H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers

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INTRODUCTION

Raji Patel is living the American Dream. Two years ago, he came to the United States from India and began working at Linko-Tech as a software engineer. The company recruited him under the H-1B visa program. Although he is working incredibly long hours and making less money than his co-workers, he is earning much more than he would in India. More importantly, Linko-Tech has been helping him apply for citizenship, and he believes that he will be able to become a citizen in the next few years. Although he feels somewhat isolated and has had a difficult time creating a life in the United States, he is looking forward to the next step in his journey.

Roger Greenman is not a happy man. He has been working in the IT Department at Nor Cal Electric for 30 years, long before it was even called “IT.” Back then, they were just the guys who knew a little something about computers. Recently, the executives at corporate sent a memorandum explaining that the IT Department work was going to be subcontracted to TechStaff. Roger and his colleagues are expected to train the TechStaff workers. Once the replacements are up to speed, the Nor Cal Electric workers
will be laid off. The severance package offered to Roger will depend, at least in part, on how well he trains his replacement.

Sanjiv Gupta is tired, scared and just wants to go home. He has been living in the “guest house” for six weeks waiting for a job. Eight people crammed together in a small apartment was not what he expected when he answered the ad to become a H1-B visa worker in America. He paid Sygate $3000 to get the visa and now the other workers in the guesthouse have told him that Sygate will take even more from his paycheck once he gets a job. He thought he had a job already lined up, but for now Sygate has told him to wait his turn and a placement will soon be available. He has been told to stay in the guesthouse and that he cannot return to India until he has completed the three years of work for which he contracted.

These three hypothetical workers, Raji, Roger and Sanjiv, are all victims of exploitation under the current H-1B visa system. An H-1B visa authorizes a noncitizen worker to immigrate to the United States and work for a specific period of time. Without the visa, that individual would not otherwise be allowed to immigrate and work in the United States. Significantly, under this program, the employer applies for the visa and sponsors the worker. If the worker is fired or the employer cancels the visa, the worker loses the legal right to be in the United States and must return home. This visa program, originally designed to bring highly skilled technical workers to the United States to meet gaps in the domestic workforce, has resulted in the exploitation of many high tech workers in the United States.

The current de facto administration of the H-1B visa system has created three categories of workers: the “pure H-1B”; the “outsourcing H-1B”; and the “body shop worker.” Each of these workers exists on a continuum of exploitation facilitated by the structure of the H-1B visa system. A pure H-1B, such as Raji Patel, arrives on a visa sponsored by the specific company for which he will work. The pure H-1B often finds himself working excessive hours for substandard pay and is afraid to protest the conditions for fear of being discharged and losing protection from deportation. The outsourcing H-1B arrives on a visa sponsored by an outsourcing company that has contracted to perform work at a company in the United States. These workers often displace existing U.S. workers, such as Roger Greenman, and work for less pay than the displaced workers work for. Finally, a body shop worker, such as Sanjiv Gupta, labors in an arrangement that exists outside the legal boundaries of the law. He arrives on a visa sponsored by a labor contractor or labor supplier. He often does not have a specific job waiting for him and sits on a metaphorical bench waiting for a job to arrive. The labor contractor often charges the body shop worker for the visa, houses him in deplorable conditions, charges him exorbitant service fees and constrains his ability to

1. The names of the workers and companies in these scenarios are all fictitious, though based on composites of the workers discussed throughout the article.
quit a job or to return home. Many of these exploitive practices can be challenged through better enforcement of the current visa law, through wrongful discharge lawsuits and through cases brought under the anti-trafficking laws.

However, even perfect enforcement of the current law and existing causes of action will not completely eradicate these practices because inherent in the H-1B program are systemic inequalities and subordinating structures that are modern manifestations of involuntary servitude, debt bondage or unfree labor. The current system creates a class of workers laboring beneath the floor for free labor because visa workers often lack the ability to protest unjust conditions or to quit. As a result, the system lowers the floor of labor protections for free, non-visa workers. Second, the visa sponsor, and not the worker, functionally owns and controls the worker’s labor. This system is reminiscent of labor ownership under antebellum slave codes. Third, the H-1B system is simply the most current example of commodified immigrant labor being exploited as part of a human supply chain on the basis of race, national origin and migrant status, a practice that began during slavery and continues today. Finally, this system prevents H-1B workers from becoming full members of the community, thereby denying them the capacity to improve their conditions. These root problems of inequality and exploitation can only be addressed by amending the current H-1B law and the current antidiscrimination statute.

The first section of this article describes the three different types of visa workers and the types of exploitation associated with each type. The second section of the article explains how the current structure creates a system of unfree labor that harms both visa and non-visa workers. In doing so, the section provides the moral and theoretical justifications for challenging this exploitation. Section three of the article describes the current legal challenges being brought under the visa laws and through independent causes of action. The final section suggests reforms to strengthen the current law and to attack the underlying system of unfree labor.

I.

2. “Free labor” and “unfree labor” in this context are not used to reflect the cost of labor to an employer. Instead, these terms refer to whether workers labor in conditions that include indicia of slavery or involuntary servitude. See, e.g., James Grey Pope, A Free Labor Approach to Human Trafficking, 158 U. PA. L. REV. 1849, 1850-51 (2010); Rebecca E. Zietlow, A Positive Right to Free Labor, 39 SEATTLE U.L. REV. 859, 860 (2016). The terms “free” and “unfree” labor have developed specific meanings within the growing body of literature on the contemporary use of the Thirteenth Amendment. A representative sampling of that literature can be found in Symposium, Thirteenth Amendment Symposium, 38 U. TOLEDO L. REV. 791 (2007); THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ed., 2010); Symposium, The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications, 112 COLUM. L. REV. 1447 (2012); Symposium, Thirteenth Amendment Symposium Through the Lens of Class and Labor, 39 SEATTLE U.L. REV. 659 (2016).
ONE PROGRAM-THREE WORKERS

The distinguishing feature between the three types of H-1B workers is the identity of the visa sponsor. Under the “pure” H-1B model, the visa is sponsored by the company where the employee is working. Under the “outsourcing” model, the visa is sponsored by a vendor that has a subcontract to perform work at a company. Finally, under the “body shop model,” the visa is sponsored by a labor contractor/supplier/agency. This section describes the process of obtaining a visa for each of these types of workers and the typical problems that result from their situations.

A. The “Pure” H-1B

1. Process

Raji Patel was thrilled when Linko-Tech told him that it had “won the lottery” and that they had received an H-1B visa for him to come work in the United States. He knew that not everyone who had a job lined up in the United States would get a visa, even people like him who had done well at the top engineering college in India. Since coming to Linko-Tech, they have told him that they like his work and will be happy to sponsor him for a green card so he can stay in the United States as a legal permanent resident. Until then, he knows that he can only stay in the United States as long as he works for Linko-Tech. So he works hard and doesn’t complain, even if the hours are longer and the pay is less than he expected when he heard he had “won the lottery.”

The United States began the H-1B program in 1990 to bring highly skilled workers in specialty occupations to fill gaps in the domestic labor supply. The number of H-1B visas is capped each year, currently at 65,000.
If applications for visas exceed the cap, then the U.S. Citizenship and Immigration Service ("USCIS") conducts a lottery to determine which companies receive a visa. For the 2016 H-1B visa season, there were 233,000 applications for the 65,000 slots. In Fiscal Year 2014, an astounding 70% of the H-1B visas granted went to people born in India, and approximately 65% went to workers in "computer-related occupations." The workers were young, with 72% between the ages of 25 and 34. For Fiscal Year 2014, their median salary was $75,000.

In order to bring a non-resident worker to the United States under this program, an employer must file a Labor Condition Application ("LCA") with the U.S. Department of Labor and a petition for an H-1B visa ("Form I-129") with the U.S. Citizenship and Immigration Service. On the LCA, the employer states, under penalty of perjury, that it has a job opening in a specialty occupation; that it has identified an employee for that position; that employment of the immigrant worker will not adversely affect any U.S. worker; that the employee will be paid the prevailing wage for a worker in that position; that the employee will receive the same benefits as other workers in that position; that the employee will not negatively affect working conditions of other employees; that the LCA will be publicly available; and that there is no active labor dispute or work stoppage in place at the time of hiring the employee. In addition, employers whose workforce is dependent on H-1B workers must also attest that they are not displacing U.S. workers, unless the visa employee is paid at least $60,000 a year or has attained a master’s degree or higher. The employer must have an approved LCA before it can be granted an H-1B visa from the USCIS.

The employer must pay the employee either the actual or prevailing wage rate for the occupation specified in the LCA and must receive benefits

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7. U.S. CITIZENSHIP & IMMIGRATION SERVS., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS 6 (2015), 6, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/H-1B/h-1b-characteristics-report-14.pdf. China received the second highest number of H-1B visas, receiving 8% of the total. Id.
8. Id. at 11.
9. Id. at 9.
10. Id. at 16.
12. An employer with 51 or more employees is considered H-1B dependent when 15% of its workforce are H-1B nonimmigrant workers; for smaller employers, the percentage ranges between 33-50%. WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #62C: WHO IS AN H-1B DEPENDENT EMPLOYER?, (July 2008), http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62C.pdf.
13. 20 C.F.R. § 655.737.
similar to other employees of the employer. The actual wage rate is determined by what the employer pays other employees with similar experience, qualifications, education, job responsibility, job function, and specialized knowledge, and it takes into consideration other legitimate business factors. Otherwise, the employer may specify a “prevailing wage” when the LCA is submitted. The prevailing wage may be set by a collective bargaining agreement or by reference to the wages for workers who are similarly employed. If using the latter, the employer can use the prevailing wage set by the National Prevailing Wage Center, a government organization. Alternately, the statute allows an employer to use its own survey, so long as it is based upon “a survey of wages published in a book, newspaper, periodical, loose-leaf service, newsletter or similar medium.”

The wage cannot be lower than the minimum wage, and, if a pay range is specified for the employee, the lowest end of the pay range cannot be lower than the employer determined prevailing wage. These provisions are designed to ensure that visa workers receive a fair wage that does not undercut the wages of American, non-visa workers.

The employee must be paid at the rate specified in the LCA, even if he is performing a different type of work that could have a lower prevailing wage rate. The statute also requires the employee to be paid once the employee “enters into employment,” which begins shortly after immigration or when the employee “first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.” The employee must continue to be paid even if she is in a “non-productive status,” unless that status is initiated by the employee. Time spent in non-productive status that is due to the employer’s inability to provide work must still be compensated at the LCA rate.

