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## ENDING THE SILENCE: THAI H-2A WORKERS, RECRUITMENT FEES, AND THE FAIR LABOR STANDARDS ACT

Andrea L. Schmitt<sup>†</sup>

*Abstract:* Increasing numbers of Thai workers are coming to the United States using “H-2A” temporary agricultural worker visas. Compared with their Latin American counterparts, Thai H-2A workers are more vulnerable to poor working conditions and other abusive employment practices for two reasons. First, the workers often pay large recruitment fees to labor recruiters in Thailand, and they therefore arrive with a much weightier debt burden. This debt, combined with conditions inherent in the H-2A system, puts intense pressure on workers to remain silent. Second, Thai workers are more culturally and linguistically isolated in rural U.S. communities than their Latin American counterparts. This comment argues that bringing claims under the minimum wage provisions of the Fair Labor Standards Act (“FLSA”) can be an effective litigation strategy to protect Thai H-2A workers who have a large recruitment-fee debt burden. Under the doctrines of apparent authority agency and inherent agency, the workers’ employers may be responsible for the fees that recruiters charge. These fees are for the primary benefit of the growers and cannot be counted as wages under the FLSA. Consequently, growers must reimburse workers for recruitment fees during their first week of employment in order to avoid minimum wage violations under the FLSA.

### I. INTRODUCTION

Wallapa McDonald is the owner of one of the three Thai restaurants in Yakima, Washington. Yakima, a city of 79,000,<sup>1</sup> is located in the rural agricultural region of central Washington State, the northwestern-most state of the United States. McDonald’s usual clientele is a representative sampling of the community—mostly White, some Hispanic,<sup>2</sup> and the occasional European or Asian visitor.<sup>3</sup> McDonald, who is Thai, estimates that half a dozen Thai speakers live in Yakima.<sup>4</sup> Because she rarely encounters other Thai people in Yakima, she was understandably astounded<sup>5</sup> when a ragged group of Thai farmers wandered into her restaurant one day in the summer of 2004.<sup>6</sup> The men were elated to have found someone who

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<sup>†</sup> The author would like to thank Professors Kristen Stilt and Joel Ngugi for their invaluable support and guidance in the writing of this comment.

<sup>1</sup> U.S. Census Bureau, *Fact Sheet: Yakima city, Washington*, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (last visited Sept. 19, 2006) [hereinafter Yakima Census].

<sup>2</sup> *Id.* (Yakima is thirty-seven percent Hispanic).

<sup>3</sup> Questions Posed to Wallapa McDonald (Feb. 24, 2006) [hereinafter McDonald Questions] (on file with The Pacific Rim Law & Policy Journal).

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

<sup>5</sup> Interview with Wallapa McDonald, Owner, Siam House Restaurant, by telephone (Feb. 23, 2006).

<sup>6</sup> Letter from Wallapa McDonald, Owner, Siam House Restaurant 1 (Jan. 22, 2006) [hereinafter McDonald Letter] (on file with The Pacific Rim Law & Policy Journal).

understood their language, and they told McDonald their story.<sup>7</sup> They had been recruited in Thailand to work in the apple orchards around Yakima<sup>8</sup> and had come to the United States on “H-2A” temporary agricultural worker visas.<sup>9</sup>

Life in Yakima had been difficult for the Thai men. They were not earning nearly as much as they had been promised by the recruiters in Thailand, and they feared they would not be able to pay back the enormous loans that they had taken out to pay labor recruiters in Thailand.<sup>10</sup> Their housing was cramped, and it lacked kitchen facilities.<sup>11</sup> The workers suspected that their employers were not paying them correctly, but they had no way to verify this because none of them could speak English or read the Roman alphabet.<sup>12</sup> Though not a legal expert herself, McDonald was certain the workers’ living conditions did not meet state standards, and she called Washington State authorities to report the violations.<sup>13</sup> She also helped the men as best she could, taking them food when their pay was late and shuttling them the thirty blocks to their hotel from her store, so they would not have to carry large bags of rice on their shoulders.<sup>14</sup>

The H-2A program, through which the Thai workers came to Yakima, is the United States’ agricultural “guest worker” program.<sup>15</sup> Established in its current form through the 1986 Immigration Reform and Control Act,<sup>16</sup> the program allows American agricultural employers to bring foreign workers to the United States on non-immigrant visas for limited periods of time.<sup>17</sup> Ostensibly, H-2A visas are only granted in times when there are genuine shortages of domestic labor.<sup>18</sup> Growers who use the H-2A program

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<sup>7</sup> Leah Beth Ward, *Thai Farm Workers Seek Equity in Strange Land*, YAKIMA HERALD-REPUBLIC, Oct. 9, 2005.

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

<sup>9</sup> *Id.* The visas are known as “H-2A” visas after their designation in the Immigration and Nationality Act. 8 U.S.C.S. § 1101(a)(15)(H)(ii)(a) (2000).

<sup>10</sup> McDonald Letter, *supra* note 6, at 1.

<sup>11</sup> *Id.* at 1; Ward, *supra*, note 7.

<sup>12</sup> McDonald Letter, *supra* note 6, at 2.

<sup>13</sup> Ward, *supra* note 7.

<sup>14</sup> McDonald Letter, *supra* note 6 at 1.

<sup>15</sup> Bruce Goldstein, *The Basics About Guest Worker Programs*, <http://www.fwjustice.org/GWbasics.htm> (last visited Sept. 19, 2006).

<sup>16</sup> Kimi Jackson, Comment, *Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry*, 76 CHI.-KENT L. REV. 1271, 1278 (2000); see also 8 U.S.C.S. § 1101(a)(15)(H)(ii)(a) (2000).

<sup>17</sup> 8 C.F.R. § 214.2(h)(1)(ii)(C) (2006).

<sup>18</sup> See 20 C.F.R. § 655.90(b)(1)(A) (2005).

usually make connections with foreign workers by using farm labor contractors, who recruit the workers in their home countries.<sup>19</sup>

Despite a host of protections and benefits provided by the H-2A program, experience has shown H-2A workers are prone to abuse by their employers.<sup>20</sup> Thai H-2A workers are even more vulnerable than most other H-2A workers, who are predominantly Latin American. This is in part because the Thais are more linguistically and culturally isolated from the rural American communities where they come to work.<sup>21</sup> More importantly, Thai workers pay substantial recruitment fees in Thailand to secure their H-2A jobs and usually arrive in the United States with staggering debt.<sup>22</sup> The magnitude of their debt and the harshness of the loan terms combine with conditions engendered by the H-2A program to render workers practically unable to complain about abusive conditions and wage and hour violations. These burdens also make it virtually impossible for the workers to leave their jobs. The workers effectively find themselves in debt bondage—they are unlikely to complain and apt to remain on the job despite poor conditions.<sup>23</sup> Protecting Thai workers from onerous recruitment fee debt would give the workers more leverage to demand safe and healthy housing and working environments.

A U.S.-based solution to recruitment fee debt is vital to enabling Thai H-2A workers to protect themselves from abuse because the Thai government cannot or will not stop Thai recruiters from charging exorbitant fees.<sup>24</sup> The minimum wage provisions of the federal Fair Labor Standards Act<sup>25</sup> may provide much-needed protection to Thai workers from large recruitment fees.<sup>26</sup>

This comment argues that claims under the minimum wage provisions of the FLSA are a viable litigation strategy for protecting Thai H-2A workers

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<sup>19</sup> See PHILIP L. MARTIN AND J. EDWARD TAYLOR, *MERCHANTS OF LABOR: FARM LABOR CONTRACTORS AND IMMIGRATION REFORM 1* (The Urban Institute 1995); See Esther Schrader, *Widening the Field of Workers*, Los Angeles Times, Aug. 26, 1999 at A1 (A single farm labor contractor in North Carolina brought half of the H-2A workers to the U.S. in 1999). The growers in Washington who recruited Thai workers did so by first hiring Global Horizons, a Los Angeles based farm labor contractor. See Settlement Agreement: Global Horizons, Inc./Department of Labor and Industries/Employment Security Department 1 (September 22, 2005) [hereinafter Global Settlement] (on file with The Pacific Rim Law & Policy Journal).

<sup>20</sup> See *infra* Part II.A.

<sup>21</sup> See *infra* Part II.D.

<sup>22</sup> See *infra* Part II.D.

<sup>23</sup> See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 595-596 (2001).

<sup>24</sup> See *infra* Part III.A.

<sup>25</sup> The Fair Labor Standards Act is the primary U.S. federal statute governing wages and hours of work. See generally 29 U.S.C.S. §§ 201-219 (2000 & Supp. 2006).

<sup>26</sup> See *infra* Part III.D.

from debilitating recruitment-fee debt. Part II discusses H-2A workers' vulnerability to abuse and demonstrates that recruitment-fee debt burden makes Thai workers particularly susceptible to abuse and attractive to U.S. growers. Part III presents a case that growers can be held accountable under the common law of agency for recruitment fees. It demonstrates that if growers are accountable for the fees, the growers violate the FLSA when they do not reimburse the recruitment fees, at least in part, during the workers' first week on the job.

## II. THAI H-2A WORKERS ARE UNIQUELY SUSCEPTIBLE TO THE ABUSIVE CONDITIONS THAT ARE COMMON IN THE PROGRAM

H-2A agricultural guest workers are susceptible to abuses, such as deficient housing, poor working conditions, and wage and hour violations, despite the protections provided for them in the H-2A regulations. It is in growers' financial interest to hire workers whose economic vulnerability makes them responsive to coercive tactics like "blacklisting."<sup>27</sup> Thai workers are inherently more vulnerable to abuse than most other H-2A workers in part because they are more linguistically and culturally isolated from the communities in which they work. They are also uniquely unlikely to complain about their conditions because Thai workers often come to the U.S. with weighty debt from recruitment fees they paid at home.<sup>28</sup>

### A. *H-2A Workers Often Experience Abuse*

The realities of H-2A workers' conditions often do not coincide with H-2A regulations. On paper, the regulations provide an impressive list of benefits to H-2A workers, including housing, round-trip transportation from their homes to the job site, a rate of pay that is almost always higher than the federal minimum wage, and a guarantee that they will have work during at least three-fourths of the contract period.<sup>29</sup> In practice, however, abuses of H-2A workers are commonplace. Farm worker advocates and reporters have documented numerous instances of abuse of H-2A workers, including:

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<sup>27</sup> "Blacklisting" is a tactic in which growers place workers' names on a "no return" list of workers who are not allowed to work for that grower again. In North Carolina, for example, "[a]ny one grower in the [North Carolina Growers' Association] determines whether an individual worker can come back to North Carolina and work for any of the almost one thousand growers in the [Association] the following year." Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. Y COM. REG. 521, 533 (2002).

