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Haiti – U.S. Migration through a Labor Lens: The H-2 Visa Program, the Temporary Protected Status (TPS), and Its Policy Implications

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Haiti – U.S. Migration through a Labor Lens: The H-2 Visa Program, the Temporary Protected Status (TPS), and Its Policy Implications

Tatiana Devia*

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INTRODUCTION

In 2018, the Trump administration, through the Department of Homeland Security, limited Haitians from accessing the United States' labor market by terminating two migration programs that benefited Haitian nationals. The administration terminated the H-2 temporary visa program and the Temporary Protected Status (TPS).¹ The termination of these programs raised issues concerning the detrimental effect for the Haitian community, the legality of the actions taken by Department of Homeland Security, and the consequences for the U.S. labor market.² An examination of Hai-

¹ In January 2018, the United States Department of Homeland Security announced the termination of the designation of Haiti for Temporary Protected Status and the identification of foreign countries whose nationals are eligible to participate in the H-2A and H-2B Nonimmigrant Worker Programs. *See* Identification of Foreign Countries Whose Nationals are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 83 Fed. Reg. 2646, 2647 (Jan. 18, 2018) (explaining that the Secretary of Homeland Security, in concurrence with the Secretary of State, determined that several countries, including Haiti, should no longer be eligible to participate because they are not meeting standards set out in the regulation); *see also* Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018) (determining that after July 22, 2019, nationals of Haiti who were granted TPS under the Haiti designation will no longer be able to renew TPS because conditions in Haiti no longer support its designation for TPS).

² Note that after writing this article, Federal Courts blocked the termination of the TPS for Haiti through two preliminary injunctions. *See* Ramos v. Nielsen, 366 F.Supp.3d 1075, 1080-81 (N.D. Cal. 2018) [hereinafter Order Granting Plaintiffs Motion for Preliminary Injunction] (stating that plaintiffs have made substantial showing on the merits to support the claim that when deciding to terminate the TPS, the Department of Homeland Security changed the criteria used by prior administrations without valid justification and while raising serious questions on whether their actions were influenced by the White House and based on animus against non-white, non-European immigrants in violation of equal protections guaranteed by the Constitution); *see also* Saget v. Trump, 375

ti's relationship with these programs sheds light on the mechanisms involved in frameworks that facilitate a population's access to the labor market.

This article aims to examine the two pathways utilized by Haitians to access low-skill job opportunities in the United States: the H-2 temporary visa program and the TPS. As background, this article provides an examination of the conditions that led Haitians to seek opportunities in the United States. Then, this article exposes the labor-related challenges and abuses experienced by Haitian workers in the agriculture industry to provide a brief illustration of life as a Haitian worker in the United States. Based on the experience of Haitian workers with the H-2 visa, an examination of this program exposes the deficiencies of this framework and potential improvements. Due to a particularly high level of vulnerability among Haitian workers, the role of the Department of Labor (DOL) in the regulation of the H-2 visa program is examined. Furthermore, the first part of this article explores the life cycle of the H-2 visa program to show the highly discretionary nature of the statute, the issues that should have been addressed in an effort to maintain the eligibility of Haiti in the program, and the role of the current political climate in the termination of the H-2A Nonimmigrant Worker Visa.

The second part of this article discusses a program that, although not intended as a labor mobility framework, presents the same concerns raised upon the examination of labor-related programs. An examination of the TPS designation demonstrates the global debate on the significance of migrants as a labor force and the efforts to address labor shortages in the United States. Finally, Haiti's relationship with the TPS illustrates the manner in which this program covered gaps in industries that also use H-2 workers to address labor shortages. The concerns raised as part of the resistance against the termination of the program demonstrate the need for Haitian low-skilled workers in the U.S. labor market, and the benefits of the TPS program as a channel to supply work-authorized immigrants.

F.Supp.3d 280 (E.D.N.Y. 2019) (stating that plaintiffs are likely to succeed on the merits of their claim that Department of Homeland Security did not conduct a good-faith, evidence-based review of facts on the ground to determine the TPS extension).

HAITIAN MIGRATION: PUSH AND PULL FACTORS

Haitians have a long history of economic migration to different countries in the Americas. A large number of Haitians immigrate to countries in the Caribbean, including the Dominican Republic and The Bahamas.³ Haitian migrants, like many other migrant groups, migrate toward the countries in which they have the closest cultural, economic, and political ties.⁴ The United States was one of these countries where waves of Haitian migrants established social and economic roots prior to the 2000s.⁵ The origin of large Haitian migration patterns towards the U.S. can be traced back to an extended time of political turmoil and extreme poverty in Haiti. Different push factors triggered an exodus of Haitians in search of safety and economic opportunities. Perhaps, the most important event causing the first mass exodus of Haitians to the U.S. can be traced to the takeover of power by former President François “Papa Doc” Duvalier in 1957.⁶

As his dictatorship progressed, the abuse of human rights increased and the economic situation worsened. Meanwhile, with the 1965 Immigration Act, the United States temporarily facilitated the migration of Haitians to the U.S. through family ties and temporary visas.⁷ However, after the United States changed its policy and restricted Haitian migration in the 1960s, boatloads of Haitian refugees began landing in South Florida throughout the 1970s and 1980s.⁸ Haitians did not receive the same treatment as Cubans,

³ JAMES FERGUSON, *MINORITY RIGHTS GRP. INT’L, MIGRATION IN THE CARIBBEAN: HAITI, THE DOMINICAN REPUBLIC AND BEYOND* 4 (2003).

⁴ *Haitian Immigration*, THE SCHOMBURG CTR. FOR RESEARCH IN BLACK CULTURE (2005), <http://www.inmotionaame.org/print.cfm;jsessionid=f8301995441520237462241?migration=12&bhcp=1>.

⁵ *Id.* (noting that during the 1980s, as government and Haitian advocates fought for the rights of newcomers to remain in the United States, large Haitian communities were emerging in places such as South Florida).

⁶ *Id.* (indicating that Duvalier’s policies affected the entire population’s economic security).

⁷ WILLIAM A. KANDEL, CONG. RESEARCH SERV., U.S. FAMILY-BASED IMMIGRATION POLICY 1 (2018) (stating that the INA specified numerical limits for five family-based immigration categories, including immediate relatives through the family reunification principle).

⁸ *See* THE SCHOMBURG CTR. FOR RESEARCH IN BLACK CULTURE, *supra* note 4 (explaining that as Haitians fled political prosecution and extreme pov-

whose mass migration was also triggered by extreme poverty and harsh conditions under a dictatorship.⁹ Haitians were sent back while Cubans were eventually offered political asylum.¹⁰

The death of Duvalier did not bring any improvement or change to Haiti. Duvalier's son Jean-Claude "Baby Doc" Duvalier took power and continued his father's policies.¹¹ Under "Baby Doc," economic and political conditions declined, human rights violations increased, and extreme poverty rates became the norm. Military coups occurred after Baby Doc fled to France, and the country was unable to transition into a democracy after the dissolution of the Duvaliers' authoritative regime. Years of corruption and abuse led to processes in which Haitians began experiencing structural violence, which refers to the mechanism that causes violent impacts through social structures and institutions, on Haitians' daily lives.¹² In sum, political turmoil, a weakened economy, and structural violence became the primary push factors leading to massive patterns of Haitian migration towards the United States and, later on, to other countries.¹³

erty, hundreds of Haitians embarked in dangerous journeys across the ocean seeking to reach).

⁹ *Id.* (describing that treatment against Haitians represented a continuous bias in U.S. policy when comparing the favorable treatment of Cuban refugees; the disproportionate number of Haitians incarcerated upon arrival; and the alarmingly high rejection rates of political asylum requests in comparison to any other national group).

¹⁰ ANDORRA BRUNO, CONG. RESEARCH SERV., U.S. POLICY ON CUBAN MIGRANTS: IN BRIEF 2 (2016) (providing that U.S. policy on Cuban migration has been shaped by the 1966 Cuban Adjustment Act and agreements that have developed policies such as the so-called "wet foot-dry foot" policy in which Cubans who reached the U.S. shores were permitted to legally stay in the United States).