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14. Id. § 655.731(a), (c)(3).
15. Id. § 655.731(a)(1).
16. Id. § 655.731(a)(2).
17. Id. § 655.731(a)(2)(ii)(A).
18. Id. § 655.731(b)(3)(ii)(B).
19. Id. § 655.731 (a)(2)(iv)-(v).
20. Id. § 655.731(c)(8).
21. Id. § 655.731(c)(6). Even if the employee has not yet begun to perform these activities, payment must begin no later than 30 days after the individual is admitted to the U.S. under the visa or 60 days after approval of the visa for an immigrant who is already in the U.S. Id. § 655.731(c)(6)(ii).
22. Id. § 655.731(c)(7).
23. Id.
The law generally prohibits an employer from charging an individual for the visa.24 Specifically, an employer may not charge an employee money to recoup the employer’s business expense, to cover the USCIS filing fee, to cover costs incurred in the petition process or to recover the Anti-Fraud Fee. In addition, the law prohibits penalizing an H-1B worker for ceasing employment before the contract ends; however, the law does allow for the employer to recover “[b]ona fide liquidated damages.”25 The liquidated damages can include business expenses, but they may not include the USCIS filing fee. Courts are directed to look to state law to determine if an assessment falls into the category of a penalty or liquidated damages.26 Employers may make certain deductions at market rate, for things such as living expenses, as long as the employee agrees to them in writing and the employer can demonstrate that they are at fair market value.27 If an employer makes deductions for the repayment of a loan, the employer must demonstrate that the loan has complied with these rules and the money was not loaned to cover a prohibited purpose.28

The Department of Labor is tasked with enforcing the rules regarding employment of workers on H-1B visas. It can assess civil penalties ranging from $1,000 to $35,000 per violation, order payment of back wages, and restrict an employer’s participation in the program.29 If an employer has been found in violation of the visa rules, it can become known as a “willful violator” and may be required to make the same additional attestations as an H-1B-dependent employer before it can continue in the H-1B program.30 The “willful violator” must make an attestation that it will not displace U.S. workers and includes requirements that the employer attempt to fill positions with U.S. workers,31 unless it pays the visa employees at least $60,000 or if the visa employee has a master’s degree or higher.32 Employers who persistently violate the rules may be debarred, or disqualified, from participation in the program for some number of years.33 The statute also

24. Id. § 655.731(c)(9)-(10). All information in this paragraph can be found in H-1B Presentation, U.S. DEP’T OF LABOR, http://www.dol.gov/whd/immigration/h1b.htm (last visited Dec. 8, 2016).
25. 20 CFR 655.731(c)(9)(i)-(ii).
26. Id.
27. Id. § 655.731(c)(9).
28. Id. § 655.731(c)(13).
32. 20 CFR § 655.737(a)-(b).
contains an anti-retaliation provision that protects workers and provides that no employer “shall . . . discharge or in any other manner discriminate against an [H–1B] employee” because the employee has disclosed information that the employee “reasonably believes evidences a violation of . . . the [Immigration and Nationality Act].”

The H-1B visa allows a worker to stay in the United States for three years. After that time, it can be renewed for another three years. If an individual wants to stay in the United States longer than those six years, he must apply for and receive a “green card,” which confers the status as a “legal permanent resident.” After being in green card status for a number of years, the individual can apply for naturalization to become a U.S. citizen. Significantly, the H-1B visa is a work visa; it is not an immigrant visa. It allows an employee to stay in the United States for as long as he is connected to an employer with a valid H-1B opening. Generally that means that the employee must remain with the company that originally sponsored his H1-B visa. If he wants to quit, he must be able to find another company that has an H-1B opening and is willing to hire him. Otherwise, he will no longer have the legal right to be in the United States, and becomes deportable. Although some highly skilled H-1B workers are able to transition to new employers, most are unable to do so. The DOL and USCIS require employers to provide H-1B workers with transportation back to their home country upon discharge.

2. Problems

Life for Raj Patel, working as a “pure” H-1B, is not so bad. He earns far more than he would have in India, is treated reasonably well, and may be on a path to becoming a United States citizen. Unfortunately, things do not always go as planned or described in the immigration rules, even for the pure H-1B. The biggest problems arise from being underpaid, overworked, and feeling unable to complain for fear of having a visa revoked and being deported.

This dynamic resulted in a class action lawsuit brought by 800 workers, many of whom were H-1B workers, at Siebel Systems. According to Kathryn Burkett Dickson, lead attorney for the plaintiffs, the case came to

34. 20 C.F.R. § 655.801(a)(1).
36. Id.
37. Id.
38. Id.
her attention because of the long hours the company required of its employees. Tagged “Siebel Slaves” in the media, the workers were given insurmountable tasks to complete with very short deadlines. The result was overwork, sleep deprivation, and health problems, including miscarriages. Siebel hired H-1B workers, mainly from China, Vietnam and India. According to Dickson, the company preferred foreign national workers because they were grateful to come to the United States, hoped for a green card, could not or would not complain about substandard working conditions, and would work “very, very hard.” Siebel believed the workers would not complain because of the threat that, if they lost their job, they would be forced to return home. Eventually, the workers sued for wage and hour violations. Siebel allegedly miscategorized the workers as “exempt” and thus did not pay them overtime. Given the large number of hours worked and the relatively high salary, overtime liability was quite large. The parties reached a 27.5 million dollar settlement, which covered approximately 800 “software engineers” or “senior software engineers” that had been misclassified as exempt employees ineligible for overtime.

In a typical scenario involving an individual complainant, Cherry Chiu, a female engineer, arrived from China to work on an H-1B with CGI-AMS as a JAVA programmer. At first there were no problems. She enjoyed her work, received positive performance reviews, had her visa renewed at the three year mark and was working with the company to get a green card. Eventually, however, two problems emerged. First, her supervisor changed. Whereas she had a positive working relationship with her previous boss, her new one treated her poorly, criticizing her personality and English ability. Second, she found out that she was paid less than were other JAVA programmers, and complained that she was not paid the prevailing wage. In response to complaints about her supervisor and her salary, she was fired and progress on her green card also came to a halt. Without a job and without her green card process completed, she became “out of status” and feared going to court because of the possibility that she would be deported.

Many H-1B workers experience similar problems with substandard pay. Although the statute says that visa workers should be paid on par with regular

42. Interview with Kathryn Burkett Dickson, Attorney, Dickson Geesman, LLP, Oakland (May 31, 2016).
43. Id.
44. See Hogarth, supra note 41. The lawsuit covered the time period January 16, 2000 to October 7, 2005, during which class members averaged 139 weeks of work. The average recovery for each of the 800 class members is $27,000. Id.
47. For a discussion of the resolution of the Chiu case, see infra Section III(B)(1).
workers, surveys consistently show H-1B workers earning less than their non-visa counterparts. One expert testified before Congress that H-1B workers averaged about $13,000 less than the median wage for U.S. workers in the same occupation and state; most H-1B workers were paid wages in the bottom 25th percentile of U.S. wages controlled by occupation and state; and just 16% of H-1B workers earned wages that were above the median U.S. wage for occupation and state. As a result, companies using H-1B workers have reported wage savings of between 20 and 40 percent after switching from using U.S. workers.

Several reasons explain the ability of companies to pay relatively low wages to H-1B workers. First, because employers may choose among wage surveys or use their own wage surveys to set the prevailing wage, they have control over the wage that will be set and have an incentive “to select the lowest of many widely varying figures.” The ability of private wage surveys to effectively protect the interests of the American workforce was recently criticized and struck down in the context of a parallel guest worker program (the H-2B visa program). In that case, the Third Circuit found that the Department of Labor’s shift in policy to allow the use of private wage surveys instead of government surveys violated the Administrative Procedures Act because it did not provide a reason for its change in policy. Although this procedural defect may not invalidate the use of private surveys for the H-1B program, the finding by the court that allowing the use of private wage surveys was an “arbitrary and capricious act” is significant. The court found the Department of Labor’s decision faulty because the private surveys resulted in wages that were consistently lower than those found in government surveys and because “this authorization creates a system that permits employers who can afford private surveys to bring H-2B workers


50. Matloff, supra note 39, at 902.


52. Perez, 774 F.3d at 188-89.

53. Id. at 189.
into the country for employment at lower wages than employers who cannot afford such surveys and who therefore must offer the higher OES prevailing wage.\textsuperscript{54} These criticisms of private wage surveys are equally applicable to the use of private wage surveys in the H-1B program.

Second, once a survey has been selected, employers can use a variety of mechanisms to set the lowest possible wage. Employers choose a prevailing wage based on a location, a job title, a job description and a job level. Each of these designations allows the employer discretion that can result in a lower wage. In setting a job title, for example, someone who works in the computer software field could be considered a “software engineer,” a “systems analyst,” or a “programmer.” An employer can choose the job title with the lowest average salary and use it on the LCA.\textsuperscript{55} The job description often includes the bare minimum education and experience requirement, which leads to a lower rate of pay.\textsuperscript{56} The employer is also able to determine the level of the job and will routinely list the job as an entry-level position, which again drives the wage rate down.\textsuperscript{57} In 2010, 54% of the H-1B visas issued were for “entry-level” positions which, according to the statute, only require a “basic understanding of duties and perform routine tasks requiring limited judgment.”\textsuperscript{58} Only 6% of the H-1B visa recipients were categorized as Level IV employees who receive the highest level of compensation.\textsuperscript{59} There have also been reported instances of an employer misrepresenting the location of a job in order to set the prevailing wage based on a lower cost region.\textsuperscript{60}

Finally, there is very little oversight of the information provided on the LCA regarding the job and its associated prevailing wage. Currently, the Department of Labor only reviews the LCA for completeness and looks for glaring inaccuracies.\textsuperscript{61} As long as the application looks reasonable on its face,
there is no independent verification. For example, in order to be subject to additional questioning, an employer would have to do something as obvious as putting a prevailing wage rate below the federal minimum wage or putting a wage rate on the application that is below the range it has submitted in its survey. As a result, “The DOL’s Office of Inspector General has described the LCA certification process as merely a ‘rubber stamp’ of the employer’s application.”

Taken as a whole, these practices result in H-1B visa workers routinely working at a pay rate below what most people would consider the true prevailing wage rate.

H-1B workers rarely complain about these problems for several reasons. Most importantly, the visa workers know that if they are terminated, they lose their legal right to be in the United States and face deportation. After having worked so hard to get to the United States, even those workers who have come temporarily are reluctant to risk the ire of the employer and being sent home. Those workers who wish to naturalize and are getting close to receiving a green card are in an even more precarious position. This pressure is so immense that “visa holders, by the very nature of their situation as workers dependent upon employers for the right to remain in the country—either permanently or temporarily—remain less likely to protest against unfair working conditions than their counterparts with permanent resident status.” H-1B visa workers may be especially hesitant to risk losing their jobs because they realize that the process of protesting working conditions is slow and ineffective. As a result, few H-1B workers will quit a job or complain and risk being terminated.

H-1B workers are also isolated socially and culturally because of their immigrant status. The workers often come without their families. Even if their spouses are legally allowed to come with them on an H-4 visa, the spouse will not have the legal right to work here unless she has her own visa. In addition, the spouse may not be able to participate in social programs such as public health and educational assistance, and may have difficulty getting a driver’s license. The workers themselves may live near each other and near their place of work, becoming an insular community tied to their employer.
that remains removed from American society at large. These immigrants tend to form their own professional and social communities and tend not to interact with other ethnic groups. These workers also do not have the same political rights as citizens, such as the right to vote, or other avenues to influence the legislature. As a result, it is difficult for them to advocate for changes in the workplace or through the political process. Those without a pathway to citizenship may view themselves as perpetual outsiders who will never be able to participate in these processes. As one author summarized,

While the high-tech industry and the domestic labor force may express their concerns and complaints in the political process through votes, lobbying groups, and connections, the H-1B workers cannot express their interests in any forum. The temporary workers’ lack of political power leaves them vulnerable to the political process and other groups’ interests, resulting in further inequality as compared to other Americans.

