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IMMIGRATION AND LABOR LAW—WE NEED YOUR HELP! BUT IT'S GONNA COST YOU: ARRIAGA, CASTELLANOS- CONTRERAS, AND WHY POINT OF HIRE FEES SHOULD BE PAID BY THE EMPLOYER

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NOTES

IMMIGRATION AND LABOR LAW—WE NEED YOUR HELP! BUT IT'S GONNA COST YOU: *ARRIAGA, CASTELLANOS-CON-* *TRERAS*, AND WHY POINT OF HIRE FEES SHOULD BE PAID BY THE EMPLOYER

“America lives in the heart of every man everywhere who wishes to find a region somewhere where he will be free to work out his destiny as he chooses.” Woodrow Wilson¹

INTRODUCTION

Each year, in an effort to alleviate labor shortages, the State Department permits² over one hundred thousand³ low-skilled foreign workers to legally enter the United States for purposes of temporary employment.⁴ Workers come from poorer nations around the globe, enticed by the promise of high paying jobs and the chance to make an honest and comfortable living for themselves

1. Special to the New York Times, *Crowds Hear Wilson and Clark Men, Too: Governor Leads Own Forces in Chicago Rally While Clark's Lieutenants Plead for Him*, N.Y. TIMES (Apr. 7, 1912), http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9B0CE1D7133AE633A25754C0A9629C946396D6CF. This quote is taken from a speech delivered in South Chicago while on the campaign trail. *Id.* Woodrow Wilson was the 28th President of the United States. *Woodrow Wilson*, THE WHITE HOUSE (Feb. 10, 2011, 4:00 PM) <http://www.whitehouse.gov/about/presidents/woodrowwilson>.

2. See 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a)-(b) (2006).

3. According to the State Department the United States admitted nearly 121,000 foreign workers in 2005: “approximately 32,000 in agricultural work, and another 89,000 . . . in other non-agricultural work.” MARY BAUER, SOUTHERN POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 1 (2007), *available at* www.vec.virginia.gov/vecportal/employer/pdf/splcguestworker.pdf; see also DEP'T OF STATE, FY-2005 NONIMMIGRANT VISAS ISSUED 21 http://travel.state.gov/pdf/FY2005_NIV_Detail_Table.pdf (last visited Apr. 21, 2011) [hereinafter *NonImmigrant Visas Issued*] (stating that there were a total of 31,892 H-2A visas and 87,492 H-2B visas issued in 2005).

4. Congress does not set a limit on the number of agricultural workers that may be admitted each year but, by comparison, there is an annual cap of 66,000 non-agricultural workers. See 8 U.S.C. § 1184(g)(1)(B); *id.* § 1101.

and their families.⁵ Francisco Sotelo-Aparicio⁶ was one such worker. He was hired, along with ninety-nine others similarly situated, to work for a chain of eight “luxury boutique hotels,” in New Orleans in the wake of Hurricane Katrina.⁷ But before he could begin, like the majority of workers employed through the United States guest worker program, Francisco Sotelo-Aparicio was forced to take on crushing debt in the form of various point-of-hire fees.⁸

Unfortunately, these fees, which almost always come out of the worker’s pocket, are rarely recoverable and create a system of involuntary servitude.⁹ This happens for several reasons, one being that under current United States law foreign workers often pay, at least initially, all inbound transportation and visa costs.¹⁰ The other major cause of this debt is the fact that employers often look to recruitment agencies to secure workers.¹¹ Unscrupulous recruiters promise prospective workers “high wages, overtime pay[,] and green cards.”¹² Believing they will make a lot of money, the workers are even more vulnerable to the recruiter’s demands for “an additional recruitment fee.”¹³ These fees have been reported to

5. 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, 905 (2008); see *NonImmigrant Visas Issued*, *supra* note 3, at 15-21 (separating H-2A and H-2B workers based on country or origin). Historically most of these workers came from Mexico and Central and South America, though, in recent years the United States has begun importing labor from places such as Thailand, South Africa, and Jamaica. See *id.*

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6. BAUER, *supra* note 3, at 12. Sotelo Aparicio responded to a newspaper advertisement seeking, among other things, maintenance workers. *Id.*

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7. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 396 (5th Cir. 2010) (en banc); see also BAUER, *supra* note 3, at 12; *Workers Pay Up to \$5,000 for Post-Katrina Hotel Jobs*, S. POVERTY LAW CTR. (Apr. 2007), <http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/recruitment-exploitation-be-1> [hereinafter *Workers Pay Up to \$5,000*].

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8. BAUER, *supra* note 3, at 12; *Workers Pay Up to \$5,000*, *supra* note 7. For purposes of this Note point-of-hire fees refers to inbound transportation, visa, and recruitment expenses.

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9. See BAUER, *supra* note 3, at 3-4.

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10. See, e.g., *Castellanos-Contreras*, 622 F.3d at 396; *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1233 (11th Cir. 2002); *Rivera v. Brickman Grp. Ltd.*, No. 05-1518, 2008 WL 81570, at *2 (E.D. Pa. Jan. 7, 2008); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Sept. 26, 2006); BAUER, *supra* note 3, at 19.

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11. Ashby, *supra* note 5, at 905; BAUER, *supra* note 3, at 3-4.

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12. Ashby, *supra* note 5, at 905.

13. *Id.*

range anywhere from \$3,000 to more than \$20,000.¹⁴ Sometimes the recruiters charge these fees without the direct knowledge of the employer,¹⁵ making it all the more difficult for the worker to recover the costs. And because the workers do not have the money to begin with, they are forced to borrow at what are often times exorbitant interest rates.¹⁶ As one example, Alvaro Hernandez-Lopez, a Guatemalan tree planter, was forced to sign a piece of paper handing over the deed to his house under the threat that failure to do so would result in being denied work in the United States.¹⁷

Since World War II, foreign workers have been a driving force behind the United States economy.¹⁸ The United States, through a number of agreements¹⁹ and passage of the Immigration and Nationality Act,²⁰ has created a massive government program aimed at protecting the economy by alleviating the ill effects of labor shortages.²¹ In doing so, Congress has gone to great lengths to ensure that United States business interests, as well as interests of the domestic workforce, are protected.²² With these important interests in mind, it is of no surprise that little thought has ever been given to the actual laborers.

Part I of this Note provides background on the United States guest worker program, particularly its historical purpose and the changes that have occurred over time. One major theme throughout this Note is the administratively created distinction between agricultural and non-agricultural workers and the problems that result

14. See *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 278 (5th Cir. 2009) (finding that workers paid between approximately \$3,000 and approximately \$5,000 in various point-of-hire fees), *aff'd en banc*, 622 F.3d 393; *SPLC Lawsuit: Indian Guestworker Defrauded by Recruiters, Forced into Slave-like Conditions*, S. POVERTY LAW CTR. (Mar. 10, 2008), <http://www.splcenter.org/news/item.jsp?aid=302> [hereinafter *SPLC Lawsuit*] (alleging that over 100 Indian workers were defrauded out of as much as \$20,000).

15. *SPLC Lawsuit*, *supra* note 14.

16. BAUER, *supra* note 3, at 9.

17. *Id.*

18. See *generally id.* at 3-5 (discussing the transformation of the Bracero program from its inception during World War II).

19. DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 173 (2002).

20. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

21. *Id.* Congress's power to authorize the legal admission of both agricultural and non-agricultural workers into the United States is codified in Title 8 of the United States Code. See *id.* §§ 1101(a)(15)(h)(ii)(a)-(b).

22. See *generally id.* § 1101; Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77, 110 (Dec. 18, 2008) (to be codified at 20 C.F.R. pts. 655-56).

therefrom. Part II examines two sharply contrasting circuit court cases: the first, an Eleventh Circuit opinion holding that point-of-hire fees, in the context of agricultural workers,²³ are primarily for the benefit of the employer and thus reimbursable; the second, a recent Fifth Circuit decision holding that none of these fees are reimbursable for non-agricultural workers.²⁴ Part III analyzes current United States law and its application in the wake of these two divergent opinions.²⁵ This Part explains that an employee’s inbound transportation, visa, and recruitment fees are primarily for the benefit of the employer. These fees operate to drive an employee’s wages below the minimum wage requirement established by the Fair Labor Standards Act. Finally, Part IV addresses the future of the guest worker program and discusses policy alternatives aimed at preventing foreign workers from falling prey to unscrupulous recruiters and exorbitant debt.

I. THE FOREIGN GUEST WORKER PROGRAM

Beginning in 1942, the United States began importing labor to supplement the nation’s depleted workforce through a series of agreements with Mexico.²⁶ With passage of the Immigration and Nationality Act²⁷ (INA) in 1952, Congress authorized the legal importation of temporary low-skilled laborers conditioned on there being a lack of available domestic workers.²⁸ From its inception, the purpose of creating a temporary foreign workforce was twofold: to ensure that United States businesses always had a steady and consistent labor force, while at the same time protecting domestic workers from adverse effects attributed to the presence of undocumented workers.²⁹

Initially, all low-skilled workers were classified as one group of “H-2” workers.³⁰ Despite the existence of one unified program, the

23. See *infra* notes 82-117 and accompanying text. R
24. See *infra* notes 118-133 and accompanying text. R
25. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc); *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002).
26. BAUER, *supra* note 3, at 3-4. R
27. 8 U.S.C. § 1101.
28. *Id.* § 1101(a)(15)(h)(ii)(a)-(b).
29. *Id.* § 1188(a)(1)(A)-(B).
30. BAUER, *supra* note 3, at 5. Congress drew no distinction between agricultural work and non-agricultural work, instead creating one all encompassing classification for all low-skilled workers. *Id.* Agriculture employment is defined by the Migrant and Seasonal Agricultural Worker’s Protection Act to include “any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act [“FLSA”] . . . [along with] the handling, planting, drying, packing, packaging, processing, freezing,

Department of Labor (DOL) recognized abuses in agricultural work and issued separate rules for agricultural and non-agricultural workers.³¹ Congress sought to address this administratively created difference through passage of the Immigration Reform and Control Act (IRCA),³² which amended the INA and legislatively separated agricultural workers from non-agricultural workers, creating two distinct programs.³³ From that point on, agricultural workers have been legally admitted into the United States on H-2A visas while non-agricultural workers have lawfully entered on H-2B visas.³⁴ Through IRCA, Congress provided specific guidelines for employing foreign agricultural workers and implemented employee protections into the H-2A program.³⁵ It noted “the unique needs of growers and the inadequacy of current protections for farm workers.”³⁶ However, Congress specifically noted that no changes were made to the statutory language regarding non-agricultural H-2B workers, and that the guidelines and protections made available to

or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802 (2006); *see also id.* § 203(f). The FLSA defines agriculture as:

farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Id. Proposed rulemaking changes would expand the definition to include all forestry workers. *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 45,906, 45,907 (proposed Sept. 4, 2009) (to be codified at 20 C.F.R. pt. 655) [hereinafter Proposed Rule].