¹¹ See THE SCHOMBURG CTR. FOR RESEARCH IN BLACK CULTURE, *supra* note 4.

¹² See generally PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR (2003) (providing an extended and in-depth analysis on the ramifications and relationships between political and economic injustice, and the suffering of large vulnerable communities).

¹³ See Kyilah Terry, *New Haitian Migration Patterns End in Displacement*, UCLA INT'L INST. (Apr. 17, 2019), <https://www.international.ucla.edu/Institute/article/202365> (reporting increasing migration patterns from Haiti to Brazil, Venezuela and Mexico).

Natural disasters also contributed to recent Haitian migration trends. The most significant event in Haiti's recent history was the 2010 earthquake. On January 12, 2010, a massive earthquake claimed the lives of over 300,000 Haitians and displaced more than 1.5 million people.¹⁴ The catastrophic destruction was unprecedented. More than eighty percent of rural housing was severely damaged and most government buildings collapsed.¹⁵ Months later, a cholera epidemic began when U.N. peacekeepers—allegedly from Nepal—spread the disease during the recovery efforts. The slow reconstruction following the earthquake has been cited as a major cause of continued extreme poverty rates. In addition, Haiti's geographical position has placed the country in the path of several hurricanes within recent years. In 2016, Hurricane Matthew severely impacted Haiti, leaving more than one million Haitians affected by the storm.¹⁶ Today, Haiti is known as the poorest country in the Western Hemisphere.¹⁷

The United States remains a preferred destination country for Haitians due to socio-economic pull factors, such as proximity to the island, family ties, and economic opportunity. The U.S. has historically benefited from low-wage migrant labor and continues to offer low-skill opportunities to different pools of migrant workers, including Haitians.¹⁸ Primarily, the majority of migrants in the U.S. have been directly motivated by economics and the country's continuous need for low-wage labor in industries experiencing labor shortages.¹⁹ These pull factors continue to attract Haitians to-

¹⁴ Jesselyn Cook, *7 Years After Haiti's Earthquake, Millions Still Need Aid*, HUFFINGTON POST (Jan. 12, 2017), https://www.huffingtonpost.com/entry/haiti-earthquake-anniversary_us_5875108de4b02b5f858b3f9c.

¹⁵ *Id.* (describing the continuous struggle to rebuild vital public buildings, including schools, hospitals and government buildings, that suffered irreparable harm during the earthquake).

¹⁶ Azam Ahmed, *Hurricane Matthew Makes Old Problems Worse for Haitians*, THE N.Y. TIMES, (Oct. 6, 2016), <https://www.nytimes.com/2016/10/07/world/americas/hurricane-matthew-haiti.html>.

¹⁷ *The World Bank in Haiti*, THE WORLD BANK (last updated Oct. 15, 2019), <https://www.worldbank.org/en/country/haiti/overview>.

¹⁸ See THE SCHOMBURG CTR. FOR RESEARCH IN BLACK CULTURE, *supra* note 4.

¹⁹ See MICHAEL CLEMENS ET AL., CTR. FOR GLOBAL DEV., *MIGRATION IS WHAT YOU MAKE IT: SEVEN POLICY DECISIONS THAT TURNED CHALLENGES*

wards the U.S. today, and the largest concentrations of Haitians are found in Florida, followed by New York, and Massachusetts.²⁰

LABOR-RELATED ISSUES EXPERIENCED BY HAITIAN MIGRANT WORKERS IN THE UNITED STATES

Haitians might be exposed to the same issues as other migrant groups in the U.S., but they confront a particularized discrimination not common in the overall migrant worker population. In general, low-skilled workers may be subject to discrimination, wage-theft, exploitation, and other abuses that interfere with their labor and housing conditions in the United States.²¹ This article briefly discusses some issues reported by Haitian workers in the agriculture field to illustrate potential abuses and discrimination against Haitian migrant workers and juxtapose them with the broader framework of labor-related migrant programs in the U.S.

Discrimination and harassment specifically targeting Haitian migrant workers in the agriculture field is not uncommon. In general, Haitians have been victims of negative stereotyping since the early stages of their migration to the United States.²² As a contemporary immigrant group, they have encountered more prejudice

INTO OPPORTUNITIES (2018) (discussing push and pull factors that drive migration patterns and policy improvements that influence economic factors).

²⁰ Jennifer Schulz & Jeanne Batalova, *Haitian Immigrants in the United States*, MIGRATION POLICY INST. (Aug. 2, 2017), <https://www.migrationpolicy.org/article/haitian-immigrants-united-states>; see generally OXFAM AMERICA, *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHT IN AMERICAN AGRICULTURE* (2004).

²¹ See Patti Tamara Lenard & Christine Straehle, *Temporary labour migration: Exploitation, tool of development, or both?* 29 POLICY & SOC'Y 283, 283-94 (2010) (discussing the exploitative nature of temporary guest work in the United States and the attempt to balance globalized migrant interests to achieve a range of benefits such as the global redistribution of wealth in the form of remittances).

²² See THE SCHOMBURG CTR. FOR RESEARCH IN BLACK CULTURE, *supra* note 4; see also Alex Stepick, *Pride Against Prejudice: Haitians in the United States*, in THE NEW IMMIGRANT SERIES at 1, 2 (Sarah L. Dunbar et al. eds., 1998) (explaining discriminatory patterns specifically aimed against Haitians that continue to perpetuate negative stereotypes).

and discrimination than any other group in the United States.²³ Since workers from Central America—primarily Mexico and Guatemala—dominate migrant labor in the field of agriculture, Haitian workers find themselves in a work environment in which co-workers, recruiters, and supervisors speak Spanish.²⁴ The fact that Haitians speak Creole creates a communication barrier that isolates them from other migrant groups.²⁵

Haitian migrant workers have reported harassment and discrimination directly and solely targeted against them by Spanish-speaking supervisors.²⁶ Female workers have also reported lewd gestures and use of discriminatory language towards Haitian women in the fields.²⁷ Haitian workers reported that they often worked in isolation from all other Hispanic workers and were subjected to harassment that was not directed against workers from other nationalities.²⁸ These issues and observations continue to be of particular importance, because there has been a rise in the number of Haitian workers in the agriculture industry, particularly in Florida.²⁹ Haitian workers, specifically on tomato farms across Florida, continue to report discrimination and a lack of Creole-speaking supervisory staff who can adequately address their needs and concerns.³⁰ To address these issues, worker-led groups that monitor

²³ Stepick, *supra* note 22, at 115 (discussing the different forms of prejudice and discrimination specifically targeted against the Haitians that perpetuate unemployment, low occupational mobility and poverty).

²⁴ Gordon Hanson, Chen Liu, Craig McIntosh, *The Rise and Fall of U.S. Low-Skilled Immigration*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY, SPRING 2017 (2017).

²⁵ *See* Stepick, *supra* note 22, at 4.

²⁶ *See generally* FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2014 ANNUAL REPORT (2014); *see also* FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2015 ANNUAL REPORT (2015) (providing several examples of worker complaints indicating discriminatory behavior against Haitian workers by field supervisors).

²⁷ FAIR FOOD STANDARDS COUNCIL (2014), *supra* note 26 at 20 (describing an episode where a supervisor used lewd and discriminatory language towards Haitian women farmworkers in the presence of auditors who were auditing a tomato farm in Florida).

²⁸ *Id.*

²⁹ FAIR FOOD STANDARDS PROGRAM, FAIR FOOD PROGRAM: 2017 ANNUAL REPORT (2017).