B. “Outsourcing H-1B”: Subcontracting Company is the Visa Sponsor

During the time that Roger Greenman has worked at Nor Cal Electric, he has noticed a lot of changes in staff. When he first began, the company employed a janitor named Gus who would clean the office during the day and also worked as a repairperson. Fifteen years ago, the company fired Gus and started using Apex Janitorial to come in every night and clean the offices. Roger also remembers when the company had a bookkeeping and accounting department. Ten years ago, Nor Cal Electric closed the department and hired Indi-Counting to perform that function. It only took Roger a few phone calls to Indi-Counting, trying to correct a mistake in his paycheck, to realize that Indi-Counting was located in India, not the United States. Roger sadly realizes that he and his colleagues will soon go the way of Gus and the bookkeepers as former Nor Cal Electric employees.

1. The Outsourcing Process

Companies in the United States subcontract a variety of functions and have been doing so for many years. Rather than employing workers directly to perform a function, the company will contract with another company (the subcontractor) to perform that function. Subcontracting a function often allows a company to decrease operating costs or to hire a group that specializes in something outside the company’s area of expertise. For example, many companies will subcontract with a janitorial service to have

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70. Interview with Kathryn Burkett Dickson, supra note 42. Dickson credits the close ties among the workers for the remarkable claims rate in the case of over 95%.
72. Rudrappa, supra note 40, at 371.
73. Underwood, supra note 70, at 740.
74. Id.
its premises cleaned or a landscaping company to have its grounds maintained.

When subcontracting a function, the company generally does not control and direct how that function is performed.\(^{75}\) Instead, the company instructs the subcontractor about what it wants accomplished and leaves it to the subcontractor to determine how the work is staffed, performed, and completed. When a company contracts with a subcontractor in another country to have the jobs performed abroad, the subcontracting is often referred to as “offshoring.” The company hands off an entire business function to another company outside the United States. Companies typically subcontract or offshore functions that are outside the core competencies or traditional work of the company.\(^{76}\) Offshoring has been a growing trend since the late 1990’s and, although the practice is being modified and adjusted, it shows no sign of disappearing.\(^{77}\)

Outsourcing is a related, though slightly different type of work shifting. Outsourcing occurs when a company contracts with another company (a vendor) to provide a service or product that has traditionally been performed by the company.\(^{78}\) In addition, the work is performed with the company’s own assets or personnel, even as the cost for the production or performance is shifted to the vendor.\(^{79}\) For example, the company will sign a contract with the vendor to perform its information technology function for a set fee. The vendor may use the company’s computer hardware and information, while providing the manpower to perform the function. Outsourcing requires a greater connection between the company and the vendor because technological and organizational information will inevitably flow between the two parties.

Roger Greenman, like many other IT professionals in the United States, is experiencing the effects of outsourcing. Roger’s situation is notable because it represents a growing trend in which the vendor is staffing the outsourced work with H-1B visa holders. In 2012, the ten companies that received the highest number of H-1B visas were companies with a business model substantially based on outsourcing.\(^{80}\) In 2013, six of the top ten

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76. See Jeff Postma et al., “7 Key Factors Driving the Offshoring of Services,” INDUSTRYWEEK (Dec. 3, 2013), http://www.industryweek.com/supplier-relationships/7-key-factors-driving-offshoring-services.

77. Postma, supra note 77 (discussing “reshoring,” a recent trend to bring this type of work back to the United States and other western countries, and “rightshoring,” the term being used to find the right balance between the types of services that can be effectively offshore and those that cannot.).


79. Bannister, supra note 75.

80. These companies received approximately half of all H-1B visas awarded. Ron Hira, *Top 10 Users of H-1B Guest Worker Program Are All Offshore Outsourcing Firms*, ECON. POL’Y INST: WORKING ECONOMICS BLOG (Feb. 14, 2013, 5:58 PM), http://www.epi.org/blog/top-10-h1b-guestworker-offshore-
companies receiving H-1B visas fell into this category, with each one receiving more than 1,000 visas. From the H-1B worker’s perspective, the distinguishing characteristic of this situation is that the vendor is the visa sponsor, rather than the company which contracted with the vendor. The H-1B worker is employed by the vendor and not by the company which benefits from the services being performed. Vendors are also less likely to sponsor workers for citizenship than are companies hiring pure H-1B workers.

For example, in late 2014, one company, Walt Disney World, decided to outsource its 250 person IT department. The vendor, HCL America, staffed the jobs with H-1B visa holders. Disney employees described a ninety-day process that they needed to complete in order to receive a 10% severance pay bonus, which was contingent upon successfully training their replacement. As one ten-year Disney employee explained: “The first 30 days was all capturing what I did . . . The next 30 days, they worked side by side with me, and the last 30 days, they took over my job completely.” One former Disney worker in his 40’s said, “I just couldn’t believe they could fly people in to sit at our desks and take over our jobs exactly.” Although it has been reported that Disney rescinded its decision in May of 2015, a group of employees filed suit in 2016 against Disney, HCL and another vendor (Cognizant) alleging that they violated the visa laws.

Other notable companies outsourcing to vendors using H-1B visa holders include Abbott Laboratories; Fossil, which transferred more than 100 jobs in Texas to employees of Infosys; Northeast Utilities, which shifted 350 jobs; and Southern California Edison, which transferred over 500 jobs. The Southern California Edison (“SCE”) story is strikingly similar to the one at Disney World. SCE contracted with Infosys, based in Bangalore, and Tata outsourcing) (stating that many of these jobs will eventually be offshored once the foreign workers develop the necessary skills and knowledge and the company develops the assets to provide these services abroad).

82. Id.
83. Id.
84. Id. (Internal quotation marks removed)
85. Id.
89. Preston, supra note 82.
Consultancy Services, based in Mumbai, to perform IT work. The workers were required to train their replacements, who they found to be younger and less skilled. SCE says that it selected Infosys and Tata after a competitive process that included some United States based vendors who would have staffed the jobs with non-visa workers from the United States. It said that the outsourcing arrangement “will lead to enhancements that deliver faster and more efficient tools and applications for services that customers rely on. Through outsourcing, SCE’s information technology organization will adopt a proven business strategy commonly and successfully used by top U.S. companies that SCE benchmarks against.” Laid-off SCE employees have also reportedly filed a lawsuit.

2. Problems with Outsourcing

Outsourcing creates a variety of problems for American workers. As a threshold matter, some argue that the practice inherently violates the visa laws. The H-1B visa process requires that an employer attest that employment of the foreign worker will not “adversely affect the work conditions of U.S. workers similarly employed.” The lawsuit filed by the Disney workers argues that Disney and the vendors lied when they made this attestation, because their layoffs adversely affected their work conditions. SCE was investigated by the Department of Labor on a similar theory, but the Department recently closed the investigation without filing charges.

Outsourcing might also adversely affect the work conditions of the existing work force because, as described above, H-1B workers are typically paid less and treated worse than are their non-H-1B coworkers. Since H-1B workers are constrained in their ability to complain about and improve their conditions, these conditions become the ones against which American workers must compete. The conditions facing the outsourced labor, in effect, set the market price and terms and conditions for the entire labor force at a relatively low level.


91. Id.

92. Id.


94. Preston, supra note 82.

Outsourcing could also potentially violate nondiscrimination statutes. In 2015, SCE employees filed a lawsuit against Tata Consulting alleging race and national origin discrimination. A similar lawsuit was filed in 2014 against Infosys, another outsourcing vendor. In a series of claims filed with the EEOC, the Disney employees claim that they have been discriminated against on the basis of national origin. The suits allege both intentional discrimination, citing statistics that employees are over 95% South Asian and statements made by employers that they prefer South Asians, as well as disparate impact claims, based on the discriminatory effect of using visa workers as their primary workforce. Because the majority of H-1B visa workers are young, outsourcing may also lead to violations of the Age Discrimination in Employment Act, which prohibits discrimination against individuals over forty years of age. According to Computer World, in 2014, “nearly 75% of [of approved H-1B applications] were for people who were 34 years old or younger. Of that group, 38% were 29 years old or younger.” At Disney, many of the replaced workers were substantially older. The H-1B workers are not necessarily more qualified, especially since the existing workers had to train their replacements.

Lastly, outsourcing can lead to offshoring and loss of jobs. Once a group of foreign workers becomes sufficiently trained in a particular company’s process and the vendor develops the appropriate capital assets, the vendor may be able to suggest an alternate arrangement, where the function is done off-site and without the use of the company’s assets. According to one source, “Over 1 million jobs in IT, call centers, and other outsourced business processes have been offshored from the U.S. over the last few years.” This results in a loss of jobs and income within the United States.

C. The Body Shop Worker: Labor Agency is the Visa Sponsor

Sanjiv Gupta’s problems began the day he answered the ad in the Mumbai newspaper for computer science workers looking for an H-1B job in the United States. When he met with the representative from Sygate, he was convinced that he would have a great job waiting for him in the United

98. Preston, supra note 82.
99. See discussion supra Section II(A)(2)(d).
102. Postma, supra note 76.
States. So, he borrowed money to pay $3000 for the visa and signed a contract that he would work for the full three-year term of the visa contract or pay “liquidated damages” in the amount of $20,000. When he arrived in the U.S., Sygate told him that his job was not ready and that he should “sit on the bench” and wait. He would not be paid during that time. But Sygate told him it would place him in the “guest house” and that he could pay the company back for room and board once he started his job. He has had a few short-term jobs, but he has never received anything near the $65,000 annual salary he was promised. Sygate retains a portion of his wages to cover room and board and other “fees.” Gupta has thought about leaving Sygate to find his own tech job or to simply go home, but Sygate constantly reminds him that if he leaves, he must pay the $20,000 liquidated damages fee, as well other money he still owes for room and board.

1. Process

Sanjiv Gupta had become an employee of a “body shop.” These companies, which tend to be relatively small, act as the visa sponsor for a significant number of H-1B workers. Unlike the outsourcing vendors which have a specific subcontract already planned to place their workers, body shop employers bring H-1B workers to the United States without a specific job or plan. They usually end up placing their workers in a series of short-term placements, often at reputable high-tech companies. They can also provide employees to an outsourcing vendor if the outsourcing vendor does not have enough manpower.

By acting as the last link in a human supply chain, body shop workers are sometimes invisible to the reputable high-tech company that is profiting from their work. One reporter described it this way:

U.S. executives often have little visibility into the treatment of contract employees because several layers of companies are involved. One recruiter for a major U.S. outsourcing firm says there’s no way his clients know how body shop workers are treated because, until recently, even he didn’t know. He discovered that some of the firms he was hiring for short-term projects weren’t using their own people but instead bringing in subcontractors, which often underpaid workers.

The same recruiter said that he is working to develop policies to better monitor subcontractors because “the agreements seem almost criminal.”

103. Moira Herbst & Steve Hamm, America’s High-Tech Sweatshops, BLOOMBERG BUSINESSWEEK, (Oct. 1, 2009, 2:00 PM) (quoting ICE official James Spero that “[t]he cases are difficult to investigate and difficult to prove” because “checking on so many small companies is labor intensive” and referencing a federal government study that 54% of visa rule violations were committed by companies with fewer than 25 employees), http://www.bloomberg.com/news/articles/2009-10-01/americas-high-tech-sweatshops.