<sup>28</sup> See Holley, *supra* note 23, at 595-596.

<sup>29</sup> See 20 C.F.R. §§ 655.102(b)(1), (5), (6), (9) (2005).

denial of medical treatment,<sup>30</sup> pesticide safety violations,<sup>31</sup> wage and hour violations,<sup>32</sup> substandard housing conditions,<sup>33</sup> and provision of dangerous transportation.<sup>34</sup>

The Washington Thai workers' experience was no exception. In the summer of 2004, most of the workers lived in overcrowded motel rooms.<sup>35</sup> They were deprived of proper kitchen facilities, and "cooked on the floor with hot burners plugged onto overloaded circuits and washed dishes in the bathtub."<sup>36</sup> These conditions violated Washington State Department of Health regulations.<sup>37</sup>

The workers suffered wage and hour violations as well. Their farm labor contractor ("FLC") illegally withheld state taxes that do not exist and federal taxes from which the workers were exempt.<sup>38</sup> The workers also alleged that money the FLC deducted to be sent to their families in Thailand never arrived.<sup>39</sup> The terms and conditions of employment remained an enigma to the workers, leaving them unable to evaluate whether the contractor and the grower breached their employment contracts.<sup>40</sup> Some workers signed one contract in Thai at home and another contract—which they could not read because it was in English—when they arrived.<sup>41</sup> Furthermore, the FLC never provided a worker agreement in Thai to some of its workers.<sup>42</sup> In at least one instance, even when the farm labor contractor did provide the contract in Thai, the contract verbiage was difficult for the worker to understand.<sup>43</sup>

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<sup>30</sup> H. Michael Semler, *The H-2 Program: Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y REV. 187, 209 (1983); Leah Beth Ward, *Desperate Harvest*, CHARLOTTE OBSERVER, Oct. 31, 1999, at 1A [hereinafter *Desperate Harvest*].

<sup>31</sup> Hall, *supra* note 27, at 534.

<sup>32</sup> Michael Blanding, *The Invisible Harvest*, BOSTON MAG., Oct. 2002 available at [http://www.bostonmagazine.com/articles/the\\_invisible\\_harvest/](http://www.bostonmagazine.com/articles/the_invisible_harvest/); Barry Yeoman, *Silence in the Fields*, Mother Jones, Jan./Feb. 2001 available at <http://www.motherjones.com/news/feature/2001/01/farm.html>.

<sup>33</sup> *Desperate Harvest*, *supra* note 30, at 1A.

<sup>34</sup> Holley, *supra* note 23, at 618.

<sup>35</sup> Lornet Turnbull, *New Guest Worker Contracts in Doubt*, SEATTLE TIMES, Feb. 20, 2002 at A18; McDonald Letter, *supra* note 6, at 2; Ward, *supra* note 7.

<sup>36</sup> Ward, *supra* note 7.

<sup>37</sup> Wash. Admin. Code 296-307-16125 (2005) (capacity of housing); Wash. Admin. Code 296-307-16165 (2005) (kitchen facilities). For H-2A housing, local housing regulations apply, and if there are none, state regulations apply. 20 C.F.R. § 655.102(b)(1)(iii) (2005).

<sup>38</sup> Stipulations of the Parties, *In Re: Global Horizons, Inc.*, No. 2005-LI-0056 at 2-3 (Washington Office of Administrative Hearings, Sept. 22, 2005) [hereinafter *Global Horizons Stipulations*]; see *Global Settlement*, *supra* note 19, at Attachment A.

<sup>39</sup> Turnbull, *supra* note 35, at A18.

<sup>40</sup> Ward, *supra*, note 7.

<sup>41</sup> Turnbull, *supra* note 35, at A18.

<sup>42</sup> *Global Horizons Stipulations*, *supra* note 38, at 2.

<sup>43</sup> Ward, *supra* note 7.

Like other H-2A workers, the Washington Thai workers were reluctant to protest. The growers deterred them from complaining by threatening to blacklist them.<sup>44</sup> The workers also alleged that the growers punished them for questioning their conditions by not allowing them to work,<sup>45</sup> thereby denying them the chance to earn money.

*B. Growers Have Incentives to Seek Workers Who Are Economically Vulnerable and Susceptible to Coercive Tactics*

H-2A workers are attractive to growers, who are constantly looking for new, more vulnerable populations with which to replenish their labor forces.<sup>46</sup> For U.S. growers of labor-intensive crops, a key to keeping production costs low is finding workers who will work for low wages and in poor conditions.<sup>47</sup> Historically, growers and the government have thwarted union organizers by ensuring that there is always a ready supply of new migrant workers who are willing to accept less compensation and fewer benefits than their better-established peers and who are unlikely to organize.<sup>48</sup> In the past, a porous border with Mexico allowed a steady stream of new migrants to enter the U.S.<sup>49</sup> However, due to stricter border enforcement or other changing social factors, growers are now finding fewer Mexican workers who are willing to work in the conditions they offer.<sup>50</sup> In the absence of a steady flow of vulnerable and difficult-to-unionize new migrants, H-2A workers are the next best thing for growers. H-2A workers are in the country for finite periods of time<sup>51</sup> and have fixed contract terms and conditions,<sup>52</sup> making them unlikely candidates for successful collective bargaining. Additionally, growers can easily coerce the workers out of talking to union representatives.<sup>53</sup>

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<sup>44</sup> *Id.* (“...they say they fear anything they say would be used against them and prevent them from coming back next season.”).

<sup>45</sup> *Id.*

<sup>46</sup> See Fred Krissman, *Agribusiness Strategies to Divide the Workforce by Class, Ethnicity, and Legal Status*, in RACE, ETHNICITY, AND NATIONALITY IN THE UNITED STATES: TOWARD THE TWENTY-FIRST CENTURY 216, 234 (Paul Wong, Ed., 1999).

<sup>47</sup> See *Id.*; Martin and Taylor, *supra* note 19, at 1.

<sup>48</sup> See Krissman, *supra* note 46, at 225, 232, 239-239; Martin and Taylor, *supra* note 19, at 6.

<sup>49</sup> See generally Krissman, *supra* note 46.

<sup>50</sup> See *Farm Labor Shortages*, RURAL MIGRATION NEWS, Jan. 7, 2006, [http://migration.ucdavis.edu/rmn/more.php?id=1087\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1087_0_4_0) (last visited Sept. 19, 2006); National Public Radio, *Labor Shortage Threatens Winter Lettuce Harvest*, ALL THINGS CONSIDERED, Dec 29, 2005 available at <http://www.npr.org/templates/story/story.php?storyId=5074844>.

<sup>51</sup> 8 C.F.R. § 214.2(h)(1)(ii)(C) (2006).

<sup>52</sup> See 20 C.F.R. § 655.102(b)(14) (2005).

<sup>53</sup> HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 159 (2004).

Employers often use threats of deportation and blacklisting as tools to maximize workers' acquiescence in poor conditions.<sup>54</sup> H-2A workers may not work for any employer other than the employers who originally sought their visas.<sup>55</sup> Thus, workers who are victims of abuse cannot leave their employers without immediately invalidating their visas.<sup>56</sup> Employers hold the power to have the workers deported, and the workers have little leverage in negotiations with the employers.<sup>57</sup> Even when employers do not immediately fire workers for complaining, they often blacklist the workers,<sup>58</sup> preventing them from returning the next season.<sup>59</sup>

The threat of deportation or blacklisting can be more intense for H-2A workers who go into debt in order to obtain H-2A jobs in the first place.<sup>60</sup> An illustrative example of debt pressure can be found in Mexican H-2A workers, who are often forced to borrow money to pay transportation costs to the United States<sup>61</sup> and obliged to pay recruitment fees of \$300 to \$1000 at home for the privilege of obtaining a visa.<sup>62</sup> Empirically, the added pressure of debt makes the workers even less likely to complain when conditions are poor.<sup>63</sup>

Growers have an interest in employing H-2A workers who have disincentives to leave their jobs, even when conditions are poor.<sup>64</sup> The workers who are most likely to stay despite abuses are those who are the most vulnerable. As the President's Commission on Migratory Labor noted

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<sup>54</sup> Ward, *supra* note 7 (“The system depends on maintaining the fear of being fired or deported and not being called back next season,” said Bruce Goldstein, executive director of the Farmworker Justice Fund...”).

<sup>55</sup> 8 C.F.R. § 214.2(h)(5)(viii)(B) (2006).

<sup>56</sup> Holley, *supra* note 23, at 595.

<sup>57</sup> Semler, *supra* note 30, at 209 (“...the employer controls the worker's very right to remain in this country.”).

<sup>58</sup> Holley, *supra* note 23, at 595.

<sup>59</sup> Blacklisting is an extremely common practice among H-2A employers. See HUMAN RIGHTS WATCH, *supra* note 53, at 159; Hall, *supra* note 27, at 533; *Desperate Harvest*, *supra* note 30 at 1A; Yeoman, *supra* note 32, at para. 27. To end up on a blacklist, a worker need not cause much trouble; workers fear blacklisting for insisting that employers comply with state requirements as simple as providing cups for drinking water in the fields. *Desperate Harvest*, *supra* note 30, at 1A.

<sup>60</sup> Holley, *supra* note 23, at 595-596.

<sup>61</sup> See Schrader, *supra* note 19, at A1; Hall, *supra* note 27, at 534. H-2A regulations require employers to pay the cost of transportation for workers from their permanent homes, but the employers do not have to pay the workers until they have completed 50 percent of the contract period. 20 C.F.R. § 655.102(b)(5)(i) (2005). The Eleventh Circuit held in *Arriaga v. Florida Pacific Farms* that, under the FLSA, growers were required to reimburse at least some of these transportation costs during the first week of work to avoid minimum wage violations. *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228 (11th Cir 2002).

<sup>62</sup> Schrader, *supra* note 19, at A1; *Desperate Harvest*, *supra* note 30, at 1A; Jen McCaffery, *Virginia's Migrants Easily Exploited*, ROANOKE TIMES, Dec. 10, 2000, at A1.