³⁰ *Id.*

working conditions at participating farms, such as the Coalition of Immokalee Workers (CIW), have increased the number of Creole-speaking staff to encourage Haitian workers to report issues.³¹

Haitian workers have also been subjected to situations involving forced labor and visa fraud. In 2010, three individuals were indicted in Florida for engaging in conspiracy to commit crimes such as forced labor and visa fraud involving Haitian nationals.³² The defendants enticed thirty-four Haitians to travel to Florida under the false pretense of gaining agriculture guest worker visas and the promise of lucrative jobs with a path to permanent residence.³³ The defendants charged substantial recruitment fees, forced workers to get loans in Haiti using their property as collateral, and confiscated the workers' passports to keep them indebted and forced to work.³⁴ Today, advocacy and worker-led groups, including the CIW, have been able to provide specific resources and information to Haitian workers to encourage them to report any abusive or coercive behavior.³⁵ These efforts attempt to bridge language barriers and protect workers from future abuse by establishing channels in which Haitian workers communicate their complaints in Creole and receive information in their native language.

TEMPORARY GUEST WORKER VISAS: UNDERSTANDING THE H-2 VISA AND PROMOTING IMPROVEMENTS

Haiti's most recent relationship with the H-2 visa program has not been extensive. After the deadly 2010 earthquake, there were

³¹ The Coalition of Immokalee Workers (CIW) is a community-based organization based in Immokalee, Florida, that advocates for farmworkers following a Worker-Driven Social Responsibility Program in participating farms across the United States. The CIW trains workers and facilitates a 24-hour complaint hotline with Creole-speaking investigators while ensuring a retaliation-free work environment.

³² Press Release, Dep't of Just., Three Indicted in Alleged Conspiracy Involving the Trafficking of Haitian Nationals (July 6, 2010), <https://www.justice.gov/opa/pr/three-indicted-alleged-conspiracy-involving-trafficking-haitian-nationals> (indicating that the defendants maintained the victims' labor through threats of serious harm).

³³ *Id.*

³⁴ *Id.*

³⁵ See generally COAL. OF IMMOKALEE WORKERS, ANTI-SLAVERY PROGRAM, <http://ciw-online.org/slavery/>.

considerable lobbying efforts by advocates, U.S. members of Congress, and immigration supporters to develop policies that could facilitate access to work opportunities by Haitians.³⁶ As a result, the U.S. Department of Homeland Security included Haiti in the H-2 temporary and seasonal guest worker program in 2012. However, five years later, upon a turbulent immigration policy crisis in the U.S., the Trump administration decided to terminate the program.³⁷ Looking at a temporary guest worker program from the Haitian perspective and experience facilitates an examination on labor-related issues implicated in such programs and their effect on the migrant Haitian population.

The H-2 Visa Program Framework and DOL's Role

The United States enacted two frameworks under which foreign workers are temporarily admitted into the country. Through the Immigration and Nationality Act of 1952, the U.S. Government established the H-2 visa program, which allows employers who anticipate a shortage of domestic workers to bring low-skilled foreign workers to perform agricultural labor (the “H-2A Program”) or higher-skilled workers for services of a temporary seasonal nature (the “H-2B Program”).³⁸ While the H-2A framework is a purely agricultural labor-market, the H-2B framework covers diverse industries including hospitality, health, construction, food service, and others.³⁹ Theoretically, the program is based on the assumption that the employer has confirmed an expected gap in the employers’ workforce due to a shortage of labor, which the employer needs to

³⁶ See Press Release, Congresswoman Wilson Leading Bipartisan Effort by Members of Florida Delegation to Help Haitians Get Family-Based and Temporary Worker Visas (Jan. 5, 2012) (available at <https://wilson.house.gov/media-center/press-releases/congresswoman-wilson-leading-bipartisan-effort-by-members-of-florida>).

³⁷ See Identification of Foreign Countries Whose Nationals are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs, 83 Fed. Reg. 2646 (Jan. 18, 2018).

³⁸ See U.S. Dep’t of Labor, *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEP’T OF LABOR, <https://webapps.dol.gov/elaws/elg/taw.htm>.

³⁹ See U.S. Dep’t of Labor, *Hiring Foreign Workers*, U.S. DEP’T OF LABOR, <https://www.foreignlaborcert.doleta.gov/hiring.cfm>.

address with a foreign and temporary workforce.⁴⁰ Before gaining the ability to hire workers under any of these temporary worker programs, an employer must go through a certification process.

As a requirement for certification, employers must offer a job that is temporary or seasonal, demonstrate that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work, and show that workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.⁴¹ Meeting these requirements is not a challenging process for employers. According to the Department of Labor (DOL), employers must continue to engage in the positive recruitment of U.S. workers even after hiring foreign workers.⁴² Under these temporary programs, U.S. employers who meet the regulatory requirements obtain a temporary labor certification for H-2 workers from the DOL.⁴³ After the certification process is finalized, the employer is authorized to continue its request for temporary migrant workers. Finally, prospective workers outside the United States can apply for a H-2 visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad.⁴⁴

Overall, there are several employer-based commitments and “diligence” implications involved in the H-2 application and certification process. Under the H-2A framework, employers commit to keeping accurate and adequate records and reporting mechanisms with respect to workers’ earnings, maintain wage and hour statements, and provide a copy of the work contract to the worker.⁴⁵ During the application process, the employer must indicate that he

⁴⁰ See U.S. Citizenship and Immigration Services, *H-2A Temporary Agricultural Workers*, USCIS.GOV, <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers>.

⁴¹ See United States Dep’t of Labor, Employment & Training Administration, *Foreign Labor Certification: H-2A Certification*, <https://foreignlaborcert.doleta.gov> (making available forms and procedures required to apply for Labor Certification).

⁴² See *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, *supra* note 38.

⁴³ *Id.*

⁴⁴ See *H-2A Temporary Agricultural Workers*, *supra* note 40.

⁴⁵ See *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, *supra* note 38 (requiring certified employers to keep accurate records and report worker activity in regard to wages, hours and employment status).

or she has made reasonable inquiries to determine that, to the best of his or her knowledge, the recruiter has not collected and will not collect any fees or compensation from H-2A workers as a condition of the employment.⁴⁶ These procedures indicate that if the United States Citizenship and Immigration Services (USCIS) determines that the employer knew or should have known of the existence of recruiting fees, the application may be denied or revoked. In the case described in the previous section, where the recruiters were indicted after falsely recruiting thirty-four Haitian workers, it is not clear whether the employers who hired the Haitian workers were penalized by the DOL. The agency has not provided any information or follow-up on this matter regarding the employer's role or knowledge of these crimes.

Observations and Recommendations for Improvements

These cases involving worker abuse—whether they involve H-2A workers or a different population—demonstrate a mechanism in which it is common to see a DOJ prosecution against the recruiters, but the role of the hiring farm is often overlooked and barely disclosed or discussed. The role of the hiring farms is significant. Although this is an issue that affects other worker populations, it is valuable to illustrate that abusive recruitment practices also affects Haitian workers, and growers should be aware of it. DOL's efforts to warn, penalize, and publicly disclose employers' practices for lack of due diligence during recruitment is minimal to nonexistent. Information regarding severe abuses involving forced labor is not readily available to the public. As a tool of accountability, DOL should enact a system that keeps track of farms involved in the hiring—directly or indirectly—of workers who were abused by recruiters. This information should be made available to the public and continuously updated. The current social environment demonstrates that mechanisms involving consumer activism

⁴⁶ DEP'T OF HOMELAND SEC., FORM I-129, PETITION FOR A NONIMMIGRANT WORKER (citing Section Two, question nine of the document stating that the employer has "made reasonable inquiries to determine that to the best of their knowledge the recruiter or facilitator used has not collected, or will not collect, directly or indirectly, any fess or compensation from H-2 workers of this petition as a condition of the employment").

deter many employers from engaging in practices that may risk their reputation.⁴⁷

Due to an Increased Level of Vulnerability, DOL Should Provide Additional Safeguards to Protect Haitian Workers

Implementation of the H-2A program is not heavily regulated and there are no independent mechanisms designed to monitor working conditions of new H-2A workers.⁴⁸ Instead, most of the program is subject to the oversight of DOL's wage and hour division. The division's primary measure to prevent an adverse impact to H-2A workers is to provide a confidential complaint hotline. Through the distribution of information—mainly in the form of a poster at the job site—the division informs workers of the employers' responsibilities regarding housing, transportation, wages, and disclosure. It is unclear whether Haitian workers are aware of this information upon their departure from Haiti or upon their arrival at their new workplace. As explained above, labor abuses may exist in farms, and Haitian workers are likely to face discrimination whether they are undocumented or lawfully abiding by H-2A regulations. As such, it is particularly important to ensure that Haitian workers are aware of their rights.

