sum, the wages and location did not match the terms the recruiters initially advertised.

A Salvadoran man named Miguel Angel Jovel Lopez told Congress during a 2009 hearing that recruiters offered him demolition work in Louisiana for 40 hours per week at \$9.50 per hour.<sup>11</sup> He paid \$4,000 to secure his employment and obtain an H-2B visa that listed a Louisiana company as his employer. Recruiters kept his paperwork until minutes before the check-in for his flight. He then learned that he would be performing asbestos-removal work in Tennessee. He waited for weeks without work, was leased out to various contractors, and was ultimately not fairly paid because the company extracted bogus deductions from his earnings. In sum, he claimed that the offered work hours, wages, location, and type of work varied considerably from the reality.

An Indian man named Aby Karickathara Raju told Congress during the same hearing that recruiters offered him and others work and permanent residence in the United States, and charged up to \$20,000 in fees from individual workers, compelling many to take on loans.<sup>12</sup> Instead, they were granted H-2B visas and subjected to more abuses that formed the basis for forced labor and human trafficking charges. In sum, he described being severely deceived about his immigration status and working conditions.

These three examples demonstrate the spectrum of abuse that can be inflicted on a worker and that begins with an initial lie or misrepresentation.

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<sup>10</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 20 (2013) [hereinafter RECRUITMENT REVEALED], available at [http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed\\_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf](http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf), archived at <http://perma.cc/DA7G-V7TF>.

<sup>11</sup> *The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 61 (2009) (statement of Mr. Miguel Angel Jovel Lopez, former H-2B Guestworker with Cumberland Environmental Resources Co. and a Member of Alliance of Guestworkers for Dignity), available at <http://www.guestworker-alliance.org/wp-content/uploads/2012/06/Leveling-the-Playing-Field-final.pdf>, archived at <http://perma.cc/Z9YP-F56H>.

<sup>12</sup> *Id.*

In each case, a worker accepts a job offer on certain terms only to discover that these terms are false and the reality is quite different than what was promised. After this initial deception, the situation degrades rapidly. These lies can set workers up for further exploitation, such as severe wage theft at the actual work phase of employment, or even human trafficking and forced labor in the most extreme cases. In addition to deceiving a worker, a recruiter may illegally charge him fees and offer exploitative loans to force him into debt.<sup>13</sup> Indebted workers feel compelled to earn the high U.S. wages they were promised and endure mistreatment. One group that surveyed Mexican H-2A workers found that they are woefully under-informed of their rights during recruitment and argue that this lack of information, and the indifference of the U.S. and Mexican authorities, contributes to the proliferation of these abuses.<sup>14</sup>

Under U.S. law, various criminal statutes address these abuses.<sup>15</sup> However, there are many obstacles for wronged workers seeking redress.<sup>16</sup> Complaining about a recruiter's practices may result in blacklisting and retaliation.<sup>17</sup> If a recruiter who has assisted a worker with the visa application process fails to return his or her passport, the recruiter effectively controls one of the worker's primary identification documents. This empowers the recruiter to use the worker's fear of being wrongly detained and deported against him.

### B. Recruitment Deconstructed

"Recruitment" is, in practice, not one unitary action but many steps. These include: advertising, scouting for and identification of potential candidates, the job offer, the hiring, the visa processing, and transportation to the destination country and worksite. I will occasionally refer to these discrete steps collectively as the "recruitment phase" of employment throughout the course of this Article. Though there is not much systematic information about common industry practices,<sup>18</sup> it is clear from worker accounts that recruiters have a hand in nearly every step of the pre-employment phase.<sup>19</sup> They do not just find candidates, as the image of a traditional recruiter would have. Rather, they often undertake the entire range of tasks for preparing a

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<sup>13</sup> RECRUITMENT REVEALED, *supra* note 10, at 18. See also U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT (2015) [hereinafter TIP 2015], available at <http://www.state.gov/documents/organization/245365.pdf>, archived at <http://perma.cc/636L-XJ6J>.

<sup>14</sup> MARIANO YARZA PIÑA, *et al.*, Jornaleros Safe, Jornaleros Mexicanos en EU con Visa: Los Modernos Olvidados 45–46 (2013), available at <https://fairlaborrecruitment.files.wordpress.com/2013/01/informe-jornaleros-safe.pdf>, archived at <https://perma.cc/G2KY-RHYV>.

<sup>15</sup> See *infra*, Part III.C.3.

<sup>16</sup> See *infra*, Part IV.C.2.

<sup>17</sup> *Id.*

<sup>18</sup> I have not found any on this particular subject after a broad search.

<sup>19</sup> See generally U.S. GOVERNMENT ACCOUNTABILITY OFFICE, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS (2015) [hereinafter GAO 2015], available at <http://www.gao.gov/assets/670/668875.pdf>, archived at <http://perma.cc/9ZCR-2ELX>; RECRUITMENT REVEALED, *supra* note 10; PIÑA ET AL., *supra* note 14, at 29.

worker for U.S. employment. Transnational recruiters introduce the concept of “guest work” when they present a job offer, help workers through the visa application process, and arrange for their international transportation. They frequently are, in effect, the first and main point of contact for the entire bureaucratic and logistical undertaking. Workers must rely on them for something at every moment of preparation before they arrive at their employment site. Understanding that “recruitment” often entails the entire process of preparing workers for their U.S. employment, and that at certain parts of this process workers are particularly vulnerable to misinformation and abuse, is critical for realizing that services essential to their employment must be performed by providers acting on behalf of workers.

There is nothing inherently immoral or illegal about recruitment done right; it is a natural and necessary first step for any employer who needs employees. The International Labour Organization (ILO) defines recruitment as “a free act of contractual agreement” whereby one party agrees to pay a fee in exchange for another party to perform agreed-upon recruitment tasks.<sup>20</sup> Recruitment is “the first step in a relation of employment,” and may include advertising, candidate canvassing and selection, job brokerage, and direct hiring or hiring by delegation.<sup>21</sup>

The ILO condemns recruitment once elements of coercion, fraud, force, or deception are introduced.<sup>22</sup> Illicit recruitment refers to the advertisement or provision of false or deceitful job offers to migrant workers, as well as the selection and transportation of these workers by means of deceit, coercion, force, or fraud.<sup>23</sup> Exploitative recruitment can take many forms, including: “deception about the nature and conditions of work, retention of passports, deposits and illegal wage deductions, charging of recruitment fees to workers, debt bondage linked to the repayment of recruitment fees, and threats of violence or deportation.”<sup>24</sup>

Deception is a critical component of any illicit recruitment scheme.<sup>25</sup> Fraudulent recruitment is considered a human trafficking-related offense by international bodies, and is a crime under the U.S. anti-trafficking act.<sup>26</sup> The crime of fraud in foreign labor recruitment amounts to, in the most basic terms, lies designed to entice someone to accept employment abroad.<sup>27</sup> The subject of these lies may be the essential terms of employment, such as

<sup>20</sup> See INT'L LABOUR ORG., *TRAFFICKING FOR FORCED LABOUR: HOW TO MONITOR THE RECRUITMENT OF MIGRANT WORKERS TRAINING MANUAL 15* (2005) [hereinafter ILO MANUAL], available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/instructionalmaterial/wcms\\_081894.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/instructionalmaterial/wcms_081894.pdf), archived at <http://perma.cc/6CP8-XJTY>.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Preventing and Responding to Abusive and Fraudulent Labour Recruitment: A Call for Action*, INT'L LABOUR ORG., available at [http://www.ilo.org/global/topics/fair-recruitment/WCMS\\_377802/lang=en/index.htm](http://www.ilo.org/global/topics/fair-recruitment/WCMS_377802/lang=en/index.htm), archived at <https://perma.cc/E6M5-FLAA>.

<sup>25</sup> ILO MANUAL, *supra* note 20, at 21.

<sup>26</sup> *Id.* at 15; see also 18 U.S.C. § 1351.

<sup>27</sup> See 18 U.S.C. § 1351.

where or who one will be working for and under what immigration status: other times it may be the actual conditions of the work itself, such as the kind of work or the hours and compensation.

In the United States (and other countries) it is typical for employers to rely on private employment agencies to perform these tasks. In some instances, these agencies rely on subcontractors that are more difficult to monitor. The web of contractors and subcontractors creates confusion for employers who may not know who is ultimately performing the service they purchased, as well as for workers, who may not understand who has hired them.<sup>28</sup> Mexican workers bound for the United States report feeling such confusion.<sup>29</sup> This complicated web also makes it difficult to determine who is committing or who is accountable for abuses.<sup>30</sup>

The job offer stage is obviously one juncture where reliable information is critical. A candidate, who is neither present in the destination country nor familiar with that country's norms and laws, is highly vulnerable to deception and misrepresentation. Further, the recruiter presenting the offer is beholden to the employer, not the candidate. A recruiter could puff up the offers, make them so tempting that a worker will pay a high (and illegal) fee, extract a profit, and exit the fray. Even an honest employer has little incentive or recourse to know what a recruiter and his subcontractors are doing. The actor most interested in testing the veracity of the claims is the potential candidate; the candidate must rely on a recruiter's offer because he has no independent means of doing so. Moreover, the recruiter has no contractual or ethical obligation to the candidate. This creates a significant opportunity for exploitation.

The dangers do not cease here, however. Workers can be controlled and subjugated through continual lies past the offer stage. Coupled with the other means of compulsion—such as debt, control over documents, and physical force—he may come to find that the reality is very harsh only when it is too late to turn back.

### C. *Models for Regulating Recruitment*

The fraudulent and exploitative recruitment of H-2 and other migrant workers has increasingly attracted the attention of international bodies, the U.S. State Department, and U.S. lawmakers. In 2014, the ILO launched a “Fair Recruitment Initiative” to study the various ways migrant workers are deceived and abused and how these abuses may amount to human traffick-

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<sup>28</sup> See GAO 2015, *supra* note 19, at 28; PIÑA ET AL., *supra* note 14, at 33–34 (29% of workers surveyed report not knowing the name of their employers, and 28% did not know the name of their recruiters, even though employer information may be found on the visa).

<sup>29</sup> RECRUITMENT REVEALED, *supra* note 10, at 12.

<sup>30</sup> PIÑA ET AL., *supra* note 14, at 30.

ing.<sup>31</sup> The ILO also aims to identify gaps in national legislation and enforcement efforts. “National legislation which regulates the recruitment industry, embedded in labour and administrative laws and/or criminal laws, is often inadequate, complicated and weakly enforced,”<sup>32</sup> the ILO maintains. They argue that enforcement efforts are presently hampered by the disjointed nature of the laws targeting recruitment abuses.

In June 2015, the ILO and the United Nations Office on Drugs and Crime announced a “global call for action” to combat exploitative recruitment.<sup>33</sup> Each office released a report on recruitment and regulation efforts.<sup>34</sup> In July 2015, the U.S. State Department highlighted the role of exploitative recruiters in global labor markets in an annual report about the state of worldwide anti-trafficking efforts.<sup>35</sup> The U.S. Government Accountability Office (GAO) released a report, commissioned by Congress as part of a reauthorization of federal anti-trafficking legislation, on the abusive recruitment practices common in both the H-2A and H-2B visa programs and called for stronger regulations.<sup>36</sup> Last, as of August 2015, two U.S. Congressmen are reportedly crafting proposals to improve oversight and enforcement over the H-2 visa programs.<sup>37</sup>

As the ILO notes, recruitment implicates intersecting bodies of law: immigration law, to create a population of legal temporary workers and define their rights; administrative law, to regulate the conduct of employers

<sup>31</sup> *Fair Recruitment Initiative*, INT’L LABOUR ORG., available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_320405.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_320405.pdf) (last visited Aug. 5, 2015), archived at <http://perma.cc/FUB2-N699>.

<sup>32</sup> *Regulating Recruitment: Labour and Criminal Justice Responses in Preventing Trafficking in Persons and Migrant Exploitation: A Tripartite Consultative Workshop Jointly Organized by the ILO and UNODC*, INT’L LABOUR ORG., available at [http://www.ilo.org/asia/whatwedo/events/WCMS\\_317001/lang—en/index.htm](http://www.ilo.org/asia/whatwedo/events/WCMS_317001/lang—en/index.htm) (last visited Aug. 5, 2015), archived at <http://perma.cc/7Z4D-93XL>.

<sup>33</sup> *UNODC, ILO Call for Action to Prevent and Respond to Abusive and Fraudulent Labour Recruitment*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (June 29, 2015), available at <https://www.unodc.org/unodc/en/frontpage/2015/June/unodc—ilo-call-for-action-to-prevent-and-respond-to-abusive-and-fraudulent-labour-recruitment.html>, archived at <https://perma.cc/3XMC-JDK5>.

<sup>34</sup> BEATE ANDREES, *et al.*, Int’l Labour Org., *Regulating Labour Recruitment to Prevent Human Trafficking and to Foster Fair Migration: MODELS, CHALLENGES AND OPPORTUNITIES* (2015), available at [http://www.ilo.org/global/publications/working-papers/WCMS\\_377813/lang—en/index.htm](http://www.ilo.org/global/publications/working-papers/WCMS_377813/lang—en/index.htm), archived at <http://perma.cc/GM7P-5YSY>; UNITED NATIONS OFFICE ON DRUGS AND CRIME, *THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT RECRUITMENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS* (2015), available at [http://www.unodc.org/documents/human-trafficking/2015/Recruitment\\_Fees\\_Report-Final-22\\_June\\_2015\\_AG\\_Final.pdf](http://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf), archived at <http://perma.cc/DB76-HG96>.

<sup>35</sup> TIP 2015, *supra* note 13, at 15; see also *2015 Trafficking in Persons Report*, U.S. STATE DEPT., available at <http://www.state.gov/j/tip/rls/tiprpt/index.htm> (last visited Aug. 8, 2015), archived at <http://perma.cc/F8LY-SQR6>.

<sup>36</sup> GAO 2015, *supra* note 19. See also *Violence Against Women Reauthorization Act of 2013*, 127 Stat. 54 §1235 (2013), available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf>, archived at <http://perma.cc/JW9Q-Q6ST>.

<sup>37</sup> Jessica Garrison & Ken Bensinger, *Members Of Congress Call For Reform Of Guest Worker Program*, BUZZFEED (Aug. 5, 2015), available at [http://www.buzzfeed.com/jessicagarrison/members-of-congress-call-for-reform-of-guest-worker-program?utm\\_term=.wfdAYybrP#.ge71v4ZZX](http://www.buzzfeed.com/jessicagarrison/members-of-congress-call-for-reform-of-guest-worker-program?utm_term=.wfdAYybrP#.ge71v4ZZX), archived at <http://perma.cc/9W3G-MWBK>.

and intermediaries; labor law, to protect the rights of workers generally; and criminal law, to punish conduct that goes beyond a mere regulatory infraction to an actual deprivation of freedom. Nations vary in their administration of recruitment. Typically, they employ one of four different models, according to the ILO: *laissez-faire*, whereby states take no action; the regulated system wherein states set minimum standards for work contracts; the state-managed system wherein states create a foreign employment office by employing multi-lateral agreements and labor attachés to monitor employers and working conditions; and finally, a state-monopoly system most common in post-socialist countries.<sup>38</sup>

Spain and the United States represent two different models. In the United States, recruitment is left to the free market, and administrative regulations merely prohibit certain conduct for employers and their agents. In Spain, the government collaborates with employers and origin countries to conduct recruitment through a series of bilateral agreements. The following sections will compare and contrast how these countries—two top immigrant destination states—organize the recruitment of agricultural and other so-called “low-skilled” guest workers.<sup>39</sup> This comparison does not attempt to prove that one model is “better” than another. There are too many variables and too little data to attempt a guess at each one’s precise strengths and weaknesses. Rather, this comparison aims to yield insights into the potential benefits of a stronger state hand during the recruitment phase.

## II. THE SPANISH SOLUTION

The United States and Spain were first and tenth respectively in the United Nation’s list of top-ten countries with the largest number of international migrants between 1990 and 2013.<sup>40</sup> In 2006 and 2007, the United States and Spain, respectively, had the two largest inflows of foreign populations among the member countries of the Organisation for Economic Co-operation and Development (OECD).<sup>41</sup> Spain and the United States are

<sup>38</sup> ILO MANUAL, *supra* note 20, at 26–27.