<sup>63</sup> See Holley, *supra* note 23, at 596; Hall, *supra* note 27, at 534.

<sup>64</sup> Comm'n on Agricultural Workers, Report 26 (1992).



in 1951, “Migrants are children of misfortune. . . . We depend on misfortune to build up our force of migratory workers and when the supply is low because there is not enough misfortune at home, we rely on misfortune abroad to replenish the supply.”<sup>65</sup> Likewise, when there is not enough misfortune in the Latin American farm worker population to keep them silenced and on the job, U.S. growers turn to more vulnerable populations, like Thai workers.

C. *Thai H-2A Workers Are Attractive to Growers Because They Are Linguistically and Culturally Isolated*

H-2A workers from Thailand are especially good “labor replacement” because they are more susceptible to abuse than their Latin American H-2A counterparts. Thai workers are much more isolated than Latina and Latino workers who may have many linguistic and cultural brethren in the communities where they work.<sup>66</sup> In Yakima, a rural community with approximately half a dozen Thai speaking residents,<sup>67</sup> the workers had no means by which to complain about their housing conditions and their suspicions about underpayment of wages. The Washington Thai workers did not speak English.<sup>68</sup> This is likely typical of Thai H-2A workers, as a majority of the Thai citizens who seek employment abroad are from the rural, poor<sup>69</sup> northeastern part of the country,<sup>70</sup> and most of these workers have no more than a fourth-grade education.<sup>71</sup> It was only by chance that

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<sup>65</sup> President’s Commission on Migratory Labor, *Migratory Labor in American Agriculture* 3 (1951).

<sup>66</sup> Latina/o and Spanish-speaking migrant workers in central Washington find an established Spanish-speaking community and have numerous social and legal services resources available to them. See Yakima Census, *supra* note 1 (thirty-seven percent of Yakima’s population is Hispanic); Washington Law Help, <http://www.washingtonlawhelp.org/WA/index.cfm/language/39/state/WA> (last visited Sept. 19, 2006) (showing the wide variety of legal information available in Spanish to Washington residents); Consejo, *Counseling and Referral Services for the Latino Community*, <http://www.consejo-wa.org/aboutus1.htm> (last visited Sept. 19, 2006) (listing social services in areas from drug abuse to domestic violence for Washington Latinos). In contrast, Thai speakers struggle to make community connections. See McDonald Questions, *supra*, note 3.

<sup>67</sup> McDonald Questions, *supra* note 3.

<sup>68</sup> Turnbull, *supra* note 35, at A18.

<sup>69</sup> Kitisak Sinthuvanich and Chitti Chuenyong, *Rural Poverty Alleviation in Thailand 2* (United Nations Economic and Social Commission for Asia and the Pacific, Meeting Paper No. 13, 1997) available at [http://www.unescap.org/rural/doc/beijing\\_march97/thailand.PDF](http://www.unescap.org/rural/doc/beijing_march97/thailand.PDF).

<sup>70</sup> In 2004, of a total of 121,200 male Thai workers abroad, 80,861 of them were from the northeastern part of Thailand. Thailand Overseas Employment Administration, *Statistics of Thai Workers by Domicile: Year: 2004* (2004) available at <http://www.overseas.doe.go.th/news/index.html>. Statistics from 1998-2003 show similar percentages of workers coming from the northeast. See Thailand Overseas Employment Administration, *Statistics of Thai Workers by Domicile: Year: 1998-2002* (2002), available at <http://www.overseas.doe.go.th/news/index.html>.

<sup>71</sup> In 2004, of a total of 121,200 Thai men working abroad, 71,329 had completed the fourth grade or a less advanced education. See Thailand Overseas Employment Administration, *Statistics of Thai Workers*

they stumbled across the Siam House restaurant and McDonald, its Thai-speaking owner.<sup>72</sup> Before meeting McDonald, the workers were utterly unable to communicate with anyone in the community and were “dependent in every practical sense” on the farm labor contractor who brought them to the country.<sup>73</sup> Thai workers are hampered by isolation from American rural communities to a far greater extent than most other H-2A workers.

Thai workers’ reduced ability to complain seems to have incentivized growers to bring them to the United States. Despite higher costs associated with recruiting and transporting Southeast Asian workers, farm labor contractors have brought increasing numbers of Asian workers using the H-2A program in recent years.<sup>74</sup> This trend represents a shift away from the historic use of H-2A visas almost exclusively for Latin American and Caribbean workers.<sup>75</sup> In the summer of 2004, a Los Angeles-based labor recruiter brought approximately 170 Thai workers to labor in the apple orchards that surround Yakima, Washington.<sup>76</sup> The same company intended to bring 550 workers in subsequent years.<sup>77</sup>

#### D. *Thai H-2A Workers Are More Vulnerable to Abuse than Other H-2A Workers*

Thai workers incur much larger recruitment-fee debt burdens than their Latin American counterparts, rendering the Thais less able to protect themselves from abuse. The Washington Thai workers paid as much as \$8000 to \$20,000 in fees to recruiters in Thailand in order to secure their

by *Education Levels: Year: 2004* (2004), <http://www.overseas.doe.go.th/news/index.html> (last visited Mar. 25, 2006).

<sup>72</sup> Ward, *supra* note 7.

<sup>73</sup> Ward, *supra* note 7; McDonald Letter, *supra* note 6, at 2.

<sup>74</sup> See *H-2A, H-2B, Braceros*, Rural Migration News, July 20, 2005, [http://migration.ucdavis.edu/rmn/more.php?id=779\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=779_0_4_0) (last visited November 4, 2006) (documenting groups of Thai H-2A workers in California, Arizona, and Hawaii); *Florida, Migrants*, Rural Migration News, July 15, 2003, [http://migration.ucdavis.edu/rmn/more.php?id=734\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/more.php?id=734_0_3_0) (last visited November 4, 2006) (referring to efforts to supply Thai H-2A workers to Florida farms); Amended Complaint for Damages and Declaratory Relief, *Ingthalangsy v. New Tree Personnel Services, Inc.* (E.D.N.C. October 2003) at 5 [hereinafter *New Tree Complaint*] (on file with The Pacific Rim Law & Policy Journal) (referring to a small group of Lao H-2A workers in North Carolina); Carrie Kahn, *Western Farmers Look for More Immigrant Workers*, MORNING EDITION, NATIONAL PUBLIC RADIO, May 12, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5400389> (referencing major farm labor contractor’s goal of bringing 5,000 Thai workers to twenty-seven states in 2007).

<sup>75</sup> See Holley, *supra* note 23, at 619 (as of 2001, ninety percent of H-2A workers were from Mexico); Jackson, *supra* note 16, at 1281.

<sup>76</sup> *H-2A, H-2B, SSN*, Rural Migration News, April 14, 2005, [http://migration.ucdavis.edu/rmn/more.php?id=985\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=985_0_4_0) (last visited November 4, 2006) [hereinafter *Rural Migration News SSN*].

<sup>77</sup> Global Horizons Stipulations, *supra* note 38, at 5.

places as H-2A workers<sup>78</sup>—staggering amounts considering that the average yearly salary in Thailand is just over \$2000.<sup>79</sup>

Numerous accounts demonstrate that it is standard practice in Thailand for recruiters to charge workers large fees for work abroad.<sup>80</sup> Most Thais who work abroad cannot pay the recruitment fees by themselves and are forced to take out loans with their homes or land as collateral.<sup>81</sup> Usurious interest rates of as much as sixty percent per year are not out of the ordinary for these loans,<sup>82</sup> which often come from “money lenders” rather than from banks.<sup>83</sup> Some of the workers who do not own property for loan collateral “rent” land deeds from neighbors or relatives, putting them further in debt.<sup>84</sup> Fear of not being able to repay recruitment fee loans seems to be a constant pressure on Thai workers.<sup>85</sup> In fact, there are at least two widely reported instances of Thai workers who committed suicide because they were unable to repay their recruitment fee loans.<sup>86</sup> An experienced farm worker advocate has noted that most Latin American H-2A workers who cannot tolerate abusive conditions “‘vote with their feet’ and leave silently

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<sup>78</sup> Rural Migration News *SSN*, *supra* note 76; McDonald Letter, *supra* note 6, at 1; Ward, *supra* note 7.

<sup>79</sup> Thailand, FOREIGN DIRECT INVESTMENT, <http://www.fdimagazine.com/news/fullstory.php/aid/1030/Thailand.html> (Jan. 5, 2005) (gross national income per capita in 2005 was \$2,190); Ward, *supra* note 7.

<sup>80</sup> \$2000 is the equivalent of THB 75,180 (75,180 Thai Baht). Currency Calculator, <http://www.x-rates.com/calculator.html> (last visited Oct. 2, 2006). See *Labour Minister Faces Grilling*, THE NATION (THAILAND), Apr. 21, 2002 (citing fees of THB 200,000 for unspecified U.S. jobs); *In Brief: Job Scam: Deported Thais Return from France*, THE NATION (THAILAND), May 25, 2003 (citing fees of THB 180,000 to THB 250,000 for promised agricultural jobs in France); Penchan Charoensutthipan, *This Needn't Have Happened*, BANGKOK POST, Aug. 31, 2002 (citing fees of THB 200,000 for jobs in Taiwan).

<sup>81</sup> Ward, *supra* note 7; Supang Chantavanich and Andreas Germershausen, *Introduction: Research on Thai Migrant Workers in East and Southeast Asia*, in THAI MIGRANT WORKERS IN EAST AND SOUTHEAST ASIA: 1996-1997 7 (Supang Chantavanich, Andreas Germershausen, & Allan Beesey eds., 2000) [hereinafter *Thai Migrant Workers, Introduction*]. A 1995 Thai Labour Ministry Survey showed that 73.5% of workers leaving Thailand needed loans to do so. Somchai Ratanakomut, *Issues of International Migration in Thailand*, in THAI MIGRANT WORKERS IN EAST AND SOUTHEAST ASIA: 1996-1997 131 (Supang Chantavanich, Andreas Germershausen, & Allan Beesey eds., 2000).

<sup>82</sup> *Thai Migrant Workers, Introduction*, *supra* note 81, at 7; Paul Handley, *Innocents Abroad*, FAR EASTERN ECON. REV., Apr. 1991 at 41; See Phannee Chunjitkaruna, *Pitfalls and Problems in the Search for a Better Life: Thai Migrant Workers in Japan*, in THAI MIGRANT WORKERS IN EAST AND SOUTHEAST ASIA: 1996-1997 263 (Supang Chantavanich, Andreas Germershausen, & Allan Beesey eds., 2000) (interest of up to 20% per month from village moneylender for job in Japan).

