

July 15, 2016

PETITION

on

LABOR LAW MATTERS ARISING IN THE UNITED STATES

submitted to the

National Administrative Office of Mexico

under the

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

REGARDING THE FAILURE OF THE U.S. GOVERNMENT TO EFFECTIVELY ENFORCE
ITS DOMESTIC LABOR LAWS, PROMOTE THE ELIMINATION OF EMPLOYMENT
DISCRIMINATION, AND PROMOTE EQUAL PAY FOR MEN AND WOMEN

NON-CONFIDENTIAL COMMUNICATION

I. INTRODUCTION AND STATEMENT OF VIOLATION

1. The H-2A and H-2B programs are critical channels through which migrant workers travel to the United States, but they are marred by sex discrimination. This discrimination takes three major forms: First, women are systematically excluded from the H-2 programs due to discriminatory recruitment and hiring practices that are facilitated by a complex and opaque international recruitment process.¹ Second, when women are admitted to the H-2 programs, they are much more likely to receive H-2B visas, which offer inferior protections and benefits as compared with H-2A visas.² Third, women within H-2B workplaces are often given less desirable, lower-paid work than their male counterparts, despite having equal qualifications.³
2. The individual petitioners, Elisa Tovar Martínez and Adareli Ponce Hernández (“the Petitioners”) and their co-workers – other unnamed migrant worker women – suffered discrimination due to the failure of the United States to effectively enforce its domestic labor laws in accordance with the North American Agreement on Labor Cooperation (“NAALC”). Petitioners are female Mexican nationals who worked in crawfish, chocolate, and crab-picking industries in the U.S. on H-2B visas, although they were qualified for and would have preferred to work on H-2A visas. While employed in the U.S., petitioners experienced discrimination in terms of a sex-segregated division of labor that resulted in lower pay for women. Further, due to general exclusion and under-recruitment of women from the H-2 programs, Petitioner Elisa Tovar Martínez has been unable to access further H-2 employment over approximately the past ten years. On the other hand, the majority of men from her community, despite having similar or lesser qualifications, have been able to. Many similar violations continue to occur across the United States and Mexico today to the detriment of similarly situated women workers.
3. The H-2A program allows foreign workers to enter the U.S. as non-immigrants for temporary, agricultural work, while the H-2B program authorizes temporary, nonagricultural work.⁴ In fiscal year 2015, the U.S. government issued a total of 108,144 H-2A and 69,684 H-2B visas.⁵ Mexican nationals represented approximately 94 percent

¹ See International Labor Recruitment Working Group, *The American Dream Up For Sale: A Blueprint for Ending International Labor Recruitment Abuse* (Feb. 2013), available at <http://www.aft.org/sites/default/files/news/ILRWGblueprint2013.pdf>; see also Centro de Los Derechos del Migrante, Inc., *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change* (2013), available at http://www.cdmigrante.org/wp-content/uploads/2013/01/Recruitment-Revealed_Fundamental-Flaws-in-the-H-2-Temporary-Worker-Program-and-Recommendations-for-Change.pdf.

² See *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, No. 1:05CV00559, 2008 U.S. Dist. LEXIS 3502 (M.D.N.C. Jan. 1, 2008).

³ See Centro de los Derechos del Migrante Inc., and the American University Washington College of Law, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* (2010), available at <http://www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf>; *Covarrubias v. Capt. Charlie's Seafood, Inc.*, No. 2:10-CV-10-F, 2011 U.S. Dist. LEXIS 72636 (E.D.N.C. July 5, 2011).

⁴ See 8 U.S.C § 1101(a)(15)(H)(ii)(a)-(b).

⁵ Department of State, *FY2015 Non-Immigrant Visas Issued* (accessed Jul. 8, 2016), available at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY15%20NIV%20Detail%20Table.pdf>

of H-2A recipients and 74 percent of H-2B recipients.⁶ In other words, over 153,000 Mexican workers traveled to the U.S. on H-2 visas that year.

4. As noted above, discriminatory recruitment and hiring practices result in women being largely excluded from the H-2 programs. Over the five-year period spanning fiscal year 2009 and fiscal year 2013, 96 percent of H-2A workers were male.⁷ By comparison, women made up approximately 28 percent of farmworkers in the United States in fiscal years 2011-2012.⁸ Similarly, in fiscal year 2013, 88 percent of H-2B workers were male.⁹ The gender breakdown of H-2B workers by industry is not publicly available.
5. Women who are admitted to the H-2 programs are likely to be funneled into the H-2B program, rather than provided equal opportunity to apply for H-2A and H-2B work.¹⁰ Both H-2A and H-2B programs provide for worker protection, but despite 2015 reforms to the H-2B program, the protections and benefits offered by the H-2A program are stronger. For example, H-2A workers are entitled to free housing and federally funded legal services while H-2B workers generally are not.¹¹ Furthermore, many H-2B workplaces are marked by sex-based segregation, with women doing less desirable, lower-paid work while men have a wider variety of options.¹²
6. The United States has failed to, and continues to fail to, effectively enforce its anti-discrimination laws with regards to women workers and job applicants in the H-2 programs. U.S. law prohibits discrimination based on sex in the hiring of employees, as well as in compensation or terms and conditions of employment.¹³ It further prohibits segregating or classifying employees based on sex in any way that tends to deprive them of employment opportunities.¹⁴ As described in Section V of this complaint, the U.S. has taken inadequate action to cease discriminatory recruitment, hiring, and employment practices within the H-2 programs.
7. The NAALC aims to ensure that increased economic integration does not lead to a corresponding decrease in labor standards. This objective is undermined unless the United States government is held accountable for its failure to respond to sex discrimination in the H-2 visa programs. Petitioners accordingly request that the Mexican National Administrative Office (NAO) thoroughly investigate the allegations in this public communications, and upon finding them meritorious, recommend ministerial

⁶ In FY2015, Mexican nationals were issued 102,174 H-2A and 51,301 H-2B visas. *Id.*

⁷ FY2013 is the most recent year for which data on the gender breakdown of the H-2A and H-2B programs is publicly available. U.S. Gov. Accountability Office, *GAO-15-154, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* 18 (Mar. 2015), available at <http://www.gao.gov/assets/670/668875.pdf>.

⁸ Farmworker Justice, *Selected Statistics on Farmworkers 2* (2013), available at <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf> (analyzing data from the U.S. Department of Labor's National Agricultural Workers Survey).

⁹ U.S. Gov. Accountability Office, *GAO-15-154* 18.

¹⁰ *See id.*, presenting statistics showing the women represent barely 4 percent of H-2A workers, compared with 12 percent of H-2B workers; *Olvera-Morales*, 2008 U.S. Dist. LEXIS 3502.

¹¹ *See* 20 C.F.R. § 655.122(d)(1) (noting H-2A employers' obligation to provide housing); 45 C.F.R. § 1626.11 (noting restriction of availability of Legal Services Corporation-funded service to H-2A workers and H-2B forestry workers).

¹² *See, e.g.* Centro de los Derechos del Migrante, *Picked Apart iv*, *supra* note 3.

¹³ 42 U.S.C. § 2000e-2(a)(1), (b).

¹⁴ § 2000e-2(a)(2).

consultations as provided for under Article 22 of the NAALC regarding the failure of the U.S. government to comply with its own obligation to avoid discrimination on the basis of sex in the issuance of H-2 visas, as well as its obligation to ensure effective enforcement of its equal employment opportunity laws.

II. STATEMENT OF VIOLATIONS OF THE NAALC

The government of the United States has failed to meet its obligations under the NAALC, and in particular, has violated the following sections:¹⁵

1. **Article 1: Objectives**, which includes: “[P]romote, to the maximum extent possible, the labor principles set out in Annex 1.” These principles include:
 7. Elimination of employment discrimination: Elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.
 8. Equal pay for men and women: Equal wages for women and men by applying the principle of equal pay for equal work in the same establishment.

The United States fails to promote the labor principles of elimination of employment discrimination and equal pay for men and women by allowing the recruiters and employers of the Petitioners, as well as the majority of employers and recruiters of H-2A and H-2B workers, to perpetrate sex discrimination in the H-2 programs. As noted above, this discrimination includes systematically excluding women from the H-2A and H-2B programs, steering women workers to the H-2B program which provides fewer benefits and protections, and providing women within the H-2B program with less desirable and lower-paid work than their male counterparts. In addition, United States government agencies directly further sex-based employment discrimination by issuing visas in a way that perpetuates the discrimination within the H-2 programs. The United States’ failure to address this discrimination is discussed in greater detail in Section V.