31. *Martinez v. Reich*, 934 F. Supp. 232, 237-38 (S.D. Tex. 1996).

32. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

33. *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a)-(b); *Martinez*, 934 F. Supp. at 237 (“Prior to the enactment of the Immigration Reform and Control Act of 1986, Congress did not differentiate between temporary workers performing agricultural and non-agricultural services.”); H.R. REP. NO. 99-682(II), at 28 (1986) (discussing authorizations “under a new H-2A worker program, targeted at agriculture”); BAUER, *supra* note 3, at 5 (“The H-2 program was revised in 1986 as part of the Immigration Reform and Control Act, which divided it into the H-2A agricultural program and the H-2B non-agricultural program.”).

34. 8 U.S.C. § 1188(c)(3)(B)(ii)(I); § 1188 (d)(1)-(3).

35. 8 U.S.C. § 1188(a)-(d). For discussion of employer protections, *see* 8 §§ U.S.C. 1188(b)(3)-(4), 1188(c)(4), 1188(g)(2).

36. *Martinez*, 934 F. Supp. at 237-38.

H-2A workers did not apply to the H-2B program.³⁷ A federal district court agreed with this interpretation, and in 1996,³⁸ found that the DOL had not provided any additional regulation for the H-2B program.³⁹

In December 2008, with a view towards completely overhauling the H-2A program, the DOL announced a new set of rules for the guest worker program.⁴⁰ President George W. Bush signed this new rule (the Final 2008 rule) into law on January 17, 2009.⁴¹ Within months, the Obama administration's new Secretary of Labor, Hilda Solis, announced the DOL's intention to suspend the new rule and return to the preceding rule for a period of nine months.⁴² Once the nine-month period expired, the DOL would then offer a new proposal.⁴³ However, before the DOL suspension could take place a federal district court in North Carolina granted an association of agricultural growers a preliminary injunction precluding the DOL from moving forward with the suspension.⁴⁴ In its decision, the district court found that the DOL had violated the Administrative Procedures Act by failing to publish a notice of proposed rulemaking changes and not allowing the public an adequate period of time to comment.⁴⁵ The court, without much explanation, further held that the grower would suffer irreparable harm if the suspension were allowed.⁴⁶ On September 4, 2009, the DOL issued a new notice of proposed rulemaking changes published in the Federal Register.⁴⁷ The public had until October 20, 2009 to com-

37. *Id.* at 237.

38. *Id.* at 237-28.

39. *Id.*

40. Proposed Rule, *supra* note 30, at 45,907.

41. *Id.* President Bush left office on January 20, 2009. See David Jackson, *Upbeat Bush Leaves Office Quietly*, USA TODAY, Jan. 21, 2009, http://www.usatoday.com/news/nation/2009-01-20-bush_N.htm.

42. Proposed Rule, *supra* note 30, at 45,908.

43. *Id.* at 45,907.

44. *N.C. Growers' Ass'n v. Solis*, 644 F. Supp. 2d 664, 674 (M.D. N.C. 2009).

45. *Id.* at 672-73. The court held that suspending the new rule and returning to the old rule, in effect, constitutes a rule change and must, for purposes of the Administrative Procedures Act, be published. *Id.* at 672 n.8; see Administrative Procedures Act, 5 U.S.C. § 5563 (2006).

46. *N.C. Growers' Ass'n*, 644 F. Supp. 2d at 669-71.

47. Temporary Agricultural Employment of H-2A Aliens in the United States, 70 Fed. Reg. 171 (proposed Sept. 4, 2009) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R. pt. 501).

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ment.⁴⁸ On February 12, 2010, the DOL announced its final rule regarding H-2A workers.⁴⁹

A. *The Bracero Program*

As the United States prepared for World War II, the State Department, aware of an impending labor shortage, entered into the Bracero agreement with Mexico to import foreign workers.⁵⁰ Critics, fearful of a spike in immigrant population, were silenced by program proponents' assertions that these Mexican workers could easily be returned.⁵¹ United States employers were required to comply with a number of measures designed to protect the interests of the Mexican workers.⁵² Despite the inclusion of these protective measures, the program was fraught with abuse.⁵³ With little government oversight, workers had money withheld by employers and were often forced to labor under deplorable conditions.⁵⁴ In addition to the problems suffered by the temporary workers, U.S. domestic laborers were "undermined [in their] ability . . . to demand higher wages"⁵⁵ because the Bracero program "create[d] the opportunity for [United States] employers to exploit cheap labor."⁵⁶ In this climate, domestic workers were simply unable to compete with

48. *News & Updates*, OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, <http://www.foreignlaborcert.doleta.gov/news.cfm> (last updated Oct. 29, 2010); Temporary Agricultural Employment of H-2A Aliens in the United States; Extension of Comment Period, 74 Fed. Reg. 50,930 (Oct. 2, 2009).

49. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010) (to be codified at 20 C.F.R. pt. 655 and 29 C.F.R. pt. 501). Among the major changes, this final rule moves away from the Bush administration's "attestation" based program, which allowed employers to attest to the fact that they had made reasonable efforts to secure domestic workers and had complied with all applicable law, and back to the more rigid labor certification program. *See id.*

50. TICHENOR, *supra* note 19, at 173.

51. *Id.*

52. BAUER, *supra* note 3, at 4. The agreement between Mexico and the United States required U.S. employers to: enter into individual contracts with employees "under government supervision," provide acceptable housing, pay the higher of a minimum wage or prevailing wage, if sufficient wages were not paid the U.S. government would supplement, and offer at least thirty days of work. Additionally, the agreement specified that the cost of transportation was to be shared by the worker, employer, and the U.S. government. *Id.*

53. *Id.*

54. *See id.*

55. *Id.* at 5.

56. Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 198 (2005).

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the Mexican workers, who could be hired and exploited for considerably less money.⁵⁷

The United States H-2 visa program was officially born in 1942, when the government allowed the Florida sugar cane industry to import workers from the Caribbean to pick sugar cane on a temporary basis.⁵⁸ This signaled the beginning of the end for the Bracero program, which officially ceased in 1964 as all temporary foreign labor was merged into one now-expansive H-2 guest worker program.⁵⁹

B. *The Immigration and Nationality Act*

The 1952 INA serves as the principle legislative mechanism for regulation and oversight of the modern guest worker programs.⁶⁰ Under the INA, it is the Secretary of Homeland Security's responsibility to grant or deny all petitions for temporary non-immigrant labor, though, before a petitioner applies with the Secretary of Homeland Security, he must first receive certification from the Secretary of Labor.⁶¹ For the Secretary of Labor to grant certification, a petitioner must demonstrate that two important factors have been met.⁶² First, a petitioner must demonstrate that there are an insufficient number of United States workers possessing the skills, ability, and availability necessary to perform the job involved in the petition.⁶³ Second, a petitioner must demonstrate that employing a foreign worker in a particular job "will not adversely affect the wages and working conditions" of similarly employed workers in the United States.⁶⁴

The government grants two distinct types of visas to low-skilled, nonimmigrant workers: agricultural workers, pursuant to the INA, are issued H-2A visas, while non-agricultural workers are legally admitted on H-2B visas.⁶⁵ These visas have the intended purpose of alleviating temporary work shortages; for purposes of

57. *Id.*; see also Lorenzo Alvarado, Comment, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 58-59, 64-65 (2001).

58. ALEC WILKINSON, *BIG SUGAR: SEASONS IN THE CANE FIELDS OF FLORIDA* 25-30 (1989).

59. BAUER, *supra* note 3, at 5.

60. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

61. *Id.* § 1101(a)(15)(H).

62. *Id.* § 1188(a)(1)(A)-(B).

63. *Id.*

64. *Id.*

65. *Id.* § 1101(a)(15)(H)(ii)(a)-(b); *id.* § 1101(a)(h)(ii)(b).

the H-2A program, “temporary [employment,] except in extraordinary circumstances, [will] last no longer than one year.”⁶⁶ Under the final rule, employers must contractually forbid recruiters and their agents⁶⁷ from receiving or seeking payments from prospective employees as a condition of employment.⁶⁸ These prohibited payments include any fee collected for an activity related to obtaining the labor certificate.⁶⁹ The cost of obtaining a passport remains with the worker, however, employers are required by the final rule to pay any “visa” fees since these fees primarily benefit the employer by allowing employees to legally enter for work.⁷⁰ If an employer violates any provision of the Code of Federal Regulations, they subject themselves to possible program debarment.⁷¹ These debarments, if enforced, only last for three years, as evidenced by the case of Global Horizons.⁷² That company was responsible for subjecting 170 workers from Thailand into forced labor and was debarred from the H-2 program in July 2006.⁷³ Their debarment was lifted in June of 2009.⁷⁴

C. *The Fair Labor Standards Act*

Congress enacted the Fair Labor Standards Act (FLSA) as a means of protecting those workers who lack the bargaining power necessary to attain wages adequate for daily life.⁷⁵ In pursuit of

66. 20 C.F.R. § 655.103(d) (2010).

67. This could be an important departure from previous rules that made no mention of “agents.” Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010) (to be codified at 20 C.F.R. pt. 655). This rule change seeks to “clarif[y] that the contractual prohibition must extend to any agent of the foreign labor contractor or recruiter.” *Id.*

68. 20 C.F.R. § 655.135(k).

69. *Id.* § 655.22(j).

70. *Id.* § 655.22(g)(2). The final rule makes clear that the only cost belonging to the employee is the cost of obtaining their passport; visa costs, which permit the worker to legally enter for work, primarily benefit the employer. See Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. at 6924.

71. 20 C.F.R. § 655.31.

72. Kari Lyderson, *Guest Workers Seek Global Horizons: U.S. Company Profits from Migrant Labor*, CORPWATCH (Nov. 3, 2006), <http://www.corpwatch.org/article.php?id=14216>.

73. *Id.*; Department of Labor Employment and Training Administration Office of Foreign Labor Certifications Program Debarments, DEP’T OF LABOR, available at <http://www.aila.org/content/default.aspx?bc=1016—6732—8737—27863—26205> (last visited Apr. 21, 2011).

74. OFFICE OF FOREIGN LABOR CERTIFICATION, DEP’T OF LABOR PROGRAM DEBARMENTS, http://www.foreignlaborcert.doleta.gov/pdf/Debartment_List_Revisions.pdf (last visited Apr. 21, 2011).

75. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706-07 (1945).

that objective, the FLSA requires employers to pay wages “free and clear” of deductions,⁷⁶ subject to a narrow exception whereby the reasonable costs of providing “board, lodging, or other facilities” may be treated as wages for FLSA purposes.⁷⁷ The FLSA creates a federal minimum wage requirement,⁷⁸ which establishes the minimum earnings an employee must receive based on an hourly rate per workweek.⁷⁹ If, during a particular work week, an amount is owed to an employee and is found “withheld in violation of [the FLSA],” that amount owed will be deemed an unpaid minimum wage.⁸⁰ A failure on the part of the employer to comply with the minimum wage requirement results not only in the employer being liable for any unpaid wages, but also for liquidated damages in an amount equal to the unpaid wages.⁸¹

II. THE ELEVENTH AND FIFTH CIRCUITS WEIGH IN ON THE QUESTION OF FEES

A. *Arriaga and the Eleventh Circuit*

In *Arriaga v. Florida Pacific Farms*, the Eleventh Circuit held that if an expense primarily benefits the employer that expense must be reimbursed to the employee to the extent that the cost drove the employee’s wages below the federal minimum wage requirement in order to satisfy the FLSA; the expense must be reimbursed within the week in which it occurred.⁸² This approach, adopted by a number of lower courts,⁸³ was the general interpretation of the FLSA for both H-2A and H-2B⁸⁴ workers until a recent decision by the Fifth Circuit changed all of that.⁸⁵

Arriaga involved a group of Mexican farm workers lawfully admitted to the United States under the H-2A program to pick

76. 29 C.F.R. §§ 531.35, 776.4 (2010).

77. 29 U.S.C. § 203(m) (2006).

78. *Id.* § 206.

79. *Id.* § 206(a)(1). As of May 2009 this rate is set at \$7.25 per hour. *Id.*

80. *Id.* § 206(d)(3).

81. *Id.* § 216(b).

82. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1236-37 (11th Cir. 2002).

83. *See Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Sept. 26, 2006); *see also Rivera v. Brickman Grp. Ltd.*, No. 05-1518, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008).

84. *See Recinos-Recinos.*, 2006 U.S. Dist. LEXIS 2510, at *44-45.

85. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 393 (5th Cir. 2010) (en banc) (holding that employers are under no legal obligation to reimburse an H-2B worker for their inbound transportation, visa, and recruitment expenses).

strawberries and raspberries during the 1998-99 season.⁸⁶ Florida Pacific Farms (the Growers), in order to meet labor demands contracted with the Florida Fruit and Vegetable Association (FFVA) for purposes of recruiting and hiring foreign workers.⁸⁷ All applications for foreign workers were completed by the FFVA, who “offered transportation arrangements in compliance with the requirements of [DOL].”⁸⁸ Prospective employees were told they would need \$130 for transportation from Monterrey to Florida, \$45 for the visa application, and another \$100 for the visa itself.⁸⁹ In addition, the workers were charged varying “referral fees”⁹⁰ by local contact people, hired by the “travel” company to refer suitable workers.⁹¹ Some were forced to pay an additional recruitment fee to the travel company’s own employees without anyone else’s direct knowledge.⁹² The Growers, who were already paying the travel company \$50 per worker, “had directed [it] not to charge the workers a fee.”⁹³

Once 50 percent of the contract period had expired, the Growers reimbursed the workers \$130 for transportation from Monterrey to Florida.⁹⁴ When the entire contract period expired, each worker was given \$20 for a bus ticket back to Mexico.⁹⁵ They were never paid for transportation from their homes to Monterrey, visa costs, or the entry document fee; nor were they ever reimbursed for “referral” payments made to the travel company or its employees.⁹⁶

Seeking legal relief, the farm workers filed suit claiming that the Growers violated the FLSA by not reimbursing them for travel, visa, and recruitment expenses at the end of their first week of work.⁹⁷ This failure to tender reimbursement resulted in the work-

86. *Arriaga*, 305 F.3d at 1231.

87. *Id.* at 1233-34.

88. *Id.* at 1233; 20 C.F.R. § 655.102(b)(5)(i) (2006) (stating “that any worker who completed the first fifty percent of the contract period would be reimbursed for the cost of his transportation to the jobsite ‘from the place from which the worker has come to work for the employer’”).

89. *Arriaga*, 305 F.3d at 1234.

90. *Id.*

91. *Id.* The “travel” company was Florida East Coast Travel and their agent was Berthina Cervantes. *Id.* at 1233. Cervantes maintained an office in Monterrey, Mexico and was primarily responsible for locating the workers. *Id.* at 1233-34.

92. *Id.* at 1234.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1231-32.

ers' wages falling below the minimum wage requirement set by the FLSA.⁹⁸ Holding that inbound transportation and visa expenses are an "incident of and necessary to" employment, the Eleventh Circuit said that a worker's travel and visa expenses are *always* the responsibility of the employer.⁹⁹ While the court did not ultimately hold the Growers responsible for the "referral fees," it did leave open the possibility that recruitment fees may also be reimbursable under the FLSA.¹⁰⁰ The court began its analysis by noting that "[t]he protections of the minimum wage provision of the [FLSA] indisputably apply to . . . [f]arm workers."¹⁰¹ "Employers [are required to] provide workers' weekly wages 'in cash or in facilities,' 'free and clear' of [any] improper deductions, at a rate no lower than the minimum wage rate. . . ."¹⁰² The only statutory exception to this FLSA requirement is 29 U.S.C. § 203(m), which says that an employer can count the reasonable cost of furnishing an employee with "board, lodging, or other facilities" as wages.¹⁰³

The Growers argued that any FLSA analysis had to at least be guided by the H-2A regulations, which require workers who complete 50 percent of the contract period to be compensated for inbound transportation costs if those payments have not previously been provided.¹⁰⁴ Reiterating that the regulations required employers to comply with all applicable federal, state, and local law,¹⁰⁵ the court rejected this argument.¹⁰⁶ The court stated that whenever employment statutes overlap, the higher requirement must always be applied unless the regulations are "mutually exclusive."¹⁰⁷

The Growers argued, unsuccessfully, that forcing an employer to reimburse these expenses in the first week may provide employees with an incentive to leave after only one week.¹⁰⁸ Acknowledg-

98. *Id.*

99. *Id.* at 1237 (quoting 29 C.F.R. § 531.32(a) & (c) (2010)).

100. *Id.* at 1244-46 (stating that had the workers been able to show that the recruiters acted with apparent authority, the Growers would be liable for the recruitment fees as well).

101. *Id.* at 1235.

102. *Id.* (quoting 29 C.F.R. §§ 531.35 & 776.4).

103. *Id.* at 1235.

104. *Id.*; 20 C.F.R. § 655.122(h) (2010) (most current version).

105. *Id.* at 1235. The court, citing the Code of Federal Regulations, noted that "[d]uring the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws and regulations." *Id.*; see 20 C.F.R. § 655.103(b).

106. *Arriaga*, 305 F.3d at 1235.

107. *Id.* (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950)).

108. *Id.* at 1236.

ing that this was more of a policy issue than a legal one, the court maintained that in the absence of clear legislative intent employers were required to abide by the FLSA.¹⁰⁹

The court's ultimate holding in *Arriaga* was that under the FLSA, "[if] an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose."¹¹⁰ Finding that transportation costs were "incident of and necessary to" employment, the court held that these expenses were reimbursable.¹¹¹ The court similarly found that visa costs are "necessitated by the Growers' employment of the [f]armworkers under the H-2A program" and are not the type of costs "that would arise as an ordinary living expense."¹¹² Once an employer chooses to utilize the program, these costs are certain to arise and it becomes incumbent upon the employer to pay them.¹¹³

Lastly, the court held that if "apparent authority" is created in a third person by the employer, then the employer might be responsible for reimbursement of recruitment fees.¹¹⁴ Two elements must be satisfied in order to require reimbursement of recruitment fees: first, the fees cannot "constitute 'other facilities,'" and second, "there must be authority to hold the [employer] liable for the unauthorized acts of [his or her] agents."¹¹⁵ In order to determine whether "apparent authority" has been created in a third party, the court looked to the Restatement (Second) of Agency section 159, which says that

apparent authority is "created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the

109. *Id.*

110. *Id.* at 1237; 29 C.F.R. § 531.35 (2010).

111. *Arriaga*, 305 F.3d at 123-38 (citing 29 C.F.R. §§ 531.3 & 531.32 (2010)). The court also cited the Department of Labor opinion letter that characterized the costs as "incidental to the employer's recruitment program." *Id.* at 1238; see U.S. DEP'T OF LABOR, OP. LTR. OF THE WAGE-HOUR ADM'R No. 1139 (WH-92) (Dec. 10, 1970).

112. *Arriaga*, 305 F.3d at 1244. In support of this finding, the court analyzed whether or not something was an ordinary living expense. *Id.* at 1242-44. While meals are cited as being primarily for the benefit of the employee, other things, such as miners' lamps, safety caps, and explosives are always primarily for the employer's benefit. *Id.* at 1243.

113. *Id.*

114. *Id.* at 1244-46 (failing to allege sufficient facts to support this, the court held that the Growers in *Arriaga* were not responsible for reimbursement of the recruitment fees).

115. *Id.* at 1245.

principal consents to have the act done on his behalf by the person purporting to act for him.”¹¹⁶

Since the workers could not establish that the Growers had created this apparent authority in the travel company, recruitment fees were held to not be reimbursable in this instance.¹¹⁷

B. Castellanos-Contreras and the Fifth Circuit

In the years following *Arriaga*, federal district courts applied its principles to H-2B workers as well.¹¹⁸ That changed when the Fifth Circuit, in *Castellanos-Contreras*,¹¹⁹ held that, even though non-agricultural H-2B workers were entitled to FLSA protection, they were not entitled to reimbursement for transportation, visa, and recruitment fees.¹²⁰

In 2006, Decatur Hotels owned and operated fifteen five-star hotels in the New Orleans area.¹²¹ Following Hurricane Katrina, Decatur looked to Accent Personnel Services Inc. (Accent) to help them fill 270 vacant hotel jobs.¹²² For their efforts in securing these workers, Accent earned \$1,200 per employee.¹²³ Workers were primarily recruited from Peru, Bolivia, and the Dominican Republic and were forced to pay between \$3,000 and \$5,000 in various recruitment, travel, and visa expenses in order to work for Decatur.¹²⁴ While they were promised forty hours of work each week with

116. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 27 (2008)).

117. *Id.* at 1245-46.

118. *See* *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Jan. 23, 2006); *see also* *Rivera v. Brickman Grp. Ltd.*, No. 05-1518, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008) (holding that inbound transportation costs, visa costs, and recruitment fees were primarily for the benefit of the employer and were thus reimbursable in the H-2B context); *Ashby*, *supra* note 5, at 905. In a case before the Eastern District Court of Louisiana the court held that “[t]he rationale employed by the *Arriaga* court is applicable to the H-2B program.” *Recinos-Recinos*, 2006 U.S. Dist. LEXIS 2510, at *44-45.

119. In an opinion authored in February of 2009 the Fifth Circuit held that the Eleventh Circuit got it wrong in *Arriaga* and pre-employment expenses were never reimbursable; backing away from this, somewhat, the court withdrew that opinion and issued a new opinion distinguishing *Arriaga* as applying to H-2A workers only. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274 (5th Cir. 2009), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010) (affirming panel decision).

120. *Castellanos-Contreras*, 622 F.3d at 403.

121. *Castellanos-Contreras*, 576 F.3d at 276; *see also* BAUER, *supra* note 3, at 10.