104. Id. (arguing that this is one way that outsourcing companies are able to hold down costs).

105. Id.

106. Id.
2. Problems

Many of the activities of the body shop employer violate the visa laws. The problems for a body shop worker like Sanjiv Gupta often begin in India. High-tech workers who are desperate for jobs in the United States may be charged huge fees to apply for an H-1B visa.\textsuperscript{107} Workers like Sanjiv are willing to pay a $3,000 fee in order to land a job in the United States allegedly paying $75,000 per year because an Indian college graduate earns approximately $4,500-$6,000 per year; however, it will be extremely difficult for them to come up with the equivalent of six months’ earnings.\textsuperscript{108} They may have to borrow the fee from friends or, in some instances, the labor broker. Body shops hide the illegal fee collection by making the employee pay the fee to a subsidiary company in India or to a relative of the company’s owner.\textsuperscript{109}

In order to process the visa, the body shop may engage in several different types of fraud. The most common is to generate a false “client letter” that states that a job exists when it in fact does not. These letters take many forms—they “can be issued by a corporation that’s actually an empty shell, a real company selling letters to staffing firms or someone creating pure forgeries.”\textsuperscript{110} Sponsors may also pressure employees in India to create false resumes or pad them with a process known as “spicing of the resume” so the employee appears to possess the correct education or experience to qualify for the visa.\textsuperscript{111}

Once an individual like Sanjiv gets an H-1B, he may be required to sign a contract promising to pay the body shop a variety of fees, including liquidated damages, if he stops working before the end of their contract.\textsuperscript{112} The liquidated damages stated in the contract generally range from $10,000 - $30,000.\textsuperscript{113} On its face, this type of fee may seem reasonable to prevent an H-1B worker from leaving a subcontractor to go work directly for a client or a competitor, although even that form of employment restriction is not

\textsuperscript{107} Id. Fees have been noted in the $2,300-$3,500 range. Stephen Stock, Julie Putnam, Scott Pham & Jeremy Carroll, Silicon Valley’s “Body Shop” Secret: Highly Educated Foreign Workers Treated Like Indentured Servants, NBC BAY AREA (Nov. 3, 2014), http://www.nbcbayarea.com/investigations/Silicon-Valleys-Body-Shop-Secret-280567322.html (noting fee of $2,300); Matt Smith, Visa Fraud in US Tech Industry Relies on Falsified Job Letters, REVEAL (Nov. 21, 2014), https://www.revealnews.org/article-legacy/visa-fraud-in-us-tech-industry-relies-on-falsified-job-letters/ (noting fee of $3,500). Sometimes the workers are simply swindled out of the fees and never receive a visa, but those claims are not actionable in the United States and are not covered in this article.


\textsuperscript{109} Smith, supra note 108.

\textsuperscript{110} Id.

\textsuperscript{111} Id.; see also Herbst, supra note 104 (discussing employee who was instructed to buy a fake university degree and who paid $9,000 for his visa sponsorship).

\textsuperscript{112} Smith, supra note 108.

\textsuperscript{113} Id.
allowed in several states. However, when these fees prevent a worker from escaping an abusive situation and returning home, they become much more like a bonding fee creating indentured servitude, because the employee cannot quit until he earns enough to pay off the fee. Enforcement of these provisions is not just an idle threat. Body shops wield this power often, suing to enforce the provisions in hundreds of cases. Employees who engaged in resume fraud are especially at risk because they have broken the visa rules and can be prosecuted for visa fraud—even if they committed the fraudulent act at the behest of the body shop. According to one body shop worker, “You can pretty much see a leash on my neck with my employer. It’s kind of like a hidden chain.”

One of the most distressing problems facing body shop workers is that they are brought to the United States without a job waiting for them. Under the visa, they are technically employed by the body shop, so they have an employer but no work. While they wait for a job, they are told to “sit on the bench” and wait. They are not paid for this unproductive time and will sometimes find menial jobs (working at a gas station or convenience store, for example) in order to make ends meet. Other times, the body shop will place them in a short-term job (or a series of short-term jobs); again, they are not paid between jobs while sitting on the bench. Body shop employers use an illegal tactic known as “running the payroll” to facilitate this practice. In order to make it appear like a benched worker is earning money, the employer will take money from the employee and run it through the payroll system of the body shop to make it appear as if the money came from a high-tech employer.

While “on the bench,” workers sometimes live in “guesthouses” provided by the body shops. The guesthouses are cramped quarters, with as many as eight to ten workers staying together. One worker described sleeping in a closet “with his feet sticking out the door.” Workers are charged excessively for rent, and the living situation prevents the worker from bringing his family to the United States. Guesthouses are also used as

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115. The Center for Investigative Reporting searched court dockets in geographic areas with tech companies to create a sample of 100 cases in which companies sued H-1B workers for leaving employment before the end of the contract term. Smith, supra note 108. See discussion infra Section II(A)(3) on Trafficking, Involuntary Servitude and Debt Bondage.
116. Smith, supra note 108.
117. E.g. Herbst, supra note 104; Smith, supra note 108; Stock, supra note 108.
118. Herbst, supra note 104 (describing the case of worker Kishor Parikh who was recruited by Dasondi).
119. Herbst, supra note 104.
120. Stock, supra note 108 (discussing conclusions based on a dozen different interviews confirming the use of guesthouses).
121. Herbst, supra note 103
122. See Stock, supra note 108.
a form of control because the body shops prevent the workers from leaving the premises. One body shop employer told a newly arrived worker, “We are placing you in the guesthouse. Until you get the job you have to stay in the guesthouse, you should not go out, even for a walk.”

Since the body shop is the official employer for these workers, it controls the worker’s paycheck and often engages in wage theft, stealing some or all of the employee’s earnings. One worker estimated that the body shop kept approximately one-third of his salary to cover “expenses” and “taxes.” In addition to making unlawful deductions, employers also fail to pay for overtime and delay payment of wages. Sometimes, employers entirely fail to pay employees for their work. For example, one body shop, Itek, placed an employee at JP Morgan. Itek stopped paying him in December 2006, even though he continued to work at the bank (and Itek continued to be paid for his services) through February 2007.

Another form of wage theft occurs when the body shop completes an H-1B visa for a fictitious job in an area with a relatively low prevailing wage rate (such as Coon Rapids, Iowa) but then places the employee in a job in a different geographic region (such as New Jersey) that requires a higher rate of pay. The employee is paid at the lower rate, while the employer collects the higher rate and keeps the difference.

II.
THE ROOT OF THE PROBLEM: GUEST WORKER PROGRAMS AS A SYSTEM OF UNFREE LABOR

Roger, Raji and Sanjiv all suffer along a continuum of exploitation. The guest worker program facilitates this exploitation because it is based on the creation and use of unfree labor. The United States’ most notorious system of unfree labor was the institution of chattel slavery practiced before the Civil War. Although the Thirteenth Amendment to the U.S. Constitution states “neither slavery nor involuntary servitude . . . shall exist with the United States,” there are echoes of slavery and involuntary servitude in many current labor situations that have been described as “modern day slavery” and criticized as violations of the Thirteenth Amendment.

123. Id.
124. Id. This was in addition to the legitimate federal and state taxes being withheld. Id.
125. Herbst, supra note 104
126. Herbst, supra note 104 (describing Ebenezer v. Itek); see also discussion infra Section II(A)(1).
127. Herbst, supra note 104 (describing the Vision Systems criminal prosecution); see discussion infra Section II(A)(1).
129. For descriptions of the types of labor arrangements characterized as modern day slavery, see, e.g., Maria L. Ontiveros, Is Modern Day Slavery a Private Act or a Public System of Oppression?, 39 Seattle U.L. Rev. 665 (2015-2016) (trafficking and immigrant labor); Maria L. Ontiveros, NCAA Athletes, Unpaid Interns, and the S-Word: Exploring the Rhetorical Impact of the Language of Slavery,
Current guest worker programs contain many of the hallmarks of slavery and involuntary servitude. Their echoes are present in the constraints placed upon a guest worker’s ability to protest poor working conditions or quit employment, which destroys the floor for free labor. There are also echoes of old slave codes in the visa sponsor’s “ownership” and “control” of the guest worker’s labor. Finally, echoes of slavery exist in the commodification of immigrants as part of the human supply chain and in the ways in which the citizenship right of guest workers are constrained. Although high technology workers earning $40,000 - $60,000 per year in 21st century America obviously do not labor in the same conditions as chattel slaves, their treatment is arguably a difference of degree, not of kind. Examining the unfree labor aspects of the guest worker program provides a framework for understanding how guest worker exploitation operates and provides insights for ways to address that exploitation.

A. Destroying the Floor for Free Labor: Involuntary Servitude and the Right to Quit

One of the main arguments made in opposition to slavery and in favor of the Thirteenth Amendment was the negative impact that a caste of unfree workers had on the working conditions of free laborers. The Supreme Court, in Pollock v. Williams, explained how restrictions on the right to quit destroy the floor for free labor and violate the Thirteenth Amendment, when it wrote:

The undoubted aim of the Thirteenth Amendment as implemented by the Anti-Peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States . . . [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.

Under the current visa program, both domestic and immigrant workers are constrained in their ability to complain about low wages or poor working conditions.
conditions. In the high-tech industry, it is difficult for American workers, such as Roger Greenman, to complain or demand higher wages for fear that they will be replaced by visa workers. 133 Those very same visa workers may be unable to complain about low pay or poor conditions because they fear being fired and deported. 134 Nor can visa workers easily quit, knowing that without the employer’s sponsorship they will become deportable and have to leave the country. 135

An even stronger echo of slavery can be found for those visa workers who have large liquidated damage provisions in their contracts. They cannot quit because they cannot afford to pay the damages. This type of arrangement is similar to “debt bondage,” a common arrangement in the early 19th century that required debtors to work for lenders or for the state, under threat of jail, until the debt was paid off. 136 These arrangements, also referred to as “debt peonage,” were struck down in a line of cases as violating the Thirteenth Amendment’s prohibition against involuntary servitude as codified in the Antipeonage Act. 137

Debt bondage is also condemned, as a form of slavery or involuntary servitude, under both contemporary United States and international law. The United States Trafficking Victim Protection Act prohibits a requirement that a person continue to work to pay off a debt that is not properly categorized as liquidated damages. 138 According to the U.S. Department of State, modern day slavery includes debt bondage where bond or debt is used as coercion to exploit and enslave workers. 139 Their website explains:

Debts taken on by migrant laborers in their countries of origin, often with the involvement of labor agencies and employers in the destination country, can also contribute to a situation of debt bondage. Such circumstances may occur in the context of employment-based temporary work programs in which a worker’s legal status in the destination country is tied to the employer and workers fear seeking redress. 140

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133. See Griffith, supra note 66, at 134; Saxenian, supra note 72, at 31.
134. See discussion supra Section I(B)(2).
136. Clyatt v. United States, 197 U.S. 207 (1905); Bailey v. Alabama, 219 U.S. 219 (1911) (striking down statute that required debtor to work for lender until the debt was paid off, under threat of going to jail); United States v. Reynolds, 235 U.S. 133 (1914) (striking down surety contract system that required continual labor under penalty of reimprisonment); Pollock, 322 U.S. 4 (1944) (striking down statutes that linked debt to service). For a fuller discussion of these cases, see Maria L. Ontiveros, Immigrant Workers’ Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment, 18 GEO. IMMIGR. L.J. 651, 660, 662-65 (2003-2004).
137. See Ontiveros, supra note 36, at 927-929 (analyzing guest worker programs as involuntary servitude).
140. Id.
The International Labor Organization also categorizes debt bondage as a form of forced labor.  