2. **Article 3: Government Enforcement Action**, which provides that: “Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action.” This includes “monitoring compliance and investigating suspected violations, including through on-site inspections; seeking assurances of voluntary compliance; [and] requiring record keeping and recording.”

The United States has failed to promote compliance with and effective enforcement of its domestic anti-discrimination laws with regards to recruitment, hiring, and job assignment in the H-2 programs. These failures are discussed in greater detail in Section V.

¹⁵ This section reproduces the relevant portions of the NAALC. The full text of the agreement is available at: <http://www.sice.oas.org/Trade/NAFTA/Labor1.asp>.

3. **Article 4: Private Action**, which states that “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-administrative, judicial or labor tribunals for the enforcement of the Party’s labor laws.”

Migrant workers with H-2B visas are denied the same access to essential legal services that other workers are entitled to. While H-2A workers may access legal services provided by organizations funded by the Legal Services Corporation, these services are only available to the subset of H-2B workers that work in the largely male field of forestry.¹⁶ In many areas, there are no alternative legal service providers, so the majority of H-2B workers are left without any legal support. Female workers who are admitted to the H-2 programs are most often steered towards non-forestry H-2B positions, resulting in a disproportionate denial of legal services.

III. STATEMENT OF JURISDICTION

1. The National Administrative Office (“NAO”) of Mexico has jurisdiction over this matter pursuant to Article 16(3), which establishes that “[e]ach NAO shall provide for the submission and receipt. . . of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures.” This submission is within the scope the NAALC because it involves the failure to enforce employment discrimination laws, which fall under the definition of “labor law” provided by Article 49 of the NAALC.
2. The Mexico NAO is empowered under Article 21 of the NAALC to request consultations with the NAO of the United States concerning labor law and its administration.
3. Article 22 of the NAALC also empowers the Secretary of Labor and Social Welfare of Mexico to request consultation with the Secretary of Labor of the United States regarding the matters within the scope of the NAALC. The issues raised in this submission, pertaining to the enforcement of employment discrimination laws for female migrant workers, are within the scope of the NAALC.
4. Review of this submission by the Mexican NAO would further the following NAALC objectives: to (1) improve working conditions and living standards in each Party’s territory; (2) promote, to the maximum extent possible, the labor principles set out in Annex 1; (3) promote compliance with, and effective enforcement by each Party of, its labor law; and (4) foster transparency in the administration of labor law.

¹⁶ 45 C.F.R. § 1626. *See also*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1350 § 504(a)(11)(1996) (listing the categories of non-citizens who may receive LSC services, but not including H-2B workers); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 540, 121 Stat. 1844, 1934 § 504(a)(11)(E) (2008) (granting LSC-funded nonprofit legal aid programs the ability to assist H-2B forestry workers).

IV. STATEMENT OF INTEREST OF THE PETITIONERS

1. Elisa Tovar Martínez (Tovar) is a citizen of Mexico and resident of San Luis Potosí who worked in the United States crab industry on an H-2B visa in the early 2000s. Although Tovar was qualified for a variety of H-2A visa jobs and would have preferred to travel with that visa, the recruiter in her community did not offer H-2A jobs to women. In the United States, Tovar's workplace was segregated by sex. Women were limited to crab-picking work, which had lower pay and fewer hours than the variety of jobs available to men, such as fishing, boiling, and cleaning. Tovar and her female coworkers lived in a crowded, poorly maintained trailer, while their male coworkers were provided with larger and more adequate housing. After returning to Mexico, Tovar asked her recruiter for work other than crab picking. In the years since, Tovar has watched the recruiter place men from her community in a variety of industries, including agricultural work on tobacco and other crops, nursery work, and construction. On the other hand, despite following up with the recruiter, she has not been able to access any further work.
2. Adareli Ponce Hernández (Ponce) is a citizen of Mexico and resident of Hidalgo who worked in the United States chocolate and crawfish industries from 2003-2006 and 2011-2013. Like Tovar, Ponce was qualified for a variety of H-2A jobs and would have preferred to travel with that visa because of its superior benefits. However, it was well known in her community that only the H-2B visa was available to women. While working in the chocolate factory, Ponce asked a team leader if she could learn to operate a machine used to store large boxes and was told that that role was only for men. Ponce and her coworkers lived in an extremely overcrowded trailer. While she and some coworkers decided to complain about this to management, others were afraid to complain because of the threat of retaliation. As women, they knew that this was one of the very few H-2 jobs available to them, if not the only one. Indeed, Ponce's former employer declined to recruit her for subsequent employment after she spoke out. Facing a job market with extremely scarce opportunities for women, Ponce was a victim of fraudulent recruitment schemes three separate times while looking for new work.
3. *Centro de los Derechos del Migrante, Inc.* (the Center for Migrant Rights or CDM) is a non-profit workers' rights organization that provides a wide range of support to Mexico-based migrant workers who experience problems with their employment in the United States. CDM offers direct legal representation, outreach and rights education in communities of origin, and worker leadership development. Based in Mexico City, with offices in Baltimore, Maryland and in Juxtlaahuaca, Oaxaca, CDM aims to remove the border as a barrier to justice for migrant workers. CDM's transnational Migrant Women's Project (ProMuMi) specifically addresses the types of abuse and discrimination that disproportionately affect migrant women. Through ProMuMi, CDM facilitates workshops with migrant women about their treatment in recruitment and employment, cultivates leadership skills, and fosters opportunities to intervene in policy debates.
4. **Farmworker Justice** is a national advocacy organization for agricultural workers. Since 1981, Farmworker Justice has monitored, advocated and litigated on behalf of workers in the H-2A and H-2B programs and its predecessors. Farmworker Justice seeks to ensure that the H-2A and H-2B programs comply with the law and regulations, including

ensuring that US workers do not suffer adverse effects because of employment of H-2A and H-2B workers, and that temporary workers' rights are enforced. In collaboration with organizations of women farmworkers, Farmworker Justice seeks to address the rampant gender discrimination affecting workers in the H-2A and H-2B programs.

5. **The North Carolina Justice Center** (Justice Center) is a non-profit legal advocacy organization serving clients throughout North Carolina. The mission of the Justice Center is to secure economic justice for disadvantaged persons and communities. The Justice Center provides legal assistance in civil matters to poor people, including H-2B workers, many of whom are directly affected by the issue before this body. The Justice Center has litigated numerous cases on behalf of H-2B workers, including the cases *Olvera-Morales v. International Labor Management Corporation, et al* and *Covarrubias v. Captain Charlie's Seafood* which deal with sex discrimination.
6. **The Southern Poverty Law Center (SPLC)** is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Founded by civil rights lawyers Morris Dees and Joseph Levin Jr. in 1971, SPLC is internationally known for tracking and exposing the activities of hate groups. SPLC is based in Montgomery, Alabama, the birthplace of the modern civil rights movement, and has offices in Atlanta, New Orleans, Miami, and Jackson, Mississippi. SPLC has litigated numerous cases on behalf of H-2A and H-2B workers.
7. **Catholic Relief Services Mexico (CRS)** addresses migration, peace-building and human rights, and inequitable access to rural development opportunities. CRS works with strategic local partners to design innovative social, political and economic strategies to address systemic injustice in Mexico, migrant and farmworker vulnerability, social transformation in high violence contexts, and rural development. CRS advocates for just policies and promotes solidarity between the people of Mexico and the United States. CRS supports projects that educate workers on their rights, provide legal representation, and support workers' movements to improve wages and working conditions, with specific attention to temporary farmworkers in Mexico and the United States.
8. **The Instituto de Estudios y Divulgación Sobre la Migración** (Institute for the Study of Migration or INEDIM) is an independent, non-partisan and pluralistic nonprofit organization that specializes in the study of migration and asylum in the region of Central America and Mexico. One of its primary objectives is to promote the exchange of information between public institutions, civil society and research centers.
9. **The Union Nacional de las Trabajadoras y Trabajadores** (National Union of Workers, or UNT) of Mexico was founded in 1997 with the firm conviction to inspire and promote an alternative reorganization of the workers' movement, based on unions' liberty, autonomy, and independence. UNT seeks new mechanisms of struggle, and innovative structures and practices to allow workers to realize transformation and democratization of the world of work and society, for the benefit of the majority of our country.
10. **The Proyecto de Derechos Económicos, Sociales y Culturales, A.C.** (ProDESC or Project for Economic, Social and Cultural Rights) is a non-governmental organization

founded in 2005 whose main goal is the defense of economic, social and cultural rights in Mexico in order to provide enforcement, justiciability and accountability of these rights on a systemic level.