122. *Castellanos-Contreras*, 576 F.3d at 277; *see also* BAUER, *supra* note 3, at 4-5.

123. *Castellanos-Contreras*, 576 F.3d at 277. Accent earned \$300 per employee from Decatur and another \$900 per employee from the various foreign recruiters and subcontractors. *Id.*; *see also* BAUER, *supra* note 3, at 4-5.

124. *Castellanos-Contreras*, 576 F.3d at 277-78; *see also* BAUER, *supra* note 3, at 4-5.

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plenty of overtime, the workers instead found themselves typically working twenty-five hours or less per week.¹²⁵

As a starting point, the Fifth Circuit opined that an employee's wages could not be "free and clear," as required, if they "kick[ed]-back" either directly or indirectly to the employer.¹²⁶ The court explained that a "kick-back" occurs when the employer shifts any business expense to the employee.¹²⁷ But rather than analyzing whether these payments were business expenses, the court instead initially found the Eleventh Circuit's interpretation in *Arriaga* altogether incorrect.¹²⁸ In a superseding opinion, the Fifth Circuit held that *Arriaga* was limited to *H-2A* workers and *H-2B* workers were not entitled to any reimbursement for out-of-pocket travel, visa, and recruitment expenses.¹²⁹ The court, in reaching this decision, cited to inferences that could be drawn from the regulations.¹³⁰

According to the court, since the Code of Federal Regulations allows for visa transferability from one employer to another, the workers' assertions that visa "expenses are specific and unique to the employer" are contradicted.¹³¹ The court applied this logic to transportation expenses as well, finding that since *sometimes* an *H-2B* worker's outbound transportation expenses belong to an employer, while an *H-2A* workers inbound transportation expenses belong to the employer, it must have been intended that *H-2B* inbound transportation expenses always be the responsibility of the employee.¹³² Finally, the court held that, like with visa expenses, there was a "division of payment for each party's respective bene-

125. *Castellanos-Contreras*, 576 F.3d at 274; see also BAUER, *supra* note 3, at 4-5.

126. *Castellanos-Contreras*, 576 F.3d at 280.

127. *Id.*

128. *Castellanos-Contreras v. Decatur Hotels, LLC*, 559 F.3d 332, 338 n.3 (5th Cir.), *withdrawn and superseded by*, 576 F.3d 275 (5th Cir. 2009), *aff'd en banc*, 622 F.3d 393 (5th Cir. 2010).

129. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 402-03 (5th Cir. 2010) (en banc). The Fifth Circuit, upon rehearing en banc, vacated their 2009 opinion and superseded it with this opinion. *Id.* at 396. In finding transportation, visa, and recruitment expenses to be the responsibility of the workers, they chose to distinguish themselves from the Eleventh Circuit in *Arriaga* by noting that their case dealt with *H-2B* workers while *Arriaga* dealt with *H-2A* workers. *Id.* at 402-03.

130. *Id.* at 402-03.

131. *Id.* at 401 n.7 (noting that five years removed from Hurricane Katrina some of the temporary workers were still in the country).

132. *Id.* at 400 (discussing regulations on inbound and outbound travel expenses and stating that the "[s]ilence on this issue is . . . deafening").

fit,” which indicated that “the [w]orkers’ use of recruiters in their own countries was not [a] . . . business expense.”¹³³

III. FEDERAL LAW AND THE FEES

A. *The FLSA Applies to Both H-2A and H-2B Workers*

To start, there is no distinction between H-2A and H-2B workers for purposes of applying the FLSA.¹³⁴ That question has never been a point of controversy, evidenced in part by the fact that both the *Arriaga* and *Castellanos-Contreras* courts concluded, despite coming to divergent results, that the FLSA applies to agricultural as well as non-agricultural temporary foreign workers.¹³⁵ This is so because under the guest worker program, all “employer[s] [are legally bound to] comply with [all] applicable federal, [s]tate, and local employment related laws and regulations.”¹³⁶ Simply put, when invoking protection under the FLSA an employee’s status is irrelevant because the FLSA is “applicable to citizens and aliens alike. . . .”¹³⁷ Since the FLSA applies to all guest workers, regardless of classification, the next logical question becomes whether failure to reimburse for pre-employment point-of-hire fees violates the statute.

B. *Because the Higher Standard is Required, the FLSA Must Be Applied*

Before discussing whether the fees are within reach of the statute it is important to note that the FLSA, not the regulations, is the controlling law when it comes to reimbursement of point of hire fees. In splitting with the Eleventh Circuit, the *Castellanos-Con-*

133. *Id.* at 404. This may be oversimplifying the matter; foreign recruiters seek out prospective employees at the employer’s behest and then, in some instances, charge exorbitant recruitment fees. See BAUER, *supra* note 3, at 3-5, 9.

134. See *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274 (5th Cir. 2009), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010); *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1237 (11th Cir. 2002).

135. See *Castellanos-Contreras*, 576 F.3d at 280; *Ariagga*, 305 F.3d at 1237.

136. *Ariagga*, 305 F.3d at 1235 (citing 20 C.F.R. § 655.103(b) (2010)). The Code contains a similar provision for H-2B workers. 20 C.F.R. § 655.22(d) (“During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations.”).

137. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (involving inquiry into applicability of the Fair Labor Standards Act to undocumented workers). Somewhat ironically, the Fifth Circuit dealt with this question more than two decades ago. See *id.* “An employee is [defined under the FLSA as being] ‘any individual employed by an employer.’” *Id.* (quoting 29 U.S.C. § 203(e)(1) (2006)).

treras court held that H-2B workers were not entitled to any reimbursement for pre-employment expenses because the regulations required that they pay for their visa and inbound transportation.¹³⁸ This was a similar argument to one advanced by the Growers in *Arriaga*.¹³⁹ Under H-2A regulations, any worker who remains on the job for fifty percent of the contract period must be reimbursed for their inbound-travel expenses.¹⁴⁰ However, whenever employment statutes overlap, the Supreme Court has held that the higher requirement is the proper standard.¹⁴¹ It may seem like splitting hairs, but in this instance it makes logical sense that, from the workers perspective, a statute requiring employees to be reimbursed in their first week of work is a significantly higher standard than one which requires that they be reimbursed following completion of fifty percent of the contract period. Taking it one step further, since the regulations require H-2B workers to pay their own visa and travel expenses without any indication that these fees are to be reimbursed, a statute that says wage deductions must be reimbursed clearly provides the higher standard.

Employers could argue that application of the FLSA only operates to circumvent the regulations; forcing employers to reimburse for transportation in the first week is bad policy because the employer surrenders this money without guarantee that the worker will remain in their employ.¹⁴² This argument is, however, not compelling and is, as the court in *Arriaga* found, devoid of any legal merit.¹⁴³ As mentioned above, the Supreme Court has clearly stated, “when employment statutes overlap, [courts] are to apply the higher requirement unless the regulations are mutually exclusive.”¹⁴⁴ Here, in the case of wage deductions, the FLSA provides

138. *Castellanos-Contreras*, 622 F.3d at 400, 402-03 (noting a distinction in “regulatory regime[s]” for H-2A and H-2B workers). The Court stated that recent changes in the DOL’s interpretation of its rules could not be applied “retroactively” since the result would be to impose “new and unanticipated obligations . . . [on Decatur] without notice or an opportunity to be heard.” *Id.* at 401 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974)).

139. *Arriaga*, 305 F.3d at 1235 (“According to the Growers, the FLSA analysis should be guided by the H-2A regulations.”).

140. See 20 C.F.R. § 655.104(h)(1) (“[I]f the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed to the employer’s place of employment.”).

141. See *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950).

142. *Arriaga*, 305 F.3d at 1235, 1237.

143. *Id.* at 1235.

144. *Id.*

the higher requirement and these two differing standards are not mutually exclusive.¹⁴⁵ The primary and fundamental purpose of the FLSA is to protect workers;¹⁴⁶ and in order to do that, it requires, among other things, employees be reimbursed within the week that the deductions occurred.¹⁴⁷ Though the distinction might be subtle, from the workers' perspective, reimbursement in the first week of employment is the higher standard.

By finding that H-2B workers are not entitled to reimbursement for any of these fees, courts are subjecting a class already afforded less protection to further abuse. The question in this instance should not focus on whether the regulations require reimbursement, but instead on whether the expenses are themselves business expenses. The argument coming out of *Castellanos-Contreras* seems to be that the H-2B regulations *imply* that these expenses more properly belong to the employee.¹⁴⁸ However, the FLSA says that if it is a *business expense* that is shifted from the employer to the employee, it violates the act.¹⁴⁹ So then, if these fees are in fact business expenses, the FLSA applies and since the FLSA carries the higher requirement in this instance, it and not the regulations should be the controlling law.

Since the FLSA applies to both H-2A and H-2B workers, and courts are required to apply the higher standard, the question of whether these payments are reimbursable turns on whether these fees¹⁵⁰ constitute an impermissible deduction in wages,¹⁵¹ and if so, whether they violate the FLSA?

145. *See id.* at 1235-36.

146. 29 U.S.C. § 202 (2006); *see Powell*, 339 U.S. at 509-10 (“In this Act, the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.”). For further discussion and analysis see generally Bruce Goldstein, Marc Linder, Laurence E. Norton II, & Catherine Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1087-88 (1999).

147. *Arriaga*, 305 F.3d at 1235, 1237.

148. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400 OR 403 (5th Cir. 2010) (en banc).

149. 29 C.F.R. § 531.35 (2010); *Castellanos-Contreras*, 622 F.3d at 400-01 (finding that “[Fifth Circuit] precedents look to the nature of the disputed expenses,” and citing *Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972), which “ask[ed] whether an act tended to shift employer expenses”).

150. For purposes of this Note point-of-hire expenses are defined as: travel, visa, and recruitment expenses.

151. These types of deductions are considered “de facto” wage deductions. *See Arriaga*, 305 F.3d at 1237 (“The costs in dispute are de facto deductions which, if not

C. *These Fees are Impermissible Wage Deductions*

Before analyzing whether the fees are in fact wage deductions, it is important to illustrate just how expenses characterized as being primarily for the benefit of the employer would violate the FLSA’s minimum wage requirement, something that can be done through a useful hypothetical created by the *Arriaga* court. The hypothetical assumes the FLSA minimum wage rate to be \$5.15 per hour.¹⁵²

Suppose a worker is required to [purchase his own] work tools, which cost \$100. In his first workweek, he works 40 hours at a rate of \$7 per hour. If only given pay for the hours worked, which would be \$280, the FLSA would be violated. This is so because the cost of the tools, which has been imposed on the worker prior to employment, reduces the wages to \$180; when \$180 is divided by 40 hours, the hourly rate drops below the minimum wage of \$5.15. However, the FLSA does not require the employer to add the cost of the tools onto the regular wages, but only to reimburse the worker up to the point that the minimum wage is met. To satisfy the FLSA, the employer would need to pay this worker \$306 the first workweek: \$100 for the tools plus \$206 (40 hours multiplied by \$5.15).¹⁵³

1. The Fees Constitute a Business Expense that is Improperly Shifted to the Employee

An employee’s wages¹⁵⁴ must be received unencumbered.¹⁵⁵ In other words, any time an employer deducts a portion of the

permissible, drove the Farmworkers’ pay below the FLSA minimum wage.”). “De facto” is defined as: “Actual; existing in fact; having effect even though not formally or legally recognized.” BLACK’S LAW DICTIONARY 479 (9th ed. 2009).