<sup>39</sup> Joaquín Arango, *Exceptional in Europe? Spain’s Experience with Immigration and Integration*, MIGRATION POLICY INST. 2 (2013), available at <http://www.migrationpolicy.org/research/exceptional-europe-spains-experience-immigration-and-integration>, archived at <http://perma.cc/7SG6-HKSJ> (citing OECD, *Key Statistics on Migration in OECD Countries: Inflows of Foreign Population 2000-2009*, available at [www.oecd.org/document/30/0,3746,en\\_2649\\_37415\\_48326878\\_1\\_1\\_1\\_37415,000.html](http://www.oecd.org/document/30/0,3746,en_2649_37415_48326878_1_1_1_37415,000.html); OECD, *ALFS Summary Tables: Population*, available at <http://stats.oecd.org/index.aspx?queryid=254>, archived at <http://perma.cc/5QGC-YLQ7>); see also Org. for Economic Co-operation and Development (OECD), *International Migration Policies and Data, Key Statistics on Migration in OECD Countries, Inflows of Foreign Population* (Oct. 16, 2014), available at <http://www.oecd.org/els/mig/keystat.htm>, archived at <http://perma.cc/XG8V-G8L6>.

<sup>40</sup> U.N. DEPT OF INT’L ECON. & SOC. AFFAIRS, INTERNATIONAL MIGRATION REPORT 5 (2013), available at [http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full\\_Document\\_final.pdf](http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf), archived at <http://perma.cc/T6N3-79C8> (noting ten countries with the largest number of international migrants).

<sup>41</sup> *Key Statistics on Migration in OECD Countries, Stocks and Flows of Immigrants, 2002-2012, Inflows of foreign population*, ORG. FOR ECONOMIC CO-OPERATION AND DEVELOP-

hence two critically important countries in our era of global mass migration.<sup>42</sup> Their rise to prominence as migration-receiving states, however, arose quite differently. Examining their respective trajectories is important in understanding their present-day recruitment models.

### A. Spanish Labor Migration and Governance

Historically, Spain was a country of emigrants.<sup>43</sup> Around the turn of the millennium, Spain experienced a massive demographic shift.<sup>44</sup> Since 2000, Spain's foreign-born population quintupled from nearly 1.5 million to 6.2 million in 2014.<sup>45</sup> This rapid shift demanded that lawmakers craft fresh policies to absorb the new arrivals. In 2000, the Spanish government enacted the country's modern immigration statute, the Ley de Extranjería 4/2000.<sup>46</sup> Unlike its 1985 predecessor, which had treated immigration as a temporary phenomenon, the new statute was more comprehensive and more generous with rights-based protections. Spain enacted the 1985 law largely to appease the European Union, which it joined in 1986.<sup>47</sup>

The massive influx of foreigners was in part caused by an economic boom that fueled a growing demand for foreign labor. In the years following the enactment of the Ley de Extranjería, Spain implemented a variety of measures in an attempt to competently govern its labor migrants. The immigration statute was substantially amended four times.<sup>48</sup> Not all of Spain's experiments in labor migration governance were successful. For example, Spain implemented a labor-quota system that proved to be a backdoor for migrants already residing or working illegally in Spain to obtain authorized work.<sup>49</sup> This system was reformed in 2000 to close the backdoor and then

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MENT, available at <http://www.oecd.org/els/mig/keystat.htm> (last visited July 14, 2015), archived at <https://perma.cc/PC2W-Q9A3>.

<sup>42</sup> See Jeffrey G. Williamson, *Global Migration*, INT'L MONETARY FUND (Sept. 2006), available at <http://www.imf.org/external/pubs/ft/fandd/2006/09/williams.htm>, archived at <https://perma.cc/Q35D-DCVY>.

<sup>43</sup> CLAUDIA FINOTELLI, LABMIGGOV, LABOUR MIGRATION GOVERNANCE IN CONTEMPORARY EUROPE: THE CASE OF SPAIN 4 (2012), available at [http://www.labmiggov.eu/wp-content/uploads/2012/04/LABMIGOV\\_WP1\\_SPAIN\\_Final-report.pdf](http://www.labmiggov.eu/wp-content/uploads/2012/04/LABMIGOV_WP1_SPAIN_Final-report.pdf), archived at <https://perma.cc/ET7L-3LVA>. Millions of Spaniards left for the Americas, Africa, and other European countries. Ortega Pérez, *supra* note 7.

<sup>44</sup> See Ortega Pérez, *supra* note 7.

<sup>45</sup> See *Main Series of Population since 1998, National Total: Population (Spaniards/Foreigners) by Country of Birth, Sex, and Year*, INSTITUTO NACIONAL DE ESTADÍSTICA, [www.ine.es/jaxi/menu.do?type=pcaxis&path=/t20/e245/p08/&file=pcaxis](http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t20/e245/p08/&file=pcaxis) (May 11, 2015).

<sup>46</sup> See Ortega Pérez, *supra* note 7; Miryam Hazán Béjar, *Immigration Policies and Amnesties in the United States and Spain: A Comparative Approach*, 5 REVISTA GENERAL DE DERECHO PUBLICO COMPARADO, 1, 13-15 (2009), available at [http://www.iustel.com/v2/revistas/detalle\\_revista.asp?id\\_noticia=408039&d=1](http://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=408039&d=1), archived at <https://perma.cc/QE7K-C98Y>.

<sup>47</sup> See *id.*

<sup>48</sup> See VLEX, *Prácticos España: Régimen Jurídico General de la Extranjería*, VLEX-447690118, available by subscription only at <http://vlex.com/vid/447690118> (last visited Feb. 16, 2015).

<sup>49</sup> LEY ORGANICA DE EXTRANJERIA 4/2000. Compare Articles 37 and 39 in 2000 version with Article 39 in 2003 version. See also FINOTELLI, *supra* note 43, at 17.

transformed altogether in 2003 into an avenue for hiring large numbers of workers, primarily from countries with which Spain had signed bilateral agreements.<sup>50</sup> In 2001, Spain adopted the “Plan GRECO” (global program for the regulation and coordination of foreigners and immigration), which called for Spain to enter agreements with origin countries that would regulate the selection and, when necessary, training of foreign workers in origin countries with the help of non-governmental organizations (NGOs).<sup>51</sup> Article 39 of the Ley de Extranjería was formally renamed “gestión colectiva de contrataciones en origen”—or collective management of origin hires.<sup>52</sup> Article 39 is the primary vehicle for large-scale hiring of foreign workers for both permanent and temporary positions (though a recent royal decree halted permanent hires due to the economic downturn). Job offers are directed to the countries with which Spain has signed bilateral agreements, and candidates are screened, selected, and assisted by a committee comprised of authorities from both the origin and destination countries and employers. According to statistics available since 2008, more than 80,000 workers arrived through this program.<sup>53</sup> In the last decade, the Spanish migration agreements have been praised and cited as an example of a best practice of temporary migration governance by the European Union and others.<sup>54</sup>

There are a variety of additional measures for Spanish employers who want to recruit foreign workers on an *individual* basis under Article 38 of the immigration statute. The immigration regulations explicitly provide for the hiring of temporary and seasonal workers on the basis of individual nominations.<sup>55</sup> Spain also implemented measures to bring unauthorized foreign laborers already in Spain into the formal labor market. The regulations permit employers to hire foreigners who were present in Spain for a continuous period of three years under the “arraigo social,” and legalize unauthorized

<sup>50</sup> FINOTELLI, *supra* note 43, at 17.

<sup>51</sup> Resolución de 17 de abril de 2001, de la Delegación del Gobierno para la Extranjería y la Inmigración, por la que se dispone la publicación del Acuerdo del Consejo de Ministros del día 30 de marzo de 2001, por el que se aprueba el Programa Global de Regulación y Coordinación de la Extranjería y la Inmigración, B.O.E. n. 101, April 27, 2001 (Spain), available at <http://www.boe.es/boe/dias/2001/04/27/pdfs/A15323-15343.pdf>, archived at <https://perma.cc/ZFZ9-NKMH>; see also MANOLO ABELLA, POLICIES AND BEST PRACTICES FOR MANAGEMENT OF TEMPORARY MIGRATION 49 (2006), available at [http://web4.uwindsor.ca/units/socialjustice/main.nsf/982f0e5f06b5c9a285256d6e006cff78/a9fee0f9ae7e1026852573d40063d1e5/\\$FILE/TempMigration.pdf](http://web4.uwindsor.ca/units/socialjustice/main.nsf/982f0e5f06b5c9a285256d6e006cff78/a9fee0f9ae7e1026852573d40063d1e5/$FILE/TempMigration.pdf), archived at <http://perma.cc/L34U-2L5U>.

<sup>52</sup> LEY ORGANICA DE EXTRANJERIA 4/2000, *supra* note 49.

<sup>53</sup> See *Anuario de Estadísticas del Ministerio de Empleo y Seguridad Social*, MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, available at <http://www.empleo.gob.es/es/estadisticas/anuarios/index.htm> (last visited May 11, 2015), archived at <https://perma.cc/8ZU3-UZCC>.

<sup>54</sup> See EUROPEAN MIGRATION NETWORK, TEMPORARY AND CIRCULAR MIGRATION: EMPIRICAL EVIDENCE, CURRENT POLICY PRACTICE AND FUTURE OPTIONS IN SPAIN 53 (2010), available at [http://extranjeros.empleo.gob.es/es/redeuropeamigracion/Estudios\\_monograficos/EMN-EN-Circular-Migration.pdf](http://extranjeros.empleo.gob.es/es/redeuropeamigracion/Estudios_monograficos/EMN-EN-Circular-Migration.pdf), archived at <http://perma.cc/EU3F-FHJZ>. See also Abella, *supra* note 51, at 49–50. Manolo Abella formerly served as the ILO’s Director of the International Migration Programme. University of Sussex, *About Us: Manolo Abella*, Migrating Out of Poverty, Consortium (last visited Nov. 1, 2015) <http://migratingoutofpoverty.dfid.gov.uk/aboutus/secretariat/manoloabella>, archived at <http://perma.cc/6A58-EFW4>.

<sup>55</sup> See R.D. 557/2011 Arts. 97–102.

migrant workers who denounce their employers and were present in Spain for a continuous period of two years under the “arraigo laboral”<sup>56</sup> (“arraigo” roughly translates to “rooted” and means “settled in”).<sup>57</sup>

Finally, Spain relied on six amnesties to absorb a total of 1.2 million unauthorized immigrants from 1986 to 2005.<sup>58</sup> These amnesties “were a key tool for readjusting the balance between ineffective state regulations and the large flow of immigrants,” particularly unauthorized immigrants, who were attracted by Spain’s “inadequate recruitment procedures, extended informal economy [about 22 percent of the GDP] and insufficient internal controls.”<sup>59</sup> All told, though Spain was to become one of the European Union’s top labor importers, its earliest policies were largely reactive and highly tolerant of unauthorized workers and informal employment, rather than the result of intelligent design.<sup>60</sup> The future will witness further changes to Spanish labor importation policies. In 2014, the European Union issued a directive on the “conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers,” to be implemented by 2016.<sup>61</sup> The directive guarantees several rights, such as mandating a work contract in the application, that housing meets health and safety standards, and that rent will not be excessive or automatically deducted from wages.<sup>62</sup>

### B. Comparison to the United States “Bracero” Framework

By contrast, the United States is a country of immigrants that has had policies in place since the 19th century.<sup>63</sup> It too has encountered varying degrees of success and failure with its immigration policies, with the 1986 amnesty and its failure to reduce illegal immigration being among the most notorious.<sup>64</sup> The United States began importing temporary migrant laborers

<sup>56</sup> R.D. 557/2011, Art. 124, § 1–2.

<sup>57</sup> WORD REFERENCE, *Definition of “Arraigo” available at <http://www.wordreference.com/es/en/translation.asp?spen=arraigo>, archived at <http://perma.cc/3NAQ-DDT2> arraigo (last visited July 22, 2015).*

<sup>58</sup> See FINOTELLI, *supra* note 43, at 37. (This source refers to “regularisations,” which are essentially amnesties.)

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 6.

<sup>61</sup> “Directive of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers,” Council Directive 2014/36 (Feb. 26, 2014), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEX:32014L0036>, archived at <http://perma.cc/4QYK-ZEZ4>.

<sup>62</sup> *Council Adopts Directive on Third-Country Seasonal Workers*, COUNCIL OF THE EUROPEAN UNION, Feb. 17, 2014, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/141044.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141044.pdf), archived at <http://perma.cc/ZH9Y-ERH3>.

<sup>63</sup> *See* WALTER A. EWING, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 3 (2012), available at [http://www.immigrationpolicy.org/sites/default/files/docs/opportunity\\_exclusion\\_011312.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/opportunity_exclusion_011312.pdf), archived at <https://perma.cc/FCN7-QZZP>.

<sup>64</sup> *See* Stephen Castles, Inaugural Lecture for the Migration Studies Unit: Migration and Social Transformation (Nov. 15, 2007) [hereinafter Inaugural Lecture], available at <http://www.lse.ac.uk/government/research/resgroups/MSU/documents/eventsRelated/castles151107-presentation.pdf>, archived at <https://perma.cc/2M4H-ZCGP>.

from Mexico to fill postwar labor shortages in 1917.<sup>65</sup> In 1942, confronting more wartime shortages, the United States entered into a series of bilateral agreements with Mexico to import farmworkers. From 1942 to 1964 four to five million Mexicans arrived under what became known as the “Bracero” (or strong-arm) program.<sup>66</sup> Despite granting the workers various rights, and some initial successes in the early phases of the program, the Bracero has a bleak legacy.<sup>67</sup> Workers were subjected to such egregious abuses that one Labor Department official likened it to legalized slavery.<sup>68</sup> In 1952, Congress enacted the modern-day H-2 visas, which were then further subdivided by the Immigration Naturalization Act of 1986 into two categories: the H-2A visa for agricultural workers and the H-2B visa for non-agricultural laborers.<sup>69</sup> In 2001, renewed interest in bilateral cooperation on immigration led the U.S. and Mexican Presidents to announce a deal for a new bilateral immigration program, but these plans were abandoned after the attacks of September 11th.<sup>70</sup>

The U.S.-Mexico case parallels the Spanish-Moroccan one, not only in terms of migration streams but also due to the role of bilateral agreements in the attempts to manage these. Like Mexicans in the United States,<sup>71</sup> Moroccans comprise the largest group of foreigners in Spain.<sup>72</sup> Incidentally, both countries have also erected fences to keep unwanted migrants from these countries out: the United States along the Mexican border, and Spain around the cities Ceuta and Melilla located on the Mediterranean coast of Africa and

<sup>65</sup> See CRS 1980, *supra* note 6, at 6–7.

<sup>66</sup> See *id.* at 15.

<sup>67</sup> See SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY, GUESTWORKER PROGRAMS IN THE UNITED STATES 4 (2013) [hereinafter SPLC], available at <https://www.splcenter.org/20130219/close-slavery-guestworker-programs-united-states>, archived at <https://perma.cc/4L8L-GX4W>; see Bryce W. Ashby, Note, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 899 (2008).

<sup>68</sup> See SPLC *supra* note 67, at 4.

<sup>69</sup> See ANDORRA BRUNO, CONG. RESEARCH SERV., IMMIGRATION OF TEMPORARY LOWER-SKILLED WORKERS: CURRENT POLICY AND RELATED ISSUES 2 (2012), available at <http://fas.org/sgp/crs/homesecc/R42434.pdf>, archived at <https://perma.cc/7Q9M-2E9H>. See also 8 U.S.C. § 1101(a)(15)(H)(ii) (2014).

<sup>70</sup> See Marc R. Rosenblum, *The United States and Mexico: Prospects for a Bilateral Migration Policy*, BORDER BATTLES (Mar. 8, 2007), available at <http://borderbattles.ssrc.org/Rosenblum>, archived at <https://perma.cc/3PHX-2HQ2>.

<sup>71</sup> See Jie Zong & Jeanne Batalova, *Mexican Immigrants in the United States*, MIGRATION INFORMATION SOURCE, Oct. 9, 2014, available at <http://www.migrationpolicy.org/article/mexicanimmigrants-united-states>, archived at <https://perma.cc/S9UQ-VAVZ>; see also Muzaffar Chishti & Faye Hipsman, *In Historic Shift, New Migration Flows from Mexico Fall Below Those from China and India*, MIGRATION INFORMATION SOURCE, (May 21, 2015), archived at <http://www.migrationpolicy.org/article/historic-shift-newmigration-flows-mexico-fall-below-those-china-and-india>, archived at <https://perma.cc/4NNM-CV97>.