**B. Visa Sponsor as Owner of Labor**

One of the distinguishing characteristics of antebellum chattel slavery was the fact that the owner of a slave owned and controlled the slave’s time, labor and service. Slave codes passed by all Southern states regulated the ways in which the owner controlled the slave’s labor. The owner benefited from the work, which the slave performed directly for his or her owner, so that the slave worked without pay for his entire life. The slave owner was also able to hire the slave out to others. An owner’s property rights in the slave were protected if the slaves were injured while performing work for others. In addition, the owner was able to control and benefit from any entrepreneurial work that slaves performed on their own time, such as growing food in a garden, sewing or mending clothes in the evening, or working as a blacksmith on Sundays. The slave owner and not the slave dictated where and for whom the slave could work.

The visa rules operate in a parallel manner. The party who sponsors the visa for the guest worker effectively owns and controls the labor of the immigrant. The pure H-1B is required to work exclusively for the sponsor because the visa is given for a specific job with a specific employer. Free American, non-visa workers are not so constrained. For the outsourcing H-1B and especially the body shop worker, the subcontracting company and the labor agency determine when and where the immigrant works. The visa sponsor controls the income given to the guest worker and is able to hire him out as he wishes. Free, non-visa workers, on the other hand, get to determine for whom they work. When a worker does not own or control his own labor, he is not free labor.

**C. Immigration, Commodification and the Human Supply Chain**

One way to conceive of slavery is as the nation’s first immigration policy. Slaves were brought to the United States to work, under an official

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144. Ontiveros, supra note 130, at 690.


policy that infringed their human rights, their labor rights, their citizen rights, and their civil rights in order to maximize production and maintain a system of racial supremacy.\textsuperscript{148} The history of guest worker programs in the agricultural industry continued this system of oppression.\textsuperscript{149} When guest workers are brought to the United States for their labor, but denied their human rights, they are commodified and viewed as labor, not as human beings. This is uncomfortably similar to the ultimate commodification of human beings that took place during slavery where people, also immigrants, were literally bought and sold.\textsuperscript{150} As discussed in the context of undocumented workers and guest workers, “[t]he wrong of slavery was the commodification and dehumanization of a racially defined group of workers.”\textsuperscript{151}

The H1B program is simply the most recent program created to bring in Asian immigrant workers, keep them powerless, and push “non-white workers into commodity status, further disempowering them, while simultaneously benefiting capital.”\textsuperscript{152} For Asian immigrants, the history of oppressive labor immigration systems includes the recruitment of workers in Hawaiian sugarcane plantations, California gold mines, and for the construction of the transcontinental railroad,\textsuperscript{153} as well as for California agriculture.\textsuperscript{154} On the Hawaiian sugarcane plantations, “Filipinos” were listed on supply manifests right in between “fertilizer” and “fuel.”\textsuperscript{155}

H-1B workers are procured through an immigration system based on race.\textsuperscript{156} Their labor is incorporated, allocated, controlled and compensated through the immigration system.\textsuperscript{157} In these ways, this immigration system commodifying and disempowering H-1B workers echoes the system of chattel slavery.

\textbf{D. Community and Citizenship}

One contemporary definition of a labor relationship that violates the Thirteenth Amendment is a system of oppression at the intersection of

\begin{itemize}
\item \textsuperscript{148} For an argument that the Thirteenth Amendment’s prohibition against “slavery [and] involuntary servitude,” U.S. Const. amend. XIII, § 2, is aimed at exploitive relationships that infringe the intersection of these rights, see Ontiveros, supra note 137, at 672-74; Ontiveros, supra note 36, at 924-25.
\item \textsuperscript{149} See Ontiveros, supra note 136, at 145-46; see also Ontiveros, supra note 36, at 930-38 (using the history of California agricultural workers from 1770 to the present to illustrate the point).
\item \textsuperscript{150} Ontiveros, supra note 36, at 929-30.
\item \textsuperscript{151} Ontiveros, supra note 137, at 674.
\item \textsuperscript{152} See Rudrappa, supra note 41, at 355.
\item \textsuperscript{153} These three industries are discussed in Underwood, supra note 69, at 728-731.
\item \textsuperscript{154} Ontiveros, supra note 36, at 933-36.
\item \textsuperscript{155} Ronald Takaki, PUA HANA: PLANTATION LIFE AND LABOR IN HAWAII 23-34 (1983).
\item \textsuperscript{156} Id. at 355-60.
\item \textsuperscript{157} Id. at 362-70.
\end{itemize}
workers’ rights, citizenship rights, human rights, and civil rights. The denial of citizenship was a key component of slavery. The lack of citizenship prevented them from being able to utilize the legal system to protect their rights or to participate in the political process to improve their situation. Today’s immigration law, which dehumanizes workers and treats them as chattel property without citizenship rights, parallels the situation of fugitive slaves. Like fugitive slaves, today’s guest workers do not have the same legal rights as other workers or the same political rights as citizens. As a result, they are not fully members of society, having instead what Keith Cunningham-Parmeter describes as “rights of partial inclusion.” When immigrants are not fully integrated into society, it is difficult for them to develop the capacity and connectedness necessary to thrive in society. This re-enforces their powerlessness, making them even more exploitable.

III.
CURRENT AVENUES FOR CHALLENGING EXPLOITATION

The lives of workers like Raji Patel, Roger Greenman, and Sanjiv Gupta raise a variety of issues of workplace exploitation. This section discusses the primary ways in which the government and workers have challenged these conditions under existing laws. These challenges arise either as complaints about compliance with the visa law or as independent, private causes of action. The first type of claim can be brought by either the government acting in its enforcement capacity or by private parties in an administrative setting. Primary enforcement authority rests with the Department of Labor’s Wage and Hour Division. The second type of challenge is brought in either state or federal court, depending upon the cause of action being alleged.

158. Ontiveros, supra note 36, at 924-25. Under this approach, guest worker programs infringe on labor rights by restricting a visa worker’s ability to quit and infringe on their civil rights by treating them differently on the basis of their race and national origin. Human rights are infringed upon when they are categorized as non-human aliens, see, e.g., Underwood, supra note 69, at 734-35, or when their living situation and mobility are constrained by body shop owners.

159. State v. Mann, 13 N.C. 263 (1829), discussed in Ontiveros, supra note 137, at 672. See also Karla Mari McKanders, Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities, 61 CATH. U. L. REV. 921, 951 (2012) (arguing “[t]his personless approach is reinforced when those who do not have citizenship are denied the protection of the law.”).

160. See Underwood, supra note 69, at 740.

161. See Rudrappa, supra note 41, at 373.


A. Violations of Visa Laws

Many of the practices described in Part I of this article violate or allegedly violate the visa laws as currently written. This section describes the spotty record of success that the government and employees have had in trying to enforce those provisions. As a procedural matter, individuals do not have a right to bring a private cause of action in federal court for violations of the visa wage rules; instead, they must file an administrative complaint with the Department of Labor.166 Their cases are heard initially by an Administrative Law Judge (ALJ) and then reviewed by the U.S. DOL Administrative Review Board. Parties may appeal these decisions to a U.S. District Court. The overall lesson from these cases is that although employees and the government are bringing actual, harmful violations to courts, they face a long, slow and often ineffective road. Given government reports indicating that as many as one in five H-1B visas have problems,167 this approach alone is not sufficient to address the exploitation confronting H-1B workers.

1. Outsourcing and “Negative Effects on Employee Working Conditions”

The Department of Labor opened an investigation at Southern California Edison in response to complaints that H1-B workers were displacing existing workers.168 The petitioners’ main argument was that by outsourcing their jobs and displacing the workers, SCE’s contract with the vendor had “a negative effect on employee working conditions” in violation of the LCA form filed by the visa employer, Infosys, and the statutory requirement for an H-1B application. The workers sought a broad reading of the “negative effect” language, and hoped to receive a precedential finding that displacing current workers violated this provision.169 Under a separate part of the current visa rules, certain employers, such as repeat violators and those who employ a large percentage of H-1B workers, do need to make attestations that the visa jobs will not displace current workers in cases where the workers are paid less than $60,000 or do not have a master’s degree or higher level of

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169. Id.
The statute does not specifically require this and does not define “negative effect on working conditions” for other employers.

The Department of Labor rejected the employees’ arguments. It closed its investigation against Infosys and issued the following statement:

The department was investigating whether Infosys was subject to the additional attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers when filing an H-1B labor condition application. . . . [I]n circumstances where a company employs only H-1B workers who receive annual wages of at least $60,000 or who have a master’s or higher degree in a specialty related to the intended employment, the department would not find violations. . . . [Because the foreign workers in question met this description], the displacement and recruitment provisions do not apply to Infosys, and there were no violations found.

The Department of Labor took a narrow, textualist approach to the statutory requirements. It focused on whether Infosys fell into a category in which it would have to make additional attestations and not displace workers, instead of whether the requirement to not have a “negative effect on the work conditions of existing employees” included displacing American workers through outsourcing. The DOL found that Infosys did not fall into that category of an employer that must not displace American worker because it paid its workers a sufficiently high salary. Although the statement does not specifically address the issue, the Department of Labor’s implied conclusion is that the term “negative effect on employment” does not include displacing workers in outsourcing situations.

2. Incorrect Prevailing Wage

Few reported cases exist in which employees have directly challenged the prevailing wage established by an employer in the LCA. This result is not surprising, given the deference given to employers and the low level of review exercised by the Department of Labor in establishing the prevailing wage rate. The cases tend to arise after an employee has complained about the prevailing wage and then been terminated. This factual situation gives rise to a retaliation claim under the statute.

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170. See discussion supra Section I(A)(1).
173. Section I(A)(2).
174. This factual situation can also result in a state tort claim for wrongful discharge in violation of public policy. See discussion supra Section III(B)(1).
A representative case is Baiju v. U.S. Department of Labor, where the employer set the petitioner’s H-1B salary by using “its own survey, which included looking at salary surveys and other documents from peer institutions as well as the salaries of [its] employees, and determined that the prevailing wage for petitioner’s position was $45,000 per year.” Later, when the employer wanted to convert the petitioner to a permanent position, the statute required the employer to file a permanent labor certification application containing a prevailing wage set by the state workforce agency (a government survey), which stated that the prevailing wage was approximately $72,000 per year. The petitioner complained that he should have been paid at the higher, government-set, prevailing wage rate, even before the granting of the permanent labor certification. The DOL administrative law judge and the administrative review board both found that the employer had validly relied on an acceptable private survey to set the prevailing wage for the work performed while on an H-1B visa and that the employer had no requirement under the statute to pay the government survey wage rate until the permanent labor certification was granted. On appeal, the district court agreed with this ruling. The petitioner did not recover anything because even though he stated a claim for retaliation under the visa statute based on his allegation that he had been fired for demanding the higher wage rate (protected activity under the statute), his claim failed on the merits because the employer showed that it had fired petitioner for a nondiscriminatory reason (refusing to perform work), not based on his protected activity.