<sup>83</sup> Chunjitkaruna, *supra* note 82, at 263; Handley, *supra* note 82, at 41.

<sup>84</sup> Ward, *supra* note 7.

<sup>85</sup> See Ward, *supra* note 7 (stating that workers sometimes sit idle, “...not getting paid, which is their worst fear as interest adds up on their loans back home.”).

<sup>86</sup> See Athittaya Wichitanurak, *Overseas-job Fees Spur Man's Suicide*, THE NATION (THAILAND), May 3, 2002 (telling the story of a Thai worker in Taiwan who killed himself over a THB 150,000 loan); Chunjitkaruna, *supra* note 82, at 265 (recounting the story of a Thai man who killed himself due to the prospect of being unable to repay a THB 200,000 loan with punitive interest for a job in Japan).

rather than complain.”<sup>87</sup> Thai workers, on the other hand, are bound to their jobs by the pressures of recruitment-fee debt.

It is difficult for workers to secure overseas employment from Thailand without utilizing recruiters. There are four methods that Thai workers may use to get jobs overseas: 1) registration with the Ministry of Labour, 2) contact through private labor recruitment agencies, 3) direct recruitment by employers, and 4) self-arrangement of employment.<sup>88</sup> The two most commonly used methods are private agencies and self-arrangement.<sup>89</sup> Although the government service costs less than private recruiters, workers are reluctant to use it because it is considerably slower.<sup>90</sup> A study of Thai workers seeking work in Singapore showed that over 300 times as many workers used private agencies as used the Ministry of Labour program.<sup>91</sup> Indeed, in Thailand, private recruiting agencies account for sixty to eighty percent of all migrant workers hired.<sup>92</sup> Thai workers seeking jobs in the United States are especially likely to need to work with private recruiters rather than arrange their own employment for two primary reasons. First, the United States is culturally and linguistically dissimilar and extremely distant from Thailand.<sup>93</sup> Second, it would be difficult, if not impossible, for the workers to navigate the H-2A visa process without

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<sup>87</sup> Hall, *supra* note 27, at 534.

<sup>88</sup> Diana Wong, *The Men Who Built Singapore: Thai Workers in the Construction Industry*, in THAI MIGRANT WORKERS IN EAST AND SOUTHEAST ASIA: 1996-1997 71 (Supang Chantavanich, Andreas Germershausen, & Allan Beesey eds., 2000).

<sup>89</sup> Kusol Soonthorndhada, *Changes in the Labor Market and International Migration Since the Economic Crisis in Thailand*, 10 ASIAN AND PACIFIC MIGRATION JOURNAL 401, 419 (2001); See Wong, *supra* note 88, at 71, table 20 (showing the private recruiters and self-arranging to be the primary methods of securing foreign work used by Thais bound for Singapore).

<sup>90</sup> See Ratanakomut, *supra* note 81, at 131. The inefficiency of the government recruiting office may be in part due to the government's lack of networks in rural areas. Soonthorndhada, *supra* note 89, at 419.

<sup>91</sup> See Wong, *supra* note 88, at 71. The study shows that in 1992, roughly the same number of workers made their own arrangements and used recruitment agencies for jobs in Singapore. *Id.* Self-arrangement would be considerably harder for Thai workers to do with U.S. companies. See *infra*, Part III.C.3.

<sup>92</sup> Press Release, Int'l Labour Org., As Migrant Ranks Swell, Temporary Guest Workers Increasingly Replacing Immigrants: Private Employment Agencies Send Millions Overseas to Work, Apr. 18, 1997, <http://www.ilo.org/public/english/bureau/inf/pr/1997/9.htm>.

<sup>93</sup> See Soonthorndhada, *supra* note 89, at 420, table 12 (showing that Thai workers used self-arrangement far less than private recruiting agencies when going to Israel for work. Israel, like the United States, is far away from Thailand and culturally and linguistically dissimilar. This is in stark contrast with the more frequent use of self-arrangement for jobs in Singapore and Taiwan.).

assistance,<sup>94</sup> and self-arrangement is more conducive to undocumented migration than to formalized visa-based processes.<sup>95</sup>

H-2A workers from Thailand are uniquely vulnerable to the abuses that pervade the H-2A program. They have limited opportunities to raise concerns because they are linguistically and culturally isolated. More importantly, the weighty recruitment debt burden that they bring to the United States disincentivizes them from complaining about their conditions. These vulnerabilities make the Thai workers both attractive to employers and susceptible to abuse.

### III. SUIT UNDER THE FAIR LABOR STANDARDS ACT MINIMUM WAGE PROVISIONS IS A VIABLE LITIGATION STRATEGY FOR PROTECTING THAI WORKERS FROM RECRUITMENT-FEE DEBT

In order to ensure adequate working conditions for Thai H-2A workers, farm worker advocates must employ a strategy for protecting the workers from the recruitment-fee debt burden that essentially deprives them of their ability to protect themselves from abuse. U.S.-based strategies are necessary because the Thai government has been unwilling or unable to protect workers from exorbitant recruitment fees. The minimum wage provisions of the FLSA may provide this needed relief for the Thai workers. In *Arriaga v. Florida Pacific Farms, L.L.C.*,<sup>96</sup> the Eleventh Circuit Court of Appeals held that a grower was not liable for recruitment fees under the FLSA because he was not responsible for the fees under the common law of agency.<sup>97</sup> Despite the holding in *Arriaga*, recruitment fees may still be attributable to growers under common law agency doctrines. Two doctrines that likely apply in the case of Thai workers are apparent authority agency and inherent agency.<sup>98</sup> If the fees are attributable to a grower, the FLSA requires the grower to reimburse the fees because the fees constitute improper *de facto* wage deductions under § 203(m) of the Act and cause the workers' earnings to fall below minimum wage.<sup>99</sup>

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<sup>94</sup> See generally U.S. Embassy, Mexico, *Visa Services: Temporary Worker*, [http://mexico.usembassy.gov/mexico/evisas\\_work.html](http://mexico.usembassy.gov/mexico/evisas_work.html) [hereinafter *Visa Services*] (last visited Sept. 19, 2006) (noting that employers must send documentation to workers before they can even apply for individual visas).

<sup>95</sup> See Soonthorndhada, *supra* note 89, at 419-21.

<sup>96</sup> 305 F.3d 1228 (11th Cir. 2002).

<sup>97</sup> *Id.* at 1245-46. Agency law is the body of rules by which the courts determine when one party is liable for the acts of another. See BLACK'S LAW DICTIONARY 64 (7th ed. 1999) (defining "agent").

<sup>98</sup> See *infra*, Parts III.C.2 and III.C.3.

<sup>99</sup> See *infra*, Part III.D.

A. *U.S.-based Solutions Are Necessary to Protect Thai Farm Workers from Recruitment Debt*

U.S. solutions to the problem of recruitment fees are needed because the Thai government does not and will not protect workers from extreme fees. A prominent U.S. farm labor contractor has claimed that the Thai government will not allow abusive recruitment and employment practices.<sup>100</sup> However, although the Thai Ministry of Labour has imposed limits on recruitment fees,<sup>101</sup> it rarely enforces these limits.<sup>102</sup> The recruitment agencies are often run by politicians who use their influence to sidestep the regulations.<sup>103</sup> Furthermore, widespread corruption within the agencies responsible for overseas employment deprives workers of essential domestic protections from exorbitant recruitment fees.<sup>104</sup>

B. *The Minimum Wage Guarantees of the FLSA Could Provide Relief from Recruitment Debt for Thai Workers*

Under the FLSA, recruitment fees may constitute impermissible wage deductions that violate the Act's minimum wage guarantees. The FLSA, which unequivocally applies to H-2A workers,<sup>105</sup> requires that employers pay workers at least the federal minimum wage of \$5.15 an hour.<sup>106</sup> Minimum wage is calculated on a weekly basis and must be "free and clear" of improper deductions.<sup>107</sup>

The FLSA contemplates two types of deductions: literal and *de facto* deductions. Literal deductions are wages which are actually subtracted from weekly pay.<sup>108</sup> *De facto* deductions are costs of employment that the employer cannot actually deduct, but that the employer forces the worker to

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<sup>100</sup> See Turnbull, *supra* note 35, at A18 (statement of farm labor contractor Mordechai Orain) ("We'd hear from the Thai government if there was a problem."); Ward, *supra* note 7 (statement of farm labor contractor Mordechai Orain) ("We are not malicious. If we took advantage of these poor people from Thailand, the Thai government would stop us right away.").

<sup>101</sup> Charoensutthipan, *supra* note 80.

<sup>102</sup> Pravit Rojanaphruk, *Confessions of a "Modern-Day Slave Trader,"* THE NATION (THAILAND), Sept. 24, 2000; See Charoensutthipan, *supra* note 80.

<sup>103</sup> Rojanaphruk, *supra* note 102; See Handley, *supra* note 82, at 41.

<sup>104</sup> Yuwadee Tunyasiri and Pradit Ruangdit, *Graft Complaint Against Irawat Labour Secretary Says It's a Political Plot*, BANGKOK POST, Apr. 24, 2002, available at <http://www.thailabour.org/news/02042401.html>; See Wut Nontharit, *Employment Scams Must End, Orders PM, Irawat Probed over Permit Distribution*, BANGKOK POST, Apr. 22, 2002, available at <http://www.thailabour.org/news/02042201.html>.

<sup>105</sup> See 29 U.S.C.S. § 203(e)(1), 206(a) (2000); 20 C.F.R. § 655.103(b) (2005); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1235 (11th Cir. 2002).

<sup>106</sup> 29 U.S.C.S. § 206(a)(1) (2000).

<sup>107</sup> See 29 C.F.R. § 531.35, 776.4 (2005); See *Arriaga*, 305 F.3d at 1235.