<sup>72</sup> See “Main Series of Population since 1998, National Total: Population (Spaniards/Foreigners) by Country of Birth, Sex, and Year,” INSTITUTO NACIONAL DE ESTADÍSTICA, available at <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t20/e245/p08/&file=pcaxis>, archived at <https://perma.cc/8XV7-HNB8>. In 2014, the population of Moroccans in Spain was 774,549.

bordered by Morocco.<sup>73</sup> Like Mexicans in the H-2 program,<sup>74</sup> Moroccans comprise the largest nationality in Spain’s formal large-scale labor recruitment program, the *gestión colectiva*.<sup>75</sup> Before Spain signed the present agreement with Morocco that created the modern-day scheme, Spain entered into an administrative agreement with Morocco in 1999 to hire temporary workers which had been used by growers in Almería.<sup>76</sup> Notably, both the United States and Spain have lower ratios of temporary to permanent workers than other member countries of the Organisation for Economic Co-operation and Development (OECD).<sup>77</sup>

In sum, both the United States and Spain have used bilateral agreements with their top sending country to play a direct role in conducting the recruitment of workers. Under the initial Bracero agreements (the program consisted of three phases<sup>78</sup>), the Mexican and U.S. governments collaborated to conduct recruitment. The U.S. Farm Security Administration contracted with the braceros and then sub-contracted with the employers, and Mexico had supervisory power over the contracts.<sup>79</sup> This model was abandoned and then revived but poorly enforced, leading to significant abuses in the final phase of the program.<sup>80</sup> With the enactment of the H-2 visa scheme, the States left recruitment to the private market. The following sections will compare and contrast the legal structure of Spain’s and the States’ present

<sup>73</sup> See Inaugural Lecture, *supra* note 64, at 4; see also BBC, *Ceuta, Melilla Profile* (March 16, 2015), available at <http://www.bbc.com/news/world-africa-14114627>, archived at <https://perma.cc/7ECL-EA64>.

<sup>74</sup> See generally *Visa Pages - U.S. Temporary Foreign Worker Visas*, GLOBAL WORKER JUSTICE ALLIANCE, available at <http://globalworkers.org/visa-pages> (stating that 90 percent of H-2A and 73 percent of H-2B visas originate in Mexico), archived at <https://perma.cc/NZ9M-85BK>. In 2013, the State Department issued H-2A visas to 69,787 Mexican workers and H-2B visas to 41,883 Mexican workers. BUREAU OF CONSULAR AFFAIRS, U.S. STATE DEPT., FY 2013 NONIMMIGRANT VISAS ISSUED, available at <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY13NIVDetailTable.pdf> (last visited Aug. 5, 2015), archived at <https://perma.cc/G3TM-YCYY>.

<sup>75</sup> See *Anuario de Estadísticas del Ministerio de Empleo y Seguridad Social*, MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, archived at <http://www.empleo.gob.es/es/estadisticas/anuarios/index.htm> (last visited May 11, 2015) (stating Africans comprise the largest number of participants and the Dirección General de Migraciones indicates that the vast majority of Africans are of Moroccan nationality), available at <https://perma.cc/SA7R-TC DK> (Notes on file with the author).

<sup>76</sup> The agreement was called “Acuerdo Administrativo entre España y Marruecos relativo a los trabajadores de temporada, suscrito en Madrid el 30 de septiembre de 1999.” See Mercedes Gordo Márquez, *Los Contratos en Origen de Temporada a las “Marroquinas”: Estrategia Empresarial para Sustituir a las Trabajadoras del Este de Europa tras la Incorporación de Estos Países a la UE*, CONGRESO INTERNACIONAL COOPERACIÓN TRANSFRONTERIZA ANDALUCÍA-ALGARVE-ALENTEJO 578 (2009), available at <http://www.aecr.org/web/congresosAACR/2009/pdfs/mesa4/5-5.pdf>, archived at <https://perma.cc/WTX7-8RDK>.

<sup>77</sup> See Jill H. Wilson, *Immigration Facts: Temporary Foreign Workers*, BROOKINGS INST., (June 18, 2013), available at <http://www.brookings.edu/research/reports/2013/06/18-temporary-workers-wilson>, archived at <https://perma.cc/2UW8-RFKL>.

<sup>78</sup> See CRS 1980, *supra* note 6, at 15.

<sup>79</sup> See Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEXAS L. REV. 895, 905 (2001).

<sup>80</sup> See *id.* at 910.

recruitment models, as well as the other administrative and criminal laws that regulate improper recruitment.

### C. *Regulating Recruitment: United States and Spain*

This section shall describe the immigration, administrative and criminal laws that comprise each country's recruitment and anti-trafficking schemes. It is meant to offer a thorough overview of the law and policies in place rather than a conclusive empirical analysis of precisely what measures are more effective than others. The incidence of fraud and abuse is relatively well-documented in the United States, but less so in Spain. Thus, it is difficult to know how effective the Spanish measures are. Nonetheless, a direct comparison of these policies should yield insights into their potential for suppressing the abuse of this vulnerable population of workers.

#### a. Immigration Laws

##### i. *The United States*

The Immigration Naturalization Act, as codified in 8 U.S.C. § 1101, statutorily defines the H-2A and H-2B worker categories. H-2A visas are for non-immigrant laborers to perform agricultural labor or services of a temporary or seasonal nature and then return to their country of residence. H-2B visas are not restricted to agriculture and are annually capped at 66,000 workers.<sup>81</sup> Both programs are limited to the 84 countries designated by the Homeland Security and State Departments.<sup>82</sup>

To obtain workers under either visa, an employer must petition the U.S. Labor Department for certification, and once certified, apply to the U.S. Department of Homeland Security.<sup>83</sup> An employer obtains certification by proving that there are not sufficient qualified domestic workers available to perform the labor, and that hiring foreign workers will not adversely affect

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<sup>81</sup> See 8 U.S.C. § 1184(g)(1)(B) (2013).

<sup>82</sup> See *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers#H2-B%20Countries> (last visited Feb. 5, 2016), archived at <https://perma.cc/M8WX-RVLA>; *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers#countries> (last visited Feb. 5, 2016), archived at <https://perma.cc/6QRR-D2CW>.

<sup>83</sup> See generally, BRUNO, *supra* note 69; see also *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/working-united-states/temporary-workers/h-2a-agricultural-workers/h-2a-temporary-agricultural-workers> (last visited July 16, 2015) [hereinafter H-2A Agricultural Workers], archived at <https://perma.cc/9ZP3-67WF>; *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, available at <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers> (last visited July 16, 2015) [hereinafter H-2B Agricultural Workers], archived at <https://perma.cc/4LPY-Z92K>.

the wages and working conditions of similarly employed domestic workers.<sup>84</sup> Once the employer’s application is approved, prospective employees abroad may apply for a visa and seek admission at a port of entry.<sup>85</sup>

Of course, an employer must find these candidates before they can apply for a visa.<sup>86</sup> The employer may travel abroad himself or, as happens more frequently, hire an intermediary recruiter or rely on one of his previous employees to recruit on his behalf.<sup>87</sup> A U.S. employer may contract with a Mexican or U.S. recruiter, who in turn may contract a Mexican recruiter, or even a second U.S. recruiter who then subcontracts with a Mexican recruiter.<sup>88</sup> The Mexican recruiter may be an agency or an individual.<sup>89</sup> Employers or recruiters may also employ “staffing agencies [that] ‘lease’ workers to other employers.”<sup>90</sup> Employers sometimes employ lawyers or law firms, who in turn often rely on Mexican recruiters, to conduct recruitment.<sup>91</sup>

In practice, a recruiter’s role typically does not end after finding qualified candidates; frequently recruiters undertake nearly all the logistics involved in preparing a worker for his employment abroad. According to one NGO report, some recruiters simply select qualified candidates and petition for a U.S. consular interview, while leaving the remaining logistics to the worker. Others, however, do much more.<sup>92</sup> “Some recruiters organize the passport paperwork, the consular appointment, travel, and room and board during the process.”<sup>93</sup> Recruiters are known to charge workers for these services in violation of both U.S. and Mexican laws.<sup>94</sup> The GAO reported that recruiters operating in Mexico frequently are not only hired to find qualified candidates, but also to act as facilitators with the candidate’s visa application process.<sup>95</sup> Agents based in Monterrey, Mexico, reported making visa appointments, assisting workers with online visa applications, explaining contracts, assisting with other employment paperwork, and returning passports once the visa is awarded.<sup>96</sup>

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<sup>84</sup> See H-2A Agricultural Workers, *supra* note 83.

<sup>85</sup> See *id.*; H-2B Agricultural Workers, *supra* note 83.

<sup>86</sup> See generally H-2A Visa, GLOBAL WORKERS JUSTICE ALLIANCE, available at [http://globalworkers.org/visas/h-2a#footnoteref105\\_bletaad](http://globalworkers.org/visas/h-2a#footnoteref105_bletaad) (last visited July 16, 2015), archived at <https://perma.cc/ZAR5-W6EX>; H-2B Visa, GLOBAL WORKERS JUSTICE ALLIANCE, available at [http://globalworkers.org/visas/h-2b#footnote15\\_7q36y91](http://globalworkers.org/visas/h-2b#footnote15_7q36y91) (last visited July 16, 2015) [hereinafter GWJA H-2B Visa], archived at <https://perma.cc/Z63H-JXUH>.

<sup>87</sup> See GWJA H-2B Visa, *supra* note 86; see also GAO 2015, *supra* note 19, at 27.

<sup>88</sup> See CDM, RECRUITMENT REVEALED, *supra* note 10, at 11. See also PIÑA ET AL., *supra* note 14, at 29.

<sup>89</sup> See CDM, RECRUITMENT REVEALED, *supra* note 10, at 11.

<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 13.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.*

<sup>95</sup> See GAO 2015, *supra* note 19, at 27.

<sup>96</sup> See *id.*

*ii. Spain*

Article 39, which governs the *gestión colectiva*, provides that the Spanish Ministry of Employment and Immigration, while taking into consideration the national employment situation, may approve an annual provision of jobs to be offered to foreigners who do not reside, nor are located, in Spain.<sup>97</sup> Though in prior years offers could be made for both permanent and temporary positions, in 2012, the Ministry restricted the program to temporary agricultural workers from signatory countries due to the economic downturn and reduced need for foreign labor.<sup>98</sup> In the 2012-2013 reporting period, the Ministry issued 9,613 employment authorizations.<sup>99</sup> In 2008 (the first year for which statistics are available), the Ministry granted a total of 42,719 authorizations. The vast majority (41,339) went to temporary workers.<sup>100</sup>

Between 2001 and 2009, Spain entered into six agreements regarding labor migration streams with Colombia, Ecuador, Morocco, the Dominican Republic, Mauritania and Ukraine.<sup>101</sup> The agreements (with the exception of Colombia's, which relies on an existing agency) create joint selection committees where public authorities and employers together select prospective workers. In the case of the Dominican Republic and Ecuador, advocates or "agentes sociales", intergovernmental agencies, and migration-related (NGOs) may participate as advisors upon invitation of both parties. The committees are tasked with selecting the best candidates, determining the course of any training, and assisting the workers during the process.

*b. Administrative Laws*

The procedural safeguards designed to benefit workers during the process varies widely from one country to the other. Spain is more protective. The worker contract must be detailed, specific, and identical to the offer; a copy (along with a government-provided attachment describing his legal rights) must be provided to the worker and origin country authorities. Information regarding destination, stay, work, housing, salary, and upon request, travel documentation, must be provided before departure. Participation is

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<sup>97</sup> See LEY ORGANICA DE EXTRANJERÍA 4/2000.

<sup>98</sup> See Orden ESS/2825/2012, de 27 de diciembre, 2012; Orden ESS/2445/2013, de 23 de diciembre, 2013; Orden ESS/2505/2014, de 29 de diciembre, 2014; Arango, *supra* note 39, at 6-7 (2013); see also *Timeline: Spain's Economic Crisis*, REUTERS, Dec. 30, 2011, available at <http://www.reuters.com/article/2011/12/30/us-spain-cuts-economy-idUSTRE7BT0RL20111230>, archived at <https://perma.cc/H8K9-B7HM>.

<sup>99</sup> See *Anuario de Estadísticas del Ministerio de Empleo y Seguridad Social*, MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, <http://www.empleo.gob.es/es/estadisticas/anuarios/index.htm> (last visited Aug. 5, 2015), archived at <https://perma.cc/TCR8-U9KL>.

<sup>100</sup> See *id.*

<sup>101</sup> See *Convenios de Flujos Migratorios Laborales*, SECRETARÍA GENERAL DE INMIGRACIÓN Y EMIGRACIÓN, MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, available at [http://extranjeros.empleo.gob.es/es/normativa/internacional/flujos\\_migratorios/index.html](http://extranjeros.empleo.gob.es/es/normativa/internacional/flujos_migratorios/index.html) (last visited Aug. 5, 2015), archived at <https://perma.cc/57JC-DWFP>.

free for candidates. A joint coordinating committee and the Spanish Tripartite Labor and Immigration Commission provide regular oversight.

By contrast, the U.S. program lacks many of these safeguards—much to the outrage of U.S. worker advocates who have called for similar measures. While contracts are mandatory and recruitment fees are banned, enforcement of the system largely relies on complaints by transient workers (a legally and politically disenfranchised community) rather than a greater oversight mechanism such as the one the Spanish government has erected. As reports indicate, much of their pre-departure guidance is left to intermediaries motivated by personal profit. Moreover, the regulations vary for each visa category.

*i. The United States*

*1. H-2A*

Employers must provide H-2A workers a copy of the employment contract in a language understood by the worker either when the worker applies for the visa or on the first day of employment.<sup>102</sup> The contract must contain references to all of the worker protections mandated by the regulations. In the absence of a written contract, the certification application shall serve as the contract.

Recruitment fees are banned for workers. An employer must assure that it has neither sought nor received payment from a worker for recruitment-related activities, including certification and application costs.<sup>103</sup> Payment includes wage deductions, kickbacks, bribes, in-kind payments, and free labor. However, employers are permitted to be reimbursed for costs that are “primarily for the benefit of the worker” such as passport fees. An employer must also contractually prohibit any foreign labor contractor or recruiter (or their agents) that it hires to seek or receive payments or compensation from prospective employees.<sup>104</sup>

The employer must also pay for subsistence and transportation from the origin country to the place of employment.<sup>105</sup> The employer may advance the costs or directly provide transportation and subsistence.<sup>106</sup> If it does not, then the employer must pay the worker for these costs, provided that the worker completes half of the work contract period.<sup>107</sup> The employer is permitted to deduct the costs of transportation and subsistence costs, provided that the job offer states the employer will reimburse the worker in full for these deductions upon completion of half the work contract period.<sup>108</sup> However, the em-

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<sup>102</sup> See 20 C.F.R. § 655.122(q) (2015).

<sup>103</sup> See *id.* at § 655.135(j).

<sup>104</sup> See *id.* at § 655.135(k).

<sup>105</sup> See *id.* at § 655.122(h)(1).

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See 20 C.F.R. § 655.122(p)(1).

ployer may not make any deductions that would violate the Fair Labor Standards Act (FLSA).<sup>109</sup>

Once employment begins, additional obligations are imposed on H-2A employers. The employer must pay for daily transportation between the housing— which is provided or secured by the employer—and the work site at no cost to the worker.<sup>110</sup> The employer must provide the tools and equipment necessary to perform the labor.<sup>111</sup> The employer must provide a “three-fourths guarantee” that he will offer workers “employment for a total number of work hours equal to at least three-fourths of the workdays” of the contracted work period.<sup>112</sup> The employer must also provide workers’ compensation insurance coverage,<sup>113</sup> three meals per day or kitchen facilities,<sup>114</sup> and guarantee a certain minimum wage.<sup>115</sup> Employers must also keep accurate earnings records and provide these to workers in writing on or before each payday.<sup>116</sup> Retaliation in the form of intimidation, threats, restraints, coercion, blacklisting or discharge is prohibited.<sup>117</sup>

## 2. H-2B

Historically, the H-2A visa was more regulated than the H-2B.<sup>118</sup> In 2012, the Obama Administration attempted to correct the regulatory imbalance. However, employers and interest groups sued the Department of Labor, and a federal court enjoined the Administration’s new rules.<sup>119</sup> As a result, until very recently, the program operated under rules issued in 2008.<sup>120</sup> The 2008 rules banned recruitment fees and imposed obligations once the work began—such as a minimum wage, disclosure of deductions, and outbound travel when a worker was dismissed—but nothing approaching the scale of the H-2A program’s regulations.