11. ***Sin Fronteras*** is a non-partisan, non-religious, not profit organization in Mexico that works in Mexico City toward changes in the conditions in which international migration and asylum occur so that these may take place within a framework of full respect of the human rights of international migrants, asylum seekers, refugees and their families.
12. ***Voces Mesoamericanas, Acción con Pueblos Migrantes*** (Mesoamerican Voices, Action with Migrant Peoples), is a Mexican civil organization founded in the context of the United States' immigration reform of 2011. By lifting up "Mesoamerican voices," the organization promotes a region-wide political focus and an intermediate- and long-term vision that takes into account the structural, economic, and political causes of migration.
13. ***Alianza Nacional de Campesinas, Inc.*** (National Alliance of Women Farmworkers) is the first national farmworker women's organization created by current and former farmworker women, along with women who hail from farmworker families. The mission of Alianza Nacional de Campesinas is to unify the struggle to promote farm worker women's leadership in a national movement to create a broader visibility and advocate for changes that ensure their human rights.
14. **The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)** is a voluntary federation of 56 national and international labor unions. The AFL-CIO is a labor movement that represents 12.2 million members, including 3.2 members represented by Working America, its community affiliate. The AFL-CIO is formed by teachers and miners, firefighters and farmworkers, bakers and engineers, pilots and office employees, doctors and nurses, painters, plumbers and many more.
15. **The American Federation of Government Employees Local 3354** works hard to preserve the dignity of all workers. We urge the Canadian and US Governments to enact policies that protect women from sex discrimination in the temporary labor programs.
16. **The Comité de Apoyo a Trabajadores Agrícolas (CATA, or Farmworker Support Committee)** is governed by and comprised of farmworkers who are actively engaged in the struggle for better working and living conditions. CATA's mission is to empower and educate farmworkers through leadership development and capacity building so that they are able to make informed decisions regarding the best course of action for their interests.
17. **The Community Food and Justice Coalition** supports groups and communities across the United States working on food justice. We are particularly concerned when women farmers and farmworkers are mistreated at any level of agricultural food production.
18. **Farmworker Association of Florida, Inc.** aims to build power among farmworker and rural low-income communities to respond to and gain control over the social, political, workplace, economic, health, and environmental justice issues that impact their lives.

19. **The Federation of Southern Cooperatives/Land Assistance Fund** is a non-profit regional organization involving 75 cooperatives with 20,000 low-income families as members. The Federation promotes cooperative and credit union development; land retention, acquisition and sustainable development for African-American family farmers; and public policy advocacy for the communities it serves.
20. **The Land Stewardship Project** is a farm and rural membership organization that works for a just and sustainable food system. We believe in racial justice and gender equity.
21. The **Legal Aid Justice Center** provides legal representation for low-income individuals in Virginia. Its mission is to serve those who have the least access to legal resources. The Legal Aid Justice Center is committed to providing a full range of services to its clients, including services that federal and state governments choose not to fund. Through local and statewide organizing, education, and advocacy, the Legal Aid Justice Center also addresses the root causes of the injustice and exploitation that keep its clients in poverty.
22. **Lideres Campesinas** (Farmworker Women Leaders) aims to strengthen the leadership of farmworker women as agents of social, political and economic change to ensure their human rights.
23. The **National Employment Law Project** (NELP) is a non-profit organization that advocates for the rights of low-wage and unemployed workers. Among our priority areas is protecting the rights of immigrant workers, who often face the worst, most dangerous and poorly paid workplace conditions in this country. In addition to the human rights abuses inherent in these jobs, they also create a race to the bottom that results in poorer conditions for all low-wage workers.
24. The **National Family Farm Coalition** envisions empowered communities everywhere working together to advance a food system that ensures health, justice, and dignity for all.
25. **The Rural Development Leadership Network** (RDLN) supports community-based development in poor rural areas through hands-on projects, education and skills building, leadership development and networking.
26. **Rural Coalition** is a grassroots alliance of farmers, farmworkers, indigenous, migrant, and working people from the United States, Mexico, Canada, and beyond. They work to build a more sustainable food system, which brings fair returns, establishes just and fair working conditions, protects the environment, and offers safe and healthy food.
27. **Sustainable Agriculture of Louisville** (SAL) aims to transform the food and agricultural systems through education, advocacy, and community organizing. Our members are organizations, farms and families that seek to restore health, dignity and justice.
28. **The Worker Justice Center of New York** pursues justice for those denied human rights with a focus on agricultural and other low wage workers, through legal representation, community empowerment and advocacy for institutional change.

29. **The *Grupo de Monitoreo Independiente de El Salvador*** (Independent Monitoring Group of El Salvador, or GMIES) is an independent organization engaged in monitoring working conditions in the textile industry. Founded in 1996, GMIES contributes to economic and social development by promoting corporate social responsibility and growth of productive jobs under fair labor standards.
30. Additional organizations that have expressed their support for the complaint include: **Global Workers' Justice** Alliance, over 20 members of the *Alianza Nacional de Campesinas* network, and over 100 members of the *Colectivo Migraciones para las Americas* (Collective on Migration for the Americas, or COMPA) network. Lists of the members of the Alianza Campesina and COMPA networks are available in Appendix 2.

V. **FAILURE OF THE UNITED STATES TO PROMOTE COMPLIANCE WITH AND EFFECTIVE ENFORCEMENT OF EMPLOYMENT DISCRIMINATION LAWS IN VIOLATION OF ARTICLES I AND III OF NAALC**

The United States' failure to address sex discrimination in the H-2 programs violates both Article I and Article III of the NAALC. In particular, the United States violates Article III by inadequately enforcing domestic anti-discrimination laws. This lack of enforcement causes the United States to violate Article I by failing to promote the principles of elimination of employment discrimination and equal pay for men and women.

Federal and State Employment Discrimination Laws

1. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers and their "agent[s]" from "fail[ing] or refus[ing]" to hire any individual because of their sex.¹⁷
2. Title VII further applies to "employment agencies," which it defines as "any person regularly undertaking... to procure employees for an employer" or to procure job opportunities for potential employees.¹⁸ It prohibits employment agencies from "fail[ing] or refus[ing] to refer for employment, or otherwise discriminat[ing] against" job applicants based on sex, and from "classify[ing] or refer[ring] for employment" any individual on the basis of sex.¹⁹ At least one court has considered H-2 employment recruiters to be employment agencies within the meaning contemplated by Title VII.²⁰
3. In addition to discrimination in recruitment and hiring, Title VII forbids employers from assigning workers to less desirable work based on sex. In particular, Title VII prohibits employers from discriminating against a worker based on sex "with respect to compensation, terms, conditions, or privileges" of employment. It also states that employers may not "limit, segregate, or classify" workers or job applicants "in any way

¹⁷ 42 U.S.C. §§ 2000e, 2000e-2.

¹⁸ § 2000e(c).

¹⁹ § 2000e-2(b).

²⁰ *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007).

which would deprive or tend to deprive any individual of employment opportunities” based on their sex or other protected characteristics.²¹

4. Title VII has been interpreted to prohibit intentionally discriminatory acts, whether openly or covertly committed; such discrimination is usually labeled “disparate treatment” on the basis of, for example, sex. Title VII also prohibits employer use of facially neutral policies that have disproportionately adverse effects, or a “disparate impact” on protected groups such as women.²²
5. In addition to Title VII, most states have their own laws prohibiting employment discrimination based on sex, covering both employers and employment agencies.²³ For example, in Florida, which accounted for 13 percent of H-2A and 7 percent of H-2B positions certified in 2015, the state’s Civil Rights Act prohibits sex-based discrimination in hiring and conditions of employment, and also disallows adverse sex-based segregation or classification of employees or applicants.²⁴ State law in Texas, which accounted for 16 percent of H-2B positions certified in FY2015, makes similar prohibitions.²⁵

Systemic Violations of Employment Discrimination Laws

Discrimination in recruitment

6. Both employers and recruiters violate Title VII by discriminating against women in recruitment for the H-2A and H-2B programs. Employers violate Title VII via two distinct theories.
7. First, as noted above, Title VII prohibits employers from failing or refusing to hire an individual on the basis of their sex.²⁶ Nearly all H-2A and H-2B employers rely on United States and/or Mexico-based recruiting agencies to source workers for temporary positions.²⁷ While this practice may be seen as neutral on its face, it facilitates the exclusion of women from H-2A and H-2B programs and thereby violates Title VII under a theory of disparate impact.²⁸ On the other hand, recruiters’ historical practices of supplying single-sex labor forces are well known to advocates and others in the H-2 field. As a result, employers’ use of recruiters without affirmative efforts to request a more

²¹ § 2000e-2(a)(1)-(2).