As mentioned in the previous section, employers apply for a certification that makes them eligible to hire a specific number of workers. The fact that the worker is tied to this sponsor employer will most likely deter workers from reporting any abuse. In addition, the information provided by the DOL does not make it clear whether there are protections from any retaliation or whether the worker—in the event of making a complaint—will be able to complete his or her visa period through a different arrangement or without any adverse impact to future H-2A repeat applications. As

⁴⁷ See Oliver Balch, *Abuse of Migrant Workers is Now a Top Risk for Businesses*, THE GUARDIAN (Feb. 16, 2016), <https://www.theguardian.com/sustainable-business/2016/feb/16/migrant-workers-top-risk-businesses> (exposing migrant abuse in different industries and the preventive role of developing national and international standards and initiatives).

⁴⁸ As previously mentioned, DOL's Wage and Hour division play the principal monitoring role. It is important to note that the current anti-migrant political environment could deter migrant workers from contacting a government agency such as DOL to report abusive employer practices.

mentioned above, worker coalitions such as the CIW address workers' labor conditions by conducting trainings and having a presence in the fields and in the community, which includes staff fluent in Haitian Creole. As such, workers are more likely to report any issues to an organization such as CIW rather than approaching a government agency. It is unlikely that the information provided by the DOL's Wage and Hour Division serves as a useful tool for workers experiencing abuses when the worker is completely unfamiliar with procedures regarding confidential complaints or worker protections, and when supervisors are specifically discriminating against Haitian workers.

Although the DOL's Wage and Hour Division oversees the H-2A program, the agency indicates that other mechanisms and laws, such as workers' compensation, the Fair Labor Standards Act, and the Family and Medical Leave Act, may also apply to the employment of H-2A workers.⁴⁹ Upon observation of the materials distributed by the DOL to workers upon arrival and the posters required to be displayed at worksites, it is clear that workers will not be able to infer that they are entitled to these types of worker protections. As such, workers are subject to discrimination, wage theft, unsafe and unhealthy housing, retaliation, and other forms of abuse. These abuses are inherent in the general migrant temporary worker community.⁵⁰

The H-2A visa program has been heavily criticized due to continuous exposure to abusive recruitment practices that permeate several industries and regions in the U.S.⁵¹ The H-2A visa program

⁴⁹ See *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, *supra* note 38.

⁵⁰ See Etan Newman, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*, FARMWORKER JUSTICE (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf>.

⁵¹ *Id.*; see also Owens et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States*, URBAN INSTITUTE (2014), <https://www.urban.org/sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.PDF> (reporting based on a study involving victims who entered the United States on temporary guest worker visas such as the H-2 visa and were subjected to different forms of abuse and exploitation); see Daniel Costa, *NPR report reveals the real reason why agricultural employers prefer guestworkers*, ECONOMIC POLICY INSTITUTE: WORKING

has been also criticized from the employers' perspective, claiming that requirements can be burdensome and expensive for employers.⁵² For example, Florida growers have complained about the paperwork and bureaucratic procedures involved in the program.⁵³ Under the H-2A visa program, employers are responsible for housing, meals, and transportation to and from the workers' countries.⁵⁴ As such, some employers blatantly indicate their preference for undocumented workers due to the process and implications involved in the H-2A program. However, growers also recognize that the current U.S. immigration environment is leaving corporate growers with the H-2A program as the only legal means to hire foreign workers to supplement their labor needs due to a shrinking pool of domestic workers, including undocumented workers.⁵⁵ The deficiencies of the H-2A program coupled with discriminatory practices against Haitian workers should influence regulatory agencies to increase their efforts in creating protections for this particular population. For example, DOL should inform employers of the particular vulnerabilities faced by Haitian workers as a minority within a Hispanic-dominated industry. DOL should develop additional layers of accountability for the abusive behavior of supervisors used by corporate employers and abusive practices against migrant workers within the employers' operations. Such layers of accountability should include follow-up mechanisms that monitor employers' complaint and issue resolution. In addition,

ECONOMICS BLOG (Jan. 29, 2016 at 1:53 PM), <https://www.epi.org/blog/npr-report-reveals-the-real-reason-why-agricultural-employers-prefer-guestworkers/>.

⁵² See Chairman Bob Goodlatte, H.R. JUDICIARY COMM., <https://republicans-judiciary.house.gov/wp-content/uploads/2017/10/102017-AG-Act-OnePager.pdf>.

⁵³ See Fritz M. Roka, *Navigating the H-2A Program*, CITRUS INDUSTRY (Sept. 8, 2017), <http://citrusindustry.net/2017/09/08/navigating-the-h-2a-program/>.

⁵⁴ See CTR. FOR GLOB. DEV., *H-2A Program for Temporary Agricultural Workers*, https://www.cgdev.org/sites/default/files/archive/doc/migration/H-2A_Fact_Sheet8.6.pdf

⁵⁵ See Kevin Sieff & Annie Gowen, *With Fewer Undocumented Workers to Hire, U.S. Farmers are Fueling a Surge in the Number of Legal Guest Workers*, THE WASHINGTON POST (Feb. 21, 2019), https://www.washingtonpost.com/world/the_americas/with-fewer-undocumented-workers-to-hire-us-farmers-are-fueling-a-surge-in-the-number-of-legal-guest-workers/2019/02/21/2b066876-1e5f-11e9-a759-2b8541bbbe20_story.html.

DOL should create culturally targeted materials for Haitian workers encouraging them to report discriminatory practices without any fear of retaliation. These materials should be distributed in all stages involved in the visa process. Considering DOL's lack of involvement and awareness involving labor-related abuses and crimes, it is critical to reexamine, develop, and propose further policy strategies. These initiatives should require multiple actors, such as workers, recruiters, employers, and community-based organizations to share their experiences and challenges with temporary guest worker visa programs.

Haiti's Brief Experience with the H-2A Program

It is challenging to assess the experience of Haitian H-2A workers in the United States due to its limited duration, limited data, lack of H-2A worker narratives, and the fact that the number of H-2A visas granted to Haitians was far lower than expected. A study conducted by the Center for Global Development (CGD) examined the economic impact of temporary Haitian workers in the U.S.⁵⁶ This study contributed valuable information to the examination of the H-2A program with respect to access to temporary guest work visas by the average Haitian worker.⁵⁷ It is also one of the only sources explaining Haitians' experiences with the program in the origin country. The study aimed to connect Haitian farmworkers with certified employers in the U.S.⁵⁸ The Haiti office of the International Organization for Migration (IOM) and two Haitian agricultural workers' cooperatives participated in the study. The study attributes the difficulty in evaluating the impact of granting H-2A visas to Haitian workers to two principal factors: first, employers who sponsor the visa were typically unfamiliar with Haiti and invested in recruiting workers from Mexico and Guatemala, and, second, high numbers of H-2A visa rejections at the consulate level in Haiti for reasons that were outside workers'

⁵⁶ Michael Clemens & Hannah Postel, CTR. FOR GLOB. DEV., *Temporary Work Visas as U.S.-Haiti Development Cooperation: A Preliminary Impact Evaluation* (Jan. 2017), <https://www.cgdev.org/sites/default/files/temporary-work-visas-us-haiti-development-cooperation-preliminary-impact-evaluation.pdf>.

⁵⁷ *See id.* at 3.