152. *Arriaga*, 305 F.3d at 1237 n.11.

153. *Id.*

154. The Fair Labor Standards Act does not specifically define what a “wage” is, but does discuss what may or may not be included. See 29 U.S.C. § 203(m) (2006) (stating that wages are not restricted to cash remuneration, but that “board, lodging, or other facilities” may, where appropriate, be included). The Department of Labor’s interpretation of the Fair Labor Standards Act states that wage payments must be in either cash or its equivalent. See 29 C.F.R. § 531.35 (2010). There is a federal definition of wages found in Title 42 of the United States Code. Here wages are defined to “includ[e] the cash value of all remuneration.” See 42 U.S.C. § 409(a) (2006). The DOL’s Bureau of Labor Statistics cites the Occupational Employment Statistics definition of wages: “straight-time, gross pay, exclusive of premium pay.” *BLS Information: Frequently Asked Questions*, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, http://www.bls.gov/dolfaq/bls_ques20.htm (last visited Apr. 21, 2011) (using the definition of wages employed by the Occupational Employment Statistics survey, which gathered employment statistics for over 800 different occupations including various low-skilled agricultural and non-agricultural jobs).

155. See 29 C.F.R. § 531.35.

worker's pay or the employee spends their own money for something that is in fact a business expense,¹⁵⁶ that amount becomes money owed to the employee. Whatever wages the employee receives are encumbered because they, by virtue of the debt, cannot walk away "free and clear" with all they were owed.¹⁵⁷ In this instance, "failure to pay . . . pre-employment expenses encumber[] . . . guest workers' wages, so that [the employer does] not pay the wages 'finally and unconditionally or free and clear.'"¹⁵⁸ Therefore, using the Fifth Circuit's words, all wages must be "free and clear" and

cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally. . . . [These] requirements . . . [are] not . . . met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee.¹⁵⁹

Addressing the issue of when an employee-incurred "kick-back" occurs, the *Castellanos-Contreras* court found that, while not defined in the regulations, Fifth Circuit precedent recognizes a "kick-back" if the expense "tend[s] to shift part of the employer's business expense to the employees."¹⁶⁰

In a case involving an employer requiring his employees to make voluntary repayments of cash register shortages, the Fifth Circuit held that the employer was violating the FLSA because the requirement impermissibly shifted part of the employer's business expense to the employee and drove the employee's wages below the federal minimum wage requirement.¹⁶¹ The reason that this

156. Any expense "primarily for the benefit and convenience of the employer" is not "reasonable and may not therefore be [used] in computing wages." See 29 C.F.R. § 531.3(d)(1). For instance, if an employee is required to provide his own tools for work or is required to purchase a uniform, those expenses are primarily for the benefit and convenience of the employer and as such count as deductions in the employee's wages that must be reimbursed for purposes of the Fair Labor Standards Act. See 29 C.F.R. § 531.3(d)(2).

157. See 29 C.F.R. § 531.35.

158. *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 280 (5th Cir. 2009) (citation omitted) (internal quotation marks omitted), *aff'd en banc*, 622 F.3d 393 (5th Cir. 2010).

159. 29 C.F.R. § 531.35.

160. See *Castellanos-Contreras*, 576 F.3d at 290 (alteration in original) (citing *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972)).

161. *Mayhue's*, 464 F.2d at 1199; see also *Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1370 (5th Cir. 1973) (involving the deduction of employee wages to pay for a damaged company truck).

was impermissible was that, as the Fifth Circuit in *Mayhue* reasoned:

with the employee's financial picture burdened with the "valid debt" of the shortages, he is receiving less for his services than the wage that is paid to him. Whether he pays the "valid debt" out of his wages or other resources, his effective rate of pay is reduced by the amount of such debts. When it is reduced below the required minimum wage, the law is violated.¹⁶²

Similarly, workers, such as those employed by Decatur Hotels, paid an expense properly belonging to their employer out of their wages, effectively reducing the amount of their pay below the minimum wage requirement.¹⁶³ Because of this shift, the wages cannot be characterized as "free and clear"; workers are encumbered by a debt that should have, for all intents and purposes, been paid by their employer.¹⁶⁴ Put another way, because these costs belonged to the employer, and not the employee, their wages were not received "finally and unconditionally" as required by the regulations.¹⁶⁵

By focusing on the question of whether the regulations *allow* an H-2B worker to recover these costs, the court, in *Castellanos-Contreras* missed the opportunity to engage in a meaningful analysis of whether pre-employment expenses constitute an impermissible shift of the employer's business expense. Had it taken the time to address this question, rather than just dismissing it, the court might have provided a useful analysis as to whether these expenses could be characterized as de facto wage deductions. This is significant because if pre-employment expenses were characterized as de facto wage deductions then, for purposes of the FLSA, the payments would have to be reimbursed.¹⁶⁶

2. The "Other Facilities" Analogy

Another way of looking at pre-employment expenses is to look at the statutory exception of "other facilities."¹⁶⁷ The FLSA says

162. *Mayhue's*, 464 F.2d at 1199.

163. *See Castellanos-Contreras*, 622 F.3d at 396-97; 29 U.S.C. § 206 (2006).

164. *See* 29 C.F.R. § 531.35.

165. 29 C.F.R. § 531.35.

166. 29 U.S.C. § 203(m).

167. *See* 29 U.S.C. § 203(m); *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 279 (5th Cir. 2009), *aff'd en banc*, 622 F.3d 393 (5th Cir. 2010) (discussing the workers' argument that "in an inverse way" the expenses can be "liken[ed]" to "other facilities").

that all employees must receive remuneration in cash, or the cash value of some other remuneration such as “board, lodging, or ‘other facilities.’”¹⁶⁸ This means an employer can meet his obligation by providing the employee with, for example, free lodging provided the cash value of that lodging, in addition to other remuneration, is equal to or greater than the minimum wage requirement.¹⁶⁹ Inversely, a worker who purchases from his own pocket an item belonging to the employer has furnished the employer with the cash value of that item to the detriment of his wages.¹⁷⁰ In its analysis, the Eleventh Circuit noted that “the cost of furnishing ‘facilities’ which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and *may not* . . . be included in computing wages.”¹⁷¹

Here, with regards to pre-employment point-of-hire fees, the employer is not providing the employee with something of benefit; the employee is not even getting something that benefits the employer. Rather, here the employee is furnishing something of primary benefit to the employer at the detriment of the employee’s own wages, with, according to the Fifth Circuit, no requirement that they be reimbursed.¹⁷² A result such as this is in opposition to the intended purpose of the FLSA.¹⁷³

Whether characterizing these expenses as a “kick-back” or arguing that they are analogous to “other facilities,” the result is the same. The employee is paying an expense that is primarily for the employer’s benefit; if that out-of-pocket expense drives his wages below the federal minimum wage requirement it violates the FLSA.¹⁷⁴

168. 29 U.S.C. § 203(m).

169. *Id.*

170. *Id.*; *contra Castellanos-Contreras*, 622 F.3d at 400-01 (rejecting this same argument brought by the workers).

171. *See Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002) (emphasis added) (quoting 29 C.F.R. § 531.32 (2010)).

172. *Castellanos-Contreras*, 622 F.3d at 400-01.

173. *See* 29 U.S.C. § 202 (finding that “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” negatively affects commerce).

174. *See Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972).

3. These Expenses can be Characterized as Costs Arising From the Employment Itself

The *Arriaga* court articulated, in its analysis, the key to identifying wages: “When evaluating expenses that are directly or indirectly related to employment,” a distinction is made between “those costs arising from the employment itself and [costs associated with] the course of ordinary life.”¹⁷⁵ Since violations of the FLSA are calculated and reviewed on a work week-to-work week basis, anything that operates to drive an employee’s weekly wages below the minimum wage requirement violates the FLSA.¹⁷⁶ This has the effect of protecting workers from improper deductions made during the course of every individual work week by affording them an immediate remedy. It also serves to further the overarching purpose of the FLSA, which is to protect a class of workers susceptible to abuse.¹⁷⁷

While the “other facilities” language applies to items provided by the employer to the employee, it may be helpful in determining what types of expenses are considered as arising out of the employment or, in other words, primarily benefiting the employer. In *Schultz v. Hinojosa*, several employees sued for back wages and overtime pay under the Fair Labor Standards Act.¹⁷⁸ There, the workers, who were slaughterers by trade, were furnished with necessary tools such as butcher’s knives and honing steel, along with appropriate clothing.¹⁷⁹ Hinojosa, the employer, deducted the costs of furnishing these items from the employees’ wages, arguing that they were “other facilities” within the meaning of § 203(m) of the FLSA.¹⁸⁰ According to the FLSA, items furnished that are found to be “primarily for the convenience or benefit of the employer” are not “other facilities” within the meaning of § 203(m) and may not be deducted.¹⁸¹ Finding the deductions improper, the Fifth Circuit “conclude[d] that as used in the statute, the words ‘other facilities’ [were] to be considered as being in *pari materia*¹⁸² with the

175. *Ariagga*, 305 F.3d at 1242.

176. *Id.* at 1237; see 29 C.F.R. § 776.4(a) (“The workweek is to be taken as the standard in determining the applicability of the Act.”).

177. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945).

178. *Shultz v. Hinojosa*, 432 F.2d 259, 260-61, 267 (5th Cir. 1970).

179. *Id.* at 266.

180. *Id.* at 267.

181. See *id.*; 29 U.S.C. § 203(m) (2006).

182. *In pari materia* means “[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed to-

preceding words ‘board and lodging.’”¹⁸³ Under that analysis, any costs associated with importing foreign workers should be characterized as primarily benefiting the employer.¹⁸⁴ As such, these costs, which bear no resemblance to “board or lodging,” if paid by the worker, act as de facto wage deductions and are impermissible under the FLSA.¹⁸⁵

The FLSA does not expressly define what constitutes “other facilities,” but the “DOL has promulgated regulations dedicated to [the] term . . . identify[ing] circumstances when an employer may claim a wage credit or deduction.”¹⁸⁶ For purposes of the FLSA wages are defined as “includ[ing] the reasonable cost . . . to the employer of furnishing [an] employee with board, lodging, or other facilities, if [the] board, lodging or other facilities are customarily furnished by [an] employer to his employees.”¹⁸⁷

The list of items that are considered wages includes items such as housing, food, clothing, meals, and other household effects.¹⁸⁸ While this list is not exhaustive, it does appear to have a common thread. Applying the Eleventh Circuit’s analysis for evaluating expenses, these expenses all appear more closely associated with expenses arising out of the course of ordinary life, as opposed to expenses that are borne from the employment itself.¹⁸⁹ The Eleventh Circuit, citing the Code of Federal Regulations, stated that if

gether, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” BLACK’S LAW DICTIONARY 862 (9th ed. 2009).