3. Wage Theft and Benching

There are several cases in which employees complain that employers do not pay the stated prevailing wage for the appropriate period of time. In one typical administrative hearing, Itek, a body shop, sponsored a computer programmer named Benly Ebenezer for his H-1B visa. Ebenezer arrived in New Jersey, ready to work, but was “benched” for approximately four months. Itek, which looked to a variety of subcontractors to place Itek workers at U.S. companies, eventually placed Ebenezer with SBM, which had a contract to provide computer programmers to J.P. Morgan in New York City. Ebenezer worked there for a little over a year. The ALJ found that

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176. Id. at *5. After cost of living increases, petitioner was being paid $50,500 per year at the time of the dispute.
177. Id. at 13-14.
179. Id. at 3-5.
Itrek violated the visa laws by failing to pay Ebenezer for the time he was benched, paying him below the prevailing wage for several months by paying him at the New Jersey rate, instead of the New York City rate; failed to pay him for several months when he was working; not offering him a return ticket to India when he was terminated; and withholding money for breach of contract damages.\textsuperscript{180} Ebenezer was awarded approximately $28,000.\textsuperscript{181}

Unfortunately, recent case law constrains the ability of the Department of Labor to investigate effectively allegations of wage theft by body shops. In \textit{Greater Missouri Medical Pro-Care Providers Inc.} ("GMM") \textit{v. Perez},\textsuperscript{182} an employee filed a complaint with state officials alleging a variety of workplace violations. GMM “provides physical and occupational therapists to serve in hospitals, nursing homes and similar facilities” by filling out numerous LCA’s and hiring physical and occupation therapists from the Philippines.\textsuperscript{183} According to the allegations, its operations were characteristic of most body shops. The worker complained that she was required to pay all of the fees to file and extend her H-1B visa, including attorney’s fees; was required to stay with others in company-paid apartment during the time she studied for and took a licensing exam; was only paid $50 per week for food during that non-productive time; and that her contract contained an illegal fee for early termination. The complaint was forwarded to the Department of Labor, which treated it as an “aggrieved party complaint”\textsuperscript{184} and found reasonable cause to investigate whether the contract contained an illegal penalty for ceasing employment early.

The Department of Labor, in accordance with its regular policy, then conducted a full investigation of all the H-1B employees at the employer “to determine if any violations exist under H-1B and to see if there are any violations to any employee during the relevant time period.”\textsuperscript{185} It found that the employer owed back wages to forty employees for benching violations, in the amount of approximately $340,000; owed about $8,000 to seventeen employees for illegal fee deductions; and owed over $8,200 to four employees for illegally withholding paychecks. On review, the award for back wages was decreased to approximately $105,000 because the original award included pay for time that was beyond the twelve-month statute of

\begin{flushleft}
\textsuperscript{180} \textit{Id.} at 12-17. \\
\textsuperscript{181} \textit{Id.} at 18-19. \\
\textsuperscript{182} 812 F.3d. 1132 (8th Cir. 2015). \\
\textsuperscript{183} \textit{Id.} at 1133. \\
\textsuperscript{184} The regulations give the Department of Labor the ability to investigate employers in four different ways: based on the investigation of an aggrieved party complaint; case-by-case random investigations of willful violators; based on reasonable cause that the employer is not in compliance; and based on specific credible information of a willful violation. 8 U.S.C. § 1182(n)(2) (2012). \\
\textsuperscript{185} \textit{GMM}, 812 F.3d at 1138 (internal citations omitted).
\end{flushleft}
limitations. The District Court upheld the award, and the employer appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit reversed the judgment of the District Court. It held that the Department of Labor could not initiate an investigation based on a specific complaint by an aggrieved party and then conduct a full-scale investigation into all the H-1B visa practices of that employer. It stated that the DOL would have to open a new investigation under a different provision of the visa statute in order to inquire into these other matters. Because the DOL had exceeded its investigatory powers, the appeals court threw out the award, thereby limiting the DOL’s ability to investigate broadly the policies and practices of body shop employers.

4. Liquidated Damages

As described above, employers often insert a clause in visa workers’ contracts that require employees to pay damages if they leave work before the end of the contract term. Although the visa statute prohibits employers from penalizing employees for leaving work early, it does allow employers to collect “liquidated damages.” Procedurally, these claims have been adjudicated in two ways. When employers sue employees to recover these damages, the employee can argue that the contract is voidable and that the liquidated damages provision is unenforceable under state law. If the employee loses in state court and faces a judgment requiring payment of these fees, she can file a claim with the Department of Labor alleging a violation of the visa provision.

In Tekstrom v. Savla for example, Sameer Savla who had been studying in Houston on a student visa, contacted Tekstrom, Inc. in response to an ad stating that the company had job openings and could quickly process H-1B visas for qualified applicants. Tekstrom hired Savla and told him to report to Delaware where he would be given a visa, provided with housing, complete a three-week training course and be placed into a position following completion of the course. When Savla arrived in Delaware, he was placed into an apartment and was required to sleep in a sleeping bag on the floor because the only bed in the apartment was shared by two female employees who were also in the training program. The trainees were required to go to the Tekstrom office every day and night during the training period and told

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186. Id. at 1135. The Department of Labor originally took the position that, although an employee must file a complaint within the twelve-month statute of limitations, an award could be granted for continuing violations that occurred before that time. The DOL did not contest the holding on review that the award could only be limited to the twelve-month time frame. Id.
187. Id.
188. 20 CFR 655.731(c)(10)(i)-(ii).
190. Savla had recently graduated from the University of Houston with a degree in computer science, where he had been studying on a student visa. Id. at *1.
that if they left the company, they would owe Tekstrom $18,000. Following
the training program, Tekstrom did not provide a job for Savla, did not pay
Savla and did not provide the promised health insurance. One of the other
participants in the program, Dharani, left the program, and Tekstrom told
Savla “if he tried to leave like Dharani he would make an example of him.”
Savla stayed in the apartment for four months with no pay, no visa and no
health insurance.

Savla was finally placed in a short-term assignment with a
subcontractor, Aria Consulting, that had a job for Savla with Bearing Point
in New York. When Savla and Aria contacted Tekstrom to inquire about his
visa, pay stubs and employment contract, Tekstrom threatened to sue Savla
and to file criminal charges against him. Savla became so upset over the
threats that he became physically ill and left New York to return to Houston.
When Tekstrom was informed of Savla’s location and illness, Tekstrom
“threatened Savla with a civil lawsuit, criminal charges, possible deportation
and the destruction of his career. . . . [It] further stated that a criminal
complaint had been prepared and they were holding back from filing it as it
could lead to his deportation and he may never be able to come back here.”
Tekstrom filed a claim against Savla seeking $18,000 under the liquidated
damages clause, which it said would cover “the company’s estimate of its
investment in a trainee, including housing, training, software licensing fees,
marketing efforts and work performed by Tekstrom’s staff as well as
potential lost revenues from the early termination of a prospective work
assignment.” In response, Savla argued that the contract was voidable and
that the liquidated damages clause was unenforceable. He also filed
counterclaims for tort and contract violations.

The state court in Delaware ruled in favor of Savla. It found that the
contract was voidable because Savla was induced to sign the contract based
on materially false misrepresentations. The court also found that the
liquidated damages clause was void as a penalty. The assessments were
found to be inappropriate for liquidated damages because Tekstrom could
have easily estimated the actual costs of housing and training, and liquidated
damages are only allowable when the damages are reasonably anticipated but
difficult to estimate. Further, the fee was found to be a penalty because it
bore no relation to the stated damages that might be caused by early breach.
As the court said, “Savla would have had to pay the $18,000 in penalty
whether he was working for one day or eighteen months. There is nothing in

191. *Id.* at *2.
192. *Id.* at *3.
193. *Id.* at *6.
194. *Id.* at *1.
195. *Id.* at *4-5.
196. *Id.* at *5-6.
197. *Id.* at *5 (using applicable state law for evaluating the validity of liquidated damages).
the record to show how the amount was arrived at or whether it is proportionate to whatever actual damage would result from a contract breach.”

Had Savla instead lost in state court, he could have challenged the judgment enforcing the liquidated damages clause by filing a claim with the Department of Labor alleging that the fee violates the visa laws. For example, in the Novinvest case, the employer secured state court judgments against three employees, which included a $5,000 “investment fee,” to cover the business expenses necessary to “hire, train and process” the employees. After the employees complained to the DOL, the ALJ stated that in order for the fee to be upheld, it must be allowable under the visa laws as one agreed to by the employees, intended to benefit the employees, not simply used to cover the employer’s regular business expenses, not exceed the stated expenses, and not exceed federal limits on garnishment of wages. In addition, the fee must be allowable as liquidated damages under applicable state law. In Georgia, where this case occurred, liquidated damages requirements included a showing that the damages caused by a breach are difficult to estimate accurately; the amount is intended to cover damages and not be a penalty; and the amount is a reasonable estimate of the probable loss. The ALJ found that the employer failed under both the visa rules and the state law because it did not provide any specifics as to how it arrived at the $5,000 figure. As a result, the ALJ found that the employer was not entitled to compensation and thus was required to return any amounts collected under the state judgments.

5. Criminal Prosecution

The U.S. government can also bring criminal proceedings to prosecute offenses such as visa fraud, mail fraud, wire fraud, money laundering and conspiracy. These cases are brought by the Department of Justice, with assistance from the Department of Homeland Security and other executive departments. For example, in a 2009 investigation of Vision Systems Group, the federal government arrested eleven people in six states for visa fraud, mail fraud, wire fraud, and conspiracy, based on allegations that they hired...
workers for jobs that did not exist and violated prevailing wage laws by paying Iowa prevailing wages while employing workers in different regions, such as San Jose, California. The case was eventually settled after the two brothers who ran Vision Systems Group pled guilty to felony charges. As a result of the plea deal, the company paid $236,000 in restitution, instead of the $7.4 million originally sought. The brothers each paid a $100 fine and received three years of probation. The company also agreed to permanent debarment from DOL certifications.

B. Private Causes of Action

Employees can bring causes of action against employers either as counterclaims to suits brought by their employers or as independent law suits seeking damages. Because there is no private right of action under the visa laws, plaintiffs must plead causes of action that are independent and distinct from the visa claims discussed above; otherwise, they are required to pursue their claims through the Department of Labor administrative framework described above. If the employee is not seeking relief under the visa laws, however, the H-1B system does not preempt local or federal employment or other laws and no exhaustion of DOL administrative remedies is required before the plaintiff may proceed in either state or federal court. For example, the requirement to pay “benched” employees for nonproductive time is a right to compensation not found in any other statute and is only actionable under the visa laws, and thus must be pursued administratively. On the other hand, a claim for the failure to pay the full amount of wages agreed to under a contract may be brought as a state law action in state court. This section describes a variety of claims that can and have been brought in state and federal courts as private causes of action.