²² § 2000e-2(a),(b),(k). *See also* U.S. Equal Employment Opportunity Commission, *915.003, EEOC Compliance Manual Section 15, Race and Color Discrimination* (Apr. 19, 2006) (providing examples of disparate treatment versus disparate impact discrimination, and citing the seminal case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

²³ National Conference of State Legislatures, *State Employment Related Discrimination Statutes* (Jul. 2015), available at <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf>.

²⁴ Fla. Stat. Ann. § 760.10(1); Office of Foreign Labor Certification, *H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2015* (accessed Jul. 8, 2016), available at https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY_2015_Q4.pdf; Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Labor Certification Program – Selected Statistics, FY 2015* (accessed Jul. 8, 2016), available at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY_2015_Q4.pdf.

²⁵ Tex. Lab. Code §21.051(1); Office of Foreign Labor Certification, *H-2B Selected Statistics*, *supra* note 25.

²⁶ 42 U.S.C. § 2000e-2(a).

²⁷ *See* Centro de los Derechos del Migrante, *Recruitment Revealed*, *supra* note 1.

²⁸ *See* § 2000e-2(k).

balanced workforce may constitute intentional discrimination, because it is foreseeable that recruiters will continue their discriminatory practices.

8. Second, as mentioned above, employers are liable for the discriminatory actions of their “agent[s].”²⁹ Recruiters act on employers’ behalf as their agents, so employers are legally responsible for their actions.
9. Meanwhile, Title VII also binds H-2A and H-2B recruiters as employment agencies. As a result, their discriminatory practices violate the statute directly.
10. Furthermore, in administering the H-2 visa programs, U.S. government agencies including the Department of Labor and State Department can be seen to act as employment agencies, in that they “procure” employees for employers.³⁰ As a result, these government agencies may be directly liable for discrimination during the recruitment process.³¹

General exclusion of women from temporary labor programs

11. Women are systematically excluded from both the H-2A and H-2B programs. As noted above, in fiscal year 2013, women made up only four percent of the H-2A worker population.³² In contrast, approximately 28 percent of farmworkers in the United States are female.³³ This disparity between the H-2A workforce and the relevant labor market suggests systematic prima facie discrimination under Title VII. Similarly, although women are disproportionately steered towards jobs in the H-2B industries, they are grossly underrepresented compared with men even within in the H-2B workforce: in fiscal year 2013, 88 percent of H-2B workers were male.³⁴
12. Sex discrimination in the H-2 programs is facilitated by a recruitment process that is generally “non-uniform, complex, and often informal.”³⁵ After receiving certification for temporary positions from the Department of Labor, United States-based employers typically contract with a recruitment agency in the U.S., which may subcontract additional U.S. and/or Mexico-based recruitment agencies or individuals to assist in locating workers.³⁶ Sex discrimination arises at various points in the recruitment chain, including employer communication of discriminatory preferences to recruiters, and recruiter discrimination in job referral whether in response to employer preferences or recruiter bias.
13. Employer preferences are likely a strong contributor to discrimination in recruitment, but the complexity of the recruitment pipeline obscures this. For example, a former female

²⁹ § 2000e.

³⁰ See § 2000e-2(b).

³¹ Note that while Title VII addresses the federal government as an employer in 42 U.S.C. 2000e-16, it does not separately address the federal government as an employment agency.

³² U.S. Gov. Accountability Office, *GAO-15-154* 18, *supra* note 7.

³³ Farmworker Justice, *Selected Statistics on Farmworkers 2*, *supra* note 8.

³⁴ U.S. Gov. Accountability Office, *GAO-15-154* 18, *supra* note 7.

³⁵ See Centro de los Derechos del Migrante, *Recruitment Revealed* 11-12, *supra* note 1.

³⁶ *Id.* at 12.

H-2A worker CDM spoke with on the condition of anonymity reported that got job through a personal connection with the recruiter, but normally the recruiter accepts only men. While at her job site in the United States, her employer told her he would be interested in hiring women, but he was worried about their physical ability to bear the heat. Additionally, he was concerned about interpersonal issues if women were present and said that if he did hire women in the future he would do so only as part of couples. Regardless of whether these preferences were directly communicated to the recruiter, the impact was discrimination in recruitment and hiring.

14. Similarly, petitioner Ponce reports that women in her community face an additional level of scrutiny based on age and physical presentation. She recently learned of a recruiter who is hiring only young and thin women for work in the crawfish industry. The employer set these discriminatory requirements, which are unrelated to the job function.
15. Advertisements for H-2 work also reveal open, facial sex discrimination in recruitment. For example, the ad reproduced in Appendix 1 publicizes an H-2A job opportunity and specifically requests applications from only males between 18 and 24. CDM staff called the recruiter who published this ad, who recruits for both H-2A and H-2B jobs, and he told CDM that no jobs were available for women.
16. Women may also be indirectly dissuaded from participation in the H-2 programs by work environments where gender-based violence and sexual harassment is commonplace. The few women in the H-2A program are especially at risk for sexual harassment and abuse, and gender-based violence against female farmworkers is widespread.³⁷ Workers' stories suggest that H-2B worker women are also at risk.³⁸ The prevalence of these types of abuses may discourage women from pursuing H-2 work, thus perpetuating sex disparities. For example, as noted above, in preparing this complaint, CDM spoke with a female former H-2A worker who preferred to remain anonymous. She described discomfort and fear, "never feeling calm," and often being the recipient of unwanted advances from male coworkers. She wishes to return to her jobsite for another season, but feels unable to do so if no other women are hired.

Funneling of women into H-2B work

17. When women are included in the H-2 programs, they are more likely to receive H-2B visas, which, despite 2015 reforms, extend inferior benefits and protections as compared

³⁷ See José R. Padilla and David Bacon, *Protect Female Farmworkers*, New York Times, Jan. 19, 2013, available at http://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html?_r=0 (citing studies estimating that 60 percent or more of farmworker women participants had experienced some form of sexual harassment). See also *Huerta et al. v. L.T. West, Inc., et al.*, Complaint and Jury Demand (W.D. La. August 31, 2011), Case 6:11-cv-01589 (describing abuses suffered by Mexican female H-2A workers employed at a crawfish processing plant, including sexual propositions by the employers).

³⁸ See, e.g. Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* 35-36, (2013), available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf (telling the story of a female H-2B worker who learned upon arrival that she had been hired to be the plant manager's mistress).

with H-2A visas. Percentage-wise, there are approximately three times as many women given H-2B visas compared with H-2A.³⁹

18. Generally speaking, women are denied the opportunity to even apply for H-2A jobs. As noted above, both Petitioners Tovar and Ponce would have preferred H-2A work to H-2B work, but it was well known that only H-2B work was available to women in their communities.
19. Marcela Olvera-Morales, a Mexican citizen and former H-2B worker, experienced similar discrimination to that reported by Petitioners. In *Olvera-Morales v. International Labor Management Corporation, et al.*, Olvera-Morales brought a class action suit against the U.S.-based employment agencies who, via recruiters in Mexico, recruited her and other Mexican women to work in the U.S. on H-2B visas.⁴⁰ At the time, Olvera-Morales was qualified for and would have preferred H-2A work.⁴¹ Despite the fact that men with similar or lesser qualifications were offered H-2A positions by the same recruiters, Olvera-Morales was “neither offered such a position nor informed that such positions existed.”⁴² In denying defendants’ motion for summary judgment, the court cited statistical discrepancies in placement of men and women in H-2A and H-2B employment.⁴³ Specifically, the court noted that women represented 13.9 percent of the H-2B visas processed by one of the recruitment agencies, but only 2.1 percent of H-2A visas.⁴⁴ Similarly, women represented 11.3 percent of H-2B workers hired by a different agency that participated in Olvera-Morales’ recruitment and placement, but only 2.2 percent of H-2A workers.⁴⁵ Olvera-Morales’ experience is representative of that of many other temporary worker women, and the statistical discrepancies in recruitment her case highlighted are not anomalous.
20. Even within H-2B industries, women are often funneled into specific occupational sectors. For example, Petitioner Tovar reports that she reached out to the person who recruited her for crab-picking work on an H-2B visa seeking a different employment opportunity. The recruiter told her that she would let Tovar know of any other jobs available. Tovar says she has been waiting for 10 years for this to happen, despite seeing men in her community be recruited for temporary work across a variety of sectors, many of which she would have been ready and willing to participate in. Though CDM and other advocates hear stories like this with frequency, we are unaware of publicly available data on the sex breakdown of H-2B employment by occupational sector. This lack of transparency inhibits monitoring and accountability.