183. *Shultz*, 432 F.2d at 267.

184. *See id.*; 29 C.F.R. § 531.35 (2010).

185. *Schultz*, 432 F.2d at 267.

186. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F. 3d 1228, 1236 (11th Cir. 2002); *see also* 29 C.F.R. § 531.32. Section 531.32 defines “other facilities” to “be something like board or lodging” including:

[m]eals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries . . . ; fuel . . . , electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees *between their homes and work where the travel time does not constitute hours worked compensable under the Act* and the transportation is not an *incident of and necessary to the employment*.

Id. (emphasis added).

187. 29 U.S.C. § 203(m) (2006).

188. 29 C.F.R. § 531.32(a).

189. *See Arriaga*, 305 F.3d at 1236-37.

an expense can be characterized as “an incident of and necessary to the employment” it could not be considered as “other facilities.”¹⁹⁰

Because they are an incident of and necessary to employment, inbound transportation expenses are different from commuting to and from work. The distinction, drawn by the *Arriaga* court, is that, for purposes of section 531.32 of Title 29 of the Code of Federal Regulations, commuting expenses are closer in relationship to “board and lodging” than other transportation expenses, which are an incident of and necessary to the employment.¹⁹¹ No one benefits from the guest worker program if the employee remains on foreign soil. Because of this, transportation expenses are more analogous to tools, the cost of which ordinarily belongs to the employer, and not something like housing, which does not, normally, have a readily discernable connection with work. Similarly, it is necessary, for employment purposes, to obtain a visa in order to legally enter and work in the United States.¹⁹² This requirement, a condition that, if not met, would result in the worker being denied entry into the United States, also seems more closely associated with the employment. The principle reason the worker is obtaining the visa is for employment and the worker is of no value to the employer if he cannot legally get to the jobsite to perform his duties. Travel and visa expenses, necessary for an employee to begin and continue work, are not the type of expenses that arise in the course of ordinary life; they are business expenses that are for the convenience and benefit of the employer. And recruitment expenses can easily be identified as primarily arising out of the employment itself, the very purpose of recruiting is to link prospective employers with available workers.

Framing it another way, a worker’s inbound transportation, visa, and recruitment fees do not look like the types of expenses that, if furnished by the employer, could be deducted from the employee’s wages under the FLSA.¹⁹³ That is because these expenses are an incident of and necessary to the employment itself.¹⁹⁴ Here,

190. *Id.* at 1237 (quoting 29 C.F.R. §§ 531.32(a),(c)). Citing two separate DOL regulations the Eleventh Circuit stated that “[t]ransportation costs are twice mentioned, and in each situation the regulation states that where such transportation is ‘an incident of and necessary to the employment’ it does not constitute ‘other facilities.’” *Id.* (citing 29 C.F.R. §§ 531.3 & 531.32).

191. *Arriaga*, 305 F.3d at 1242; 29 C.F.R. § 531.32(a).

192. 8 U.S.C. §§ 1201 & 1202 (2006).

193. *Id.*; 29 C.F.R. § 531.32.

194. This language is seen in the context of transportation to the jobsite. If an employer provides the employee with transportation to the jobsite, the cost of that

again, the employee has essentially furnished the employer with costs that are associated with the employment. These costs constitute an improper wage deduction and the FLSA says they must be reimbursed.¹⁹⁵

D. *Federal Law Requires the Reimbursement of Inbound Transportation, Visa, and Recruitment Expenses Because They Act as De Facto Wages*

Point-of-hire fees such as a worker's inbound transportation, visa, and recruitment expenses operate as de facto wage deductions because they are costs more closely associated with the employment itself. Logically, if the worker does not accept employment, they will not incur these costs.

The primary purpose of securing inbound transportation and obtaining a visa is for the employment itself. These are not expenses that the worker would likely incur in the ordinary course of life, and as such, under an *Arriaga* analysis these costs more appropriately belong to the employer. Further, a worker's visa is attached to his employer.¹⁹⁶ If the employment is terminated, the visa is cancelled and the worker repatriated.¹⁹⁷ Applying the ordinary living expense test, the Eleventh Circuit held that it is the "employer[s] deci[sion] to utilize the . . . program" that gives rise to these costs "and . . . is therefore incumbent upon the employer to pay them."¹⁹⁸

The same is true for recruitment fees; after all it is the employer who initiates the process by employing the recruiter to find labor. Because the employer needs labor, workers are charged exorbitant fees by recruiters. The point being that if there was no employment need, then, for purposes of the guest worker program, there would be no recruitment fees. And, even if assumed, for sake of argument, that the fees could reasonably be charged to either the

transportation may not be deducted from an employee's wages even though the employee receives a benefit. By virtue of the fact that transportation is incident of and necessary to the work itself, the primary beneficiary is the employer. See 29 C.F.R. § 531.32.

195. 29 C.F.R. § 531.32.

196. 8 U.S.C. § 1184. There are, obviously, other ways for immigrants and non-immigrants to obtain visas for entrance into the United States; for purposes of this paper the focus is on temporary non-immigrant workers whose access is directly connected to their employment. See *id.*

197. *Id.*

198. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F. 3d 1228, 1244 (11th Cir. 2002).

employee or the employer, the principle purpose of the FLSA is to protect workers from exploitation.¹⁹⁹

Recruitment fees also differ fundamentally from “other facilities” in that these are fees that seem to arise from the employment itself. Housing, for instance, can be said to be an “other facility” because it is something a worker would seek out regardless of employment; its primary benefit is to the employee. On the contrary, no worker, in the course of ordinary life, seeks to put up the deed to their house in order to pay a recruiter an exorbitant fee *unless it means that they will get the job*. Again, using the Fifth Circuit’s analysis, if “other facilities” are read in *pari materia* with board and lodging then recruitment fees “differ[] in all fundamental characteristics from” such.²⁰⁰

While one could argue that seeking employment is in line with activities arising out of the course of ordinary life, that analysis fails here for the following reason: the employer, by virtue of accessing the program, is admitting a need for workers, workers that cannot be obtained without the assistance of recruiters. It is debatable whether the employee benefits from this employment experience.²⁰¹ Although recent reports such as those released by the Southern Poverty Law Center would indicate employees do not benefit, there is no doubt that the employer benefits. For the worker, the fee is an incident of and necessary to the employment and as such should be reimbursable under the FLSA.

E. *Castellanos-Contreras: An Argument that Inbound Transportation and Visa Expenses Are the Responsibility of the Employee and Why that Does Not Work*

It is of little surprise that the argument brought by the guest workers in *Castellanos-Contreras* was “that they [were] entitled to reimbursement because, under 29 U.S.C. § 203(m), the expenses they incurred [were] *de facto* deductions from cash wages received for their first week of work, [in effect] leaving [them] a [cash] bal-

199. 29 U.S.C. § 201.

200. *Arriaga*, 305 F.3d at 1243-44; *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 283 (5th Cir. 2009), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010).

201. BAUER, *supra* note 3, at 19; *Castellanos-Contreras*, 622 F.3d at 400; *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *44-45 (E.D. La. Jan. 24, 2006); *see also* *De Luna-Guerrero v. N.C. Grower’s Ass’n, Inc.*, 338 F. Supp. 2d 649, 657, 661 (E.D.N.C. 2004). *See generally* *Rivera v. Brickman Group, LTD.*, No. 05-1518, 2008 WL 81570, at *7-9 (E.D.Pa. Jan. 7, 2008).

ance owed them by [their employer].”²⁰² This is the same argument brought by the workers in *Arriaga*.²⁰³ Despite the fact that this argument was successful in *Arriaga*, and was a winner for H-2B workers throughout the lower courts,²⁰⁴ the Fifth Circuit, citing its previous holding in *Donovan v. Miller Properties, Inc.* rejected this argument.²⁰⁵

In contrast, and in the context of H-2B workers, the *Castellanos-Contreras* court, addressing the question of inbound transportation expenses, found guidance in the INA and H-2A regulations.²⁰⁶ “Under the [INA], an H-2B guest worker’s *outbound* transportation expenses sometimes belong to the employer [and] [u]nder [H-2A regulations], an H-2A guest worker’s inbound transportation expenses sometimes belong to the employer.”²⁰⁷ This, the court reasoned, coupled with the fact that “[n]o provision . . . requires an employer to [pay] an H-2B guest worker’s inbound transportation expenses . . . [is] indicative” of Congress’s desire to assign these inbound transportation costs to the H-2B worker.²⁰⁸ Since Congress took the time to expressly address an H-2B worker’s outbound transportation expenses and the United States Customs and Immigration Services in their regulations expressly address an H-2A worker’s inbound transportation expenses, Congress’ silence on the question of an H-2B worker’s inbound transportation indicates a preference that these costs remain the responsibility of the worker.²⁰⁹ The court employed similar logic when it came to visa

202. *Castellanos-Contreras*, 576 F.3d at 279. The workers argued, unsuccessfully, that these pre-employment expenses (inbound travel, visa, and recruitment) are akin to “employer-furnished ‘facilities,’ such as room and board,” which are permissibly deducted from an employee’s wages because they confer a benefit to the employee. Inversely, the employees argued, these costs inferred a benefit on the employer and should thus be reimbursed. *Id.*; see also 29 U.S.C. § 203(m).

203. See *supra* notes 97-98 and accompanying text.

204. *Recinos-Recinos*, 2006 U.S. Dist. LEXIS 2510, at *44-45; see also *De Luna-Guerrero*, 338 F. Supp. 2d at 661-63. See generally *Rivera*, 2008 WL 81570.

205. See *Castellanos-Contreras*, 576 F.3d at 280; *Donovan v. Miller Props., Inc.*, 711 F.2d 49, 50 (5th Cir. 1983) (deciding the question of whether “other facilities” provided by the employer need to be the “employee’s choice” in order for the employer to properly deduct the costs from wages). The court in *Donovan* held that “employee choice” had no bearing on whether or not the employer could deduct the costs under 29 U.S.C. § 203(m). *Donovan*, 711 F. 2d at 50; see 29 U.S.C. § 203(m).

206. *Castellanos-Contreras*, 576 F.3d at 282.

207. *Id.*

208. *Id.*; see 8 U.S.C. § 1184(c)(5)(A) (2006); 20 C.F.R. § 655.102(b)(5)(i) (2010).