1. State Tort and Contract Claims

In the Tekstrom case, in addition to defeating the employer’s claims for payment of liquidated damages, the plaintiff successfully sued in contract for unpaid wages and intentional misrepresentation in the contract, and in tort for intentional infliction of emotional distress. Savla was awarded

205. See Thibodeau, supra note 60.
207. Id.
210. Id. at 959.
approximately $50,000 in damages on the contract claim (including unpaid wages, compensatory damages and liquidated damages) and $40,000 on the tort claim (including $20,000 for pain and suffering and $20,000 in punitive damages).\textsuperscript{212} The court also awarded approximately $75,000 in attorneys’ fees.\textsuperscript{213} In considering the intentional infliction of emotional distress claim, the court concluded, “when an employer threatens an employee with deportation, lawsuits, false criminal charges, and sabotage of his professional career, this conduct should be regarded as intolerable in a civilized community.”\textsuperscript{214}

Employees may be able use the visa laws within a tort claim by tethering a claim for wrongful discharge to the visa laws. In \textit{Chiu v. CGI-AMS}, the plaintiff brought a variety of claims, including a claim for wrongful discharge in violation of public policy— a California tort claim which requires a plaintiff to show that she engaged in an activity protected by public policy and was discharged for that activity.\textsuperscript{215} The plaintiff alleged that she was fired because she demanded to be paid the appropriate prevailing wage under the H1B visa rules, and that this federal policy provided the “public policy” necessary for the tort claim.\textsuperscript{216} The court upheld this theory, and the plaintiff was awarded $360,000 in emotional distress damages.\textsuperscript{217}

\textbf{2. Trafficking, Involuntary Servitude and Debt Bondage}

Passed pursuant to the Thirteenth Amendment and as an amendment to the Anti Peonage Statute of 1867,\textsuperscript{218} the Trafficking Victim’s Protection Act (“TVPA”)\textsuperscript{219} seeks to eliminate certain systems of unfree labor in the United States. The statute prohibits peonage, forced labor, debt bondage, slavery and involuntary servitude. Significantly, the TVPA provides for a private cause of action, so individuals can challenge abusive arrangements without waiting

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\item[(C.D. Cal. 2011)]. There, recruiters allegedly used a “bait-and-switch” tactic in which visa applicants were required to pay additional fees after joining the program or lose a large initial payment. \textit{Id.}
\item[212]. \textit{Tekstrom}, at *1.
\item[213]. \textit{Id.}
\item[214]. \textit{Id.} at *12.
\item[215]. The plaintiff also sued for retaliation under California’s Fair Employment and Housing Act, California overtime labor code violations and national origin discrimination. Complaint, Chiu v. CGI-AMS (US), LLC, (Cal. Super. Ct. Feb. 9, 2005) (No. CIV 444771) (on file with author).
\item[218]. Plaintiff’s attorneys were awarded approximately $715,000 in fees and costs. Order Awarding Attorney’s Fees and Costs, Chiu v. CGI-AMS (US), LLC, (Cal. Super. Ct. June 15, 2006) (No. CIV 444771) (on file with author).
\item[219]. See Ontiveros, supra note 136, at 147 (describing origins of, legislative amendments to and changes to the TVPA).
\end{enumerate}
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for government intervention.\textsuperscript{220} There are at least two ways that the current treatment of guest workers can violate the TVPA. First, “forced labor” or involuntary servitude occurs when labor is obtained by any of the following:

1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
2) by means of serious harm or threats of serious harm to that person or another person;
3) by means of the abuse or threatened abuse of law or legal process; or
4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.\textsuperscript{221}

Further, the section adds:
1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.
2) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.\textsuperscript{222}

As the cases discussed below illustrate, in the context of H-1B workers, employers, subcontractors, or body shop owners can be found to have procured forced labor through abuse or threatened abuse of the legal process when they manipulate the visa immigration process to prevent employees from quitting or leaving employment. The employers who require employees to pay large sums of money before they can quit can be found to have procured forced labor through threats of serious financial harm. Either of these actions can be found to violate the TVPA.

In addition, the statute prohibits “debt bondage,” defined as:

the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not


\textsuperscript{221} 18 U.S.C. § 1589(a).

\textsuperscript{222} Id. § 1589(c).
applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.\textsuperscript{223}

When an employer requires an employee to pay a large sum of money before quitting and that sum cannot be justified as “liquidated damages,” the employer’s actions should run afoul of this language. Cases such as \textit{Tekstrom}, fit into this category, although the plaintiff in that case did not allege a TVPA violation.

Several cases have been brought on behalf of H-1B workers under the forced labor approach. For example, in \textit{Panwar v. Access Therapies, Inc.},\textsuperscript{224} the court found that Panwar stated a claim for a violation of the TVPA.\textsuperscript{225} In that case, Panwar signed an employment agreement which required him to work for two years as a physical therapist at a weekly net pay rate of $800-$1,000. He was also required to execute a Promissory Note in which he promised to pay for his visa and $20,000 if he left before the end of the contract term. The employer benched Panwar for eight months without pay instead of placing him in a job, and, when he inquired about receiving a work assignment and pay, the employer threatened to revoke his visa. He was eventually placed in a job at a wage rate less than promised. When Panwar filed a lawsuit to recover the visa fee, pay for time spent on the bench, and for underpayment of contract wages, the employer fired him and threatened to revoke his visa.\textsuperscript{226} The court found that the employer’s threat to revoke Panwar’s visa if he continued to inquire about his placement and wages to be an abuse of the legal process.\textsuperscript{227} In addition, the court found that the threat of serious financial harm (being in debt to the Defendant for $20,000) adequate to state a claim under the TVPA because it prevented him from being able to voluntarily terminate his employment as a form of non-physical coercion.\textsuperscript{228}

In \textit{Nuñag-Tanedo v. East Baton Rouge Parish School Board},\textsuperscript{229} the employer, Universal Placement International (UPI), working closely with another recruiting organization, PARS International Placement Agency (PARS), recruited teachers from the Philippines under the H-1B program to work for a school district in Louisiana.\textsuperscript{230} UPI first required the teachers to pay a $5,000 fee for their visas. UPI arranged for the interview with the U.S. Embassy necessary to complete the visa process, and required that the teachers tell the Embassy to forward the passports and visas directly to

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\item 223. 22 U.S.C. § 7102(4) (2012).
\item 225. \textit{Id.} at 957-58.
\item 226. \textit{Id.} at 954.
\item 227. \textit{Id.} at 958.
\item 228. \textit{Id.} at 958.
\item 230. \textit{Id.} at 1138. Defendants also included Navarro, the owner and President of UPI and Emilio Villarba, official representative for PARS. \textit{Id.} at 1138.
\end{itemize}
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UPI. 231 UPI then required the teachers to pay an additional $10,000 and the cost of relocation to the United States, threatening that if they failed to do so, they would forfeit the initial $5,000 fee, not be given their passport or visa, and not be allowed to travel to the United States. 232 The teacher plaintiffs “felt that they had to comply with [the] Recruiter Defendants’ demands since they needed to work in the United States to repay their debt(s).” 233 Once the plaintiffs arrived in Louisiana, the defendants threatened to deport the plaintiffs when they tried to change their living arrangements to some place less expensive and complained to a local television reporter about their employment situation. 234 The defendants also sued teachers who posted a blog about their situation and “made additional threats to sue, allow visas to expire, and terminate teachers if the teachers did not pay additional fees.” 235

The court found that the defendants’ actions of threatening deportation, allowing visas to expire, and termination of employment constituted forced labor obtained through “abuse or threatened abuse of law or legal process.” 236 In addition, they found that defendants’ actions constituted forced labor obtained through threats of serious financial harm because forfeiting the $5,000 would constitute an amount equal to a year and a half of salary in the Philippines, 237 and through psychological coercion because defendants “intentionally manipulated the situation so that Plaintiffs would feel compelled to remain and would obey all of Defendants’ demands.” 238

3. RICO

The Racketeer and Influenced Corrupt Organization Act ("RICO") 239 provides civil and criminal avenues to attack a pattern of racketeering activity. In order to state a RICO claim, plaintiffs must show that an enterprise engages in a pattern of racketeering activity. 240 The pattern must include at least two “predicate acts” listed in the statute. 241 Predicate offenses that might be implicated in H-1B visa cases include: threats; extortion; mail fraud; wire fraud; victim or witness intimidation; crimes regarding citizenship or naturalization documents; misuse of passports; fraud and

231. Id.
232. Id. at 1138-39, 1142.
233. Id. at 1139.
234. Id.
235. Id.
236. Id. at 1143-44, 1146, 1147.
237. Id. at 1146.
238. Id.
misuse of visas, permits, and other documents; and peonage, slavery or trafficking in persons.\textsuperscript{242}

At least two cases involving H-1B workers\textsuperscript{243} have found that the plaintiffs stated a cause of action for RICO. In \textit{Nuñag-Tanedo}, the court found that the plaintiffs had sufficiently pled, based on the facts discussed above, the predicate acts of forced labor, trafficking, and unlawful document related practices.\textsuperscript{244} The court also found that the plaintiffs had pled extortion as a predicate act when “Defendants threatened Plaintiffs with ‘deportation and financial ruin in violation of Cal. Penal Code §§ 518-519 if they did not pay the fees required under the [multiple contracts].’”\textsuperscript{245} The court also allowed the plaintiffs’ RICO claim to go forward in \textit{Access Therapies, Inc. v. Mendoza}, where the defendant allegedly preyed on “vulnerable foreign nationals,” luring them “to its employ with promises of good wages, benefits, and working conditions.”\textsuperscript{246} The company “then reneged on those promises while at the same time trapping [them] into servitude” through the use of “unconscionable promissory notes that contain illegal penalty clauses and used the threat of enforcing those notes to coerce [them] not to complain or seek relief based on [] working conditions or Access’s broken promises.”\textsuperscript{247}

Displaced American workers, like Roger Greenman, have also turned to RICO in an attempt to challenge outsourcing practices, but these cases have not been as successful. In January of 2016, two RICO suits were filed against Walt Disney World and the two labor contracting firms it used, Cognizant and HCL.\textsuperscript{248} The complaint against Disney and Cognizant alleged the commission of fraud in the preparation of visa documents as the predicate RICO act.\textsuperscript{249} In October 2016, the District Court granted a motion to dismiss without prejudice because the plaintiffs were unable to state predicate acts under RICO.\textsuperscript{250}

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\item \textsuperscript{242} 18 U.S.C. § 1961 (2012).
\item \textsuperscript{243} RICO has been used more extensively by workers on a H-2A or H-2B laborer visas. For a discussion of those claims (which are analytically similar), see Lee, supra note 220, at 56-62.
\item \textsuperscript{244} \textit{Nuñag-Tanedo v. E. Baton Rouge Par. Sch. Bd.}, 790 F. Supp. 2d 1134, 1147-48 (C. D. Cal. 2011).
\item \textsuperscript{245} \textit{Id.} at 1149-1151. But the plaintiffs failed to sufficiently plead the predicate act of wire or mail fraud. \textit{Id.} at 1148-49.
\item \textsuperscript{246} \textit{Access Therapies, Inc. v. Mendoza}, No. 1:13-CV-01317-JMS-DML, 2014 WL 4670888, at *2, (S.D. Ind. Sept. 18, 2014). The \textit{Mendoza} court did not specify the predicate acts because the defendants only challenged other aspects of the RICO claim. In \textit{Panwar v. Access Therapies, Inc.}, 975 F. Supp. 2d. 948 (S.D. Ind. 2013), the plaintiff’s RICO case was denied because the plaintiff failed to adequately plead the existence of an “enterprise” that bears a “family resemblance” to a prototypical RICO case. \textit{Id.} at 957 (citing Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997)).
\item \textsuperscript{247} \textit{Mendoza}, 2014 WL 4670888, at *3.
\item \textsuperscript{250} \textit{Moore v. Technology Solutions}, 2016 WL 5943593 (M.D. Fla. 2016).
\end{itemize}
4. Employment Discrimination

Recently, displaced workers such as Roger Greenman have turned to anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, to challenge their employer’s actions. Title VII prohibits discrimination based on race and national origin, while Section 1981 prohibits discrimination based on race, defined in a broad way to include ancestry and ethnic characteristics. Neither statute specifically prohibits discrimination based on citizenship, migrant, or immigration status. In the seminal 1973 case, Espinoza v. Farah Mfg., the Supreme Court held that discrimination based on citizenship was analytically distinct from discrimination based on national origin. In Espinoza, a clothing manufacturer in Texas refused to hire anyone who was not a U.S. citizen. The Court found that discrimination based on citizenship might be used to infer intentional discrimination against people from a specific country or to form the basis of a disparate impact claim if it resulted in fewer people of a specific national origin being hired. In the factual situation of Espinoza, however, no such discrimination existed because the plaintiff was a Mexican citizen and the employer’s workforce was overwhelmingly of Mexican descent. Espinoza created a bright line rule that discrimination based on citizenship status is not per se discrimination based on national origin. Thus, in order to bring successful discrimination claims under the current law, plaintiffs need to prove discrimination based on race and/or national origin, not on immigration, migrant or citizenship status.