³⁹ As noted above, women make up only approximately 4 percent of H-2A workers, compared with 12 percent of H-2B workers. Gov. Accountability Office, *GAO-15-154* 18, *supra* note 7.

⁴⁰ *Olvera-Morales*, 2008 U.S. Dist. LEXIS 3502.

⁴¹ *Id.* at *6

⁴² *Id.*

⁴³ *Id.* at *34-35.

⁴⁴ *Id.*

⁴⁵ *Id.* at *34.

21. The funneling of women into H-2B as opposed to H-2A work most likely takes place via similar mechanisms to those that facilitate the general exclusion of women from the H-2 programs, discussed in paragraphs 12-15 above.
22. Additionally, as discussed in paragraph 16 above, sex disparities in H-2A workplaces, themselves a product of discrimination, create a work environment that discourages women from pursuing or accepting H-2A work. For example, the anonymous H-2A worker CDM spoke to in the preparation of this complaint described being the only woman in a shared trailer with five men, often being the target of advances from male coworkers, being expected to clean up after her male coworkers, and frequently feeling fearful for her safety. It is common for H-2A employers to not provide housing for women and families. The worker did not feel that she experienced any direct discrimination from her employer, but the environment created by the sex imbalance was so uncomfortable that she may not return. She says that she wants to return and work another season, but she will only feel safe doing so if other women are part of the H-2A group that is hired and she is unsure if they will be.

Discrimination in job assignments

23. As noted above, in addition to discrimination in recruitment and hiring, Title VII forbids employers from assigning workers to less desirable work based on sex. However, many H-2B employers violate this prohibition by maintaining sex-segregated workplaces.
24. Within H-2B workplaces, labor is often segregated and women earn less than male counterparts. This was the case in petitioner Tovar's workplace, where women were relegated to crab-picking work while men had a wide range of job assignments. Female crab-pickers were paid by the pound, while the majority of positions available to men were paid by the hour. Male workers were typically given more hours than female workers, and their hourly wages were higher than what female crab-pickers could earn in the same amount of time. Sex-based discrepancies in the crab industry, where Tovar worked, are discussed in greater detail in the CDM report *Picked Apart*, available online at <http://www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf>.
25. Tovar's sex-segregated workplace is not unique. In *Covarrubias v. Captain Charlie's Seafood*, Mexican women H-2B workers filed a class action lawsuit and charges of discrimination against a North Carolina seafood company for unlawfully restricting them to certain work solely on the basis of their sex.⁴⁶ The plaintiffs, like Tovar and her coworkers, were restricted to crab-picking work for which they were paid by the piece.⁴⁷ On the other hand, their male counterparts were given "a variety of work," such as cooking and moving crabs and handling crab traps.⁴⁸ This resulted in more hours and greater earnings for the male workers.⁴⁹ Like Tovar and her coworkers, the plaintiffs and

⁴⁶ *Covarrubias v. Capt. Charlie's Seafood, Inc.*, 2011 U.S. Dist. LEXIS 72636.

⁴⁷ Complaint at p. 13-14, *Covarrubias v. Capt. Charlie's Seafood, Inc.*, 2011 U.S. Dist. LEXIS 72636. Full text available at: <https://www.aclu.org/covarrubias-v-captain-charlies-seafood-inc-complaint>.

⁴⁸ *Id.* at 14.

⁴⁹ *Id.*

their female coworkers were capable of performing the work assigned to men.⁵⁰ As with *Olvera-Morales*, the plaintiffs' experience is representative of that of many women working in the temporary labor program.

26. Finally, petitioner Ponce also experienced sex segregation in the chocolate factory in which she worked. In her workplace, only men were allowed to operate the machine used to store large boxes of chocolate. Though Ponce never saw the pay stubs of her male counterparts, she heard rumors that male machine operators were paid more than their female counterparts who packed the boxes. Ponce asked a team leader if she could learn to operate the machine, which she would have been physically capable of operating. The team leader denied this request, telling Ponce that that role was only for men, because it was too risky for women.

Failure to Effectively Enforce Employment Discrimination Laws

27. The NAALC requires each Party to promote compliance with and effectively enforce its labor law "through appropriate government action." The continuation of systematic employment discrimination described above is the result of the failure of the United States government to effectively enforce its domestic labor laws. The Petitioners and their co-workers were victims of violations of their labor rights under U.S. law, and as a result, the U.S. has breached its obligations as a member party to the NAALC.
28. Migrant women workers face many barriers to justice, which the United States has not adequately addressed. Some of these barriers are described in paragraphs 29-33. Additionally, the United States government actively participates in the discrimination described in this complaint. This is discussed further in paragraph 34.
29. In order to make a Title VII claim against an employer, a worker or job applicant must first file a complaint with the Equal Opportunity Employment Commission.⁵¹ Though EEOC accepts information about cases over the phone, a worker can only file a charge in person or by mail.⁵² In addition, many government agencies require complaints to be submitted online.⁵³ This process may be prohibitive for many H-2 workers, who often live in remote locations, lack transport separate from that provided by their employer, do not have access to computers, and have little knowledge of the resources available to them. While information on the number of EEOC complaints filed by H-2 workers is not publicly available, many advocates believe that these barriers cause few to be submitted.
30. Additionally, the fact that H-2 workers' visas are tied to their employers makes it particularly intimidating for them to speak about against sex discrimination or other abuses. Even workers who suffer severe abuse are unlikely to be able to change employers while maintaining lawful status, creating a barrier to reporting and addressing abuses.

⁵⁰ *Id.*

⁵¹ U.S. Equal Opportunity Employment Commission, *Filing a Lawsuit*, (accessed Jul. 8, 2016), available at <https://www.eeoc.gov/employees/lawsuit.cfm>.

⁵² U.S. Equal Opportunity Employment Commission, *How to File a Charge of Employment Discrimination*, (accessed Jul. 8, 2016), available at <https://www.eeoc.gov/employees/howtofile.cfm>.

⁵³ Padilla, *Protect Female Farmworkers*, *supra* note 37.

31. Women’s general exclusion from the H-2 programs creates a further barrier to justice for those women who are admitted and then encounter abuses in their workplaces. Because there are so few work options available to women, the threat of retaliation looms larger than it does for their male counterparts, as it did for Ponce’s coworkers who were afraid to complain about bad housing conditions. As a result, women H-2 workers may be even more reluctant to attempt to vindicate their rights. While retaliation is itself illegal under Title VII, the anti-retaliation provision is often unenforced.⁵⁴
32. Further, United States law denies H-2B workers outside of the forestry industry the opportunity to receive free legal services from organizations that receive funding from the Legal Services Corporation – in many instances, what would be the only option for legal representation for these workers.⁵⁵ Because women admitted to the H-2 programs are disproportionately funneled into H-2B, and are very unlikely to be recruited as forestry workers, this restriction falls more heavily on them.
33. Some courts have been reluctant to apply federal anti-discrimination statutes to transactions occurring outside of the United States.⁵⁶ For example, in *Reyes-Gaona v. North Carolina Growers Association*, the Fourth Circuit held that Mexican workers who alleged age discrimination in H-2A recruitment could not bring suit under the Age Discrimination in Employment Act.⁵⁷ In so holding, the court declared that, "the simple submission of a resume abroad does not confer the right to file an ADEA action."⁵⁸ On the other hand, the EEOC has issued proposed guidance on national origin discrimination that explicitly rejects this reasoning, “tak[ing] the position that foreign nationals outside the United States are covered by [equal employment opportunity] statutes when they apply for U.S.-based employment.”⁵⁹
34. Finally, the United States government’s failure to address rampant sex discrimination within the H-2 programs may itself violate the equal protection guarantees of the United States Constitution.⁶⁰ In particular, the Department of Labor, State Department, and U.S. Citizenship and Immigration Services control the overall process of H-2 visa issuance, and many state workforce agencies play a role in administering the programs. These agencies have notice of the sex discrimination in the H-2 program, as they are best positioned to analyze aggregate data on visa issuance by gender. In addition, many advocates have publicly highlighted the issue of sex discrimination in these programs in recent years. However, in the face of this knowledge these government agencies continue

⁵⁴ 42 U.S.C. § 2000e-3(a)

⁵⁵ See 45 C.F.R. § 1626.