⁵⁸ *See id.* at 1.

control and unrelated to personal characteristics other than “insufficient ties to Haiti.”⁵⁹ The most common reason for rejection involved the determination that the home-country ties, such as property ownership, were insufficient to motivate return.⁶⁰

In the study, the workers who were able to obtain visas traveled to Alabama and Oregon and all returned to Haiti upon the expiration of their visa.⁶¹ The study followed several workers who traveled under the temporary guest worker visa program and sought to repeat H-2A employment after their return to Haiti.⁶² Haitians indicated their desire to travel to the U.S. as temporary workers due to the impact of remittances for family members and for the workers’ future financial goals.⁶³ Workers whose work was part of the impact study did not express significant concern regarding any labor abuse or their overall experience as H-2A workers other than “the project might not continue and they would be unable to work in the U.S. again.”⁶⁴ The fact that this sample study did not reflect well-known abuses related to temporary work visas “suggest[s] that recruitment can be properly designed to deliver large benefits to users of the visa.”⁶⁵ This inference could be attributed to the fact that the participation of several organizations and employers’ involvement in the study removed any potential abusive recruiters

⁵⁹ *Id.* at 4 (explaining that embassy officers perform a vetting assessment per applicant to determine whether to approve or reject a temporary guest worker visa).

⁶⁰ *See id.* at 4 n.5.

⁶¹ *Id.* at 4.

⁶² *Id.* (stating that Haitians interviewed as part of this sample and who did not apply for the H-2A visa in the first stage of the study, expressed interest in applying for the program in the future after seeing how other Haitians were able to send remittances as H-2A workers in the U.S.).

⁶³ *Id.* at 11 (analyzing the impact of remittances on the lives of Haitians when even a short span of work in the United States could more than double the annual household income received by other household members); see Barrera Oscar David & Zanusso Claire, *Migration Transfers and Labor Supply: Evidence from Haiti*, PARIS SCH. OF ECON., (Dec. 11, 2017), <https://www.parisschoolofeconomics.eu/docs/barrera-rodriguez-oscar-david/migration-transfers-labor.pdf> (stating that migration significantly affects Haitians’ household decisions and participating in migration increases the probability to receive transfers and increase household income).

⁶⁴ Clemens & Postel, *supra* note 56, at 14.

⁶⁵ *Id.* at 15.

and imposed a level of employer accountability. Perhaps the positive experience reflected in this study, although largely focused on the economic impact for Haitian households, demonstrates that the involvement of several organizations and identifiable points of contact in both countries can diminish the abuses inherent in agricultural migrant employment.

The low number of visas granted to Haitian workers and the fact that there is a high rate of visa rejections, which are based on the determination that home-country ties are insufficient to demonstrate the discrepancies between DHS regulations and the realities of potential Haitian H-2A candidates. As later discussed in this article, DHS noted high rates of visa refusals as one of the reasons for preventing Haitians from applying for the H-2 visas; but many of these refusals are due to factors that may not be easily remediated, such as showing property ownership to strengthen home-country ties.⁶⁶ Under these circumstances, placing an emphasis on rejection rates demonstrates a lack of synchronicity between a country of origin, such as Haiti, and the U.S. government's expectations and regulations. The experiences of Haitian workers under the H-2A program in the U.S. are not easily identified due to the small numbers of Haitian workers who were able to obtain H-2A visas.⁶⁷ However, the study described in this section and the current advocacy efforts by several organizations challenging the cancellation of the H-2A program, suggest that Haitian workers were relying on its continuation before its abrupt termination.

The Termination of the H-2A Program: Evidence of the Highly Discretionary Nature of the H-2 Statute and the Role of the Current Political Climate

A country's designation as a participant of the H-2 program is examined and published annually by the DHS in the Federal Register. In designating countries as participants in the nonimmigrant worker program, the Department of Homeland Security (DHS),

⁶⁶ See *Haiti Removed from Temporary Visa Eligibility List*, BLOOMBERG LAW (Jan. 17, 2018, 12:49 PM), <https://news.bloomberglaw.com/daily-labor-report/haiti-removed-from-temporary-visa-eligibility-list> (providing recent data and sources on program visa refusal rates and number of visas issued to Haitians).

⁶⁷ Clemens & Postel, *supra* note 56, at 1.

with the concurrence of the Secretary of State, considers four regulatory factors:

- 1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal;
- 2) The number of final and unexecuted order of removal against citizens, subjects, nationals, and residents of that country;
- 3) The number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and
- 4) Such other factors as may serve the U.S. interest.⁶⁸

DHS indicates that examples of the fourth regulatory factor include fraud, abuse, overstay rates, and non-compliance with the terms of the H-2 visa program.⁶⁹ In addition, DHS may also consider evidence "relating to the economic impact on particular U.S. industries or regions resulting from the addition or continued non-inclusion of specific countries."⁷⁰ Under the statute, determinations regarding country participation—and removal—are made based on the factors listed above and the sub-factors taken into consideration as part of "U.S. interest[s]."⁷¹ However, at the time Haiti was removed from the H-2 Program, DHS specifically added an additional consideration to the factors that may serve the U.S. interest: "evidence of past usage of the H-2A and H-2B programs by nationals of the country."⁷² This was a sign of the discretionary nature of the statute and the potential legal issues involved in this determination. It is important to note that prior to the current administration, DHS did not raise any red flags regarding potential issues with Haiti's participation in the program.

⁶⁸ Nonimmigrant Classes, 8 C.F.R. §214.2(h)(5) (2016).

⁶⁹ *See id.* at (h)(5)(F)(C).

⁷⁰ 83 Fed. Reg. at 2646-47 (Jan. 18, 2018).

⁷¹ *See generally id.*

⁷² *Id.* at 2647.

Under the Trump administration, the Secretary of Homeland Security determined that Haiti would no longer be designated as an eligible country “because they are not meeting the standards set out in the regulation.”⁷³ According to DHS, Haitian nationals under the H-2 program “present extremely high rates of refusal, and those issued [H-2 visas] have historically demonstrated high levels of fraud and abuse and a high rate of overstaying the terms of their H-2 admission.”⁷⁴ DHS indicated that Haiti has not shown improvements in regards to these issues and as a result, Haiti’s inclusion on the 2018 H-2 program is “no longer in the U.S. interest.”⁷⁵

Since the inception of the H-2 visa program for Haitian nationals, the U.S. government consistently granted fewer than seventy visas per year for H-2A workers.⁷⁶ In comparison to other countries in the Americas, Haitian temporary guest workers do not represent a significant number.⁷⁷ Reports and data show that prior to 2016, there was not a significant rate of Haitian workers overstaying their visa.⁷⁸ These reports also indicate that Haitian H-2A visa overstay rate jumped to forty percent in 2016, as suggested by DHS.⁷⁹ However, such reports may also suggest that workers suspected that the program was going to end under the Trump administration, thus prompting workers to avoid their return to Haiti.⁸⁰ This inference can also be backed-up by the fact that this was not an issue or red flag prior to the current administration.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ DEP’T OF HOMELAND SEC., *Yearbook of Immigration Statistics*, Nonimmigrant Admissions Supplementary Tables (2012-2016), www.dhs.gov/immigration-statistics/yearbook, <https://www.dhs.gov/immigration-statistics/yearbook>, <https://www.dhs.gov/immigration-statistics/yearbook>.

⁷⁷ *Id.* (providing total number of visas granted per country).

⁷⁸ See Clemens & Postel, *supra* note 56.

⁷⁹ Yeganeh Torbati, *Trump Administration Bars Haitians from U.S. visas for low-skilled work*, REUTERS (Jan. 17, 2018 at 7:33 PM), <https://www.reuters.com/article/us-usa-immigration-haiti/trump-administration-bars-haitians-from-u-s-visas-for-low-skilled-work-idUSKBN1F702O>.

⁸⁰ See Alex Nowrasteh, *Haitian Guest Workers Overstayed their Visas Because the Government Cancelled the Program for Them*, CATO INSTITUTE (Jan. 18, 2018 at 11:56 AM), <https://www.cato.org/blog/haitian-guest-workers-overstayed-their-visas-because-government-cancelled-program-them>.