209. *Castellanos-Contreras*, 576 F.3d at 280-83. The Department of Labor has codified this reimbursement rule in the Code of Federal Regulations. See 20 C.F.R. § 655.102(b)(5)(i).

expenses, holding that they, like inbound transportation, are costs that more appropriately belong to the employee and are not the responsibility of the employer.²¹⁰ In reaching this conclusion, the court placed great emphasis on the fact that employers are responsible for fees associated with the application to sponsor H-2B workers,²¹¹ while citing the Code of Federal Regulations²¹² in concluding that the visa expenses themselves are more properly borne by the employee.²¹³

When juxtaposing the *Arriaga* and *Castellanos-Contreras* decisions, the following result is reached: a worker, employed for agricultural employment, *must* be reimbursed for their inbound transportation and visa expenses within their first week of work, regardless of whether or not they ever complete any more of their contractual obligation. Conversely, a worker employed to work in a non-agricultural job, will *never* be entitled to recoup these costs, even if they complete their contractual obligation in its entirety. A result like this is not only unfair to the H-2B worker, but it is also unfair to the agricultural employer, who will have to pay transportation and visa expenses for each and every one of their employees, while their non-agricultural counterparts will never bear these costs. If the rationale for greater regulation of the agricultural program²¹⁴ is the fact that historically these workers have been subject to abuse, then, given recent reports of abuse of non-agricultural workers,²¹⁵ H-2B workers should now be recognized as needing the same types of legal protections. In order to ensure this, the analysis applied to transportation costs by the Eleventh Circuit in *Arriaga* should extend not only to H-2A workers, but to H-2B workers as well. In fact, prior to the Fifth Circuit's decision in *Castellanos-Contreras*, a court for the Eastern District of Louisiana held that "[t]he *rationale* employed by the *Arriaga* court is applicable to the H-2B program. Plaintiffs in this case correctly noted that *Arriaga* is

210. *Castellanos-Contreras*, 576 F.3d at 280.

211. *Id.*; see 8 C.F.R. § 214.2(h)(2)(i)(A) (2010) (mandating that in order to become a qualified H-2B visa sponsor, certain forms and filing fees must be submitted).

212. 22 C.F.R. § 40.1(l)(1) (2010). This section of the Code requires "a nonimmigrant visa applicant [to] submit for formal adjudication by a consular officer . . . with any required supporting documents [as well as] the requisite processing fee or evidence of the prior payment of the processing fee when such documents are received and accepted for adjudication by the consular officer." *Id.*

213. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400 (5th Cir. 2010) (en banc); 8 C.F.R. § 214.2(h)(2)(i)(A); 22 C.F.R. § 40.1(l)(1).

214. See generally *Martinez v. Reich*, 934 F. Supp. 232, 237-38 (S.D. Tex. 1996).

215. See generally BAUER, *supra* note 3, at 13.

a FLSA case which does not hinge on any differences between the H-2A and the H-2B guest-worker programs.”²¹⁶

F. *An Additional Requirement for Recruitment Fees*

In order for recruitment fees to be reimbursed, workers may need to meet an additional requirement. The court in *Arriaga* held that recruitment fees might be reimbursable under the FLSA if the workers could establish that there was apparent authority created in the recruitment agency.²¹⁷ On February 12, 2010, the DOL published a new final rule, which requires employers to contractually forbid recruiters and their agents from accepting fees as a condition of employment.²¹⁸ The question with recruitment fees would seem to turn less on whether the fees can be classified as wage deductions, and more on whether apparent authority can be established to hold the employer liable.²¹⁹

The Restatement (Third) of Agency defines “apparent authority” as: “the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”²²⁰ Employers rely on foreign recruiters to supply their labor force. Prospective employees trust these recruiters to link them with good jobs. The principal’s manifestation, in this instance is to find and hire workers, and the worker has reason to believe that the recruiter has authority to act on behalf of the principal. The DOL has expressed an intention to protect workers from being forced to pay exorbitant recruiting fees.²²¹ They have done this by requiring, in their final rule, employers to contractually forbid any recruiter or their agent from accepting a fee as a condition of employment.²²²

216. *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist LEXIS 2510, at *44-45 (E.D. La. Jan. 24, 2006); *see also* *De Luna-Guerrero v. N.C. Grower’s Ass’n, Inc.*, 338 F. Supp. 2d 649, 656-57 (E.D.N.C. 2004). *See generally* *Rivera v. Brickman Group, LTD.*, No. 05-1518, 2008 WL 81570 (E.D.Pa. Jan. 7, 2008).

217. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1244-46 (11th Cir. 2002).

218. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010) (to be codified at 20 C.F.R. pt. 655.135).

219. *Id.* at 6926.

220. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).

221. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. at 6925.

222. *Id.* at 6925-26. The new rule, published February 12, 2010, requires employers to contractually forbid all recruiters *and* their agents from accepting a fee as a condition of employment. *Id.* at 6883, 6925-26. The new rule goes on to state that this requirement must be bona fide and “evidence showing that the employer paid the re-

That should not mean that employers are exempted from responsibility simply because he or she followed guidelines and contractually forbade their recruiters from receiving this fee. The Tenth Circuit has “held that a principal may be liable for acts of an agent that are expressly contrary to instructions if the third party has a reasonable belief that the agent is authorized.”²²³ Purely from a policy standpoint this requirement, that purports to be a protection for the workers, cannot in practical effect provide a shield from liability for employers.

IV. THE FUTURE OF THE GUEST WORKER PROGRAM

A. *Congress and the DOL’s Lack of Clarity Needs to be Addressed*

Given the recent lack of clarity by the DOL, one should not assume that their opinions are controlling. In fact, administrative agencies opinions, findings, and rulings can be relied on for their persuasive value, but nothing more.²²⁴ Analyzing the arguments brought forth in *Arriaga*, the Eleventh Circuit found that Opinion Letters²²⁵ written by the DOL, under a *Skidmore* analysis, carried some weight, but the amount of “weight . . . in a particular case . . . depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²²⁶

cruiter no fee, or an extraordinarily low fee, or continued to use a recruiter about whom [they] had received numerous credible complaints” may be used to show that the contractual requirement was not in fact bona fide. *See id.* at 6925-26.

223. Andrea L. Schmitt, Comment, *Ending the Silence: Thai H-2A Workers, Recruitment Fees, and the Fair Labor Standards Act*, 16 PAC. RIM L. & POL’Y J. 167, 183 (2007) (citing *Phillips Petroleum Co. v. Buster*, 241 F.2d 178, 183 (10th Cir. 1957)). *Phillips* held that even though an agent failed to follow company policy, the fact that the company held him out as their agent, “with apparent authority to act for it [with] respect to ordinary local matters,” was sufficient to hold the principal company liable. *Phillips Petroleum Co.*, 241 F.2d at 183.

224. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1238 (11th Cir. 2002) (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

225. These opinion letters expressed the DOL’s position, at the time of *Arriaga*, that any deduction cutting into the minimum wage for the transportation of workers from their place of origin to their place of employment are primarily for the benefit of the employer and as such violate the FLSA. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 280-81 (5th Cir. 2009) (citing U.S. DEP’T OF LABOR, OP. LTR. OF THE WAGE-HOUR ADM’R No. 1139, 1990 DOLWH LEXIS 1, at *3 (June 27, 1990)), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010).

226. *Arriaga*, 305 F.3d at 1238 (quoting *Skidmore*, 323 U.S. at 140).

In *Skidmore v. Swift*, the Supreme Court addressed the issue of “what, if any, deference courts should [give] to [an] Administrator’s conclusions.”²²⁷ “[T]he rulings, interpretations and opinions of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which [the] courts . . . may properly resort for guidance.”²²⁸ *Skidmore* involved firefighters who were required by their employers to sleep on the premises.²²⁹ The firefighters argued that because they were required to sleep on the premises, those hours should be counted as work hours for purposes of the FLSA.²³⁰ Despite drawing a distinction between the role of the courts and that of an administrative agency, the Supreme Court articulated in *Skidmore* that “while not controlling upon the courts by reason of their authority,” under the FLSA, the “opinions of the Administrator . . . do constitute a body of . . . informed judgment to which courts . . . may properly resort for guidance.”²³¹

Because they promulgated the rules, the DOL’s interpretation “constitutes a body” that should be consulted for guidance. Recently, the DOL reversed their position on point of hire transportation fees stating that “[t]he cost[] of relocation to the site of the job opportunity generally is not an ‘incident’ of an H-2B worker’s employment within the meaning of 29 C.F.R. 531.32, and is not primarily for the benefit of the H-2B employer.”²³² Then, in March of 2009, the DOL stated that “[the] issue warrants further review . . . and the [December 2008] interpretation may not be relied on as a statement of agency policy. . . .”²³³ In their Notice of Proposed Rulemaking Changes, published in the Federal Register in September of 2009, the DOL ducked the issue by first by mentioning it in

227. *Skidmore*, 323 U.S. at 139 (involving the question of whether or not tests developed by DOL for purposes of determining if an employee’s time spent sleeping on the premises, as required by his employer, could be characterized as work time, should be treated with deference by the courts).

228. *Arriaga*, 305 F.3d at 1238 (quoting *Skidmore*, 323 U.S. at 140).

229. *Skidmore*, 323 U.S. at 139.

230. *Id.*

231. *Id.* at 140.

232. *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 281 (5th Cir. 2009) (second alteration in original), *aff’d en banc*, 622 F.3d 393, 400 (5th Cir. 2010); Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78020, 78040 (Dec. 19, 2008).

233. Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13261, 13262 (Mar. 26, 2009).

an H-2A context only, and second, stating simply that the FLSA operates independently of the H-2A program.²³⁴

Essentially, because Congress has been silent on the issue of point of hire fees, the courts and the DOL have been left to offer varying interpretations. The result is fundamentally unfair in that it expects the worker to shoulder all of the costs associated with coming to the United States to help alleviate our labor shortages. The INA was established for two principle purposes: first, to ensure a sufficient labor force of ready, able, willing, and qualified workers; and second, to prevent the potential of United States workers suffering adverse effects due to the presence of undocumented workers.²³⁵ Since the welfare and well being of the foreign workers is not an explicit purpose of the Act it is fair to say that these workers, who are economically necessary, are, to put it mildly, at a disadvantage.

The hotel workers in *Castellanos-Contreras* each incurred between \$3,000 and \$5,000 worth of debt prior to even starting work.²³⁶ Their wages ranged between \$6.02 per hour to \$7.79 per hour, and they were not reimbursed for any of their point of hire expenses.²³⁷ In most cases, low and unskilled workers, who are willing to leave their families and countries of origin in order to find life-subsistent jobs, are not the kind of workers who can readily afford to pay \$5,000 out of pocket. Because they cannot afford these costs, they often have to take out a loan, at an exorbitant interest rate, in order to obtain a visa, secure transportation to the job site, and pay their recruiter.²³⁸

B. *Even if the Fees are Reimbursed, Problems Persist*

A problem inherent in this analysis is that by characterizing these payments as de facto wage deductions, the worker may still be

234. Temporary Agricultural Employment of H-2A Aliens in the United States, 74 Fed. Reg. 171, 45,906, 45,915 (proposed Sept. 4, 2009). The DOL noted:

language has been added to place employers on notice that they may be subject to the FLSA that operates independently of the H-2A program and imposes requirements relating to deductions from wages. In providing notice to employers of companion FLSA requirements, the Department hopes to assure better protection of U.S. and foreign workers.