<sup>108</sup> See *Arriaga*, 305 F.3d at 1236.

assume.<sup>109</sup> *De facto* deductions have the same potential to violate the FLSA as literal deductions because “there is no legal difference between deducting a cost directly from the worker’s wages and shifting a cost, which they could not deduct, for the employee to bear.”<sup>110</sup>

One example of a *de facto* deduction would be a special uniform that an employer required a worker to purchase prior to the first day on the job. If the employer did not reimburse the employee for the cost of the uniform during the first week of work, the employer would be, in effect, deducting the cost of the uniform from the worker’s wages for that week.<sup>111</sup> In the same way, when a grower fails to reimburse recruitment fees, these fees may constitute *de facto* deductions under the Act. A violation of the FLSA would occur if the fees, when subtracted from the worker’s total earnings for the first week of work, push the worker’s wages below federal minimum wage.<sup>112</sup> In order to comply with the FLSA, the grower would need to reimburse at least a sufficient portion of the fees to ensure that the worker’s first week’s wage rose to the federal minimum wage.<sup>113</sup>

An example of the weekly calculation formula for wages under the FLSA shows how a grower may be required to reimburse a large part of a particular Thai worker’s recruitment fees. First, imagine that a miner is required to purchase safety equipment costing \$250 before starting work. During the first week of work, the miner works forty hours at a pay rate of \$10 an hour. The miner’s weekly wages total \$400, which is clearly an average of more than \$5.15 an hour (the FLSA-mandated federal minimum wage). However, the employer must also treat the \$250 expense as a *de facto* deduction, which pushes the total earnings for the first week to \$150. The average hourly wage is then \$3.75 per hour. The employer does not have to pay the entire cost of the safety equipment, but the employer must reimburse the miner enough to return the hourly wages at least to the federal minimum. In this case, the employer would owe the miner \$56, which would raise the total earnings to \$206—exactly \$5.15 per hour.<sup>114</sup>

In the case of a Thai worker who paid \$5000 in recruitment fees, the result of the minimum wage calculation would be more extreme. A farm worker working forty hours at \$9 per hour would earn \$360 in the first week. The \$5000 recruitment expense, however, would drop this wage to \$-4640

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<sup>109</sup> See *id.* at 1236-1237.

<sup>110</sup> *Id.*

<sup>111</sup> See *Marshall v. Root’s Rest., Inc.*, 677 F.2d 559, 560-61 (6th Cir. 1982).

<sup>112</sup> *Arriaga*, 305 F.3d at 1237.

<sup>113</sup> *Id.*; see *De Luna-Guerrero v. North Carolina Growers Ass’n*, 338 F. Supp. 649, 657 (E.D.N.C. 2005).

<sup>114</sup> 29 C.F.R. § 531.35 (2005); See *Arriaga*, 305 F.3d at 1237 nn.10-11.

for the week. The grower would then owe the worker \$4846, enough to raise the wages to \$206 (\$5.15 for 40 hours). The grower would not be liable for the entirety of the recruitment fees, but would violate the FLSA unless she or he paid the worker at least enough to comply with federal minimum wage requirements.<sup>115</sup>

C. *Recruitment Fees Charged to Thai Workers May Often Be Attributable to Growers Under the Common Law of Agency*

The only court to address the question of H-2A recruitment fees and the FLSA began with the premise that in order for the growers to be liable under the Act for recruitment fees, the fees must be legally attributable to the growers under agency law.<sup>116</sup> That court did not find that the fees there were attributable to the growers.<sup>117</sup> Notwithstanding, under a thorough analysis of agency law, growers who employ Thai workers may be responsible for the fees under the doctrines of apparent authority agency or inherent agency.<sup>118</sup>

I. *Growers May Be Responsible for Recruitment Fees Under the Doctrine of Apparent Authority Agency*

The doctrine of apparent authority agency is outlined in the Restatement (Second) of Agency (“Restatement”),<sup>119</sup> section 27 which states:

<sup>115</sup> See *Arriaga*, 305 F.3d at 1237 nn.10-11.

<sup>116</sup> See *id.* at 1245. Although the *Arriaga* court assumed that an agency law analysis was necessary, it is arguable that agency law determinations are not required at all. The court’s analysis of transportation fees does not include an agency analysis, but instead proceeds directly to the question of whether transportation fees are for the primary benefit of the growers. For transportation fees, the court did not require that the bus companies be agents of the growers in order to charge bus fare to the workers. *Id.* at 1237. Because no court has addressed whether agency analysis is necessary, this Comment assumes that agency analysis is required, but it does not analyze, nor does it intend to foreclose, the argument that agency analysis is not required in order to hold growers responsible for recruitment fees.

<sup>117</sup> *Id.* at 1245-46.

<sup>118</sup> See *infra*, Parts III.C.2, III.C.3.

<sup>119</sup> In cases where the FLSA is at issue, courts apply federal common law. *United Parcel Service, Inc. v. Int’l Brotherhood of Teamsters*, No. 6:00CV6ORL19DAB, 2001 WL 1725291, at \*5 (M.D.Fla. Mar. 8, 2001) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964)); See also *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995) (applying common-law successorship doctrine under the FLSA). Indeed, when the court applies common law to cases arising under federal statutes, it often uses federal common law. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957). Federal courts have traditionally followed the Restatement closely when examining common-law agency questions. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989) (citing the Restatement eight times and acknowledging a traditional reliance on the Restatement); *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n.15 (7th Cir. 1998) (recognizing that federal courts rely on the Restatement as a valuable source for establishing the federal common law of agency); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755-56 (1998) (relying heavily on the Restatement in a Title VII case); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 902 (D. Minn. 1999) (same).



apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.<sup>120</sup>

Applied to the present problem, a grower might confer on a recruiter the apparent authority to charge recruitment fees by sending a letter to a worker saying that the fees were authorized.

However, the grower does not need to have such direct contact with the workers to confer apparent authority. The common law of agency dictates that "other conduct" that may establish apparent authority includes putting agents in positions in which they might ordinarily do the things that they purport to do.<sup>121</sup> A survey of state agency law as treated by federal courts shows the firmly established concept of "apparent authority by position" at common law.<sup>122</sup> A principal creates apparent authority when the principal puts the agent in a position that justifies the third party's assumption that the agent has authorization to perform the act in question, regardless of whether the agent is actually authorized.<sup>123</sup>

U.S. growers who seek Thai workers generally put recruiters in positions that justify workers' belief that they have authority to charge recruitment fees. It is standard practice for growers to hire U.S.-based farm labor contractors to recruit H-2A workers for them,<sup>124</sup> but these contractors do not complete that task alone. There are two principal methods by which U.S. growers can gain access to workers in Thailand: through the Thai Department of Employment, or through private agencies.<sup>125</sup> Due to Thai regulations, every U.S. grower who uses a Thai private recruiting agency

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<sup>120</sup> RESTATEMENT (SECOND) OF AGENCY § 27 (1958); see Arriaga, 305 F.3d at 1245.

<sup>121</sup> Restatement (Second) of Agency § 27 cmt. a (1958). Section 27 comment a states: "[A]pparent authority can be created by appointing a person to a position . . . which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent." *Id.*

<sup>122</sup> *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 726 (8th Cir. 1995); *Phillips Petroleum Co. v. Buster*, 241 F.2d 178, 182-83 (10th Cir. 1957) (*reh'g denied*); *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1089 n.13 (D.D.C. 1986).

<sup>123</sup> *Prop. Advisory Group, Inc. v. Bevona*, 718 F. Supp. 209, 211 (S.D.N.Y. 1989). "[A]pparent authority may arise *absent any direct contact* between the principal and the third party." *Id.* (emphasis added).

<sup>124</sup> See Martin and Taylor, *supra* note 19, at 1; Shrader, *supra* note 19. (A single farm labor contractor in North Carolina brought over half of the United States' H-2A workers in 1999). The growers in Washington who recruited Thai workers did so by first hiring Global Horizons, a farm labor contractor. See Global Settlement, *supra* note 19, at 1.

<sup>125</sup> Thailand Overseas Employment Agency, *Thai Manpower Guide*, <http://www.overseas.doe.go.th/employers/tmguid.html> (last visited Sept. 19, 2006).

will necessarily appoint the recruiter as her “recruiting agent.”<sup>126</sup> In order to use a private agency, the employer must submit, among other things, a statement of “power of attorney” which authorizes the Thai recruiter to: 1) recruit and select workers, 2) sign all employment contracts on behalf of the employer, and 3) apply for visas.<sup>127</sup> The relationship between the grower and the recruiter is thus a formalized one in which the grower has put the recruiter in the position of “recruiting agent.”

These “recruiting agents” have apparent authority to charge recruitment fees to workers. Once a labor recruiter is appointed to the position of “grower’s recruiting agent,” the agent has apparent authority as long as the agent behaves in ways that are consistent with the habits of the locality, trade, or profession.<sup>128</sup> It is ubiquitous practice in rural northern Thailand for recruiters to charge recruitment fees to workers who seek foreign employment.<sup>129</sup> The Bangkok recruiting agencies employ local village representatives (called *saay*) to make initial contact with workers and even to help arrange the loans through which the workers pay their recruitment fees to the Bangkok agencies.<sup>130</sup> Thai workers see fees as an integral part of the recruitment process;<sup>131</sup> they have no legitimate reason to suspect that the recruiters have overstepped their bounds.

If the recruiters charge fees that the growers have forbidden them to charge—even if they commit fraud in charging the fees—the growers may still be responsible for their acts under apparent authority agency. The Tenth Circuit Court of Appeals held that a principal may be liable for acts of an agent that are expressly contrary to instructions if the third party has a reasonable belief that the agent is authorized.<sup>132</sup> The Supreme Court, extending this liability to cases of fraud, explained in *American Society of Mechanical Engineers v. Hydrolevel Corp.* (“ASME”) that a principal is

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<sup>126</sup> See Thailand Overseas Employment Agency, *Thai Manpower Guide: Step One: Application for Approval from the DOE*, [http://www.overseas.doe.go.th/employers/priv\\_step.html](http://www.overseas.doe.go.th/employers/priv_step.html) (last visited Sept. 19, 2006).

<sup>127</sup> *Id.*

<sup>128</sup> RESTATEMENT (SECOND) OF AGENCY § 49 cmt. c (1958); See also *Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 726 (8th Cir. 1995). “Acts are interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality, trade or profession, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise.” RESTATEMENT (SECOND) OF AGENCY § 49 cmt. c (1958).

<sup>129</sup> See *supra* Part II.D

<sup>130</sup> Wong, *supra* note 88, at 73.

<sup>131</sup> See *supra* Part II.D.