If overstay rates were not an issue before 2016, it can be assumed that Haitian workers were relying on the possibility of returning to the U.S. by re-applying for the H-2A visa and maintaining a commitment to the terms of the program. As mentioned above, it is important to note that the number of visas granted was not significant in comparison to other countries. Advocates for the program indicated that issuing temporary worker visas could perhaps deter overstay and promote incentives for workers to comply with current regulations. This rationale shows the delicate balance between workers' migration decision-making and the implications related to the current political environment of the country of destination.

The Counter-Productive Risks of Abruptly Ending the Program: Observations and Final Remarks

It is important to emphasize that prior to the availability of H-2 visas, Haitians came to the U.S. through family-based petitions or asylum claims, in addition to pathways of irregular migration.⁸¹ Later, Haiti became eligible to participate in the temporary work visa programs, thus gaining access to the U.S. labor market and its benefits. After all, temporary guest worker programs can influence international economic development through remittances.⁸² As such, there was likely a commitment towards any legal pathway of labor migration that could contribute to Haiti's economic development due to its continuous recovery efforts, and social and economic conditions. In fact, Haiti is in the top ten countries of remittances by share of gross domestic product (GDP).⁸³ Remittances

⁸¹ See Royce Bernstein Murray & Sarah Petrin Williamson, *Migration as a Tool for Disaster Recovery: A Case Study on U.S. Policy Options for Post-Earthquake Haiti* 7 (Ctr. for Glob. Dev., Working Paper No. 255, June 2011).

⁸² See Michael Clemens, *Economic Impacts of H-2 Visa Eligibility for Haiti*, CTR. FOR GLOB. DEV. (Nov. 8, 2011), <https://www.cgdev.org/page/economic-impacts-h-2-visa-eligibility-haiti>; Dilip Ratha, *The Impact of Remittances on Economic Growth and Poverty Reduction*, MIGRATION POLICY INST., Sept. 2013, at 1.

⁸³ See *Remittance Profiles: Top Receiving Countries*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/programs/data-hub/remittance-profiles-top-receiving-countries>.

represent twenty-five percent of the country's GDP with more than half of those remittances coming from the United States.⁸⁴

Several considerations should be part of the analysis involving the potential implications of maintaining Haiti as an eligible country for temporary work visas. Regarding the H-2A visa, Haitians lack sufficient skills, capital, or interest to qualify for a substantial number of high-skilled employment-based visas. This reality is reflected in the low number of visas issued to Haitians for these purposes in recent years.⁸⁵ As such, the H-2B visa is a more valuable labor migration mechanism from Haitians. In general, migrant workers often report that, if given the opportunity, workers would choose to apply for the H-2 visa program and comply with all its regulations over migrating irregularly.⁸⁶ At the time the H-2A program for Haitian workers was examined, studies recommended that Congress offer this visa program as an alternative legal channel to unlawful migration.⁸⁷ On the other hand, farmers in the U.S. continue their efforts to enhance channels that supply them with new workers and to create strategies that facilitate the retention of the current workforce.⁸⁸

For a country with severe social, public health, and economic challenges, coupled with ongoing recovery efforts, the H-2 program represented one of the few options available for Haitians to temporarily access the U.S. labor market. This experience exposed Haitian workers to the labor market in the United States while contributing to the economies of both countries. The short-lived Haitian H-2 program and its abrupt termination could trigger a precarious situation for those already residing in the U.S. and thus, promote irregular migration and overstays. It is important to recognize that under the current regulations, temporary guest worker programs are highly sensitive to political environments and are not always in sync with the realities of the origin countries. Certain

⁸⁴ See Schulz & Batalova, *supra* note 20.

⁸⁵ See *Yearbook of Immigration Statistics*, *supra* note 66 (providing number of visas granted per year by category and country).

⁸⁶ See SIMÓN PEDRO IZCARA PALACIOS, *LOS JORNALEROS TAMAULIPECOS Y EL PROGRAMA H-2A DE TRABAJADORES HUÉSPEDES* (Plaza & Valdés 1st ed. 2010).

⁸⁷ Murray & Williamson, *supra* note 81.

⁸⁸ Philip Martin, *Immigration Policy and Agriculture: Possible Directions for the Future*, 5 J. ON MIGRATION AND HUMAN SEC. 252, 258 (2017).

eligibility criteria could lead countries undergoing massive recovery efforts towards a failed relationship with the H-2 visa. These considerations and the Haitian experience are relevant for understanding and improving the design of temporary guest worker programs.⁸⁹ Although tragically imperfect and seen as “inherently abusive,”⁹⁰ the H-2 program does implicate a set of safeguards that could facilitate labor mobility and decrease exposure to all the risks associated with irregular immigration.⁹¹ After all, advocacy efforts in support of the program focused on its potential for contributing to the development of the country by providing labor opportunities for Haitian nationals, increasing remittances, and avoiding irregular migration patterns.⁹²

THE TPS CONUNDRUM: FROM HUMANITARIAN TO LABOR RAMIFICATIONS

Although never intended as a labor mobility designation, the Temporary Protection Status (TPS) for Haitian workers demonstrates labor-related implications. TPS holders in the U.S. have significantly high levels of labor force participation.⁹³ Currently, the TPS designation for Haitian nationals is opening a debate on the role and needs of migrant labor forces in the U.S. and the effect of TPS on the labor market.

⁸⁹ See generally Kathleen Newland & Andrea Riestler, *Welcome to Work? Legal Migration Pathways for Low-Skilled Workers*, 3 MIGRATION POLICY INST., Jan. 2018, at 1.

⁹⁰ See Etan Newman, *supra* note 48; *Close to Slavery: Guestworker Programs in the United States*, SOUTHERN POVERTY LAW CENTER (Feb. 19, 2013).

⁹¹ See David Bier, *Guest Workers Can Help End Illegal Immigration*, COMPETITIVE ENTER. INST. BLOG (Nov. 27, 2012), <https://cei.org/blog/guest-workers-can-help-end-illegal-immigration>.

⁹² See Press Release, *supra* note 36.

⁹³ See American Immigration Council, *Workers with Temporary Protected Status in Key Industries and States* (Jan. 9, 2019), <https://www.americanimmigrationcouncil.org/research/workers-temporary-protected-status-key-industries-and-states>; see generally Nicole Prchal Svajlenka, *What Do We Know About Immigrants With Temporary Protected Status*, CTR. FOR AMERICAN PROGRESS (Feb. 11, 2019, 12:01 AM), <https://www.americanprogress.org/issues/immigration/news/2019/02/11/466081/know-immigrants-temporary-protected-status/>.

The TPS was established in the Immigration Act of 1990 through a humanitarian lens, rather than as a labor migration-related designation.⁹⁴ Congress originally designated TPS as a status intended to protect foreign nationals in the U.S. from being returned to their home country if there are certain life-threatening circumstances.⁹⁵ Temporary circumstances, such as an ongoing-armed conflict, environmental disasters (earthquake, flood, or epidemics), and other extraordinary conditions are events that cause a serious threat to the personal safety of the national re-entering the country.⁹⁶ In general, TPS designation prevents the deportation of the national to the country of origin and provides a work permit for eligible individuals. This designation may be renewed for six, twelve, or eighteen months and repeated indefinitely, but it does not provide a path for permanent residency.⁹⁷

TPS Designation for Haiti: A Designated Limbo

Immediately after the 2010 earthquake, the U.S. government announced the designation of TPS for Haitian nationals who were in the U.S. as of January 12, 2010.⁹⁸ The designation was granted for eighteen months subject to renewal.⁹⁹ In granting the TPS, the U.S. government indicated that the return of Haitian nationals to Haiti would bring more hardship to the nation.¹⁰⁰ Since then, the U.S. has continued to renew the TPS. This designation continued to be renewed in light of two additional events: a cholera epidemic

⁹⁴ See Claire Bergeron, *Temporary Protected Status After 25 Years: Addressing the Challenge of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION AND HUMAN SEC. 22, 24 (2014).

⁹⁵ U.S. Citizenship and Immigration Services, *Temporary Protected Status*, USCIS.GOV (last updated Nov. 1, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

⁹⁶ See 8 U.S.C. §1254a (2019).