⁵⁶ *Reyes-Gaona v. North Carolina Growers Assn., Inc.*, 250 F.3d 861, 866-67 (4th Cir. 2001). *But see Olvera-Morales ex rel. Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211, 221 (N.D.N.Y. 2004) (declining to apply *Reyes-Gaona*’s logic where the plaintiff “applied to and was hired by” a U.S. employer).

⁵⁷ *Reyes-Gaona*, 250 F.3d at 866-67.

⁵⁸ *Id.* at 866.

⁵⁹ Equal Employment Opportunity Commission, *PROPOSED Enforcement Guidance on National Origin Discrimination* 50 (2016), available at <https://www.regulations.gov/document?D=EEOC-2016-0004-0001> (citing *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 n.5 (3d Cir. 1997) (finding that the place where a job is performed constitutes the location of the work site for ADEA coverage purposes); *Gantchar v. United Airlines, Inc.*, No. 93 C 1457, 1995 WL 137053, at *4-6 (N.D. Ill. Mar. 28, 1995) (finding that Title VII jurisdiction is dependent on the location of potential employment)).

⁶⁰ U.S. Const. amend. V, XIV.

to further the H-2 recruitment process and to issue visas. These actions may constitute the denial of equal protection to H-2 worker women.

VI. SUGGESTED ENFORCMENT MEASURES IN THE UNITED STATES

1. Article 3(1) of the NAALC defines promotion of compliance with and effective enforcement of labor law through appropriate government action to include appointing and training inspectors; monitoring compliance and investigating suspected violations, including through on-site inspections; seeking assurances of voluntary compliance; requiring record keeping and reporting; providing or encouraging mediation, conciliation and arbitration services; and seeking sanctions for violations.
2. The Petitioners recommend that the Mexican NAO encourage the United States to advocate for the following measures with the appropriate government agencies:
 - a. The Equal Employment Opportunity Commission's (EEOC) proposed guidance that anti-discrimination statutes apply to "foreign nationals when they apply for U.S.-based employment" should be implemented as final guidance.⁶¹ The EEOC should make it explicit that this guidance applies not only to national origin discrimination but to all forms of prohibited discrimination including sex discrimination. To address employers' use of the complex recruitment chain to circumvent anti-discrimination laws, the EEOC should clarify that U.S. employers are directly liable for discrimination recruiters carry out abroad on their behalf, since the recruiters act as their agents for hiring employees who will work in a U.S. workplace.⁶²
 - b. The Department of Labor (DOL) should implement H-2 program regulations such as the following to address sex-based discrimination through the recruitment chain. To effectuate these regulations, the DOL should require that employers disclose the identity of recruitment actors throughout the chain.
 - i. H-2 program regulations should be amended to address discrimination against non-U.S. workers. Currently, both H-2A and H-2B program regulations explicitly prohibit sex-based discrimination but only against U.S. workers.⁶³
 - ii. H-2 program regulations should expressly require employers to apprise everyone in their recruitment chain that they must comply with U.S. anti-

⁶¹ See Equal Employment Opportunity Commission, *supra* note 59.

⁶² This is consistent with Title VII's application to "agents." See 42 U.S.C. § 2000e. The EEOC's draft guidance on national origin discrimination provides examples of situations where employers and recruiters are jointly liable for actions carried out by recruiters. However, in the examples provided and the cases they are drawn from, the recruiters have more control over workers' employment than many who recruit H-2 workers, such as training or disbursing paychecks. See Equal Employment Opportunity Commission, *PROPOSED Enforcement Guidance on National Origin Discrimination* 14-15; see also Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (Dec. 3, 1997), 1997 WL 33159161, at *4-5 (describing factors the EEOC considers to determine whether a business exercises sufficient control over an employee to qualify as their employer).

⁶³ 20 CFR § 655.135(a); 20 CFR § 655.20(r).

discrimination laws. In addition, employers should require their recruiters to demonstrate non-discrimination, and the regulations should reiterate that employers are directly liable for discriminatory actions carried out by recruiters on their behalf, since recruiters act as employers' agents.

- iii. Just as H-2 employers are required to attempt to recruit U.S. workers before recruiting temporary foreign workers, the DOL should require that employers ensure that recruiters H-2 employers contract with specifically target women in some portion of their recruitment efforts. For example, DOL could require that job postings be circulated to non-profit and government organizations that seek to promote women's advancement.
 - iv. Additionally, the DOL should require employers to submit an accounting of job assignment by sex as a condition of receiving future visas. The DOL should then adopt internal policies that call for the rejection of future visa requests from employers whose hiring and job assignment results for H-2 workers are so disproportionately adverse to women as to establish a prima facie case of sex discrimination.
 - v. The H-2 regulations should be amended to address the way that workers' visa being tied to their employer impedes speaking out about violations. In particular, the regulations should specify that a worker will not lose lawful immigration status and their work authorization will be valid for other employers for the duration of the labor certification period, if they are fired in retaliation for speaking out about discrimination, or as a result of discrimination. While workers who file retaliation complaints may also currently apply for deferred action, which allows recipients to stay in the United States lawfully for a temporary period of time and apply for employment authorization during that period, the process is not uniform or transparent and may be inaccessible to many workers.
 - vi. Employers using guestworkers should be required to post a bond sufficient to cover the value of the workers' legal wages. Absent a requirement to post a bond or otherwise demonstrate solvency before certification, employers have avoided paying workers back wages owed by filing for bankruptcy.⁶⁴
- c. The EEOC and state agencies charged with implementing anti-discrimination policy should make their complaint processes more accessible to H-2 workers. For example, advocates have suggested setting up a 24-hour complaint hotline in multiple languages, including indigenous languages.⁶⁵ In addition, the EEOC

⁶⁴ Southern Poverty Law Center, *Close to Slavery*, *supra* note 38, at 40 (discussing a case in which SPLC won damages of over \$11 million for former H-2B workers, but the company declared bankruptcy).

⁶⁵ See Padilla, *Protect Female Farmworkers*, *supra* note 37. While this article specifically focused on sexual harassment, its recommendations are relevant to sex discrimination as well.

should improve the accessibility of its complaint process to workers and job applicants abroad.

- d. Furthermore, access to legal services, including federally funded legal services should be extended to all H-2 workers. Currently, only H-2A worker and a subset of H-2B workers can receive services from organizations funded by the Legal Services Corporation. The “super restriction” that prohibits Legal Services Corporation-funded entities from representing many H-2 workers should also be eliminated.⁶⁶
- e. In addition to attempting to address the barriers to workers’ seeking justice, EEOC and the DOL should affirmatively allocate more resources to investigating and monitoring H-2 workplaces for sex-based labor segregation and the DOL should preclude employers and recruiters found to have discriminated from obtaining H-2 visas for a period of several years. The EEOC and Department of Labor should also take affirmative steps to address sexual harassment, gender-based violence, and other work environment conditions in H-2 workplaces that function to dissuade women from pursuing non-segregated work.
- f. The DOL, Department of State (DOS), and United States Citizenship and Immigration Services (USCIS) should improve record keeping and data transparency to allow for better monitoring of sex distribution in the H-2 programs, including by occupation and wage. In particular:
 - i. The DOS should publish the overall gender breakdown of H-2A and H-2B visas issued on an annual basis. This data should include a geographic identifier such as the employer’s postal code. Similarly, USCIS should publish the overall sex breakdown of H-2A and H-2B visa holders to enter the country on an annual basis. Currently, this data is public, but only accessible via heavily delayed and often redacted Freedom of Information Act request.
 - ii. USCIS and the DOL should better align their databases to track and publish aggregate data on the number of H-2A and H-2B positions filled by sex, occupation, and wage.