<sup>132</sup> *Phillips Petroleum Co. v. Buster*, 241 F.2d 178, 183 (10th Cir. 1957) (*reh’g denied*) (holding that where an agent directly contravened a policy requiring him to report to the home office before entering into agreements, the principal was still liable for his acts).

liable for fraud facilitated by an agent's position when the transaction seems to the third party to be within the ordinary duties of the agent.<sup>133</sup> Thai workers are justified in thinking that the growers' agents are charging authorized recruitment fees, and therefore under the doctrine of apparent authority, the growers are responsible for the fees.

Strong policy considerations justify holding the employers liable even for expressly unauthorized or fraudulent acts. The court in *ASME* pointed out that liability for principals puts pressure on principals to ensure that their agents abide by the law.<sup>134</sup> Put a different way, growers who are held accountable for the fees that their agents charge in Thailand are more likely to take steps to insure that the agents they hire are trustworthy and comply with instructions.

In the context of Thai workers who are recruited for jobs in the United States, this policy makes especially good sense. The workers are often on the other side of the globe from the growers when they first make arrangements with recruiters and enter into their employment contracts.<sup>135</sup> They have few means by which to ascertain the recruiters' actual scope of authority.<sup>136</sup> The growers may argue that distance and language barriers also make it difficult to for the growers to effectively control the recruiters' activities. While this may be true, the growers make conscious decisions about where to recruit and which recruiters to employ, and they have financial leverage with the recruiters.<sup>137</sup> The growers are in a much better position to insure that the recruiters comply with their wishes than are the workers. Thus, the growers should bear the risk of unauthorized acts by their recruiting agents.

## 2. *The Court's Reasoning in Arriaga Leaves Substantial Room for Future Findings that Recruitment Fees Are Attributable to Growers*

Only one circuit court decision, *Arriaga v. Florida Pacific Farms, L.L.C.*, has directly addressed the issue of recruitment fees for H-2A workers

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<sup>133</sup> *Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982) (*reh'g denied*) (quoting RESTATEMENT (SECOND) OF AGENCY § 261 cmt. a). "[L]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.*

<sup>134</sup> *Id.* at 572.

<sup>135</sup> See McDonald Letter, *supra* note 6; Turnbull, *supra* note 35.

<sup>136</sup> See Ward, *supra* note 7; Turnbull, *supra* note 35.

<sup>137</sup> See Brief for Appellants at \*10-\*12, *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002) (No. 16402-B); Handley, *supra*, note 82 (showing that recruiters receive commission from employers).

and their relation to the FLSA.<sup>138</sup> The *Arriaga* court did not find the growers in that case to be responsible for recruitment fees because the court concluded that there were no words or conduct in the factual record which, interpreted reasonably, could have established apparent authority.<sup>139</sup> However, the *Arriaga* court did not expressly address the doctrine of apparent authority by position.<sup>140</sup>

In *Arriaga*, the defendant growers hired a farm labor contractor to recruit workers for their Florida farms, who then contracted with another international recruiter and travel agent.<sup>141</sup> The growers instructed the recruiters not to charge recruitment fees to the workers, but the international recruiting agency did so nonetheless.<sup>142</sup> The workers alleged that the fees violated the FLSA by pushing their weekly wages below the federal minimum wage.<sup>143</sup> The *Arriaga* court did not reach the question of whether failure to reimburse recruitment fees could violate the FLSA because it determined that the growers in the case were not responsible for the fees under the common law of agency.<sup>144</sup>

There are two reasons that the Eleventh Circuit's finding in *Arriaga* does not foreclose the possibility that courts in the future will find growers responsible for such fees under the FLSA. First, agency law questions are inherently fact-specific inquiries,<sup>145</sup> thus a determination under agency law in any particular case is not dispositive of other cases with distinct facts. Second, the *Arriaga* court conducted a limited analysis of agency law.<sup>146</sup> This analysis, which did not expressly address apparent authority by position and did not consider other possible routes to agency such as inherent agency,

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<sup>138</sup> *Arriaga*, 305 F.3d at 1228.

<sup>139</sup> *Id.* at 1245-46.

<sup>140</sup> *See id.* at 1244-1246. Perhaps the court did not address apparent authority by position because the parties did not expressly argue it. *See generally* Brief for Appellants, *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002) (No. 16402-B); Brief for Appellees, *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002) (No. 16402-B). However, there was some evidence in the record that the growers had placed the recruiters in a position that could create apparent authority. For example, the growers hired the Florida Fruit and Vegetable Association ("FFVA") to be their labor recruiters, and the FFVA shared these duties with Berthina Cervantes, who ran an international recruiting and travel business. *Arriaga*, 305 F.3d at 1233.

<sup>141</sup> *Arriaga*, 305 F.3d at 1233-1234.

<sup>142</sup> *Id.* at 1234.

<sup>143</sup> *Id.* at 1231-1232.

<sup>144</sup> *Id.* at 1244-1246.

<sup>145</sup> *See* *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1090 n.13 (D.D.C. 1986); *Selheimer & Co. v. Murphy*, 319 B.R. 395, 407 (Bankr. E.D.P.A. 2005).

<sup>146</sup> *See Arriaga*, 305 F.3d at 1245; *see generally* Brief for Appellants, *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002) (No. 16402-B); Brief for Appellees, *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002) (No. 16402-B).

does not set out a comprehensive basis for evaluation of growers' responsibility for recruitment fees.<sup>147</sup>

### 3. *Growers May Be Responsible for Recruitment Fees Under the Doctrine of Inherent Agency*

Under the doctrine of inherent agency,<sup>148</sup> growers may be held responsible for recruitment fees even when the "apparent authority by position" requirements are not met. Inherent agency holds a principal liable for the acts of her agent when the third party reasonably believes that the agent has authority to do what she is doing, regardless of whether the

<sup>147</sup> See *Arriaga*, 305 F.3d at 1245; See also *infra* Part III.C.2.

<sup>148</sup> The most recent draft of the Restatement (Third) of Agency proposes to do away with inherent agency altogether. RESTATEMENT (THIRD) OF AGENCY Introductory Note (Tentative Draft No. 2, 2001). There is an active debate in the literature over whether it is prudent to eliminate inherent agency. See generally John Dwight Ingram, *Inherent Agency Powers: a Mistaken Concept Which Should Be Discarded*, 29 OKLA.CITY U. L. REV. 583 (2004); Gregory Scott Crespi, *The Proposed Abolition of Inherent Agency Authority by the Restatement (Third) of Agency: an Incomplete Solution*, 45 SANTA CLARA L. REV. 337 (2005); Matthew P. Ward, Note, *A Restatement or a Redefinition: Elimination of Inherent Agency in the Tentative Draft of the Restatement (Third) of Agency*, 59 WASH. & LEE L. REV. 1585 (2002). In his Note, Matthew Ward argues against the abandonment of inherent agency because it would change the outcome of cases in which inherent agency has been correctly applied, and thus would represent a substantive change from current law. *Id.* at 1604-1605. Gregory Crespi replies that the Restatement (Third)'s "expansion" of apparent authority and its re-worded estoppel sections would cover any cases previously covered by inherent agency. See Crespi, at 359, 362.

The Thai workers' situation illustrates that inherent agency should be retained as a distinct concept because it encompasses situations not otherwise covered by the Restatement (Third) of Agency. As a beginning point, the Third Restatement includes a definition of "manifestation" which serves as an express recognition of the concept of "apparent authority by position." See RESTATEMENT (THIRD) OF AGENCY § 1.03, § 1.03 reporter's note a (T.D. No. 2, 2001). This unequivocally covers situations in which a worker knows that the grower has put the recruiter in the position of "recruiting agent" on the grower's behalf. On the other hand, the Third Restatement's estoppel provision covers situations in which a worker justifiably believes (for any reason, not limited to manifestations by the grower) that recruitment fees are authorized, and the grower carelessly causes that belief or both 1) has notice of that belief, and 2) fails to take reasonable steps to notify the workers of the facts. RESTATEMENT (THIRD) OF AGENCY § 2.05 (T.D. No. 2, 2001). Before the court can hold the grower liable under estoppel, the worker must prove that the grower carelessly or unreasonably caused the worker's change in position in some way.

The Restatement (Third)'s formulation creates a coverage gap, leaving principals not liable in situations in which they would have been liable under the Restatement (Second). As Mr. Ward correctly notes, apparent authority by position does not apply unless the third party *knows* that the principal has officially put the agent in a certain position. *Ward* at 1593-1594. However, "if the agent's conduct alone causes the third party's belief, even if that conduct would make everyone reasonably believe that the agent has authority, then no apparent authority exists." *Ward* at 1591. One can easily imagine a situation in which a farmer in rural northeastern Thailand might encounter a recruiter, and having nothing to go on but the manifestations of the recruiter himself, reasonably believe that the recruiter is authorized to charge recruitment fees. The grower in this situation would be liable for the fees not by apparent authority, but by the current doctrine of inherent agency. The estoppel inquiries—whether the grower carelessly caused the belief or knew of the belief and failed to take reasonable steps to notify the worker—would be irrelevant to an inherent agency analysis under the current restatement. By requiring the worker to prove these estoppel elements in order to hold the grower accountable, the Restatement (Third) imposes additional burdens on the claimant, and therefore substantively alters the law of agency.

principal made any manifestations that authority existed.<sup>149</sup> In the case of Thai workers and American growers, the inherent agency doctrine would be useful specifically when a court has found apparent authority to be lacking because the workers were unaware that the grower had officially put the recruiter in the position of “recruiting agent.”

The Restatement section 161 outlines three key requirements for principals’ liability based on inherent agency: 1) the agent must be a “general agent”; 2) the acts must “usually accompany” or be “incidental to transactions which the agent is authorized to conduct”; and 3) the other party must reasonably believe that the agent is authorized.<sup>150</sup> This rule is based on inherent agency powers, which stem solely from the existence of the agency relationship itself, and *not* from actual authority or apparent authority.<sup>151</sup> Under the inherent agency power doctrine, “. . . the principal becomes a party to the unauthorized contract made by his general agent even though there has been *no representation* that the agent was authorized.”<sup>152</sup>

Thai recruiters who demand recruiting fees from workers fulfill the threefold requirements of Restatement section 161. First, the recruiters are “general agents” rather than “special agents” of the growers. Under the restatement definitions, “[a] general agent is an agent authorized to conduct a series of transactions involving a continuity of service,”<sup>153</sup> while “[a] special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.”<sup>154</sup> The Restatement recognizes that the difference between the two types of agents is “a matter of degree,” and it gives the following factors as guidance for making the distinction: “the number of acts to be performed in accomplishing an authorized result, the number of people to be dealt with, and the length of time needed to accomplish the result.”<sup>155</sup> Growers hire farm labor contractors to undertake every aspect of the recruitment and hiring process. This process, especially for a harvesting crew of 100 or more workers, includes innumerable contacts and transactions, including initial discussions of contract terms, contract signing, visa procurement, and travel

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<sup>149</sup> Ward, *supra* note 148, at 1586.