Unlike the H-2A program, the old H-2B rules included nothing regarding the disclosure of job order, employer-provided items, the three-fourths guarantee, earnings statements, retaliation and unfair treatment. The proposed 2012 rules would have imposed these and more. Eventually, the 2008 rules were *also* challenged and temporarily enjoined under a different case.<sup>121</sup> On April 30, 2015, the Departments of Labor and Homeland Secur-

<sup>109</sup> See *id.*

<sup>110</sup> See 20 C.F.R. § 655.122(d), (h)(3).

<sup>111</sup> See *id.* at § 655.122(f).

<sup>112</sup> *Id.* at § 655.122(i).

<sup>113</sup> See *id.* at § 655.122(e).

<sup>114</sup> See *id.* at § 655.122(g).

<sup>115</sup> See *id.* at § 655.120.

<sup>116</sup> See § 655.122(j),(k).

<sup>117</sup> See § 655.135(h).

<sup>118</sup> See BRUNO, *supra* note 69, at 18.

<sup>119</sup> See Muzaffar Chishti, *et al.*, *Recent Court Decisions Put a Sharp Spotlight on U.S. H-2B Temporary Worker Visa Program* (Apr. 23, 2015), available at <http://www.migrationpolicy.org/article/recent-court-decisions-put-sharp-spotlight-us-h-2b-temporary-worker-visa-program>, archived at <https://perma.cc/4REL-QVAS>.

<sup>120</sup> See BRUNO, *supra* note 69, at 6.

<sup>121</sup> See Chishti, *et al.*, *supra* note 119.

ity jointly issued new interim regulations. These newly-minted regulations are nearly identical to the ones the Obama administration intended to enact in 2012.

However, as this Article went to press, on December 18, 2015, Congress enacted the Consolidated Appropriations Act of 2016, which prohibits the Labor Department from using any fiscal year funds to *enforce* the three-fourths guarantee, though it remains a part of the regulations as codified.<sup>122</sup> This development has greatly concerned labor advocates who believe it further imperils the rights of H-2B workers.<sup>123</sup>

Under the new rules, employers must provide a copy of the job order, either when they apply for the visa or on the day work begins, in a language the worker understands.<sup>124</sup> Next, there are several requirements for recruitment and related costs. Employers or their agents must provide with the application a copy of all agreements with the recruiters it hires to conduct international recruitment, and these agreements must contain the contractual prohibition against charging recruitment fees.<sup>125</sup> Employers and agents must also provide the identity and location of the hired agents and employees, in addition to their agents or employees.<sup>126</sup> The Department of Labor is required to publish a list of these recruiters and agents.<sup>127</sup>

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<sup>122</sup> Consolidated Appropriations Act of 2016, Pub. L. No. 114-113 §§ 111-114, 565 (2016) (enacted). The Act also prohibits the use of funds to enforce 20 CFR 655.70, which governs audits of applications. It also excludes from the 2016 cap any returning workers who were already admitted and counted towards the cap in 2013-2015. It also provides a methodology for determining the prevailing wage rate. This Act is not the only recent legislation targeting the H-2B program. In October 2015, four senators introduced the ‘Save Our Small and Seasonal Businesses Act of 2015’ to amend the H-2B visa program. Save Our Small and Seasonal Businesses Act of 2015’ S.2225, 114th Cong. (2015). Labor advocates oppose the bill for essentially rolling back many of the protections announced by the new rules of April 2015. See INT’L LABOR RECRUITMENT WORKING GROUP *Oppose the Save our Small and Seasonal Business Act of 2015 (S.2225)*, available at <https://fairlaborrecruitment.files.wordpress.com/2015/11/s-2225-ilrwg-advocacy-paper.pdf>, archived at <https://perma.cc/456G-WBBP>. Among the changes, the bill would *not* require that an employer provide: the identity of its foreign recruiters and subcontractors; employment conditions in a language understood by the workers; tools and equipment; the three-quarters guarantee; earnings records; visa fees; and whistleblower protections. It also contains no protection analogous to § 655.20(z), which mandates employer compliance with applicable laws, including the TVPA’s prohibition against the knowing confiscation or destruction of a worker’s passports, visas or immigration documents. See INT’L LABOR RECRUITMENT WORKING GROUP, *Side by Side Comparison of 2015 DOL H-2B Regulations and S.2225*, available at <https://fairlaborrecruitment.files.wordpress.com/2015/11/side-by-side-comparison-of-2015-dol-h-2b-regulations-and-s-2225-short.pdf>, archived at <https://perma.cc/TT2M-GQ9G>.

<sup>123</sup> Laura D. Francis, *Immigration Roundup: Issues with H-2Bs Again*, LABOR AND EMPLOYMENT BLOG, BLOOMBERG LAW, Jan. 7, 2016, available at <http://www.bna.com/immigration-roundup-issues-b57982065877/>, archived at <https://perma.cc/5NHC-YQXD>. Rachel Micah-Jones, Op-ed: *Bill Decimates Migrant Worker Protections*, BALTIMORE SUN, Dec. 4, 2015, available at <http://www.baltimoresun.com/news/opinion/oped/bs-ed-h2b-visas-20151206-story.html>, archived at <https://perma.cc/7ET9-JESJ>.

<sup>124</sup> See 20 C.F.R. § 655.20(1).

<sup>125</sup> 20 C.F.R. § 655.9(a).

<sup>126</sup> See *id.* at § 655.9(b).

<sup>127</sup> See *id.* at § 655.9(c).

The employer, its agents, and its employees must not seek or receive payment of any kind from the worker for activities related to certification or employment, including attorneys' fees, application and petition fees, or recruitment costs.<sup>128</sup> Payment includes wage deductions, kickbacks, bribes, in-kind payments, and free labor.<sup>129</sup> However, employers may receive reimbursement for costs that are primarily for the worker's benefit, such as passport fees.<sup>130</sup> Moreover, employers must contractually prohibit their recruiters (and agents and employees of the recruiters) who they hire, either directly or indirectly, to recruit H-2B workers from seeking or receiving payments and other compensation from candidates.<sup>131</sup>

As for transportation and subsistence expenses, the employer must provide or reimburse the worker for these costs from the origin country to the place of employment if the worker completes half of the work period.<sup>132</sup> It may directly make the payments, advance the costs to the worker, or reimburse the worker.<sup>133</sup> When it is customary, the employer must advance these costs for workers traveling to the worksite.<sup>134</sup> When the employer reimburses the worker it must keep accurate cost and payment records.<sup>135</sup> If the worker completes the work period or is dismissed before it ends, then the employer must pay for the worker's return trip.<sup>136</sup> The employer must disclose whatever he intends to pay in the job order.<sup>137</sup> Additionally, the employer must pay or reimburse the worker in the first work week for all visa and visa-related fees—but not for charges primarily for the benefit of the worker, such as passport fees.<sup>138</sup>

Once employment has begun, the employer must abide by additional regulations. The employer must pay a certain minimum wage;<sup>139</sup> disclose deductions, which should comply with the FLSA;<sup>140</sup> provide free of charge the tools and equipment necessary to perform the labor;<sup>141</sup> provide a "three-fourths guarantee";<sup>142</sup> keep and provide earnings statements on each pay day,<sup>143</sup> and post and maintain in a conspicuous location a Department of Labor workers' rights poster in English and other common languages.<sup>144</sup> Re-

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<sup>128</sup> *See id.* at § 655.9(o).

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> *See* 20 C.F.R. § 655.9(p).

<sup>132</sup> *See id.* at § 655.20(j)(1).

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See* 20 C.F.R. § 655.20(j)(2).

<sup>139</sup> *See id.* at § 655.20(a), (b).

<sup>140</sup> *See id.* at § 655.20(c).

<sup>141</sup> *See id.* at § 655.20(k).

<sup>142</sup> *Id.* at § 655.20(f).

<sup>143</sup> *See id.* at § 655.20(i).

<sup>144</sup> *See id.* at § 655.20(m).

tialiation in the form of intimidation, threats, restraints, coercion, blacklisting, discharge, or discrimination are prohibited.<sup>145</sup>

*ii. Spain*

The procedural safeguards vary among the agreements. The first four agreements signed in 2001 are substantially similar; the last two signed in 2007 and 2009 with Mauritania and Ukraine contain more provisions regarding the communication of job offers between countries and the offers' contents. Among the first four agreements, Ecuador's and the Dominican Republic's invite NGOs to participate in the selection process as advisors.<sup>146</sup> Because this additional layer of oversight is of particular interest, and because Ecuador is Spain's second greatest sending country after Morocco, an analysis of the Ecuadorian agreement is warranted. To reiterate, aside from this provision, the first four agreements are almost identical. Moreover, the regulations and ministerial orders that govern the particulars of the selection process and worker rights during selection, travel, and employment apply to all of the agreements.

Selected workers must sign an employment contract no later than thirty days, and shall receive travel documentation should they request it.<sup>147</sup> A copy of the contract must be provided to the Ecuadorian authorities.<sup>148</sup> The contract may be substituted by an analogous document if it is the industry standard, provided that the coordinating committee allows it.<sup>149</sup> The contract must comply with a labor regulation that mandates an employer inform a worker in writing regarding the essential elements of the contract, such as (at a minimum): the parties' identities; the start date and duration in the case of temporary work; place of business; category or professional group; salary and payment schedule; duration of the work day; notification deadlines for canceling the contract, or where impossible, the method for setting them; and the applicable collective bargaining agreement.<sup>150</sup> Employers must comply with the terms of the work contract.<sup>151</sup>

The contract must also match the contents of the job offer.<sup>152</sup> The job offer must describe with precision the labor conditions offered; this cannot be substituted with a mere generic reference to labor laws or collective bar-

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<sup>145</sup> See *id.* at § 655.20(m).

<sup>146</sup> See Acuerdo entre el Reino de España y la República Dominicana relativo a la regulación y ordenación de los flujos migratorios laborales, hecho en Madrid el 17 de diciembre de 2001; Acuerdo entre el Reino de España y la República del Ecuador relativo a la regulación y ordenación de los flujos migratorios, hecho en Madrid, el 29 de mayo de 2001. See Art. IV, sec. 1 of each agreement.

<sup>147</sup> See Acuerdo entre el Reino de España y la República del Ecuador relativo a la regulación y ordenación de los flujos migratorios, hecho en Madrid, el 29 de mayo de 2001. See Art. IV, sec. 2, 3.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See Real Decreto 557/2011, Art. 170.

<sup>151</sup> See Orden ESS/1/2012, Art. 3.1(b).

<sup>152</sup> See *id.* at Art. 3.1(b).

gaining agreements.<sup>153</sup> Authorities are required to review the offer to ensure it complies with applicable laws.<sup>154</sup>

Employers must submit along with their visa solicitations three documents signed by the workers: the work contracts, a ministerial document briefly outlining their rights, and a promise to return to their origin country at the end of the employment period.<sup>155</sup> The ministerial document includes the employers' obligations to provide adequate housing, to organize the trip to Spain and the return trip, to pay for the first of these trips, and to pay for the transportation costs to their housing site upon arrival.<sup>156</sup> It also makes specific reference to the governing statute, regulation, ministerial order, and the applicable collective bargaining agreement.

Participation in all phases of the selection process must be completely free of charge for the candidates.<sup>157</sup> Workers assume the administrative costs inherent to travel. Should they fail to do so, the employers are required to pay the costs.<sup>158</sup> Before departure, workers must receive the information necessary to arrive at their destination, and necessary information concerning the conditions of their stay, work, housing, and salary.<sup>159</sup>

The selection committee ensures that the candidates learn precisely the conditions of the offer, the geographic region, and the industry of the corresponding work authorization.<sup>160</sup> Both countries' authorities facilitate the selection committee's role as much as possible and reasonably contribute to any course of training and the workers' travel to Spain.<sup>161</sup>

Once employment begins, employers must guarantee a period of "continuous activity," which in the case of temporary agricultural work means at least 75 percent of the customary amount of work.<sup>162</sup> Employers must also guarantee adequate housing, travel arrangements to and from Spain, at a minimum coverage for the first of these trips' costs, and coverage of transportation costs from the entry point into Spain and their housing site.<sup>163</sup> Employers must also promise to act diligently so that workers may return home once the employment period ends.<sup>164</sup> Workers must return to their origin country once the work period ends and report to the Spanish consulate within one month to verify their compliance.<sup>165</sup>

The Ministerial Order also guarantees temporal and seasonal workers the right to change employers provided that they can justify the need for a

<sup>153</sup> *See id.* at Art. 6.2.

<sup>154</sup> *See id.* at Art. 7.1.

<sup>155</sup> *See id.* at Art. 9, 7.

<sup>156</sup> *See id.* at Anexo V.

<sup>157</sup> *See id.* at Art. 8.6.

<sup>158</sup> *See* Acuerdo entre Espana y Ecuador, Article 5.

<sup>159</sup> *See id.*

<sup>160</sup> *See* Orden ESS/1/2012, Art. 8.6.

<sup>161</sup> *See* Acuerdo entre Espana y Ecuador, Article 5.

<sup>162</sup> Orden ESS/1/2012, Art. 3.1(a).

<sup>163</sup> *See id.* at Art. 3.2.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.* at Art. 19.

change and upon request by a new employer.<sup>166</sup> Finally, a Tripartite Labor and Immigration Commission regularly reviews the administration of these agreements based on reports from the Immigration Department and status updates from employer and union representatives.<sup>167</sup>

### c. Criminal Laws

The United States has a statute devoted to fraud in foreign labor contracting, a greater number of cases and reported victims of this crime, and greater political attention around this issue than does Spain. This can be expected given the much lengthier history of the H-2 program. Spain had little time to implement its program and even less to analyze it as migration flows effectively trickled to a near halt within a few years. Despite this, there are scattered voices calling for more attention to fraud and labor trafficking within the legal recruitment programs. Existing reports only offer a dim glance into the problem of labor trafficking generally, but not this specific population. The lack of systemic data on the fraudulent recruitment of laborers imported via *gestión colectiva* makes it difficult to compare with the United States, which also lacks anything approaching a global study. However, the issue has the benefit of substantial attention from U.S. policymakers and advocacy groups active on this particular issue.

#### i. *The United States*

Fraud in foreign labor contracting is criminalized under 18 U.S.C. § 1351, which states that:

Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be [punished].<sup>168</sup>

This section was enacted in 2008 as part of a periodic reauthorization of the Trafficking Victims Protection Act of 2000 (TVPA), the country’s comprehensive federal anti-trafficking act,<sup>169</sup> and the first piece of criminal anti-trafficking legislation since the post-civil war amendments.<sup>170</sup> Prior laws criminalized offenses such as peonage, enticement into slavery, and sale into

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<sup>166</sup> See *id.* at Art. 13.

<sup>167</sup> See *id.* at Art. 20.

<sup>168</sup> 18 U.S.C. § 1351 (2008).

<sup>169</sup> See William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5067-71 (2008) (enacted).

<sup>170</sup> See Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 100 (2006).

involuntary servitude, but none adequately covered the trafficking scheme from beginning to end.<sup>171</sup>

Congress intended the Act to be broad and far-reaching by targeting both labor and sex-trafficking, and providing relief to victims across the globe.<sup>172</sup> Congress enacted an information-gathering mandate, a national task force, immigration relief, monetary assistance for foreign countries, and criminal penalties.<sup>173</sup> The new crimes included forced labor, trafficking, and unlawful conduct with respect to documents.<sup>174</sup> The overarching goals of the legislation are referred to as the three P's: prevention of trafficking, protection of victims, and prosecution of criminal actors.<sup>175</sup> Then-Secretary of State Hillary Clinton announced a fourth "P," for partnership with foreign governments and organizations, in 2009.<sup>176</sup> The Act was subsequently amended in 2003, 2005, 2008, and 2013, adding several labor-trafficking related provisions such as a civil remedy and unlawful conduct with respect to immigration documents.<sup>177</sup>

Charges were brought under §1351 soon after its enactment, and the Justice Department has publicized a few successful cases involving foreign workers.<sup>178</sup> Though there is no official estimate of the number of H-2 worker victims of fraudulent recruitment, the U.S.-based International Labor Recruitment Working Group (ILRWG) has compiled nearly forty reports by government agencies and NGOs studying abuse and exploitation across guest worker visa categories.<sup>179</sup> Many of these are devoted to the H-2 visas, and contain scads of worker testimonials.<sup>180</sup> The GAO report echoes many of the advocates' concerns and recommends greater protections for workers.<sup>181</sup>

## ii. Spain

Spain has neither a comprehensive anti-trafficking law akin to the TVPA, nor a section criminalizing fraudulent recruitment akin to §1351.