In Koehler v. Infosys Technologies Limited, Inc., American plaintiffs alleged discrimination based on race and national origin in hiring, promotion and discharge. For their intentional discrimination claims, they put forth evidence of South Asians being treated more favorably than Caucasian Americans, as well as statistics showing that 96% of the workforce was South Asian Americans.

253. In addition to the two reported cases discussed below, former employees of Walt Disney World have filed complaints for discrimination based on national origin and age with the EEOC. See Patrick Thibodeau, Two Disney IT Workers Prepare to Sue Over Foreign Replacements, COMPUTERWORLD, (Nov. 23, 2015, 1:25 PM), http://www.computerworld.com/article/3007933/it-careers/two-dozen-disney-it-workers-prepare-to-sue-over-foreign-replacements.html.
254. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). The Court uses the definition of race as it was understood in 1866, the year that Section 1981 was passed. Id. at 610-11. It does not prohibit discrimination based on place or nation of origin; instead, it focuses on ancestry or ethnic characteristics. Pourghorashi v. Flying J., Inc., 449 F.3d 751, 756 (7th Cir. 2006).
256. Id. at 92.
257. Id. at 90-91. See also Maria L. Ontiveros, Migrant Labour in the U.S.: Working Beneath the Floor for Free Labour?, MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW, (Cathryn Costello & Mark Freedland eds., 2014) (discussing effect of case on development of law regarding discrimination against immigrants on basis of immigrant status).
Asian. They also offered direct evidence in the form of testimony from a hiring manager who stated, “There does exist an element of discrimination. We are advised to hire Indians because they will work off the clock without murmur and they can always be transferred across the nation without hesitation unlike [a] local workforce.” The court found that these allegations stated plausible claims for disparate treatment discrimination under Title VII on the basis of national origin and Section 1981 on the basis of race. The court reasoned that the plaintiffs established a distinct racial group (South Asians) or national origin (Indian, Bangladeshi, and Nepalese) that were favored over Caucasians of American national origin.

In Heldt v. Tata Consultancy Services, plaintiffs brought disparate treatment claims under Title VII and Section 1981, using gross statistical disparities to establish their prima facie case. They alleged that 95% of the defendant’s employees were persons of South Asian descent, race and/or national origin, while South Asians compose only 1-2% of the United States population. The plaintiffs argued that the defendants achieved their discriminatory goal by sponsoring a large number of South Asians for visas; hiring a disproportionate number of South Asians from the United States; and discriminating against non-South Asians in placement, promotion, demotion and termination. The court allowed the claim to go forward because these facts gave notice of the basis for the claim and the defendant could not rely on the use of a visa-based business model as a defense to allegations of discrimination based on race and/or national origin. The defendant could not establish that “use of the visa programs must be non-discriminatory by definition” and that the plaintiffs could “never show” that they were discriminated against as a result of this business practice.

Plaintiffs have also been allowed to proceed under a Title VII disparate impact theory. In Koehler, plaintiffs alleged that the employer’s practice of “setting annual ‘visa quotas’ to support the growth of their United States offices, hiring South Asian workers in sufficient numbers to meet those quotas, and securing visas for foreign workers to enter and work in the U.S.,” resulted in the hiring of South Asian workers over American workers. The court found that the defendant’s practice of “growing their U.S. offices by setting visa quotas for additional South Asian workers, budgeting for the associated expenses of securing the visas, and filling employment vacancies

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259. Id. at 943-44.
260. Id. at 944 (internal quotation marks omitted).
261. Id. at 946.
262. 132 F. Supp.3d 1185 (N.D. Cal. 2015).
263. Id. at 1189-90.
264. Id. at 1187.
265. Id. at 1188.
266. Id. at 1189.
by assisting persons of the South Asian race to enter this country to work in the defendants’ U.S. offices” constituted a specific and particular employment practice that resulted in a disparate impact on Caucasian Americans.\footnote{Id. at 948.}

Immigrant visa workers who seek to have discriminatory treatment remedied under Title VII also must focus on discrimination based on national origin and not based on immigration status. For example, in Chellen v. Pickle,\footnote{446 F. Supp. 2d 1247 (N.D. Okla. 2006).} a group of Indian visa workers were given substandard work assignments, housed in deplorable conditions, and racially insulted.\footnote{Id. at 1265.} They were called “Indian dogs”\footnote{Id. (internal quotation marks omitted).} and described by the employer as “‘my Indian animals I brought from India to work.’”\footnote{Id.} Plaintiffs prevailed on claims of national origin discrimination.\footnote{Id. at 1284.} However, both immigrant visa workers and American workers who try to state claims based on immigrant status rather than national origin have difficulty prevailing.\footnote{See Rachel Bloomekatz, Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace, 54 UCLA L. REV. 1963 (2007) (discussing the difficulty of immigrant visa workers stating national origin discrimination claims and arguing that domestic workers should have better chance of succeeding when displaced by visa worker).}

IV.
SUGGESTIONS FOR REFORM

The lawsuits discussed above challenging the continuum of exploitation caused by the H1-B program have the potential to address individual problems; though for them to be truly effective, administrative agencies must increase enforcement. The larger systemic problem of unfree labor associated with guest worker programs, however, can only be addressed with legislative reform. This section suggests two areas for reform: revisions to the current visa laws and an amendment to Title VII to prohibit discrimination based on migrant or immigration status.

A. Revisions to Visa Laws

Four concrete changes to the visa laws can make significant progress to ameliorating the harmful effects of a guest worker program. First, guest worker visas should be fully portable. Once a person is awarded an H1B visa, she should be able to stay in the United States for the length of the visa, even if she is fired or quits. This will give the workers more bargaining power in protesting poor working conditions or low pay. It will put them on par with other American workers and help prevent employers from leveraging guest

\footnote{Id. at 948.}
\footnote{446 F. Supp. 2d 1247 (N.D. Okla. 2006).}
\footnote{Id. at 1265.}
\footnote{Id. (internal quotation marks omitted).}
\footnote{Id.}
\footnote{Id. at 1284.}
\footnote{See Rachel Bloomekatz, Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace, 54 UCLA L. REV. 1963 (2007) (discussing the difficulty of immigrant visa workers stating national origin discrimination claims and arguing that domestic workers should have better chance of succeeding when displaced by visa worker).}
workers’ powerlessness against other employees in such a way as to bring down the floor for free labor. Full portability will also give the worker more control over her own labor, so that it is no longer “owned” by someone else. The worker, and not the visa sponsor, will become her own master.

Second, the visa laws should be amended to prevent employers from hiring visa workers when that employment will have a negative effect on American workers. A variety of possibilities exist. First, all employers should be required to make a showing of a labor shortage before hiring visa workers. Second, there should not be exemptions from the requirement to not negatively affect working conditions for those employers who hire visa workers with advanced degrees or who pay over $60,000 a year. Third, agencies must more closely scrutinize the ways in which employers set the prevailing wage, including the use of private wage surveys and the employers’ designation of job classifications, job level, job description and geographical locations in ways that set artificially low wages. 275 Finally, the ability to subcontract entire departments to groups of visa workers should be constrained so that existing workers have an ability to compete for those jobs. One way to do this would be to adopt language from the L-1 visa program that prohibits a visa holder from being hired out to an unaffiliated, nonpetitioning employer. 276 This has the potential to eliminate subcontracting and practices of the body shops.

Third, there should be more protection and accountability in the supply chain to hold accountable the large companies at which subcontracted and body shop visa workers actually work. Other industries have utilized different models for increasing accountability for the end users of labor. For example, in California, the end users in certain industries must certify that they are paying a sufficient contractual amount to enable the labor supplier to pay appropriate wages and benefits. 277 Another approach has been the use of pressure on companies to adopt private codes of conduct, which have resulted in improved conditions that have been tailored to the specific industry. 278 These approaches should be examined to determine which might be appropriate to use in the high-tech industry.

275. Fulmer, supra note 49, at 857-858.
276. Id. at 859; Goodsell, supra note 48, at 169-71.
277. Cal. Lab. Code § 2810(a) (West 2016) (“A person or entity shall not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided.”).
278. See Debra Cohen Maryanov, Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain, 14 Lewis & Clark L. Rev. 397 (2010) (discussing the codes adopted by companies that have succeeded in reaching abusive labor practices).
Finally, H-1B visas must include a full path to citizenship.\textsuperscript{279} When there is no pathway to citizenship, a person is commodified. She is brought here solely for her labor, and not valued as a person, as a human. Without this recognition, the person is not able to connect to the community, build capacity and become empowered. Without a feeling of belonging, a person will not contribute to society or her community. Work without citizenship rights becomes a way to control and exploit labor based on race, national origin and migrant status.\textsuperscript{280}

**B. Amend Title VII to Prohibit Discrimination Based on Citizenship, Migrant or Immigration Status**

Both American workers and H1-B immigrant workers have turned to Title VII to protest discrimination in their employment resulting from the visa program. For American workers, this discrimination has mainly taken the form of refusal to hire and discharge. For the immigrant workers, the discrimination takes the form of low pay, harassment, benching and discharge. Both groups, in order to be successful, have had to plead and explain their cases as forms of discrimination based on national origin or race. In truth, the discrimination is more likely a result of citizenship, migrant or immigration status.

Title VII should be amended to prohibit discrimination on these bases. Such a prohibition would be consistent with international law, which views discrimination based on immigrant status as a human rights violation.\textsuperscript{281} An amendment would still allow the federal government to determine which immigrants have the legal right to work in the United States, but it would not allow employers to treat certain workers worse, in their terms and conditions of employment, because of their citizenship, migrant or immigrant status. Employers would no longer be able to prefer visa workers over American workers, and U.S. employers would no longer be able to harass immigrants because of their status or refuse to hire a non-citizen solely because he or she has not naturalized. Employers would still be able to defend citizenship requirements or compliance with visa contracts using the types of defenses currently available in other types of discrimination cases.

\textsuperscript{279} Though many different approaches to guaranteeing citizenship exist, the principle is more important than the details. See Richard T. Middleton, *Comprehensive U.S. Immigration Reform: Policy Innovations or Nondecisions*, 38 SETON HALL LEGIS. J. 313 (2014) (discussing the six pillars currently suggested for successful pathway legislation).

\textsuperscript{280} See *supra* Section II(D).

CONCLUSION

The H-1B program was originally intended to help American companies and workers like the hypothetical Raji Patel. He could provide needed, hard-to-find technical expertise to a company, make a decent living, and perhaps become an American citizen. Unfortunately, the visa rules are set up in such a way as to leave him powerless to protest poor treatment, overwork, or lack of pay. At the same time, American workers like the hypothetical Roger Greenman have to compete with Raji and other H1-B workers or find themselves displaced. As a result, their living standards decline. Finally, the lives of some of the H1B workers like Sanjiv Gupta are even worse. They arrive in America to find broken promises about the job they thought would be waiting for them and the amount of money they would earn. Bound by contracts with unconscionable penalties, they find themselves unable to quit and go home, even if they want to. Better enforcement of the visa laws, as well as state and federal causes of action, can help ameliorate the situation, but true change will only happen with revisions to the guest worker visa program, so that it is no longer a system of unfree labor.