<sup>150</sup> RESTATEMENT (SECOND) OF AGENCY § 161 (1958).

<sup>151</sup> *Id.* § 161 cmt. a, *Id.* at § 8A. (“Inherent Agency Power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.”).

<sup>152</sup> *Id.* § 161 cmt b (emphasis added).

<sup>153</sup> *Id.* § 3(1).

<sup>154</sup> *Id.* § 3(2).

<sup>155</sup> *Id.* § 3 cmt. a.

arrangements<sup>156</sup> and can take many months. The farm labor contractors and their sub-agents are thus “general agents” of the growers under the Restatement definition.

The case of *Cardenas v. Benter Farms*<sup>157</sup> called upon the district court for the Southern District of Indiana to decide if a farm labor recruiter was a general agent of his grower.<sup>158</sup> The recruiter was employed as a crew chief by the defendant, and part of his job was to recruit and hire workers.<sup>159</sup> The facts showed that he was hired to “transact all the recruiting business of the [defendant]” and that the growers did not place any restrictions on the way in which he was to recruit workers.<sup>160</sup> The court applied the Indiana common law definition of “general agent”<sup>161</sup> and held that the recruiter was a general agent of the growers.<sup>162</sup>

When Thai recruiters assess recruitment fees to workers, they also fulfill the second and third requirements of the Restatement section 161: they are doing something that “usually accompanies” authorized recruiting acts, and the workers have no reason to believe that they are not authorized to charge the fees.<sup>163</sup> In Thailand, it is standard practice for recruiters to charge recruitment fees as part of the process of connecting foreign employers with Thai workers.<sup>164</sup> The workers rely on their knowledge of the system and on the statements of the recruiting agents themselves to make reasonable judgments that recruiting fees are an ordinary, authorized part of the recruitment scheme.

The policy rationale behind the doctrine of inherent agency applies especially well to U.S. growers who recruit in Thailand. The inherent agency doctrine may seem unduly harsh to employers, but the Restatement’s drafters argue forcefully that growers, and not workers, should bear the risks of the recruitment agency relationship. A comment to Section 161 explains

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<sup>156</sup> See McDonald Letter, *supra* note 6, at 1; Ward, *supra* note 7; Visa Services, *supra* note 94; 20 C.F.R. § 655.102 (b)(5) (2005).

<sup>157</sup> No. IP 98-1067-C T/G, 2000 WL 1372848 (S.D. Ind. Sept. 19, 2000).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at \*9.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at \*8. Indiana common law defines a general agent as “one who is authorized to transact all the business of his principal, or all of his business or some particular kind, or as some particular place.” *Id.*

<sup>162</sup> *Id.* at \*9. The *Cardenas* court, though not using the term “inherent agency power,” upheld the doctrine’s rationale: “if one of two innocent parties must suffer due to a betrayal of trust—either the principal or the third party—the loss should fall on the party who is most at fault. Because the principal puts the agent in the position of trust, the principal should bear the loss.” *Id.* at \*9 (citing *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind. 1998)).

<sup>163</sup> See *supra* Part II.D

<sup>164</sup> See *supra* Part II.D.

that agents are essential parts of principals' businesses.<sup>165</sup> Principals reap efficiency gains when third parties do not have to rigorously scrutinize the extent of the agents' authority in every seemingly routine transaction.<sup>166</sup> Put simply, an employer who has benefited from the availability of general agents should bear the risk that the agent may do unauthorized things. This risk should not fall on innocent third parties. Thai workers, especially those who come from the rural northeastern corner of the country, have scarce means by which to ascertain whether or not the recruiters with whom they deal are acting according to the growers' instructions. Even if the workers knew how to reach the growers by telephone, contact would be exceedingly difficult because the workers do not speak English,<sup>167</sup> and the fifteen hour time difference<sup>168</sup> would complicate communications. The growers, on the other hand, prefer Thai workers, and they benefit greatly from sending recruiters to find the workers—a task which growers do not have the time or the language skills to perform.<sup>169</sup> It is the growers, not the Thai workers, who should bear the risks of the growers' recruitment efforts.

#### D. *The FLSA Requires Growers to Reimburse Recruitment Fees*

Once a court finds a grower to be responsible under agency law for recruitment fees, the FLSA requires the court to analyze whether the growers must reimburse the workers for the fees. The fees are impermissible *de facto* wage deductions under the FLSA and must be reimbursed unless they satisfy two requirements: 1) they must fall within the exception for "other facilities" as defined in section 203(m) of the Act; and 2) they must be "for the primary benefit" of the worker, rather than the grower. The recruitment fees paid by Thai workers do not meet either of the requirements, and are therefore impermissible deductions. As a result, the growers must reimburse the workers for enough of the fees during their first week of work to ensure

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<sup>165</sup> RESTATEMENT (SECOND) OF AGENCY § 161 cmt. a (1958).

<sup>166</sup> *Id.* "In the situation in which an agent's powers exist only because of the rule stated in [section 161], the principal's liability cannot be based upon the rules of contracts, torts, or of restitution, since, by hypothesis the principal has not communicated with the third person by any authorized means . . . . His liability exists solely because of his relation to the agent. . . . Commercial convenience requires that the principal should not escape liability where there have been deviations from the usually granted authority by persons who are such essential parts of his business enterprise. In the long run it is of advantage to business, and hence to employers as a class, that third persons should not be required to scrutinize too carefully the mandates of permanent and semi-permanent agents who do no more than what is usually done by agents in similar positions." *Id.*

<sup>167</sup> See *supra* Part II.C.

<sup>168</sup> See Time and Date.com, *The World Clock—Time Zones*, <http://www.timeanddate.com/worldclock/> (last visited Sept. 19, 2006).

<sup>169</sup> See *infra*, Part III.D.3.



that the workers' wages meet minimum wage standards. This result effectuates the purpose of the FLSA by protecting workers who have little bargaining power.

*I. Recruitment Fees Are Permissible Wage Deductions Only If They Fall Within the FLSA's "Other Facilities" Exception*

The FLSA and its accompanying regulations provide a two-part test to determine if wage deductions are allowable. The Act, in 29 USC § 203(m),<sup>170</sup> allows certain kinds of wage deductions by providing that employers can count as "wages"—and therefore legitimately deduct—the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his [or her] employees."<sup>171</sup> In effect, these "customarily furnished" items count as "wage credits" for employers, and they are allowable even if they cause weekly take-home wages to fall below minimum wage.<sup>172</sup> The growers in *Arriaga* argued that recruitment fees were "other facilities" within the meaning of the Act, and therefore were allowable deductions.<sup>173</sup> However, the FLSA's accompanying regulations further clarify that the "the cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages."<sup>174</sup> Thus *de facto* deductions for recruitment fees that push weekly wages below minimum wage violate the FLSA unless: 1) they are "other facilities" within the meaning of the Act, and 2) they are for the "primary benefit and convenience" of the workers rather than the grower.

Courts tend to blend the analysis for these two inquiries, but they are conceptually distinct. The first poses a threshold question: whether the recruitment fees even qualify as "other facilities," making them *eligible* to count toward workers' wages. If the fees are not "other facilities," the court need not look any further—the employer is required to reimburse the fees. If the fees *are* "other facilities," the second element requires the court to ask if the fees are for the primary benefit of the employer, not the worker. If the fees primarily benefit the employer, they are not "reasonable" and therefore

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<sup>170</sup> 29 U.S.C. § 203(m) (Supp. 2006).

<sup>171</sup> *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir 2002); *see also* 29 U.S.C. § 203(m).

<sup>172</sup> *Arriaga*, 305 F.3d at 1236; *see also* 29 U.S.C. § 203(m).

<sup>173</sup> *Arriaga*, 305 F.3d at 1236.

<sup>174</sup> 29 C.F.R. § 531.32(c) (2005) (emphasis added).

unallowable *de facto* deductions from wages. In this scenario, the employer is also required to reimburse employees for recruitment fees.

2. *Recruitment Fees Do Not Fall Within the “Other Facilities” Deduction Exception*

Recruitment fees should not be considered “other facilities” within the meaning of the FLSA. The phrase “other facilities” is not defined in the FLSA, and the Supreme Court has not established a test for determining whether an item or expense is “other facilities.”<sup>175</sup> However, the two circuit courts that have explicitly dealt with the definitional issue are in agreement; the phrase “other facilities” must be read in the context of the words “board and lodging” in section 203(m).<sup>176</sup>

This view is supported by the text of 29 C.F.R. § 531.32, which indicates that “other facilities” must be room and board or something similar.<sup>177</sup> Section 531.32 provides examples of things that are similar to board and lodging, including meals furnished at company restaurants, housing, general merchandise from company stores, electricity for dwellings, and transportation to and from work.<sup>178</sup> The court in *Arriaga* recognized that the common thread among the “facilities” on this list is that they all “arise in the course of ordinary life.”<sup>179</sup> Recruitment fees certainly do not meet this standard. A worker may pay the fees only once a year, perhaps even only once in a lifetime.<sup>180</sup> The foreign employment connections that the fees “purchase” are not quotidian necessities, but extraordinary and infrequent expenditures. The fees, therefore, do not fall within the section 203(m) of the FLSA and cannot be deducted from worker’s wages.

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<sup>175</sup> See *De Luna-Guerrero v. North Carolina Growers Association, Inc.*, 338 F.Supp. 649, 659 (E.D.N.C. 2005).

<sup>176</sup> The courts in both *Shultz v. Hinojosa*, 432 F.2d 259, 267 (5th Cir. 1970) and *Soler v. G. & U., Inc.*, 833 F.2d 1104, 1109 (2d Cir. 1987) stated that the phrase “other facilities” is *in pari materia* with the words “board and lodging.” Black’s Law Dictionary defines “*in pari materia*” as: “[Latin ‘in the same matter’] I. adj. On the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 794 (7th ed. 1999).