<sup>171</sup> See generally H.R. Rep. No. 106-487 at 14 (1999).

<sup>172</sup> See generally Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000) (enacted).

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*; see also 18 U.S.C. § 1589, 1590, and 1592.

<sup>175</sup> See *Four "Ps": Prevention, Protection, Prosecution, Partnerships*, U.S. DEP'T OF STATE, available at <http://www.state.gov/j/tip/4p/index.htm> (last visited Aug. 5, 2015), archived at <https://perma.cc/D5TZ-WYLS>.

<sup>176</sup> See *id.*

<sup>177</sup> See generally 18 U.S.C. § 1595, 1597.

<sup>178</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS 343 (2010), available at <http://www.state.gov/j/tip/rls/tiprpt/2010/index.htm>. *Criminal Section Selected Case Summaries*; U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/criminal-section-selected-case-summaries> (last visited May 11, 2015), archived at <https://perma.cc/8ZC3-DQKC>.

<sup>179</sup> See *Resources: Fair Labor Recruitment*, INT'L LABOR RECRUITMENT WORKING GROUP, available at <https://fairlaborrecruitment.wordpress.com/resources/> (last visited May 11, 2015), archived at <https://perma.cc/RBW8-NSJN>.

<sup>180</sup> See *id.*

<sup>181</sup> See GAO 2015, *supra* note 19, at 56–57.

Spain added an anti-trafficking provision to its criminal code in 2010.<sup>182</sup> Article 177bis penalizes anyone who uses violence, intimidation, or fraud; who abuses a position of authority or a victim's lack of meaningful choice; or who grants or receives payments or benefits to gain consent from a victim's custodian in order to capture, receive, shelter, exchange, or transport victims for the purposes of forced labor or slavery-like conditions.<sup>183</sup>

Spain enacted Article 177bis to comply with Spain's new international obligations under the Palermo Protocol and Warsaw Convention, and to redress the inadequacy of the existing law.<sup>184</sup> Spain had relied until then on the smuggling section, Article 318bis, as well as other crimes related to the smuggling of laborers, Articles 312 and 313.<sup>185</sup> A designated trafficking statute was necessary to comply with its international obligations to penalize trafficking and protect victims.<sup>186</sup> Spain signed the Protocol and Convention in 2000 and 2008, respectively (they entered into force in 2002 and 2009).<sup>187</sup> (The United States is also a signatory to both international conventions).<sup>188</sup>

Commentators applaud the significant advancements Spain made thereafter, such as adding an article to the Ley de Extranjería regarding victim identification and cooperation for law enforcement officials (in response to another Warsaw requirement), the release of comprehensive national plan against sex trafficking, a framework protocol for victim protection, and the appointment of a national rapporteur (to comply with a 2011 European Union directive).<sup>189</sup> Nonetheless, observers emphasize the need for addi-

<sup>182</sup> See LEY ORGÁNICA 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, B.O.E. n. 152, June 23, 2010, available at [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-9953](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-9953), archived at <https://perma.cc/NAW4-JH9J>.

<sup>183</sup> See LEY ORGÁNICA 10/1995, de 23 de noviembre, del Código Penal, available at <http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444&tn=1&p=20141204&vd=#txv>, archived at <https://perma.cc/2JZ2-MLLS>, B.O.E. n. 281, Nov. 24, 1995. Art. 177 bis, subsection 1. Trafficking for the purposes of sexual exploitation and organ harvesting are also criminalized under this subsection.

<sup>184</sup> See Teresa Rodríguez Montañés, *Trata de Seres Humanos y Explotación Laboral: Reflexiones Sobre la Realidad Práctica*, LA LEY PENAL (DIGITAL) 109: 1–21 (2014).

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*; LEY ORGÁNICA 5/2010.

<sup>187</sup> See Council of Europe Convention on Action against Trafficking in Human Beings, No.: 197, Warsaw, March 16, 2005, available at [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p\\_auth=z1MYcZ6W](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures?p_auth=z1MYcZ6W) [hereinafter Warsaw Convention], archived at <https://perma.cc/A8JH-FNNM>.

<sup>188</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (list of signatories), available at <https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last updated Sept. 26, 2008), archived at <https://perma.cc/5LQ8-37ZX>; *Council of Europe Convention on Action against Trafficking in Human Beings*, COUNCIL OF EUROPE TREATY OFFICE, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=11/03/2015&CL=ENG> (last updated Nov. 3, 2015), archived at <https://perma.cc/53PB-GAAD>.

<sup>189</sup> See LEY ORGÁNICA DE EXTRANJERÍA 4/2000, Art. 59bis, subsection 1; see also Warsaw Convention; MINISTRY OF HEALTH, SOCIAL SERVICES AND EQUALITY, A COMPREHENSIVE PLAN AGAINST HUMAN TRAFFICKING FOR PURPOSES OF SEXUAL EXPLOITATION (2010), available at <http://www.mssi.gob.es/ssi/violenciaGenero/tratadeMujeres/planIntegral/home.htm>, archived at <https://perma.cc/DZ8W-JWQE>; EUROPEAN COMMISSION, MIGRATION AND HOME

tional measures (such as a comprehensive law) to correct existing deficiencies.<sup>190</sup> They decry the emphasis on sex-trafficking over labor-trafficking, the lack of agency coordination and resources, and the focus on combatting unauthorized immigration over human trafficking.<sup>191</sup>

Partly because the law is new, and because sex-trafficking has managed to draw more attention than labor-trafficking, the precise nature of labor-trafficking in Spain remains something of a mystery. Few formal studies exist and the courts have handed down very few labor-trafficking sentences.<sup>192</sup> As a result, little is known about labor-trafficking in Spain<sup>193</sup> and groups, including the Council of Europe and U.S. State Department, have called for a greater focus on this crime.<sup>194</sup>

Though there have been reports of labor exploitation and coercion of workers hired via the “contingente” (the labor-quota system that was the precursor to *gestión colectiva*) and nominative recruitment channels, few details are provided.<sup>195</sup> The reports include allegations of fraud and false

AFFAIRS, EMN AD-HOC STUDY 2013: IDENTIFICATION OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS IN INTERNATIONAL PROTECTION AND FORCED RETURN PROCEDURES, 1- 3 (2013), *available at* [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/25a.spain\\_national\\_report\\_trafficking\\_en\\_version\\_feb2014.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/25a.spain_national_report_trafficking_en_version_feb2014.pdf), *archived at* <https://perma.cc/QWX2-F3ZC>. The government adopted this measure pursuant to Article 140 of R.D. 557/2011; *see also* *Designación Formal de Relator Nacional Contra la Trata de Seres Humanos*, MINISTRY OF HEALTH, SOCIAL SERVICES AND EQUALITY, May 21, 2014, *available at* [http://www.mssi.gob.es/ssi/violenciaGenero/laDelegacionInforma/pdfs/Relator\\_Trata1.pdf](http://www.mssi.gob.es/ssi/violenciaGenero/laDelegacionInforma/pdfs/Relator_Trata1.pdf) (citing Council Directive 2011/36/EU of the European Parliament and of the Council of April 5, 2011 on preventing and combating trafficking in human beings and protecting its victims), *archived at* <https://perma.cc/C3NT-9VX4>.

<sup>190</sup> *See* RED ESPAÑOLA CONTRA LA TRATA DE PERSONAS, REPORT BY THE SPANISH NETWORK AGAINST TRAFFICKING IN PERSONS FOR THE EUROPEAN COORDINATOR AGAINST TRAFFICKING 3 (2015), *available at* <http://www.slideshare.net/ProyectoEsperanza/summary-report-of-the-spanish-network-against-human-trafficking-to-european-coordinator-against-trafficking-myria-vassiliadou>, *archived at* <https://perma.cc/FS43-CAS6>.

<sup>191</sup> *See id.*; *see also* GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, COUNCIL OF EUROPE, REPORT CONCERNING THE IMPLEMENTATION OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS BY SPAIN 7 (2013) [hereinafter GRETA], *available at* [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA\\_2013\\_16\\_FGR\\_ESP\\_public\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Reports/GRETA_2013_16_FGR_ESP_public_en.pdf), *archived at* <https://perma.cc/FP5F-BLBG>.

<sup>192</sup> *See id.*; *see also* Rodríguez Montañés, *supra* note 184, at 9. One sentence involved forced begging. The author attributes this lack of sentences to the government’s focus on sex trafficking, as well as the lack of attention on the part of NGOs and unions. *Cf.* STATE 2014 TIP REPORT, U.S. DEPARTMENT OF STATE 35-36 (2014) *available at* <http://www.state.gov/j/tip/rls/tiprpt/2014/>, *archived at* <https://perma.cc/A2K8-CD4A>.

<sup>193</sup> *See generally* ASOCIACIÓN COMISIÓN CATÓLICA ESPAÑOLA DE MIGRACIONES, LA TRATA DE PERSONAS CON FINES DE EXPLOTACIÓN LABORAL: UN ESTUDIO DE APROXIMACIÓN A LA REALIDAD EN ESPAÑA (2006) [hereinafter ACCEM], *available at* [http://www.accem.es/ficheros/documentos/pdf\\_publicaciones/trata.pdf](http://www.accem.es/ficheros/documentos/pdf_publicaciones/trata.pdf), *archived at* <https://perma.cc/CYW5-KXHV>; Andrea Giménez-Salinas Framis, *et al.*, *La Dimensión Laboral de la Trata de Personas en España*, REVISTA ELECTRÓNICA DE CIENCIA PENAL Y CRIMINOLOGÍA 9 (2009), *available at* <http://criminol.ugr.es/recpc/11/recpc11-04.pdf>, *archived at* <https://perma.cc/5NM7-3W3D>.

<sup>194</sup> *See* GRETA, *supra* note 191, at 7. The U.S. State Department has also criticized the Spanish government for not improving victim identification among migrants, and for failing to enact any awareness campaigns aimed at forced labor. *See* U.S. STATE DEP’T, TRAFFICKING IN PERSONS REPORT 2014, COUNTRY NARRATIVES: N-S 354 (2014), *available at* [www.state.gov/j/tip/rls/tiprpt/2014/index.htm](http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm), *archived at* <https://perma.cc/2V58-U57M>.

<sup>195</sup> ACCEM, *supra* note 193, at 83, 87.

promises regarding labor conditions, excessive hours, forced labor, and wage theft.<sup>196</sup> Nonetheless, precise information about the actual incidence of fraudulent recruitment of this specific population is unavailable. This, of course, certainly makes it difficult to evaluate the efficacy of its recruitment policies.

Some relevant data on labor trafficking more generally does exist. A 2013 report from the Spanish Attorney General indicates that fraud or false promises were employed in each of the nine live cases under investigation for labor trafficking.<sup>197</sup> The annual U.S. State Department’s report from 2014 stated that many cases of forced labor in Spain involved immigrants in the agricultural and service sectors.<sup>198</sup> The 2015 report recommended that Spain increase investigations and prosecutions of labor trafficking offenses, but favorably highlighted the creation of a new anti-trafficking unit in the Civil Guard that made labor exploitation “a strategic focus.”<sup>199</sup> Labor trafficking and fraud in formal recruitment is plainly an issue, but the lack of data makes it extremely difficult to get a sense of its scope.

### III. APPLYING THE SPANISH SOLUTION TO THE UNITED STATES

#### A. *Global Perspectives on the Guest Worker Debate*

The U.S. guest worker model is under attack from all sides.<sup>200</sup> Employers argue that it does not meet their legitimate needs for labor, and that the expense and bureaucratic burden of participation is too heavy to bear; advocates, on the other hand, argue that ineffective regulations and lax enforcement permit workers to be mistreated.<sup>201</sup> Proposals to reform the visa program have floated, without avail, through Congress in the past several decades.<sup>202</sup> Two of the most recent were contained in broader immigration reform bills. The 2013 bill would have sunset the H-2A visa and replaced it with a W visa for nonimmigrant farmworkers, administered by the Department of Agriculture rather than the Department of Labor.<sup>203</sup> It also would

<sup>196</sup> See *id.*

<sup>197</sup> See MINISTERIO FISCAL DE ESPAÑA, FISCALÍA DE EXTRANJERÍA, DILIGENCIAS DE SEGUIMIENTO DEL DELITO DE TRATA DE SERES HUMANOS EN ESPAÑA (2013), available at [https://www.fiscal.es/fiscal/PA\\_WebApp\\_SGNTJ\\_NFIS/descarga/2014\\_09\\_09\\_Diligencias%20de%20Seguimiento%20del%20delito%20de%20trata%20de%20seres%20humanos.pdf?idFile=3652df84-37d1-49aa-b354-be7503558ebd](https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/2014_09_09_Diligencias%20de%20Seguimiento%20del%20delito%20de%20trata%20de%20seres%20humanos.pdf?idFile=3652df84-37d1-49aa-b354-be7503558ebd), archived at <https://perma.cc/JM5L-NUB8>.

<sup>198</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, COUNTRY NARRATIVES: SPAIN (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226818.htm> (last visited: May 13, 2015), archived at <https://perma.cc/F4DQ-294T>.

<sup>199</sup> TIP 2015, *supra* note 13, at 315.

<sup>200</sup> It should be noted that just as Spain has many avenues for legal, temporary migration, the U.S. has several visa categories for other kinds of workers, such as high-skilled professionals, au-pairs, etc. These temporary, nonimmigrant workers are all “guest workers.”

<sup>201</sup> See BRUNO, *supra* note 69, at 17–18.

<sup>202</sup> See *id.*

<sup>203</sup> See generally The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2233, 4701–4703 (2013).

have reformed the H-2B visa and added significant requirements for third-party recruiters, such as employer disclosure and recruiter certification.<sup>204</sup> In 2007, the guest worker issue derailed the overall immigration bill, signifying the importance of resolving this question.<sup>205</sup>

These attacks are not only justified but natural and inevitable given the myriad of compromises guest worker programs are intended to strike. This program is at the heart of conflicts between employers and native workers, and policymakers' dual obligations to both maintain domestic industries' competitive edge in a globalized market and honor a liberal democracy's humanitarian commitment to human rights.<sup>206</sup> Unfortunately, it seems that when power-players run the cost-benefit analysis, the social costs fall to workers.<sup>207</sup>

The larger questions posed by guest worker programs, and whether they are ultimately desirable or should be discarded, are the subject of much scholarship. This paper takes no position, but rather takes a pragmatic stance and assumes that because a guest worker program was an integral part of the last two reform bills, a guest worker program in some form will be carried on into the future. And if so, due consideration to the recruitment of these workers must be given to ensure the best possible recruitment mechanism is put into place. These larger debates shed light on the components necessary for a successful program, and in particular, the need to properly study their efficacy. This message ought to be applied to any counter-trafficking measures built in to the program.

Professor Wayne Cornelius neatly sums up one of the key problems with guest worker programs:

All such programmes share a basic conceptual flaw, i.e., the lack-of-fit between a temporary worker program and the needs and preferences of migrant workers and their employers. Even among Mexican nationals, who have a multi-generational history of short-term labor migration to the U.S., fewer than one out of 10 now employed in the United States is working in agriculture or some other seasonal job. Because of technological changes, even agricultural jobs increasingly are year-round. Rotating temporary workers through permanent jobs is simply not sound policy, and it invites non-compliance with the terms of the program by both mi-

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<sup>204</sup> See generally *id.* at § 3601–3614, 4601–4607.