⁹⁷ American Immigration Council, *Temporary Protected Status: An Overview* (May 21, 2019), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview>.

⁹⁸ Press Release, Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status (TPS) for Haitian Nationals (Jan. 15, 2010).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

and the 2016 Hurricane Matthew.¹⁰¹ On November 2017, Secretary of Homeland Security Elaine Duke announced her decision to terminate the TPS for Haitian nationals— as well as nationals from El Salvador—with a delayed effective date of eighteen months. Therefore, the designation was scheduled to terminate on July 22, 2019.¹⁰² According to DHS, after an inter-agency consultation process, “the extraordinary but temporary conditions cause by the 2010 earthquake no longer exist.”¹⁰³ The administration also indicated that Haiti has now sufficiently recovered and migrants are in a position to safely return to their country.

Of the more than 400,000 TPS holders, ninety-three percent are from El Salvador, Haiti, and Honduras.¹⁰⁴ There are over 58,000 Haitian nationals living in the U.S. under the TPS designation.¹⁰⁵ Approximately 21,900 Haitians live in Florida, with the vast majority working in the hospitality, food services, retail trade, and healthcare industries.¹⁰⁶ Although the TPS designation was not designed to create a path for legal permanent residence, recent efforts by Congress and advocacy groups resulted in a bipartisan bill that would offer a direct path towards permanent residency, the Aspire-TPS Act.¹⁰⁷ The proposed bill has not yet received enough support and no updates have been provided as of this time.

The outcome on the TPS termination is uncertain. Several groups have filed lawsuits challenging the termination of the pro-

¹⁰¹ Press Release, Rubio Urges Acting DHS Secretary to Grant TPS Designation for Haiti (Jul. 22, 2019) (encouraging the Department of Homeland Security to reconsider the termination of the Temporary Protected Status for Haiti).

¹⁰² Press Release, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017).

¹⁰³ *Id.*

¹⁰⁴ Claire Felter & Amanda Shendruk, *What is Temporary Protected Status (TPS)?*, COUNCIL OF FOREIGN REL. (last updated May 8, 2018), <https://www.cfr.org/article/what-temporary-protected-status-tps>.

¹⁰⁵ Lizette Alvarez, *58,000 Haitians in U.S. May Lose Post-Earthquake Protections*, N.Y. TIMES (May 20, 2017) <https://www.nytimes.com/2017/05/20/us/haitians-us-earthquake-immigration-protections.html>.

¹⁰⁶ CAP immigration team, *TPS Holders in Florida*, CTR. FOR AMERICAN PROGRESS (2017), https://cdn.americanprogress.org/content/uploads/2017/10/19125938/101717_TPSFactsheet-FL.pdf.

¹⁰⁷ See *ASPIRE-TPS Act of 2017: Bill Summary*, NAT'L IMMIGR. FORUM (Jan. 10, 2018), <https://immigrationforum.org/article/aspire-tps-act-2017-bill-summary/>.

gram for migrants from Haiti and El Salvador.¹⁰⁸ Worker community-based groups and organizations such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU) filed different complaints against the U.S. government challenging the decision to terminate the program on the grounds that the decision was discriminatory and unlawful under the meaning of the statute.¹⁰⁹ The complaints raise labor related issues and mentions the concerns raised by groups such as the Chamber of Commerce. Currently, two preliminary injunctions are in effect.¹¹⁰ If the court reverses the injunctions as a final decision and without any limitations, the TPS termination will take effect 120 days after TPS beneficiaries are notified.¹¹¹

The announcement of the termination of the TPS status for Haitian workers triggered reactions and concerns about addressing the impact on Haitian nationals and on Haiti's development efforts.¹¹² At the same time, it affirmed the fact that there are implications for the Haitian labor market in the U.S. After the announcement of the TPS termination, several legal and policy issues were raised by different organizations. Interestingly, most of the concerns on this issue are also present when debating the landscape of migration pathways for low-skilled workers.

¹⁰⁸ Jennifer Riddle, *Challenges to TPS and DED Terminations*, CATHOLIC LEGAL IMMIGR. NETWORK INC. (last updated Apr. 16, 2019), <https://cliniclegal.org/resources/challenges-tps-terminations>.

¹⁰⁹ *Id.*; see e.g., Complaint, Nat'l Ass'n for the Advnc. Colored People v. United States Dep't of Homeland Sec., 364 F. Supp. 3d 568, 568 (D. Md. 2018) (No. 1:18-cv-00239)

¹¹⁰ As indicated earlier in this article, several advocacy groups organized to dispute the legality of DHS' decision to terminate the TPS designation through two lawsuits that lead to two preliminary injunctions. The injunctions question the legality and motive behind the government's decision to eliminate the TPS. Currently, beneficiaries under the TPS designation for Haiti maintain their status until further developments. See *Ramos v. Nielsen*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018) (order granting preliminary injunction); *Saget v. Trump*, No. 18-cv-01599 (E.D.N.Y. Apr. 11, 2019) (order granting preliminary injunction).

¹¹¹ USCIS, *Update on Ramos v. Nielsen*, USCIS (last updated Jun. 24, 2019), <https://www.uscis.gov/update-ramos-v-nielsen>.

¹¹² See *Temporary Protected Status for Haiti*, CATHOLIC LEGAL IMMIGR. NETWORK INC. (Aug. 2017), <https://cliniclegal.org/sites/default/files/resources/presidential-transition/Temporary-Protected-Status-for-Haiti.pdf>.

TPS and the Labor Market: Serious Economic Implications for Haiti and the United States

In general, advocacy groups and studies have addressed the implication of TPS on migrant labor market outcomes. As a migrant community, Haitians are an isolated worker community amongst industries driven by a Hispanic labor market. Having TPS designation and possessing a work permit has given Haitian migrants the opportunity to gain access to a wide array of low-skilled jobs.¹¹³ TPS holders have also gained access to higher-paying jobs that may not be open to unauthorized migrants. TPS migrant workers have filled a gap in the labor market that would generally be addressed when examining labor shortages and when considering the need for temporary low-skilled workers.

In the midst of the recent debates concerning the termination of TPS, migrant TPS holders have become part of the global debate on migrant labor markets.¹¹⁴ TPS holders are now being treated as a migrant labor community, rather than a migrant community receiving protection based on humanitarian grounds. For example, TPS holders can also seek entry into a third country in lieu of returning to the country of origin. As such, countries such as El Salvador moved to negotiate a potential agreement with Qatar to allow Salvadoran migrants forced out of the U.S. to work temporarily in the Gulf country.¹¹⁵ The Salvadoran foreign minister has engaged in conversations with the Qatari government to discuss the structure and details of this program. The potential agreement is a direct result of low-wage labor needs in Qatar for the building of

¹¹³ See Pia Orreniues & Madeline Zavodny, *The Impact of Temporary Protected Status on Immigrants' Labor Market Outcomes*, 105(5) AM. ECON. REV. 576, 576-80 (2015); See generally Leblang et al., *Labor Market Policy as Immigration Control: The Case of Temporary Protected Status*, INT'L POLITICAL ECON. SOC. (2018), https://internationalpoliticaleconomysociety.org/sites/default/files/paper-uploads/2018-09-26-11_54_13-leblang@virginia.edu.pdf (explaining the benefits of TPS status for the purposes of granting formal labor market access to those migrants who already emigrated to the United States).

¹¹⁴ Orreniues & Zavodny, *supra* note 95 (describing TPS as a mechanism that provides access to the United States labor market and higher wages that lead to higher rates of remittances to Haiti).

¹¹⁵ *El Salvador Eyes Qatar Jobs for Migrants Leaving U.S.*, AL JAZEERA (Jan. 17, 2018), <https://www.aljazeera.com/news/2018/01/qatar-recruit-salvadorans-deported-180117083136308.html>.

World Cup stadiums. Analysts and advocacy groups have commented on this potential agreement and voiced concerns about labor conditions for migrant workers in Qatar.¹¹⁶ Similar discussions have not yet taken place in the case of Haitian nationals, but this event suggests that TPS holders are being examined under the labor migration lens as groups of migrants seeking labor mobility.