VII. CONCLUSION

1. The government and people of Mexico have the right to require the United States to abide by its obligations under NAALC. When domestic labor laws are not enforced, it is not only temporary workers who are harmed. Competing employers are placed at an economic disadvantage, free trade is disrupted, and employees in both Mexico and the United States are harmed.

⁶⁶ Southern Poverty Law Center, *Close to Slavery*, *supra* note 38, at 45.

2. The United States government is failing to effectively enforce its employment discrimination law. The Petitioners ask that the Mexican NAO take the following steps to bring the United States government into compliance with its obligations.

VIII. ACTIONS REQUESTED

Compliance with its responsibilities under the NAALC requires the U.S. government to effectively enforce its labor laws, particularly with respect to employment discrimination.

Accordingly, the Petitioners request the following actions to remedy the violations:

1. The Petitioners respectfully request that the NAO of Mexico take the following steps to bring the U.S. government into compliance with its obligations under the NAALC, and in particular so that the U.S. government adopts the methodologies of compliance articulated in Section VI of this Communication:
 - a. Initiate a review pursuant to Article 16(3);
 - b. Commit to undertaking cooperative consultations with the NAO of the United States as stipulated under Article 21 of the NAALC;
 - c. Pursue investigative measures, in accord with Section 6 of the Regulation published in the Diario Oficial de la Federación of April 28, 1995, by:
 - i. Accepting additional information from other interested parties;
 - ii. Engaging an independent Mexican expert in the aforementioned matters to assist the Mexican NAO with the review;
 - iii. Arranging for on-site investigations and a detailed study by the expert on what perpetuates sex discrimination in recruitment for H-2 work;
 - d. Hold public information sessions with workers, worker advocates, and judicial and other government officials affected by the failure of the United States to promote the compliance with and enforcement of employment discrimination laws, in locations that would allow the maximum participation of workers, workers' advocates, and expert witnesses involved to provide testimony and additional information to the Mexican NAO without incurring undue personal expenses or hardship, having first made adequate arrangements for translation and having provided adequate notice to Petitioners. Such public information sessions should be held in the top five origin states for H-2 workers and Mexico City, as well as in Washington, D.C.
2. Petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico begin consultations at the ministerial level with the Secretary of Labor of the United States on the matters raised in this submission in accord with Article 22 of the NAALC, and formally include the organizations and individuals who filed this submission in those consultations;

3. That the Mexican NAO grants such further relief, including the convening of the Arbitral Panel and the levying of monetary enforcement, as it may deem just and proper.

Respectfully submitted,

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Centro de los Derechos del Migrante, Inc.
Nuevo León 159, Int. 101
Col. Hipódromo, Del. Cuauhtémoc
06100 Ciudad de México, D.F.
MEXICO

Farmworker Justice
1126 16th St NW # 270
Washington, DC 20036
UNITED STATES

North Carolina Justice Center
PO Box 28068
Raleigh, NC 27411
UNITED STATES

Southern Poverty Law Center
400 Washington Ave.
Montgomery, AL 36104
UNITED STATES

Catholic Relief Services Mexico
Indiana 260, Int. 503
Col. Ciudad de los Deportes, Del. Benito Juárez
03710 Ciudad de México, D.F.
MEXICO

Instituto de Estudios y Divulgación Sobre la Migración (INEDIM)
Mexicali 4, Dpto. 6
Col. Hipódromo, Del. Cuauhtémoc
06170 Ciudad de México, D.F.
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Unión Nacional de las Trabajadoras y Trabajadores (National Union of Workers, or UNT)
Villalongín 50
Col. Cuauhtémoc, Del. Cuauhtémoc
06500 Ciudad de México, D.F.
MEXICO

Proyecto de Derechos Económicos, Sociales y Culturales, A.C. (ProDESC)
Calle Zamora 169-A
Col. Condesa, Del. Cuauhtémoc
06140 Ciudad de México, D.F.
MEXICO

Sin Fronteras
Carlos Dolci No.96
Col. Alfonso XIII, Del. Álvaro Obregón
01460 Ciudad de México, D.F.
MEXICO

Voces Mesoamericanas, Acción con Pueblos Migrantes
Pantaleón Domínguez, 35A
29250 San Cristóbal de Las Casas, Chiapas
MEXICO

Alianza Nacional de Campesinas, Inc.
P. O. Box 20033
Oxnard, CA 93034
UNITED STATES

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
815 16th St. NW
Washington, DC 20006
UNITED STATES

American Federation of Government Employees Local 3354
4300 Goodfellow Blvd Bldg 104D
St. Louis, MO
UNITED STATES

CATA – Comité de Apoyo a Trabajadores Agrícolas/Farmworker Support Committee
P.O. Box 510
Glassboro, NJ 08028
UNITED STATES

Community Food & Justice Coalition
398 60th Street

Oakland, CA 94618
UNITED STATES

Farmworker Association of Florida, Inc.
1264 Apopka Boulevard
Apopka, FL 32703
UNITED STATES

Federation of Southern Cooperatives/Land Assistance Fund
PO Box 95
Epes, AL 35460
UNITED STATES

Land Stewardship Project
821 E. 35th Street #200
Minneapolis, MN 55407
UNITED STATES

Legal Aid Justice Center
1000 Preston Avenue, Suite A
Charlottesville, Virginia 22903
UNITED STATES

Lideres Campesinas
2101 South Rose Avenue, Suite A
Oxnard, CA 93033
UNITED STATES

National Employment Law Project
75 Maiden Lane, #601
New York, NY 10038
UNITED STATES

National Family Farm Coalition
110 Maryland Avenue NE
Suite 307
Washington, DC 20002
UNITED STATES

Rural Development Leadership Network
PO Box 98, Prince St. Station
New York, NY 10012
UNITED STATES

Rural Coalition
1029 Vermont Ave NW Suite 601

Washington, DC 20005
UNITED STATES

Sustainable Agriculture of Louisville (SAL)
104 Forest Court
Louisville, KY 40206
UNITED STATES

Worker Justice Center of New York
1187 Culver Road
Rochester, NY 14609
UNITED STATES

Grupo de Monitoreo Independiente de El Salvador
Residencial Decápolis, Pasaje San Carlos No.5
San Salvador
EL SALVADOR

IX. APPENDICES

1. **Appendix 1:** Job ad specifying male workers between 18 and 35 years old
2. **Appendix 2:** List of member organizations of supporting networks


Appendix 1: Job ad specifying male workers between 18 and 35 years old

11/5/2015

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[?Tienes experiencia en piscas; ? quieres ir a estados unidos con visa de trabajo ¿](#)

Written by [Francisco Hernandez V.](#) on October 31, 2015 in [ANUNCIOS](#), [Hijos Ausentes](#), [Jocotepec](#), [NOTICIAS](#) with [0 Comments](#)



TRABAJO #PREPARATE #VISAH2A #INMIGRACION #EDUCACION

TIENES EXPERIENCIA EN LA PISCA DE FRUTA CON BERRYMEX, DRISCOLLS O DOLE. TE INTERESA TRABAJAR EN USA?
TE INVITAMOS A PARTICIPAR EN NUESTRA ACADEMIA DEL MIGRANTE PARA PREPARARTE PARA SOLICITAR UNA VISA H-2A PARA TRABAJOS TEMPORALES EN EL CAMPO EN USA.

Los invitamos a registrarse para un curso donde prepararemos a las personas que tengan interés en solicitar una visa de trabajo H-2A para trabajadores agrícolas. El curso se dará el — Domingo 8 de Noviembre de 10 am – 1:00 pm en Independencia #27 sur, Jocotepec, Jalisco 45800

<http://jocotepec.com/tienes-experiencia-en-piscas-quieres-ir-a-estados-unidos-con-visa-de-trabajo/>

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Appendix 1: Job ad specifying male workers between 18 and 35 years old

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?Tienes experiencia en piscas? ¿quieres ir a estados unidos con visa de trabajo? : JOCOTEPEC.COM

La Lic. Liliana Miranda de San Diego, CA estará impartiendo este curso. Debe registrarse para poder participar:

Se abrirá el registro el día 6 de Noviembre. Hay solo cupo para 100 personas. Para registrarse pase a Independencia # 27 sur Jocotepec Jalisco con estos documentos:

Requisitos del Registro:

- Passaporte Mexicano vigente
- IFE vigente
- Acta de nacimiento
- Experiencia de 1 año en la pesca de frutas o verduras.
- Carta de recomendación
- Copia de cheques/nomina de la empresa en la que trabajó (mínimo 6 meses)
- Nunca haber estado en USA como indocumentado
- Hombre entre la edad de 18 – 35 años de edad.