Id.

235. See 8 U.S.C. § 1188(1)(A)-(B) (2006).

236. *Castellanos-Contreras v. Decatur Hotels, LLC*, 576 F.3d 274, 278 (5th Cir. 2009), *aff'd en banc*, 622 F.3d 393, 400 (5th Cir. 2010); see BAUER, *supra* note 3, at 10.

237. *Castellanos-Contreras*, 576 F.3d at 278.

238. See Ashby, *supra* note 5, at 904-05.

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subjected to loss of wages owed due to out-of-pocket expenses that primarily benefit the employer. This will happen where, as in most cases, a worker is contractually scheduled to earn more per hour than the minimum wage. In these cases, under an FLSA analysis, the worker can only recover unpaid wages up to the amount set out in the statute. Presumably, then, the worker would lose whatever he was contractually scheduled to earn above the minimum wage.²³⁹

A larger problem is that there is no good way of ensuring that employers will ever reimburse these costs. If an employer decides not to reimburse the costs, the worker’s only recourse would be to seek relief in the courts. Of course, since the worker is bound to their United States employer,²⁴⁰ this puts them in the precarious position of having to decide whether to move forward with a lawsuit and risk having their visa cancelled, or to continue to labor under massive debt.

One way to deal with this would be to require an upfront reimbursement.²⁴¹ Proponents of this position assert that “[a]lthough *Arriaga*-type reimbursement is the law in a number of circuits, it is frequently ignored, and some immigrant rights advocates note that temporary guest workers are rarely, if ever, paid properly even under [the] clearly codified law such as the minimum wage.”²⁴² The issue is compounded for H-2B workers who are not even entitled to free legal services,²⁴³ making it less likely that they will bring an *Arriaga*-type action.²⁴⁴ One author goes on to propose the development of a reimbursement structure where upfront payments for transportation, visa, and recruitment expenses would be required prior to attaining a labor certification from the DOL.²⁴⁵ These funds could be estimated, and the fees paid by the employer held in a government escrow account “through which certified checks would be issued to workers upon [their] arrival at the worksite.”²⁴⁶

239. See 20 C.F.R. §§ 655.10-6.55.11 (2010) (requiring employers to obtain a prevailing wage rate prior to seeking labor certification).

240. 8 U.S.C. § 1184.

241. Ashby, *supra* note 5, at 916-27 (arguing that requiring upfront reimbursement would prevent workers from falling into indentured servitude).

242. *Id.* at 916.

243. *Temporary Forestry Workers Now Eligible for LSC-Funded Legal Services*, GEORGIAADVOCATES.ORG (Jan. 11, 2008), http://www.georgiaadvocates.org/news/article.176193-Temporary_Forestry_Workers_Now_Eligible_for_LSCFunded_Legal_Services.

244. Ashby, *supra* note 5, at 904 n.61.

245. *Id.*

246. *Id.*

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While this would certainly be an improvement over what is currently in place, it still requires the workers to make the initial payments. In most instances these workers will have to borrow the money, often at very high interest rates. A better solution would be to require the employer to directly pay all travel and visa costs, and, as has been suggested by some commentators, a fee for recruitment services.²⁴⁷ This would lock an employer into a recruiter, creating a vested interest on the part of the employer in ensuring that the recruiter does not improperly charge fees. It would also ensure that the recruiter has been paid for his services, making it less likely that they will break their contractual obligations by seeking payment from the actual workers. At the very least it is a way of making employers, who too often throw their hands up and claim lack of knowledge, accountable for the activities of the agencies they employ.

In addition, workers should be informed, in their native language, through whatever agency oversees the exportation of labor, that upfront, point-of-hire expenses are not their responsibility. The United States and sending countries need to create memoranda of understanding that create a governmental partnership aimed at mutually benefiting each other by ensuring that qualified workers receive fair protection and equal benefit of the law.

Travel and visa expenses, paid directly by the employer, could be secured by the government and transferred from one prospective employee to another in the event an employee does not work out. By putting the onus on the employer to pay these fees, they have a greater investment in these workers. Further, employers may be more likely to increase wages for domestic workers, making jobs more attractive to the United States labor force, since hiring foreign workers will cost them more money. Finally, and most importantly, this will help ensure that a class of people, ripe for abuse, are not plunged into forced labor situations where the debt they have accrued simply by seeking employment forces them to labor into subhuman conditions.

C. *Recent Attempts by Congress to Address the Issue*

In recent years, members of Congress have proposed legislation that, had it passed, may have positively impacted the guest

247. Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010) (to be codified at 20 C.F.R. pt. 655.135); Ashby, *supra* note 5, at 916-27.

worker program. For example, George Miller, the Chairman of the House Committee on Education and Labor, introduced the Indentured Servitude Abolition Act in 2007,²⁴⁸ a bill that would have required that the terms of employment be clearly and accurately disclosed to workers,²⁴⁹ in their native languages.²⁵⁰ Additionally, Chairman Miller's bill sought to outlaw what he termed "exorbitant" fees paid by workers to recruiters, force foreign labor recruiters to register with the DOL, grant the DOL the ability to exclude unscrupulous recruiters from participating in guest worker programs, and hold both recruiters and employers liable for violating any of the Act's provisions.²⁵¹

Also in 2007, Vermont Senator Bernie Sanders introduced a bill with the stated purpose of "increas[ing] the wages and benefits of blue collar workers by strengthening labor provisions in the H-2B program, to provide for labor recruiter accountability, and for other purposes."²⁵² The Increasing American Wages and Benefits Act²⁵³ (the Act) would have applied many of the protections specifically designated for H-2A workers to H-2B workers as well.²⁵⁴ Some of the proposed provisions included affording H-2B workers with transportation reimbursement,²⁵⁵ while also seeking to increase prevailing wage rates and authorizing the Legal Services Corporation to represent H-2B workers.²⁵⁶ The Act also marked an attempt to regulate international recruitment of guest workers

248. Comm. on Educ. and Labor, *Chairman Miller Introduces Bill to End Indentured Servitude in the U.S. and its Territories*, U.S. HOUSE OF REPRESENTATIVES (Mar. 20, 2007, 5:52 PM), http://www.house.gov/apps/list/speech/edlabor_dem/rel033007.html [hereinafter Comm. on Educ. and Labor].

249. *Id.*

250. Indentured Servitude Abolition Act of 2007, H.R. 1763, 110th Cong. § 2(a)(3) (1998) (seeking to require that workers be provided with information in their "native language," where "necessary and reasonable"). This bill "was introduced by California Representative George Miller in 2007 but never passed." Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 439 n.239 (2010). For more information see *Indentured Servitude Abolition Act of 2007*, OPENCONGRESS, <http://www.opencongress.org/bill/110-h1763/show> (last visited Apr. 21, 2011).

251. Comm. on Educ. and Labor, *supra* note 248.

252. Increasing American Wages and Benefits Act of 2007, S. 2094, 110th Cong. (2007).

253. *Id.*

254. *H-2B Legislation in the 110th Congress: Senator Sanders Introduces Legislation to Protect U.S. and H-2B Workers*, FARMWORKER JUSTICE, <http://www.farmworkerjustice.org/guestworker-programs/h-2b/153-h-2b-legislation-in-the0110th-congress> (last visited Apr. 21, 2011).

255. S. 2094 § 105(J).

256. *Id.* § 101(F).

by recruitment firms employed by United States businesses seeking employees.²⁵⁷ The bill never made it out of committee.²⁵⁸

CONCLUSION

Simply put, the United States economy has, and will continue to depend on the labor of foreign citizens. These men and women are, in many ways, the backbone of this great nation. They keep the economy moving by taking jobs that cannot be filled by American workers. In doing this, they are promised a better life, an opportunity to better their circumstances, an opportunity that they will not find in their home country. Yet, too many of them become victims, easy prey for unscrupulous recruiters who are only too willing to rob them of everything. Because they are poor, they are oftentimes forced to borrow in order to cover all of the fees necessary for them to attain employment. This debt forces them into a life of involuntary servitude. The system encourages this by forcing employees to bear the burden of these costs. It also encourages this by permitting employers to contract with recruiters with little, if any, government regulation. The employer is able to shield himself by, in effect, playing a game of “don’t ask and don’t tell”; so long as he is unaware of what is going on he escapes liability.

The FLSA requires an employee to receive his wages free and clear of deductions. If an employee has to shoulder the costs of their inbound transportation and visa attainment, along with paying a recruiting fee, these wages cannot be said to be free and clear because these costs operate as de facto wage deductions.²⁵⁹ The FLSA makes clear that any deductions that work to drive an employee’s wages below the minimum-wage requirement must be reimbursed within the week in which they occur.²⁶⁰ The best way to determine whether these costs are de facto wage deductions is to determine whether they are the type of cost that would arise in the course of ordinary life, or whether they are an incident of and necessary to employment. Because these expenses are primarily for the benefit and convenience of the employer, they are more properly characterized as being an incident of and necessary to employ-

257. *Id.*

258. Carr, *supra* note 250; Increasing American Wages and Benefits Act of 2007, S. 2094, 110th Cong. R

259. 29 C.F.R. § 531.35 (2010); *see also* Castellanos-Contreras v. Decatur Hotels, LLC, 576 F.3d 274 (5th Cir. 2009), *aff’d en banc*, 622 F.3d 393 (5th Cir. 2010); Arriaga v. Fla. Pac. Farms, LLC, 305 F.3d 1228 (11th Cir. 2002).

260. 29 U.S.C. § 206 (2006); 29 C.F.R. § 531.35.

ment. They are, for purposes of the FLSA, legally the responsibility of the employer, and as such, must be reimbursed to the employee within his first week of employment.

Unfortunately, it is not that simple. The United States guest worker program consists of two separate and unequal classifications. One group, the courts have held, is entitled to reimbursement for inbound transportation and visa expenses and that reimbursement is to take place in their first week of employment. This group may also be entitled to recover recruitment fees if they can establish apparent authority. The other group is entitled to nothing. America is often referred to as the land of opportunity. For these unskilled foreign workers, that reference will remain empty until real change is enacted.

The *Arriaga* principles should apply to both H-2A and H-2B workers alike. There are no valid reasons why one class of worker should be afforded protection and not the other. While that solution makes sense, it is not, by itself, enough. Simply reimbursing the worker will not prevent them from taking on the debt in the first place and from being preyed upon by unscrupulous recruiters. A better solution would be to require United States employers to directly pay for all inbound travel, visa, and recruitment fees for the workers. Asking those who are already poor to shoulder the burden of moving our economy forward is both impractical and wrong. Employment is not a benefit if it creates involuntary servitude. But the ability to have cheap labor is always beneficial and inbound transportation, visa, and recruitment expenses are necessary in order for foreign workers to labor in the United States.

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