<sup>205</sup> See Dave Jamieson, *Immigration Reform: Guest Worker Program Considered As Part Of Deal*, HUFFINGTON POST, Jan. 31, 2013, available at [http://www.huffingtonpost.com/2013/01/31/immigration-reform-guest-worker-program\\_n\\_2593729.html](http://www.huffingtonpost.com/2013/01/31/immigration-reform-guest-worker-program_n_2593729.html), archived at <https://perma.cc/E9K5-3FNN>; see also David Grant, *Immigration Reform 101: Is a Sensible Immigration Reform Possible?*, CHRISTIAN SCI. MONITOR, Feb. 8, 2013, available at <http://www.csmonitor.com/USA/Politics/DC-Decoder/2013/0208/Immigration-reform-101-Is-a-sensible-guest-work-er-program-possible>, archived at <https://perma.cc/ZF33-TGQC>.

<sup>206</sup> See BRUNO *supra* note 69, at 1.

<sup>207</sup> See Stephen Castles, *Back to the Future? Can Europe Meet its Labour Needs through Temporary Migration?*, INT'L MIGRATION INST. 22 (2006), available at <http://www.imi.ox.ac.uk/publications/wp-01-06>, archived at <https://perma.cc/9G7J-XNAZ>.

grants and employers. Such a policy is politically expedient, however, since hardly any politician wants to acknowledge that there are permanent jobs in an advanced industrial economy that cannot be filled with native-born workers.<sup>208</sup>

In Europe, guest worker programs were believed to be a “thing of the past,” a post-World War II memory.<sup>209</sup> Indeed, as Western Europe realized that it needed labor migrants to fill certain categories of low-skilled jobs, and to replenish its population as native fertility rates declined, there emerged a renewed interest in guest worker policies.<sup>210</sup> But their re-emergence is “highly controversial.”<sup>211</sup> Critics warn of the failures of past models, such as the *braceros* in the United States and the *Gastarbeiters* in Germany (which resulted in the permanent settlement of guest workers as well as high levels of illegal immigration), while optimists argue that “innovative policy designs could help to avoid past policy mistakes and generate significant benefits all round, including for migrant workers and their countries of origin.”<sup>212</sup> Martin Ruhs concludes that the success of guest worker programs depends on the “the host country’s willingness and capacity to enforce the law strictly against all parties—recruitment agents, employers and migrant workers—who illegally circumvent the programme.”<sup>213</sup> Otherwise, employers and workers will have every incentive to avoid these programs and continue choosing illegal immigration.<sup>214</sup> Enforcement is a critical component:

Liberal and democratic host countries have a particularly poor record of enforcing the law against employers who illegally employ migrant workers. In 2002, for example, only 53 employers were fined for immigration violations in the whole of the United States . . . . The failure to enforce sanctions against employers is widely agreed to be one of the most important factors in irregular immigration/illegal work and, ultimately, in the failure of labour immigration policies. This is because, in contrast to all other immigration control policies, employer sanctions serve the important purpose of addressing the *demand* for illegally employing migrant

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<sup>208</sup> Wayne A. Cornelius, *Controlling ‘Unwanted’ Immigration: Lessons from the United States, 1993-2004*, THE J. OF ETHNIC AND MIGRATION STUD. 775, 778 (2004). See also INT’L LABOR RIGHTS FORUM, PRECARIOUS WORK: HOW TEMPORARY JOBS AND SUBCONTRACTING UNDERMINES WOMEN, MIGRANTS AND WORKERS’ RIGHTS TO DECENT WORK 1 (2009), available at <http://www.laborrights.org/publications/precarius-work-how-temporary-jobs-and-subcontracting-undermines-women-migrants-and> (emphasizing the dangers of replacing permanent jobs with temporary ones to undermine the rights of migrants), archived at <https://perma.cc/A3Z2-A8XD>.

<sup>209</sup> Castles, *supra* note 207, at 2 (“Between the end of the Second World War and the early 1970s, all the fast-growing industrial economies of W. Europe had imported labour, especially for lower-skilled jobs in manufacturing, construction and the services.”).

<sup>210</sup> See *Id.* at 6–7.

<sup>211</sup> Martin Ruhs, *The Potential of Temporary Migration Programmes in Future International Migration Policy*, 1–2 INT’L LABOUR REV. 1 (2006).

<sup>212</sup> *Id.* at 8.

<sup>213</sup> *Id.* at 16.

<sup>214</sup> *Id.*

workers. Without policies that curb demand, policies aimed at minimizing supply (border control, deportations) are likely to be much less effective than they could be.<sup>215</sup>

Ruhs, an associate professor of political economy at Oxford University and expert on the economics and politics of international labor migration, concludes that these programs could be a positive alternative to the current tacit acceptance of illegal migration, which is not a sustainable model for Europe. However, when crafting any new policy, Professor Castles warns against the temptation of narrow, short-term, policy-driven scholarship.<sup>216</sup> Many failed policies were based on the work of social scientists willing to reinforce basic assumptions because they were peripheral to other concerns.<sup>217</sup> He warns: “[S]udden political interest can also be a bad thing. There is a danger that ‘policy-relevant’ will turn into ‘policy-driven’ research.”<sup>218</sup> One piece of conventional wisdom is that these programs “can be made to work, despite the failure of similar ‘guestworker’ policies in the past, and will provide a win-win-win situation for receiving countries, migrants and origin countries,” an assumption he believes to be “mistaken or problematic.”<sup>219</sup>

Professor Castles notes that the purported benefits are unlikely to materialize if migrants settle permanently as they did in the past, or if they are cheated out of wages and denied rights as they were in the past.<sup>220</sup> He is skeptical that enough political will could be mustered to ensure that such policies are effective:

[Temporary migrant worker programs] can only be mutually beneficial if governments take an active regulatory role. This would mean a reversal of neo-liberal approaches, which have led to a decisive reduction in state involvement in the economies of developed countries since the 1980s. It would also require developed-country employers to relinquish some of the profits obtained through imposing low wages and poor conditions on migrant workers. Skepticism is called for here: it seems more likely that employers would prefer to employ undocumented workers, rather than accept higher wage costs.<sup>221</sup>

Indeed, it seems something of this nature occurred in Spain, where both amnesties and the informal economy have diminished the appeal of a guest worker program:

<sup>215</sup> *Id.* (internal citations omitted).

<sup>216</sup> Inaugural Lecture, *supra* note 64, at 1.

<sup>217</sup> *Id.* at 3.

<sup>218</sup> *Id.* at 6.

<sup>219</sup> *Id.* at 7.

<sup>220</sup> *See id.* at 15.

<sup>221</sup> *See* Castles, *supra* note 208, at 12.

Guestworker type programs [in Southern European countries such as Italy and Spain] have not played a significant role, since spontaneous entry followed by periodic regularization measures seems to have proved an effective way of channelling workers into economies marked by high levels of informal employment. The quota system introduced in Spain in 2002 to bring in migrants on short-term permits to meet specific labour-market needs was small in scale and seems to have been rather ineffective (OECD, 2005, 104).<sup>222</sup>

### B. Controversy Regarding the Spanish Model

The quota-system Castles refers to is the precursor for the gestión colectiva system. The establishment of these temporary migration programs was not without controversy. Spanish filmmakers produced a documentary about how the bilateral agreements displaced unauthorized workers and left them in a precarious humanitarian condition.<sup>223</sup> Other commentators have asked themselves why temporary workers are needed in Spanish fields at all.<sup>224</sup> Though the Spanish programs have been subject of scholarship—much of which focuses on whether it meets its stated objectives as sound migration policy—there is less information on whether outright fraud is possible or probable given the oversight mechanism built in to the agreements. Nonetheless, migrants in one study reported wishing they received more information during the recruitment phase, and also reported discrepancies between what was promised and what they found upon beginning their employment.

Researchers interviewed migrants who participated in one of the precursors to the bilateral agreement model—an agreement between the Unió de Pagesos, a Catalan growers association, and the government of Colombia, entered into in 1999, wherein the association recruited Colombian workers and guaranteed them a set of rights.<sup>225</sup> The migrants who were interviewed reported overall satisfaction with the program, but pointed out a few problem areas.<sup>226</sup> Regarding the recruitment phase, they reported that much of it was done through informal networks of friends, that there was insufficient information, and that this lack of information led to significant anxiety about

<sup>222</sup> *Id.* at 21 (internal citations omitted).

<sup>223</sup> See Intermedia Producciones, *La Fresa Amarga*, VIMEO, <https://vimeo.com/70235376>.

<sup>224</sup> See e.g., Teresa Torres Solé, et al., *La Contratación de Mano de Obra Temporal en la Agricultura Hortofrúcticola Española*, REVISTA DE ESTUDIOS SOBRE DESPOBLACIÓN Y DESARROLLO RURAL (2013), available at [http://www.ceddar.org/content/files/articuloof\\_363\\_01\\_10\\_4422-ager.2013.03.pdf](http://www.ceddar.org/content/files/articuloof_363_01_10_4422-ager.2013.03.pdf), archived at <https://perma.cc/3F27-7ZDG>.

<sup>225</sup> See Ricard Zapata-Barrero, et al., *Circular Temporary Labour Migration: Reassessing Established Public Policies*, 2012 INT'L J. OF POPULATION RES. 1, 5–6 (2012) [hereinafter *Reassessing Policies*].

<sup>226</sup> The migrants report being dissatisfied with the lack of visa portability, which bound them to one employer. They also complained that employers discouraged their applications for permanent residency, even though they could be eligible under Spanish law. See *id.* at 8. However, they did report satisfaction at being in a less precarious situation than unauthorized workers, by virtue of having a set of legal rights. See *id.* at 5-6.

whether the offers could be a hoax orchestrated by cartels.<sup>227</sup> They also reported they did not receive enough information about salaries.<sup>228</sup>

Migrants also reported housing conditions below the promised standards including: “Overcrowding, lack of space for recreational activities in collective housing, insufficient equipment for the number of habitants in each accommodation, poor ventilation, and housing located on the outskirts of urban areas.”<sup>229</sup> Moreover, although the migrants are covered by the same bargaining collective agreements as natives, in practice, their working conditions are worse.<sup>230</sup> Researchers also noted that the workers experienced occasional periods of inactivity, not knowing their contractual and legal rights beforehand, a lack of certainty over selection criteria and whether they would be selected again, a lack of oversight over the inherently unequal employer-employee relationship, and patronage.<sup>231</sup>

This final observation is similar to that of another Spanish scholar who writes that some Spanish growers in Huelva (one of the world’s largest strawberry-producing regions)<sup>232</sup> seemed to prefer Moroccan women—ostensibly because their feminine hands were better suited to the delicate task of strawberry-picking—but more likely due to perceptions that they are more docile and more likely to return home to their families.<sup>233</sup> Furthermore, both growers and Spanish authorities encouraged the repeat selection of individual workers.<sup>234</sup>

### C. *Reforming the United States Recruitment Model*

This Article assumes that the next attempt at comprehensive immigration reform will bring an opportunity to overhaul the U.S. guest worker program. In designing a new system, lawmakers must acknowledge that the current scheme is a tool in the hands of traffickers and that this should not be allowed to stand. The system should not be so easily exploited by bad actors. Rather it should be a critical piece of an anti-trafficking strategy. Of the four ILO models used to regulate recruitment abroad, which is the best suited for this task? Leaving recruitment totally unregulated or allowing it to be completely monopolized by the state are obviously two unwelcome and unlikely extremes. The previous sections have described how the regulatory model is presently employed in the United States and the state-controlled model is

<sup>227</sup> See Ricard Zapata-Barrero, *et al.*, MIGRACIÓN LABORAL, TEMPORAL Y CIRCULAR (MLTC) DE TRABAJADORES ENTRE COLOMBIA Y ESPAÑA: UN MODELO A CONSOLIDAR ESPAÑA, GRUPO DE RECERCA INTERDISCIPLINARI EN IMMIGRACIÓ (GRITIM) 80–81 (2009).

<sup>228</sup> See *id.*

<sup>229</sup> Zapata-Barrero, *Reassessing Policies*, *supra* note 225, at 8.

<sup>230</sup> See *id.* at 8–9.

<sup>231</sup> See *id.* at 9.

<sup>232</sup> See Hayley Boriss, *et al.*, *Commodity Strawberry Profile*, AGRICULTURAL MARKETING RESOURCE CENTER, available at [http://www.agmrc.org/commodities\\_products/fruits/strawberries/commodity-strawberry-profile/](http://www.agmrc.org/commodities_products/fruits/strawberries/commodity-strawberry-profile/), archived at <https://perma.cc/GEQ4-NVMZ>.

<sup>233</sup> See Gordo Márquez, *supra* note 76, at 588.

<sup>234</sup> See *id.* at 590.

employed in Spain. Do lawmakers retain and reform our model? Or adopt one more similar to Spain’s? This section tests each model against the “4-P” paradigm and suggests that the answer is somewhere in between.

a. The Regulatory Model

U.S. advocates have proposed many reforms to cure the present regulatory model riddled with problems. Presently, the Labor Department’s reliance on worker complaints (rather than independent audits or other more proactive measures), and the myriad of obstacles for workers who want to report and pursue complaints make “protection” and “prosecution” very difficult.<sup>235</sup> Workers often cannot distinguish between legal and illegal fees because recruiters often bundle them.<sup>236</sup> Moreover, workers are linguistically and geographically isolated; many are intimidated and threatened with blacklisting; some are forbidden from receiving legal aid (H2Bs); and others are not covered by migrant- and farm-labor statutes that could protect them from fee exploitation.<sup>237</sup> There are many practical and legal barriers to organizing or unionizing.<sup>238</sup> Even when workers file complaints, the Labor Department fails to process them properly.<sup>239</sup> When a criminal prosecution or civil suit is initiated, it may be difficult to establish a link between an employer and a recruiter operating abroad.<sup>240</sup> Some workers refuse to testify because they are afraid of deportation.<sup>241</sup> Private attorneys are reluctant to

<sup>235</sup> See AMERICAN DREAM FOR SALE, *supra* note 3, at 25.

<sup>236</sup> See GAO 2015, *supra* note 19, at 54.

<sup>237</sup> See *H-2B Visa*, GLOBAL WORKERS JUSTICE ALLIANCE, available at <http://globalworkers.org/visas/h-2b#A> (last visited March 31, 2015), archived at <https://perma.cc/U5PB-KXWA>. RECRUITMENT REVEALED, *supra* note 10, at 23; AMERICAN DREAM FOR SALE, *supra* note 3, at 43. No group that receives federal funding from the Legal Services Corporation may represent H-2B workers who do not work in forestry. See Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 137-146 (2010). The Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Worker Protection Act (AWPA) offer private rights of action. However, splits among federal courts mean employers are not always required to bear the costs of recruitment, visa, and travel costs under the FLSA. AWPA explicitly excludes H-2A workers and even some H-2B workers who are considered to perform agricultural work under the statute’s more expansive definition of agriculture. See also Shane Dizon & Nadine K. Wettstein, IMMIGRATION LAW SERVICE §16:92 (2d ed. 2013).

<sup>238</sup> See generally EXCLUDED WORKERS CONG., EXPANDING THE RIGHT TO ORGANIZE TO WIN HUMAN RIGHTS AT WORK 34-47 (2010), available at [http://www.unitedworkerscongress.org/uploads/2/4/6/6/24662736/ewc\\_rpt\\_final4.pdf](http://www.unitedworkerscongress.org/uploads/2/4/6/6/24662736/ewc_rpt_final4.pdf), archived at <https://perma.cc/5CZX-MAVK>. The National Labor Relations Act (NLRA) excludes agricultural workers. See 29 U.S.C. § 152(3). Federal law gives H-2B, but not H-2A, workers the right to form or join a union. See AMERICAN DREAM FOR SALE, *supra* note 3, at 41 (citing 29 U.S.C. § 157). See also Piña et al., *supra* note 14, at 35 (describing blacklisting).

<sup>239</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT NO. 09-629, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT 3-4 (March 2009), available at <http://www.gao.gov/new.items/d09629.pdf>, archived at <https://perma.cc/HG7E-VF5N>.

<sup>240</sup> See generally, Mariana Minaya, *American Dreams, Trafficking Nightmares*, 2 TENN. J. OF RACE, GENDER, & SOC. JUST. 64 (2013).

<sup>241</sup> GAO 2015, *supra* note 19, at 54.

take on these cases due to the transience of the clients (who must return home once their visas expire), the complexity of transnational litigation, and the minimal value of their monetary claims.<sup>242</sup> While eliminating these obstacles is critically important,<sup>243</sup> they highlight the value of improving prevention methods.

