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Immigration Issues Hounding Migrant Domestic Workers

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A fair deal usually begins with parties who negotiate on equal footing. Migrant women in search of jobs, however, lose out on what is fair or beneficial to them because they are several steps behind their prospective employers.

To start with, their need to make a living normally far outweighs the employer's need for household help. Families in the US have quite a few alternatives to live-in general houseworkers, which may be quite expensive but are nevertheless readily available.

Also, more migrant women from underdeveloped countries flock to the US and add to the growing domestic labor market. The perceived competition for jobs among migrant women leaves them with no recourse but to accept without question the terms of employment being offered.

But even with all the foregoing factors in play, the painful reality for most domestic workers is that their disadvantage is largely based on the fact that they are undocumented migrant workers.

Disclosure of immigration status

Why do workers, in general, have to disclose their immigration status to their employers in the first place?

As a measure of prudence on the part of a migrant worker, it would be best if she did not volunteer information about her immigration status to anyone. Undocumented migrants have the right to remain silent and to counsel when asked about their immigration status.

Employers, however, are actually required by the Immigration Reform and Control Act (IRCA) to verify the identity and immigration status of employees they hire after 6 November 1986. They are required to accomplish an Employment Eligibility Verification Form or "I-9" form for each employee. This is because the IRCA made it illegal for an employer to hire a person who is not authorized to work in the US.

Once the I-9 Form is completed, there is no need for the employee to show his documents, much less to leave them with her employer. The only exception is when the law requires the employer to re-verify the employee's status.

It may seem that the migrant domestic worker is chained to an oppressive work environment by her precarious immigration status because her employer may, at any time, report her to the authorities. There are, however, adverse legal consequences that an employer will face if he decides to report an undocumented employee to the authorities.

The most serious of these are the monetary fines and criminal penalties imposed on an employer who knowingly hires, recruits or refers for a fee an undocumented migrant after 1986. Such employers are, specifically liable for civil penalties for the first, second and third offenses, or criminal penalties, if a pattern or practice of violating such law is established.

In addition, an employer who reports an undocumented worker to the INS cannot expect his desired results right away. The INS has an internal policy against acting immediately upon an employer's report that his worker is undocumented if such report is used to interfere with the worker's rights or an ongoing labor dispute. The employer's report would have to be submitted to the INS District Counsel first, and action, if recommended, requires the approval of the Assistant District Director. There is, however, no guarantee that the worker will not be deported or removed by the INS.

Categories of undocumented workers

Migrant domestics in the US fall under three general categories: first, those who have overextended their stay beyond the period allowed in their I-94 (arrival-departure record); second, those who entered under A-3 or G-5 special visas procured for them by their employers who are diplomats and officials of international organizations, respectively; and third, those who entered under B-1 visas who accompany US citizens who reside abroad but are visiting the US or non-migrant businessmen, students and professionals.

Those who remain in the US beyond the expiration of their authorized stay are the typical run-of-the-mill undocumented migrant domestics. They enter the US under temporary visas but, in contravention of the terms under which their entry was allowed, stay beyond their authorized stay expired or seek employment, or both. Undocumented migrant women usually find jobs in households as babysitters, nannies, housekeepers or elderly companions.

The special temporary visa holders, though starting a bit differently from their overstaying counterparts or those working *sans* permit, are not necessarily better off. As noted in the study of Human Rights Watch, a Washington D.C.-based organization, A-3 and G-5, B-1 visas are employment-based, meaning if the domestic worker leaves her abusive employer, she loses legal immigration status and risks deportation.

In the event the domestic worker leaves her employer and files a complaint with the authorities against him/her, she no longer has legal basis for her continued stay in the US. Thus, like the overstaying temporary visa-holder above, she would be considered an undocumented migrant worker.

There are certain G-5 or A-3 visa holders who are fortunate enough to find better employers. In such cases, they must be able to transfer before the expiration of their authorized stay and within thirty days from leaving their original employer. This 30-day "grace period" is not officially sanctioned by either the Department of State or the INS. This is only customarily granted by the Department of State. Theoretically, the domestic worker may still be sent home after her employment is terminated.

Pursuing legal redress

While the prospect of being sent home right away is one of the stumbling blocks to a migrant domestic worker's attempt to obtain legal redress for abuse or exploitation, she may still invoke or appeal to the INS's discretion in extending her stay in the US.

In civil cases, the INS may allow the reentry to the US of such domestic worker for so-called "urgent humanitarian reasons" or for "significant public benefit." An example of such a situation is when that individual is set to appear as a witness in a civil court case. The INS may also give an individual 120 days to leave the US voluntarily without further proceedings. Finally, it may either delay its removal proceedings or the enforcement of a deportation order,

as the case may be. Here, the running of the period of the individual's unlawful stay is not interrupted.

At any rate, should the INS, in its discretion, allow the domestic worker to stay in the US and work in the meantime, there is no particular type of visa status that the INS can issue to her. In other words, even if the domestic worker files a case against her employer, she still has no guarantee of continued stay in the US.

The situation of an undocumented worker who may be a witness or a victim in a criminal case is slightly different in that the INS may authorize her to stay legally. For one, she may be granted an "S visa" status if she is willing to supply critical information regarding the US presence of criminal syndicates or organizations. If she is a victim of human trafficking or smuggling, she may be granted a "T visa" status. Third, if she is a victim of certain types of criminal activities or where she suffered mental and physical abuse, the INS may grant her a "U visa" status.

Green card option

A migrant worker may apply for a permanent resident status while in the US. There is a long waiting time of about several years before the immigrant status is eventually issued. It must be noted, however, that if a migrant worker's non-immigrant status has expired, she may be subject to deportation at any time.

The application for a permanent resident status involves several steps. In general, the process starts off with the filing by the employer of an application for an alien labor certification with the Department of Labor.

It is not unusual for an alien labor certification to be obtained in three years from the filing of the application. After obtaining the labor certification, the employer would have to file with the INS an immigrant visa petition or what is known as the I-140 petition. An alien who is in a valid non-immigrant status may also concurrently file in the US an application for adjustment of status.

3-Year/ 10-Year Bar

A migrant worker whose status has expired cannot file for an adjustment of status. Her only option is to file an application for an immigrant visa at her home country. The trouble is, she may be barred from returning to the US. Under the law, an alien who has stayed at least six months beyond the period allowed in her visa is barred from entering the US for three years. Those who have been overstaying for at least a year are barred from entering the US for ten years.

An exception to the 3 and 10-year bar rule is if an application for labor certification had been filed by the employer or a relative petition was filed on behalf of the alien worker on or before the 30 April 2001 deadline set in Section 245 (i) of the Immigration and Naturalization Law and the alien was physically present in the US on 21 December 2001. In such case, the alien worker may apply for an adjustment of status and may be interviewed in the US upon payment of a $1,000 penalty.