Key aspects of the TPS debate include discussions on the negative impact to the Haitian economy due to the potential loss of a substantial quantity of remittances¹¹⁷—as discussed when examining the detriments of cancelling the H-2 visa program—and to the implications involving the economic and social reintegration of returning migrants to Haiti. However, most of the backlash following the announcement of its termination has focused on the economic and labor-based detriment to the United States due to the loss of migrant workers.¹¹⁸ Advocates, lawmakers, and several U.S. organizations, including the U.S. chamber of commerce, responded by highlighting the effect of losing TPS workers on the U.S. economy and its businesses.¹¹⁹ The reduction in GDP and high turnover costs are amongst the most relevant concerns.¹²⁰

¹¹⁶ *Id.*; see generally *Migrant Workers Rights with Four Years to the Qatar 2022 World Cup: Reality Check*, AMNESTY INT’L (2019), <https://www.amnesty.org/en/latest/campaigns/2019/02/reality-check-migrant-workers-rights-with-four-years-to-qatar-2022-world-cup/>.

¹¹⁷ See Leblang et al., *supra* note 95 at 2 (discussing benefits of legally accessing the United States labor market with access to higher wages and ability to transfer remittances as part of a New Economics of Labor Migration (NELM) model).

¹¹⁸ AMANDA BARAN & JOSE MAGAÑA-SALGADO, IMMIGRANT LEGAL RES. CTR., ECONOMIC CONTRIBUTIONS BY SALVADORAN, HONDURAN, AND HAITIAN TPS HOLDERS: THE COST TO TAXPAYERS, GDP, AND BUSINESSES OF ENDING TPS (2017); see also Walter Erwing, *Vital Industries Could Suffer Significant Damage as Workers with TPS Lose Their Status*, IMMIGR. IMPACT (Jan. 9, 2019), <http://immigrationimpact.com/2019/01/09/industries-suffer-damage-workers-tps/>.

¹¹⁹ Press Release, New Am. Econ., 60 Chambers of Commerce Call on Congress to Protect DACA and TPS (May 30, 2019) (available online at <https://www.newamericaneconomy.org/press-release/60-chambers-of-commerce-call-on-congress-to-protect-daca-and-tps/>).

¹²⁰ BARAN & MAGAÑA-SALGADO, *supra* note 118; see Michelle Chen, *A Labor Battle at . . . Disney World?*, THE NATION (Jan. 9, 2018), <https://www.thenation.com/article/a-labor-battle-at-disney-world/> (indicating

In the same way that different industries lobby for H-2A workers, the U.S. Chamber of Commerce, the National Association of Home Builders, and other groups have lobbied to keep TPS migrant workers.¹²¹ This issue brought together industry and labor groups that are usually in opposition. Several groups have also noted that there is no economic justification for ending TPS and sending back thousands of migrant workers.¹²² On the other hand, employers are also voicing their concerns regarding the lack of access to workers.¹²³ It is now evident that several industries regard the TPS designation as a labor program, bypassing any discussions addressing its original purpose, a humanitarian-based designation. For example, the healthcare industry has also raised concerns regarding the shortage of workers within their industry and the impact of the TPS termination on the elderly who are dependent on home health aides.¹²⁴ This industry has noted that departing low-skilled workers will be hard to replace and that demand cannot be met by pushing out “current work-authorized immigrants while limiting channels for new workers.”¹²⁵

Additional Considerations: Assimilation and Migratory Ramifications

Another layer of complexity in regard to migrant workers who settle in their destination country is the process of assimilation. Policy and economic perspectives address the fact that TPS holders are integral members of the social fabric of the communities that

that employers in Orlando and other major TPS destination cities are heavily dependent on Haitian migrants).

¹²¹ *Id.*; see also Yuki Noguchi, *Ending Temporary Protection for Foreign Workers Could Hurt U.S. Rebuilding Efforts*, NAT’L PUB. RADIO, (Dec. 6, 2017), <https://www.npr.org/2017/12/06/568569232/ending-temporary-protection-for-foreign-workers-could-hurt-u-s-rebuilding-effort>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Melissa Bailey, *As Trump Targets Immigrants, the Elderly Brace to Lose Caregivers*, NBC NEWS, (Mar. 26, 2018), <https://www.nbcnews.com/health/health-care/trump-targets-immigrants-elderly-brace-lose-caregivers-n860046>.

¹²⁵ Sara Mcelmurry, *The looming crisis in health care*, CHICAGO BUS., (Feb. 6, 2018), <http://www.chicagobusiness.com/article/20180206/OPINION/180209939/the-looming-crisis-in-health-care>.

have embraced them (for economic or humanitarian reasons), but the worker-as-a-person perspective is often overlooked. In his book, *We Wanted Workers*, George Borjas highlights the benefits, rationale, and costs of assimilation, a process in which workers “learn the language and embrace the cultural, social, and political norms of their new homes.”¹²⁶ Haitian TPS holders have lived in the U.S. for over seven years and have fully embraced the norms and customs of the U.S. by seeking higher-paying jobs, learning the language, and contributing to the efforts of advocacy groups and worker coalitions. Although labor migration policy often fails to recognize the implications of workers’ lives in their new environments, it is important to acknowledge that there is an economic and social advantage to promoting the continuation of programs that meet one of the goals of U.S. immigration policy, addressing labor shortages, through the use of well-assimilated groups, such as Haitian migrants.

Finally, it is important to mention that the cancellation of the TPS program can invoke unintended consequences for current migration flows from Haiti to the United States. Under a New Economics Labor Migration (NELM) model, migration is seen as a household strategy to diversify the labor portfolio and increase household income.¹²⁷ Economic factors, such as access to remittances, have the potential to manage additional migrant flows for household units benefiting from it. As such, TPS has the potential to maintain (or even increase) remittances by Haitians who have access to the higher wages in the formal U.S. labor market and, thus, decrease the need for illegal entry into the United States.¹²⁸ These arguments suggest that there are benefits to promoting policies that grant access to the labor market by migrants who have already emigrated to the United States.

Overall, it is fair to infer that when it comes to labor migration issues regarding Haitian nationals, TPS holders have effectively become part of the migration policy universe. The effect of having

¹²⁶ GEORGE J. BORJAS, *WE WANTED WORKERS: UNRAVELING THE IMMIGRATION NARRATIVE* (2016).

¹²⁷ See Leblang et al., *supra* note 113 at 7 (describing NELM as a model that argues that migration decisions in the Global South are made by the family and household unit and not the individual).

¹²⁸ *Id.* at 14 (examining the effects of TPS on migration flows).

a large community of migrants authorized to work in the U.S. placed TPS holders within a broader labor migration discourse related to the discussion of labor shortages, an issue usually reserved to the discussion on temporary guest worker programs in the U.S. When it comes to examining the Haiti–U.S. labor relationship, it is impossible to overlook the effect of the TPS program.

CONCLUSION

An examination of the H-2 temporary visa framework and its life cycle with respect to a particular country demonstrates the far-reaching and sometimes unrecognized mechanisms that play a role in the development and survival of these frameworks. Evaluating the life cycle and the experiences of a specific population within a specific visa program could improve legal channels for temporary guest workers and contribute to the improvement of immigration policies. At the same time, examining a program with a focus on a specific population sheds light on the specific labor and migration issues experienced by this worker population. The labor, immigration policy, and economic development implications discussed in this article demonstrate the mutual needs and benefits to maintaining programs that facilitate access to the United States labor market by Haitian workers. Terminating the H-2 visa program and the TPS designation for Haiti will have a significant impact for the U.S., a country with high labor demands that benefits from Haitian work forces, and for Haitian workers, a population in need of labor opportunities in the United States. The current Haitian migrant crisis and their exodus to other countries in the Caribbean, Chile, Brazil, and Canada demonstrate that there could be unintended consequences, such as irregular migration, upon the termination of two programs that benefited Haiti and several U.S. industries.