<sup>177</sup> 29 C.F.R. § 531.32 (2005).

<sup>178</sup> *Id.*

<sup>179</sup> *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1242 (11th Cir 2002).

<sup>180</sup> See McDonald Letter, *supra*, note 6 (recruiters charge fees up front in Thailand before workers leave the country).

3. *Recruitment Fees Are Impermissible Deductions Because They Are “for the Primary Benefit” of the Growers Rather Than the Workers*

Even when the courts do find that expenses fall within the category of “other facilities,”<sup>181</sup> these items are not always deductible from pay. Instead, they receive only a rebuttable presumption of “reasonableness.”<sup>182</sup> Workers may rebut this presumption by showing that the fees were “primarily for the benefit of the growers.”<sup>183</sup> The fact that the regulation contains the word “primarily” (rather than “exclusively” or “entirely”) is essential to this analysis because it demonstrates recognition that facilities often benefit an employee at the same time as they benefit the employer.<sup>184</sup> The court then must determine which party is the primary beneficiary of the fees.

Recruitment fees paid by Thai H-2A workers are “primarily for the benefit of the growers” under any common-sense reading of the phrase. Growers are not allowed to hire H-2A workers until they receive certification from the Department of Labor that there are not any local workers available to do the work that they require.<sup>185</sup> Without the H-2A workers, the growers’ crops will rot in the fields. Their entire harvests, and perhaps the very survival of their businesses, may be at stake. By using the H-2A program, the growers get reliable, documented employees.

The workers also benefit from the farm labor jobs that they obtain by paying the recruitment fees, but courts have consistently held that expenses are not for the benefit of the worker merely because they enable the worker to secure a job in the first place.<sup>186</sup> H-2A workers may earn more in the United States than they do at home. They may also sometimes enjoy better working conditions at their U.S. jobs. However, as one court observed, “. . . the issue is not whether working in the United States is better than working [in their own country] or whether ‘on balance’ working in the

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<sup>181</sup> By its everyday meaning, the term “facility” connotes “something created to serve a particular function,” such as a bathroom or a stadium. See THE AMERICAN HERITAGE DICTIONARY COLLEGE EDITION 484 (2d. ed. 1991). However, the term “facility” in the context of the FLSA is interpreted broadly to encompass all kinds of services and resources, such as clothing, food, and transportation. See 29 C.F.R. § 531.32 (a) (2005).

<sup>182</sup> *Soler*, 833 F.2d at 1109-10 (holding that the presumption of “deductibility” even for housing—a clear cut example of “board and lodging”—could be overcome with evidence that the housing was for the employer’s primary benefit).

<sup>183</sup> As outlined in 29 C.F.R. § 531.32 (c), “the cost of furnishing ‘facilities’ which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.”

<sup>184</sup> See *Soler*, 833 F.2d at 1111 (Oakes, J. dissenting).

<sup>185</sup> 20 C.F.R. § 655.90(b)(1)(A) (2005).

<sup>186</sup> See *Marshall v. Root’s Restaurant, Inc.*, 677 F.2d 559, 560-561 (6th Cir. 1982); *Shultz v. Hinojosa*, 432 F.2d 259, 266-267 (5th Cir. 1970).

United States is a ‘good deal’ for the workers.”<sup>187</sup> The issue is whether the growers are the primary beneficiaries of the fees. Though the workers benefit in some way from the recruitment process (and the fees that facilitate it), the workers’ availability preserves the growers’ businesses. Thus, the growers are the primary beneficiaries of the fees.

Beyond the common meaning of “primary benefit,” the Code of Federal Regulations indicates that things which are “for the primary benefit of the employer” are things which directly enable employees to do their jobs.<sup>188</sup> 29 C.F.R. § 531.32(c) provides courts with examples of things that are for the primary benefit of the employer.<sup>189</sup> These include: safety equipment, electric power when used for commercial production, company guard protection, charges for rental of uniforms when uniforms are required by the nature of the business, and transportation that is an incident of and necessary to the employment.<sup>190</sup> All of the listed items enable workers to complete their assigned work.

Courts have held that long-distance transportation costs are for the primary benefit of employers because they are necessary for H-2A workers to do their jobs.<sup>191</sup> The *Arriaga* court held that transportation costs for workers from Mexico to the United States were for the primary benefit of the growers.<sup>192</sup> The court pointed out that growers who choose to participate in the H-2A program know that workers will not come from commutable distances, and that someone will have to pay for their transportations costs.<sup>193</sup> In that instance, the court had the benefit of a specific reference in the regulations to transportation costs. In the Code of Federal Regulations, one example of a cost that is for the primary benefit of the employer is “transportation charges where such transportation is an incident of and necessary to the employment.”<sup>194</sup> The court examined the words “incident” and “necessary” in detail, and determined that the transportation costs were “an incident of and necessary to” the workers’ employment because they were an “inevitable and inescapable consequence of having foreign H-2A workers employed in the United States.”<sup>195</sup>

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<sup>187</sup> *De Jesus De Luna-Guerrero v. North Carolina Growers Association, Inc.*, 338 F.Supp. 649, 662 (E.D. N.C. 2005).

<sup>188</sup> *See* 29 C.F.R. § 531.32(c) (2005).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1242 (11th Cir 2002); *De Jesus De Luna-Guerrero v. North Carolina Grower's Ass'n*, 338 F. Supp. 2d 649, 661 (D.N.C. 2004).

<sup>192</sup> *Arriaga*, 305 F.3d at 1242.

<sup>193</sup> *Id.*

<sup>194</sup> 29 C.F.R. § 531.32 (c) (2005).

<sup>195</sup> *Arriaga*, 305 F.3d at 1242.

Though recruitment fees are not specifically mentioned in the regulations which accompany the FLSA, the same analysis shows that they are also “an incident of and necessary to” the jobs of Thai H-2A workers. Growers who choose to employ workers from Thailand will be required by Thai authorities to authorize Thai recruiting agents to act on their behalf. This relationship is not only required by Thai law,<sup>196</sup> but is also necessary as a practical matter for U.S. growers, who would otherwise find it impossible to make contact with the kind of workers they seek—farmers from rural northeastern Thailand. It is necessary to for H-2A workers to travel long distances, thus incurring transportation costs, to arrive and work in the United States. In the same way, it is necessary for employers to use recruiting agencies to find Thai workers—and someone must pay the recruiters for their efforts.<sup>197</sup> The realities of the Thai recruitment system make recruitment fees every bit as “inevitable and inescapable” as long-distance transportation costs. As a result, under 29 C.F.R 531.32(c), the fees “may not be used in computing wages,” including as *de facto* pre-employment deductions.<sup>198</sup>

#### 4. *Growers Must Reimburse Workers for the Recruitment Fees During Their First Week of Work*

Under the FLSA, a determination that recruitment fees are impermissible *de facto* deductions from workers’ pay has a clear consequence: the employers must reimburse the workers for the major part of the recruitment fees during their first week of work so that the fees do not push the workers’ wages below the federal minimum wage.<sup>199</sup> The FLSA mandates that employers pay workers at least \$5.15 per hour,<sup>200</sup> calculated on a weekly basis. Workers’ pay must be “free and clear”<sup>201</sup> of improper deductions, both actual and *de facto*.<sup>202</sup> *De facto* deductions are costs that the employer does not actually deduct from wages, but instead forces the worker to incur directly.<sup>203</sup> Employers must reimburse employees for expenses that they incur during the same week that the expenses arise.<sup>204</sup> In

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<sup>196</sup> See *supra*, Part III.C.2.

<sup>197</sup> See *supra*, Part II.D.

<sup>198</sup> 29 C.F.R § 531.32 (c).

<sup>199</sup> See *supra*, Part III.B.

<sup>200</sup> 29 U.S.C 206(a)(1) (2000 & Supp. 2006).

<sup>201</sup> 29 C.F.R. §§ 531.35, 776.4 (2005).

<sup>202</sup> *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir 2002).

<sup>203</sup> *Id.*

<sup>204</sup> 29 C.F.R. § 531.35.

the case of pre-employment expenses—such as recruitment fees—the employer must reimburse the costs during the workers’ first week of work.<sup>205</sup>

*E. Holding Recruitment Fees to Be Impermissible Deductions Under the FLSA Would Be Consistent with the Purposes of the Act*

A finding that recruitment fees are primarily for the benefit of the growers and the resulting requirement that growers reimburse Thai workers’ recruitment fees would be consistent with the purposes of the FLSA. When a court is faced with ambiguity in the provisions of the FLSA, the court uses the legislative purpose of the act to guide its determination of the correct outcome.<sup>206</sup> In *Brooklyn Savings Bank v. O’Neil*,<sup>207</sup> the Supreme Court recognized that the primary purpose of the FLSA was to “aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”<sup>208</sup> To that end, workers cannot waive their statutory right to a minimum wage.<sup>209</sup>

Thai workers often find themselves in dismal economic situations, and they have very little bargaining power as compared with the U.S. growers who employ them. If courts allow growers to shift their recruitment costs to workers without reimbursing them at least to minimum wage levels, the effect is to allow the workers to waive their FLSA rights in order to secure employment. If, on the other hand, courts hold growers responsible for the fees, then the purpose of the FLSA—the protection of those workers least able to protect themselves—is accomplished.

#### IV. CONCLUSION

H-2A workers historically have been vulnerable to abuses by their employers. Thai H-2A workers are particularly disadvantaged because they arrive in the United States already saddled with staggering debt from the recruitment fees they pay to secure their jobs. Despite the Eleventh Circuit’s decision in *Arriaga*, the minimum wage provisions of the FLSA can provide substantial protection to these workers. In most cases involving Thai workers, recruitment fees will be impermissible *de facto* wage deductions

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<sup>205</sup> *Arriaga*, 305 F.3d at 1237 (citing *Marshall v. Root’s Restaurant, Inc.*, 677 F.2d 559, 560 (6<sup>th</sup> Cir. 1982)).

<sup>206</sup> *See Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 404 (1942).

<sup>207</sup> 324 U.S. 697, 707 n.18 (1945)

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 707.

under the Act. Suit under the FLSA minimum wage provisions can hold agricultural employers liable for their recruitment costs. As a result, the Thai H-2A workers, provided with essential relief from recruitment-fee debt, will have increased freedom to protect themselves from abusive conditions and employment practices.