U.S. advocates propose measures to regulate the employer-recruiter relationship and better inform workers as early as possible.<sup>244</sup> All fees for recruitment, transportation, lodging, and administrative costs should be totally banned (or, alternatively, employers should reimburse workers for visa and travel expenses during their first work week).<sup>245</sup> Neither employers nor recruiters should provide loans to workers.<sup>246</sup> Recruiters ought to join a publicly-searchable recruiter registry, and employers should be required to hire only registered recruiters and disclose these hires on a visa petition.<sup>247</sup> Staffing agencies should not petition for H-2 workers.<sup>248</sup> Employers and recruiters should be audited.<sup>249</sup> A worker's visa should not be tied to one employer.<sup>250</sup>

Employment contracts ought to be mandatory for anyone recruited abroad, and should include several provisions: the name and contact information for employers and recruiters, the type of visa, usual workplace address, start and end date, type of work, and any costs the worker shall bear.<sup>251</sup> Federal agencies should offer pre-departure and post-arrival orientation via oral training sessions and written materials in a language understood by the worker.<sup>252</sup> Agencies should provide contact information for legal services, advocacy organizations, and the designated H-2 worker federal hotline.<sup>253</sup> Workers should receive an outline of their rights during the consular interview (though the TVPA mandates that a pamphlet outlining some rights should be distributed).<sup>254</sup> Employers should regularly file "end-of-year" reports about their experience.<sup>255</sup> Agencies should "cooperate with sending

<sup>242</sup> *H-2B Visa*, GLOBAL WORKERS JUSTICE ALLIANCE, available at <http://globalworkers.org/visas/h-2b#A> (last visited March 31, 2015), archived at <https://perma.cc/EF5T-NLWT>.

<sup>243</sup> Observers recommend that workers be able to protect their own rights at all times by improving access to unions, legal services, courts, and ensuring that they have control over their own passports and freedom of movement. See AMERICAN DREAM FOR SALE, *supra* note 3.

<sup>244</sup> See *id.*

<sup>245</sup> See RECRUITMENT REVEALED, *supra* note 10, at 27–28. AMERICAN DREAM FOR SALE, *supra* note 3, at 28.

<sup>246</sup> See RECRUITMENT REVEALED, *supra* note 10, at 28.

<sup>247</sup> See *id.* at 27–28.

<sup>248</sup> See *id.* at 28.

<sup>249</sup> See AMERICAN DREAM FOR SALE, *supra* note 3, at 36.

<sup>250</sup> See *id.* at 37.

<sup>251</sup> See *id.* at 6, 32.

<sup>252</sup> See RECRUITMENT REVEALED, *supra* note 10, at 27–28; see AMERICAN DREAM FOR SALE, *supra* note 3, at 6.

<sup>253</sup> See *id.*

<sup>254</sup> See AMERICAN DREAM FOR SALE, *supra* note 3, at 22.

<sup>255</sup> RECRUITMENT REVEALED, *supra* note 10, at 28; see AMERICAN DREAM FOR SALE, *supra* note 3, at 6.

country governments to thwart misleading propaganda about U.S. work visa programs.”<sup>256</sup>

The themes of these reforms, viewed together, are enhanced oversight of employers and recruiters, educating and empowering workers early on, and engaging foreign governments to enforce these efforts; or, in the language of the “4-P” paradigm: “prevention” and “partnership.” A comparison with the Spanish state-controlled model reveals how far ahead it is with regards to these particular goals.

Spain partnered with sending countries and created selection committees to perform selection, education, and training. In two of the national partnerships, NGOs are invited to provide services and add a layer of advice and oversight. Participation is free for all candidates. The selection committee is required to assist candidates with understanding a detailed employment offer that explicitly includes the governing laws, and with learning the geographic region and industry of the offered employment. Selected workers sign a detailed contract with mandatory provisions, as well as a detailed explanation of their rights, before an employer can solicit a visa. The offer must match the contract, and the origin country receives a copy of the contract. The workers are not tied to one employer. Workers receive information regarding their destination, stay, work, housing, and salary before they travel, and are entitled to receive travel-related documentation should they request it. Travel is arranged and paid for by the employer. The worker must check in with the Spanish consulate upon his return to ensure that he or she has not overstayed the visa. A requirement like this could also serve to ensure that a worker is not being held captive.

Spain and the sending country are also required to create a joint coordinating committee to monitor the implementation of the agreements, propose any necessary revisions, disseminate information about the agreement in both countries, and resolve any difficulties that might arise.<sup>257</sup> The committees may meet on petition of either party; some agreements contain a minimum requirement of meeting at least once a year. Furthermore, in Spain, the

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<sup>256</sup> AMERICAN DREAM FOR SALE, *supra* note 3, at 22.

<sup>257</sup> Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales, hecho en Madrid el 21 de mayo de 2001 publicado en el B.O.E. del 4 de julio de 2001, Art. 17; Acuerdo entre el Reino de España y la República Dominicana relativo a la regulación y ordenación de los flujos migratorios laborales, hecho en Madrid el 17 de diciembre de 2001, publicado en el B.O.E. del 5 de febrero de 2002, Art. 19; Acuerdo entre el Reino de España y la República del Ecuador relativo a la regulación y ordenación de los flujos migratorios, hecho en Madrid, el 29 de mayo de 2001, publicado en el B.O.E. del 10 de julio de 2001, Art. 21; Acuerdo entre el Reino de España y la República de Mauritania, relativo a la regulación y ordenación de flujos migratorios laborales entre ambos Estados, hecho en Nuakchott el 25 de julio de 2007, publicado en el B.O.E. del 30 de octubre de 2007, Art. 14; Acuerdo sobre mano de obra entre el Reino de España y el Reino de Marruecos firmado en Madrid el 25 de julio de 2001, publicado en el B.O.E. del 20 de septiembre de 2001, Art. 18; Acuerdo relativo a la regulación y ordenación de los flujos migratorios laborales entre España y Ucrania, firmado en Madrid el 12 de mayo de 2009, publicado en el B.O.E. del 10 de agosto de 2011, Art. 14.

Tripartite Labor and Immigration Commission regularly monitors the process.

In practice, the United States has been increasing its education efforts. As mentioned, the TVPA of 2003 mandates that all individuals applying for guest worker visas learn generally of the dangers of labor trafficking and their legal rights. However, this does not approach the specific list of rights that the Spanish document provides, which names the specific regional law that governs their situation. The Mexican consulate is working on disseminating more information via job fairs and radio waves, and the Labor Department is partnering with other countries to do the same.<sup>258</sup> The U.S. and Mexican governments recently agreed to launch education efforts for H-2 workers and combat abusive recruitment as a result of complaints filed under the NAALC.<sup>259</sup> These efforts are sorely necessary. One NGO reports that only 31 percent of surveyed workers said they received information from the U.S. government, and only one percent from the Mexican government.<sup>260</sup>

This direct comparison reveals the obvious potential of a state-controlled system. For one, it could take the recruiter entirely out of the equation. It is unclear whether savvy actors could find a way to exploit this system somehow, such as by taking it upon themselves to disseminate offer in more rural areas. Nonetheless, the public authorities have significant control over the dissemination and management of offers and the selection of candidates. The state-controlled model also takes the recruiter out of the role of broker between the worker, the employer and authorities, as it allows for the worker to engage directly with them and vice versa. Public authorities can inform workers directly regarding their legal rights in a comprehensive way. The model does not rely on piecemeal efforts by legitimate or non-legitimate actors. Finally, it also allows for direct collaboration with the foreign government on even the most basic steps of recruitment, and the workers can benefit from this dual oversight. Thus, this model merits serious consideration.

#### b. A Dual State-Controlled Model

The United States has prior experience with the state-controlled model. In the first phase of “Bracero,” beginning in 1942, the Mexican and U.S. governments agreed to a trial period wherein representatives from both governments screened candidates at a Mexico City recruitment center and transported the selected individuals to farms in various states. When the contract period ended the workers returned to the Mexico City recruitment center.<sup>261</sup>

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<sup>258</sup> See GAO 2015, *supra* note 19, at 39.

<sup>259</sup> See U.S. Response to Mexico’s Request for Migrant Worker Outreach, U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, available at <http://www.dol.gov/ilab/trade/preference-programs/US-Mexico.htm> (last visited May 12, 2015), archived at <https://perma.cc/MU56-R6KM>.

<sup>260</sup> See Piña, ET AL., *supra* note 14.

<sup>261</sup> See Bickerton, *supra* note 79, at 903–904.

The two nations agreed that the Mexican government would have supervisory power over the contracts, which were made between the workers and the U.S. Farm Security Administration.<sup>262</sup> The Farm Security Administration then subcontracted with employers.<sup>263</sup>

However, employers “especially disliked the government-to-government nature of the program, preferring a direct recruitment system.”<sup>264</sup> In 1947, when the wartime program ended and the governments had to negotiate a new agreement, the state-control model was dropped and employers were permitted to directly contract with workers.<sup>265</sup> This model generated various problems, including an increase in illegal immigration and lax enforcement. Mexico, in turn, pushed for a return to the government-to-government model under a new agreement in 1951.<sup>266</sup> Under the new, more detailed recruitment agreement, U.S. Labor Department officials selected candidates at recruitment centers in the Mexican interior.<sup>267</sup> Mexican officials also had a say in this process.<sup>268</sup> The workers traveled to a reception center in the United States.<sup>269</sup> The employer paid for the worker’s entire journey from Mexico to the reception center and the place of employment.<sup>270</sup> Workers also received guarantees as to wages, employer-provided lodging, the right to unionize, and more.<sup>271</sup> These requirements, however, were poorly enforced.<sup>272</sup>

Commentators emphasize that under any new program, “both countries must insist that enforcement of the safeguards be taken seriously to avoid a repetition of the worst aspects of the Bracero Program.”<sup>273</sup> These safeguards could include “automatic monetary sanctions for breaches of rules in international agreements.”<sup>274</sup> For Mark Rosenblum, a director and policy analyst at the Migration Policy Institute, one of the key takeaways from the Bracero experience is the value of strong bilateral enforcement:

Mexican oversight of guest-worker contracts between 1942 and 1947—during which time consular workers had the power to suspend contracts and blacklist abusive employers—contributed to a high level of contract compliance, which is why employer allies in Congress made elimination of Mexico’s oversight role a top prior-

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<sup>262</sup> *See id.* at 905.

<sup>263</sup> *See id.*

<sup>264</sup> *Id.*

<sup>265</sup> *See id.*

<sup>266</sup> *See id.* at 907-908.

<sup>267</sup> *See id.* at 908.

<sup>268</sup> *See id.*

<sup>269</sup> *See id.*

<sup>270</sup> *See id.*

<sup>271</sup> *See id.* at 909.

<sup>272</sup> *See id.*

<sup>273</sup> *Id.* at 918.

<sup>274</sup> *Id.*

ity in 1947-48 and again in 1954 after state-to-state contracting resumed during the Korean War.<sup>275</sup>

Rosenblum also highlights the importance of strong executive enforcement. He notes that the Truman and Roosevelt administrations enforced contractual obligations despite employer's resistance,<sup>276</sup> and that Truman tried unsuccessfully to "impose sanctions on noncompliant employers," but was stymied by Congress.<sup>277</sup> He also notes that both administrations, "resisted grower demands to renegotiate the treaty and angered members of Congress by holding growers accountable to the terms of their Bracero contracts."<sup>278</sup>

The "Bracero" episode highlights both the benefits and significant political demands of this model. Could a third alternative both embrace the positive aspects and eschew the drawbacks?

### c. Partial State-Control

The third alternative demands considering the discrete duties involved in the recruitment phase of employment and determining which actor is the most appropriate to perform them: the state and its agents, civil society, or the private market. Recall the tasks that comprise the recruitment phase: scouting for and evaluating candidates, offering the selected candidates a job, formally hiring them via a work contract, assisting them in the visa application process, and transporting them to the final worksite. The current assignment of these widely diverse tasks to the private market is perplexing, as each demands different skillsets and implicates different sets of expertise. Moreover, who is the private market actor to accountable in principle and in practice? The employer who hires him or the worker who benefits from his services? The faulty rationale behind the current assignment of tasks is exposed once tested against the "4-Ps."

#### i. Prevention

When considering the chronology of the recruitment phase, one asks:

- Are private market actors qualified to find and select candidates to perform duties for private employers? Probably. Recruitment is traditionally a private market function. Natives and permanent migrants regularly benefit from it.
- Can U.S. employers be trusted to hire and contract with foreigners? Of course, it happens regularly. However, permanent migrants need

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<sup>275</sup> Mark Rosenblum, *U.S.–Mexican Migration Cooperation: Obstacles and Opportunities*, FEDERAL RESERVE BANK OF DALLAS PROCEEDINGS at 107 (2006) (internal citations omitted), available at <https://www.dallasfed.org/assets/documents/research/pubs/migration/rosenblum.pdf>, archived at <https://perma.cc/PL6D-HVWH>.

<sup>276</sup> See *id.* at 103–4.

<sup>277</sup> See *id.* at 103.

<sup>278</sup> *Id.* at 100.

not rely on any employer (prior, present or future) to learn relevant cultural, legal, and employment norms that could help in understanding their contract and its enforceability; rather, they possess the means to learn these independently. This is not the case for a temporary migrant, who needs help in understanding his contractual rights and obligations.

- Who is best qualified to provide visa-related services? A private market actor who is contractually bound to the employer rather than to the government who grants the rights, or to the employee who is arguably the greater beneficiary? Here, reform is clearly necessary. Experience shows that workers need guidance and education to understand both the bureaucratic process of obtaining the visa, as well as the legal rights that attach to it. Recruiters reportedly assume this role and often assist with filing online applications, retaining and returning identification documents, and even coaching workers for consular interviews.<sup>279</sup> These services are ostensibly for the benefit of the employer, but in practice they are for the direct benefit the employee. Properly understanding these legal rights is absolutely critical to workers, whereas an employer and his agents can afford to be indifferent. Yet the recruiter is contractually liable to the employer who hired him, not the worker who sorely needs the help.
- Are private market actors qualified to transfer individuals across the border? Boarding a vehicle or plane is submitting to physical confinement. Protective measures are necessary. As migrants have little money to finance their own transportation, the federal government could conceivably intervene here and contract with a commercial provider and pass the costs along to employers via a subcontract or facilitate a similar arrangement.

This evaluation of tasks and actors is preliminary, and hampered by lack of information on current business practices of the recruitment firms used across the border.<sup>280</sup> While this gap in information deserves serious attention—to be discussed subsequently—it seems clear that certain tasks, which are for the benefit of the worker, should not be left to the private market. Assistance with the visa processing, education regarding contractual and legal rights, and transportation to the worksite are all areas where the federal government should intervene and assume or outsource these tasks to partners.

At present, under the current models, large numbers of workers report not knowing or understanding their rights under their visa.<sup>281</sup> Non-profit organizations could be enlisted to provide mandatory pre-departure education, training, post-arrival orientation and preliminary legal counsel to every participating worker. The main objective is that every participant receives the

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<sup>279</sup> GAO 2015, *supra* note 19, at 27.

<sup>280</sup> After a broad search I found no reports on this subject in particular.

<sup>281</sup> PIÑA ET AL., *supra* note 14, at 32–33.

fullest possible preparation and well understands his contractual and legal rights. The existing general efforts targeted at broad audiences are laudable, but because every worker is at risk, and because every worker is bestowed with a new set of legal rights, each individual ought to be specifically prepared. Anything less shortchanges the worker. As for transportation, while certainly any commercially-licensed provider can be trusted with physical transport, there must be a proper level of oversight in order to reduce workers' vulnerability as they cross the border.

*ii. Partnership: Checks and Balances*

The third alternative, of partial state-control, ensures that there would be tight collaboration with the Mexican government through a bilateral agreement. Of course, shifting responsibilities from private market to public or civil society actors does not eliminate the possibility of exploitation or corruption. The Bracero period, for example, is fraught with examples of abusive officials across various agencies.<sup>282</sup> Civil society organizations are not immune either. All of the relevant players—both the U.S. and Mexican governments, NGOs, the private market, and workers—ought to be engaged in order to act as checks and balances so as to protect the integrity of the process.