Temas del Curso:

Este curso es para personas que tengan interés en solicitar una Visa H-2A. Revisaremos los siguientes temas:

- Requisitos y procesos para solicitar la visa y como contactar a las empresas.
- Como solicitar Certificación de no antecedentes penales de Mexico
- Solicitud de FBI de no antecedentes penales en USA.
- Como hacer un curriculum vitae para comprobar tu experiencia
- Expectativas y la vida de un trabajador agrícola.
- Tus derechos laborales en USA
- Requisito de hacer tus impuestos en USA y como solicitar el numero de seguro social.
- Leyes Criminales y de inmigración en USA
- Solicitar una licencia de manejar en USA
- Como hacer remesas y abrir una cuenta de banco en USA
- Finanzas: Como crear un presupuesto y ahorrar.
- Manejo de comida en el trabajo y salubridad
- Tu salud en el trabajo – protección en contra de los pesticidas y la deshidratación.

El costo de este curso es de \$450 dólares. El deposito es de solo \$150 dólares y el resto se da en pagos en 3 meses. Se puede hacer el pago en pesos.

Este curso esta limitado para solo 100 personas. Por favor de llamar para registrarse lo mas pronto possible. Para su registro puede contactar a la Lic. Liliana Miranda al 01 858 361-0664. Mándanos un inbox con tu numero de teléfono o un email a liliana@guiadeinmigracion.com y nosotros te llamamos por teléfono para que no pagues una llamada de larga distancia.

OJO***Las empresas en USA cubren los costos del proceso de las visa.

OJO**Este es un curso para prepararte para solicitarlo una visa H2A. Nuestra empresa tiene contactos con varias empresas en USA que necesitan trabajadores y te ayudaremos a solicitar trabajo con ellos. No te podemos garantizar trabajo ya que esto dependerá de tu experiencia y asegurar que el gobierno te de la visa. Les estamos cobrando por la consultoría para preparar todos los requisitos para solicitarlo, ayudarte a preparar tu solicitud para sobresalir y prepararte para una vida en USA. El costo de este curso corre completamente por tu cuenta. Estamos preparando a las personas para solicitar trabajo en Diciembre y Enero para trabajar en USA a partir de Marzo del 2016.

Related

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Appendix 2: List of member organizations of supporting networks

1. ***Alianza Nacional de Campesinas, Inc.*** members include the following organizations: Asociación Campesina de Florida (Florida), Amigas Unidas (Washington), Campesinos Sin Fronteras (Arizona), Centro de los Derechos del Migrante, Inc. (Mexico and USA), Coalición contra la Violencia Sexual de Illinois (Illinois), Coalición Rural/Rural Coalition (National), Colonias Development Council (Southern New Mexico), Justicia para Mujeres (Justice 4 Women) (Mid-Atlantic Region), La Mujer Obrera (El Paso, Texas), Mujeres Campesinas Unidas (Immokalee, Florida), Mujeres Divinas (New York), Mujeres Forjando Futuro (New York), Mujeres Luchadoras Progresistas (Oregon), Multicultural Efforts to End Sexual Assault (MESA) (Indiana), Organización en California de Líderes Campesinas, Inc. (California), Pequeños Agricultores de California (PAC) (San Benito County, California), Pineros y Campesinos Unidos de Noroeste (PCUN) (Oregon), Rural Development Leadership Network (National) Tierra del Sol Housing Corporation (New Mexico), Workers' Justice Center of Central New York (New York), Workers' Justice Center of New York (New York).
2. ***COMPA*** members include the following organizations: 1 de 7 Migrando, AFABI AC, Albergue de Migrantes de Ixtepec, Hermanos en el Camino, Albergue del Desierto (Centro de Reintegración Familiar de Menores Migrantes), Alma, AMEXCAN, AMUCSS, APOFAM, Asociación de Salvadoreños y sus Familias en México, Babel Sur, Be Foundation, BONÓ - Servicio Jesuita Migrante, CAFAMI, CAFEMIN, Casa del Migrante en Tijuana AC, Casa del Migrante Saltillo, Casa del Migrante, Casa Nicolás, Casa Madre Assunta, Casa Tochan, Catholic Relief Services, CCAMYN, CDH Fray Matías de Córdoba, CDHM Tlachinollan, CEALP, CEMAC A.C., Centro de Apoyo al Migrante en Querétaro, Centro de Apoyo al Trabajador Migrante, Centro de Atención al Migrante Éxodus, A.C. (CAME), Centro de DH para los Pueblos Indígenas Oaxaca, Centro de Recursos Para Migrantes, CIDE, CIMICH - Coalición Indígena de Migrantes de Chiapas, Clínica Jurídica Alaide Foppa, Coalición Pro Defensa del Migrante, COAMI, Colectivo Por una Migración Sin Fronteras, Colectivo Transnacional CODETZIO, Colectivo Ustedes Somos Nosotros, Comité de Derechos Humanos de Tabasco A.C. CODEHUTAB, Comité de Familiares de Migrantes Desaparecidos, Comité de Familiares de Migrantes Desaparecidos del Progreso, CONVIVE A.C., ECOSUR, El Rincón de Malinalco, Enlace Ciudadano de Mujeres Indígenas, Espacio Migrante, Estancia del Migrante González y Martínez, A.C., Red para las Migraciones en Querétaro, Federación Zacatecana, AC, FM4 Paso Libre, FOCA/ Red Mesoamericana Mujer, Salud y Migración-Capítulo México, FOCA/RMMSM, Frente Indígena de Organizaciones Binacionales (FIOB), Fundación Comunitaria del Bajío, Fundación para el Desarrollo, Fundación para la Justicia y el Estado Democrático de Derecho (FJEDD), Fundar, Galería MUY, GIMTRAP A.C., Help for Be Progress, IDC, Identidad Migrante y Derechos Humanos, IDHEAS, INCIDE Social, A.C., INEDIM, Iniciativa Ciudadana, Iniciativa Ciudadana-Región Puebla, Iniciativa Kino, Immigrant Initiative, INSAMI, INSP, Instituto Jose Pablo Rovalo Azcue, Instituto Para las Mujeres en la Migración AC (IMUMI), Insyde, Irapuato Vive A.C., ITESO, IyEC, Jornaleros Safe, Juventudes Indígenas y Afromexicanas en Acción (JINACO), La 72 Hogar-Refugio para Personas Migrantes, Las Dignas, Latin America Working Group, Maestría Migración UIA, Mesa Transfronteriza Migraciones y Género (MTMG), Migrantólogos/Instituto Mora, Mujeres Unidas y Activas - Immigrant Youth Coalition, Nosotras somos tu voz, ODA (Otros Dreamers in Action), Por la Superación de la Mujer A.C., PRAMI UIA DF, PRAMI UIA

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Laguna, PRECADEM A.C., Prevencasa A.C., Programa Casa Refugiados A.C., Red Bajío en Apoyo al Migrante, Red Binacional de Mujeres Artesanas, Red de Desarrollo Sustentable, Red de Mujeres del Bajío A.C., Red Jesuita con Migrantes de LAC, Red Mesoamericana Mujer, Salud y Migración-Capítulo Guatemala, Red MOCAF / RIOD-México, Red Nacional de Género y Economía, Red Nic Migración CEPS, Red para las Migraciones en Querétaro (RMQ), Respuesta Alternativa, RIMD, Fundación para la Justicia y el Estado Democrático de Derecho (FJEDD), Ririki Intervención Social S.C., Servicio Jesuita a Migrantes-México, Sin Fronteras IAP, SIPAM, SMR, Sria. Técnica Red de Defensoras, Tres Gatos Films, UADG-Investigadora, UAZ, UAZ/ RIMD, UFCW Canadá, UIA-Puebla, Un Mundo Una Nación, Una Mano Amiga en la Lucha Contra el Sida A.C., Voces Mesoamericanas-Acción con Pueblos Migrantes, WOLA.