The Mexican government is directly and politically accountable to its nationals and in a better position than the U.S. government to protect their interests. And while bilateralism is imperative, it is not enough. One author, writing on the shortcomings of the North American Agreement on Labor Cooperation (NAALC), has suggested “an enforcement mechanism that works independently from governments” and is modeled after the North American Agreement on Environmental Cooperation (NAAEC).<sup>283</sup> The NAAEC provides for the submission of complaints of violations to an independent body that first investigates whether the claims have merit and then involves the government; this process reports more success than the NAALC, which has no such mechanism.<sup>284</sup> The independence of the intermediate body ensures that it will “confront the governments, and not merely bow to the political forces that make enforcement of the NAALC so difficult.”<sup>285</sup> This suggestion could be adopted under a bilateral recruitment model. An independent body could receive worker complaints related to recruitment and pressure both governments to act.

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<sup>282</sup> See Alex Nowrasteh, *How to Make Guest Worker Visas Work*, CATO INST. 12, Jan. 31, 2013, available at [http://object.cato.org/sites/cato.org/files/pubs/pdf/pa719\\_1.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/pa719_1.pdf), archived at <https://perma.cc/HD6N-96EP>.

<sup>283</sup> Frank H. Bieszcza, *Labor Provisions in Trade Agreements: From the NAALC to Now*, 83 CHI.-KENT. L. REV. 1387, 1401 (2008), available at <http://scholarship.kentlaw.iit.edu/klawreview/vol83/iss3/11>, archived at <https://perma.cc/S75Z-U77D>.

<sup>284</sup> See *id.*

<sup>285</sup> *Id.* at 1402.

*iii. Protection and Prosecution*

Bilateralism is crucial for another reason: Mexican collaboration is indispensable to law enforcement efforts. A customs and enforcement official told the GAO that investigating and prosecuting these cases is difficult because the agency does not have jurisdiction to investigate when workers pay their fees in Mexico.<sup>286</sup> Without this jurisdiction, it is impossible to pursue leads and amass institutional experience to combat the problem. Appealing to Mexico for help is sorely necessary. Because the continuum of deceit and exploitation crosses the border, it is only logical that the two countries share information and collaborate on law enforcement efforts. Mexican authorities are in a better position to know what occurs in their national territory.

The ILO advocates for an “integrated approach” that incorporates international instruments, national legislation, and awareness-raising efforts—and consolidates these under a national action plan.<sup>287</sup> A national plan targeting fraudulent recruitment could serve to set the agenda for the bilateral collaborations between the countries and the various actors providing the needed services for the workers. It could also ensure that the interrelated bodies of law operate in harmony. This action plan should also include a mandate for interested players to study this complex problem more closely.

*iv. Research Agenda*

Lawmakers should follow the example set by the TVPA and set a research agenda that encourages continual study and amendment. There are many unanswered questions surrounding illegality and fraud in the H-2 visa program. Here is the chance for both federal investigators—such as inspector generals’ offices or government accountability offices—and the academy to fill the gap of formal studies and reports. Scientific data and continual re-evaluation of policy measures are sorely necessary.

As Professor Castles points out, there is a real danger in merely inviting academics, without more, to resolve migration questions for fear that they will become driven by policy rather than by an unbiased, scientific method.<sup>288</sup> This is certainly a risk, given the influence of public pressure and federal funding. The best ways to eliminate or minimize that risk in practice is beyond the scope of this Article, though Professor Castles provides reasonable precautions that could serve as excellent starting points. But if done properly, the academy could add another welcome check-and-balance to this overall scheme. This population may be particularly interesting to the academy because it is a chance to study the motives and dispel counterproductive myths of the “good” migrant: the migrant who wants to follow the letter of the law and who is willing to make concessions (namely, permanency).

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<sup>286</sup> GAO 2015, *supra* note 19, at 54.

<sup>287</sup> See ILO MANUAL, *supra* note 20, at 29.

<sup>288</sup> See generally Inaugural Lecture, *supra* note 64.

One scholar, writing on human trafficking in Mexico, states that “more statistical analysis is needed to create better-targeted policies.”<sup>289</sup> This recommendation ought to apply to this worker population, and is another area ripe for Mexican-American collaboration. There is little tradition of quantifying the success or failures of trafficking prevention policies.<sup>290</sup> Were the federal government to partially “takeover” recruitment with the goal of suppressing fraud, evaluating the adopted measures would be imperative. Certainly, creating and strengthening administrative tools would tend to discourage fraud,<sup>291</sup> but discrete measures should be scrutinized and evaluated for their efficacy. Often, “actions in one area can have both anticipated and unanticipated consequences in others.”<sup>292</sup> Notably, in other areas of immigration enforcement, official attempts to create obstacles for smugglers have merely encouraged them to be more creative, which only imperils the lives of the smuggled individuals and “perpetuates lawbreaking rather than deterring it.”<sup>293</sup> Efforts must be continually re-evaluated to ensure that they are effective. Indeed, determining whether or to what degree policies have “chang[ed] behavior” and “deterred exploitation and lawbreaking” is difficult but necessary.<sup>294</sup>

More information on the actors who perpetrate fraud on workers is necessary to know whether preventative methods are effective. For example, additional employer obligations—e.g., mandatory contracts—may effectively dissuade opportunistic employers. However, these may be insufficient to deter a professional criminal operation, such as one with the power and will to bribe officials. One commentator outlined a brief and general “typology of exploitative actors” who facilitate illegal labor.<sup>295</sup> The available literature paints a fair sketch of the various players, but typically with an emphasis on the harms inflicted on workers rather than the motives and machinations of the perpetrators themselves. Professionals ought to analyze the inner workings of these criminal schemes; a potential area of field work for a criminologist. Moreover, “the connections between migration and cor-

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<sup>289</sup> See Victoria Rietig, *New Law, Old Impunity: Mexico Has a New Anti-Trafficking Law But Will It Address the Country's Problems?*, 2 OXFORD MONITOR OF FORCED MIGRATION 21, 21 (2012).

<sup>290</sup> See Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 155 n.85 (2006).

<sup>291</sup> See ILO MANUAL, *supra* note 20, at 19 (“In general, abusive recruitment is made easy in environments characterized by social, legal and administrative failures. Some of the major factors or conditions, which seem to facilitate abusive recruiting practices, are: [ . . . ] Lack or weakness of administrative tools and structures to monitor the action of recruiters.”).

<sup>292</sup> DEMETRIOS G. PAPADEMETRIOU, MIGRATION POLICY INST., CURBING THE INFLUENCE OF “BAD ACTORS” IN INTERNATIONAL MIGRATION 3 (2014), available at <http://www.migrationpolicy.org/research/curbing-influence-bad-actors-international-migration>, archived at <https://perma.cc/78EY-ELMA>.

<sup>293</sup> *Id.* at 4.

<sup>294</sup> *Id.* at 2.

<sup>295</sup> See MEGHAN BENTON, MIGRATION POLICY INST., SPHERES OF EXPLOITATION: THWARTING ACTORS WHO PROFIT FROM ILLEGAL LABOR, DOMESTIC SERVITUDE, AND SEX WORK 4 (2014), available at <http://www.migrationpolicy.org/research/migration-exploitation-illegal-labor-domestic-servitude-sex>, archived at <https://perma.cc/E5XQ-5A6F>.

ruption, whether in the country of origin or along migration trajectories, remain relatively unexplored.”<sup>296</sup> For the purposes of a state-run model, investigating and understanding the role of official corruption in the pre-employment phase is indispensable.

There are many “bad actors” who conduct, or in some way contribute to, the business of illicit migration, including criminal enterprises, profiteering middlemen, corrupt officials, exploitative or indifferent employers, and apathetic consumers.<sup>297</sup> Yet, it is markets, not individual actors, that drive illegality.<sup>298</sup> Despite this, enforcement efforts are concentrated on targeting individual enterprises rather than “meaningfully address[ing] the underlying market conditions for illegality.”<sup>299</sup> The market and administrative conditions driving illegality and exploitation within the H-2 program deserve serious attention.

One critical player in the market is the H-2 worker himself, and there is a sore lack of empirical data about his motivations and role as a participant in the labor market. This leads to speculation and dangerous misconceptions in political debate. Even the victim of fraud, for example, is sometimes viewed with suspicion.<sup>300</sup> Cynics may ask whether he or she could or should know that offers contain puffery or whether he or she views the poorly-regulated guest worker system as one area where rules could be bent in their favor at the cost of suffering some abuse.

There may well be “bad actors” among would-be H-2 workers who want to abuse the legal system and gain entry at whatever cost. Perhaps they are willing to endure exploitation in a quasi-underground labor market, and, in doing so, they are perpetuating the degradation of the market. Yet, it does not follow that this population should be left vulnerable to human traffickers. Again, the remedy here is data. What do potential candidates in Mexico know about the U.S. labor market, the quality of offers, the administration of the program, and the nature of employment in the United States? Information will help dispel myths and obviate the need for speculation about the intentions and, by inference, the potential blameworthiness of the job-seekers.

#### v. *Rejecting a Complete Takeover*

This Article advocates for a partial, rather than total, “takeover” for several reasons. First, critics already denounce the program as unwieldy and

<sup>296</sup> See Jørgen Carling, *et al.*, *Finding Connections: The Nexus between Migration and Corruption*, MIGRATION POLICY INST., May 12, 2015, available at <http://www.migrationpolicy.org/article/finding-connections-nexus-between-migration-and-corruption>, archived at <https://perma.cc/H3BN-JRR2>.

<sup>297</sup> See PAPADEMETRIOU, *supra* note 292, at 2.

<sup>298</sup> See *id.*

<sup>299</sup> *Id.*

<sup>300</sup> See Vipul Naik, *Are Restrictive Guest Worker Programs in Employers’ Interests?*, OPEN BORDERS, Feb. 27, 2015, available at <http://openborders.info/blog/restrictive-guest-worker-programs-employers-interests/#more-17208>, archived at <https://perma.cc/R9GY-UZG7>.

expensive.<sup>301</sup> Costly federal intervention ought to be eschewed wherever it is unnecessary. As this analysis reveals, there are many tasks during recruitment that are traditionally undertaken by private market actors, and could probably remain in their hands. Federal agencies should intervene only when leaving the task to the market means assigning it to an actor who is not accountable to the worker. Agencies can partner with non-profits to provide education and assistance with the visa application process, and can facilitate contracts with commercial providers to provide transportation for workers. If in the future worker organizations are strong enough to assume these tasks without federal assistance, then federal actors can downgrade their level of involvement and oversight.

Ultimately, it is likely best for workers to have the most control over the services that directly benefit them. One report favorably highlights the practices of a community in the Mexican state of Guerrero, where the residents elect the candidates themselves and often choose the neediest individuals.<sup>302</sup> Community leaders contact employers directly, and the employers arrange for consular interviews.<sup>303</sup> The report's authors note that despite some problems (which they largely leave unspecified), this scheme avoids some pitfalls of employing recruiters and also benefits the community by ensuring that its members get a fair shot at employment opportunities.<sup>304</sup>

One of the interviewers reported that this practice began after several workers from the community were bilked out of fees by one of its members.<sup>305</sup> This member's son was working on a ranch in the United States when the rancher announced he needed more workers to harvest lettuce. The son obtained permission to tell his former neighbors back home, and asked his father to spread the word.<sup>306</sup> The father, however, charged recruitment and visa fees, and only about half of the interested people actually received a visa.<sup>307</sup> The hired workers arrived on the farm and learned about proper recruitment practices from their employer.<sup>308</sup> One told the employer that he had paid recruitment fees, and the employer fired the person who had charged them.<sup>309</sup>

The report does not provide details about how the workers ensure they understand their contractual and legal rights, the visa application process, or arrange for their transportation across the border and to the worksite. Encouraging more of such hyper-local organization, where communities can conceivably employ their own lawyers and reputable car services to guide and transport workers, could be a long-term goal if it is shown to be a fruitful model replicable across Mexico.

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<sup>301</sup> See Nowrasteh, *supra* note 282.

<sup>302</sup> See PiÑA ET AL., *supra* note 14, at 30.

<sup>303</sup> See *id.*

<sup>304</sup> See *id.*

<sup>305</sup> See *id.* at 30–31.

<sup>306</sup> See *id.*

<sup>307</sup> See *id.*

<sup>308</sup> See *id.*

<sup>309</sup> See *id.*

In another case, municipal leaders in a Oaxacan community directly employ the recruiter, who provides them information about the wages and working conditions. The community then asks him to sign a binding agreement wherein he must promise not to permit unauthorized deductions or wage theft, assure proper equipment, find adequate housing, ensure that workers engaging in illegal activities are handled by the proper U.S. authorities and not the employer, and ensure the workers' return within two days of the expiration of the visa.<sup>310</sup> A community assembly then selects the workers.<sup>311</sup> The community ceases to employ any recruiter who breaks the contract. Community leaders also post identifying information about the recruiter in public places to prevent others from soliciting his services.<sup>312</sup>

Empowering local communities is a worthwhile goal, but in the short term, the federal government is in the best position to assume certain recruitment-related tasks, provide oversight, coordinate the various bodies of law under the “4-P” paradigm, set a research agenda, and engage the Mexican authorities. Moreover, the partial “takeover” minimizes costs and leaves room for the role of federal agencies to evolve as circumstances change. This flexibility is crucial to ensure only the best measures are retained while the others are discarded. Only effective policies will ensure migrants and employers continue to participate in the H-2 program rather than turn to the illegal market where abuses flourish.<sup>313</sup>

#### CONCLUSION

Eradicating the fraudulent recruitment and trafficking of agricultural and “low-skilled” guest workers ought to be a high priority should Congress decide to retain the H-2 visa program in any form. This Article attempts to show the potential virtues of a state-controlled model, such as Spain's, and tailor it to the U.S. context. This Article does not provide a comprehensive analysis of the Spanish model; it cannot offer a complete empirical evaluation of the program. The efficacy of the Spanish measures is largely unknown; how precisely they would work here is untested. The U.S. problems are easy to see given their extensive documentation; the Spanish ones are less so. Yet even this review of the laws and policies in place provides insights and inspiration.

The example of our European contemporary bolsters our intuition that the delicate tasks entrusted to the private market during the pre-employment phase ought not to remain there. Rather, such practices would be better left to actors who are accountable to workers and who can check and balance the others: federal agencies, civil society organizations, the academy, and pri-

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<sup>310</sup> See *id.* at 31.

<sup>311</sup> See *id.*

<sup>312</sup> See *id.*

<sup>313</sup> See PAPADEMETRIOU, *supra* note 292, at 4 (“[One] strategy is to regularly adjust legal channels so that playing by the rules is a realistic and *preferred* option for low-skilled migrants and their employers.”).

vate actors only where appropriate. Reforming recruitment ought to extend beyond merely enacting the regulatory enhancements promoted by advocates. Mandating contracts, for example, will not guarantee that they will be understood. Leaving the visa application process as it is will likely mean that recruiters and employer agents are left to assist workers at this critical juncture. These agents are not beholden to workers, and this creates a significant problem. Intervention is necessary to ensure that workers are served by individuals accountable to them and their interests. This is a natural space for the non-profit sector and government to collaborate.

A federal action plan that borrows the “4-P” paradigm can ensure these efforts are well-coordinated. This plan would set the agenda for investigation, take account of existing efforts so none are in conflict, and enable further policy reforms upon the discovery of new evidence or circumstances—much like the TVPA does for broader anti-trafficking actions. Involving Mexico is critical to the plan’s success. Mexican collaboration is welcome on many fronts, including pre-departure education, orientation, and more. Mexican and U.S. agents ought to collaborate in order to overcome the difficulties presented by lack of investigatory jurisdiction. The governments ought to respond jointly to direct worker complaints, particularly if they are vetted by an independent body that would increase the pressure to act. Recruitment fraud is inherently a transnational crime, and as such, both nations ought to jointly address it.

This Article does not claim that Spain’s recruitment system is ideal, but rather that its notable innovations in the recruitment arena should be taken into account. Congress must seize this opportunity to reform the broken U.S. system, but it need not start from scratch. It can and should look to our European counterparts, as it did during the last major immigration reform in 1986. The Spanish innovations echo many of our advocates’ recommendations as well as the narrow successes in our own history. Its modern-day example encourages us to revisit and perfect some of our narrow historical achievements. Lawmakers could take advantage of these tried methods. Bracero’s bleak legacy might still be rescued. A dark past could be transformed into a beacon for a brighter future.