

September 19, 2011

PETITION

on

LABOR LAW MATTERS ARISING IN THE UNITED STATES

submitted to the

National Administrative Office (NAO) of Mexico

under the

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

REGARDING THE FAILURE OF THE U.S. GOVERNMENT TO EFFECTIVELY ENFORCE  
ITS DOMESTIC LABOR LAWS, PROMOTE COMPLIANCE WITH MINIMUM  
EMPLOYMENT STANDARDS, AND PROTECT MIGRANT WORKERS.

**NON-CONFIDENTIAL COMMUNICATION**

H2-B  
VISA  
sub  
agent USA

## I. INTRODUCTION AND STATEMENT OF VIOLATION

1. Every year, hundreds of thousands of migrant workers travel to the United States to work. Tens of thousands of these migrant workers are authorized to work in the U.S. under the H-2B program. This federal program allows foreign workers to enter the U.S. as non-immigrants for temporary, nonagricultural work.<sup>1</sup> It allows employers to hire foreign laborers for a temporary work period upon meeting certain regulatory requirements.<sup>2</sup> In 2010, the United States issued 47,403 H-2B visas to foreign workers;<sup>3</sup> over seventy percent were issued to Mexican workers.<sup>4</sup> During their employment, all H-2B workers are protected under federal and state laws, and have the right to earn an applicable minimum wage and, with few exceptions, to earn overtime pay.
  2. The individual petitioners, Leonardo Cortez Vitela, Efraín Vásquez Flores, Julián Andrés García Zacarías (“The Petitioners”) and their co-workers – other unnamed migrant workers – suffered unpaid wage violations due to the failure of the United States government to effectively enforce its domestic labor laws in accordance with the North American Agreement on Labor Cooperation (“NAALC”). Petitioners are Mexican nationals who worked for J&J Amusements, Inc. (J&J) in 2007 and Reithoffer Shows, Inc. (Reithoffer) in 2008 on H-2B visas. While employed in the United States, Petitioners were paid a wage below the federal minimum, were deprived of overtime wages, and some were not paid for all the hours they worked. Despite their efforts, these workers have been unable to obtain a legal remedy for these violations. Many similar violations continue to occur across the United States today to the detriment of similarly situated workers.
  3. While the NAALC respects the right of the member states (Parties) to establish their own domestic labor laws, each Party is also bound to (1) ensure that the laws provide for high labor standards and (2) promote compliance with and effectively enforcement of such labor laws. Under Article 49, the obligation of effective enforcement of the labor laws includes specifically laws and regulations related to (1) “minimum employment standards, such as minimum wages and overtime ...” and (2) “protection of migrant workers.”
  4. The United States has failed to, and continues to fail to, effectively enforce its minimum wage laws for H-2B workers, by permitting companies to routinely pay less than the minimum hourly wage for hours worked and deny employees reimbursement that the law requires for travel, visa and recruitment costs related to

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<sup>1</sup> See 8 U.S.C. § 101(a)(15)(H)(ii).

<sup>2</sup> See 8 U.S.C. § 101(a)(15)(H)(ii); 20 C.F.R. §§ 655.1-113.

<sup>3</sup> DEPARTMENT OF STATE, NONIMMIGRANT WORLDWIDE ISSUANCE AND REFUSAL DATA BY VISA CATEGORY (2010), available at <http://www.travel.state.gov/pdf/FY2010NIVWorkloadbyVisaCategory.pdf>.

<sup>4</sup> DEPARTMENT OF STATE, NON-IMMIGRANT VISA ISSUANCES BY VISA CLASS AND BY NATIONALITY, 2010, available at [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html).

their employment in the United States.<sup>5</sup> This allegation arises, in part, from the failure to inspect and monitor workplaces, investigate complaints, or ensure effective remedies for violations of minimum employment standards for H-2B workers. It is worth noting that in the past there have been other complaints before the NAO of Mexico regarding similar violations related to migrant workers and these complaints have been accepted for revision.<sup>6</sup>

5. The United States has failed and continues to fail to provide the migrant workers “in . . . [its] territory with the same legal protection as [its] . . . nationals in respect of working conditions.” For example, even though the United States Congress has declared in its legislation that there is a need to provide equal access to the legal system, including high quality legal services for those who do not have the means to hire private representation<sup>7</sup>, the U.S. does not permit H-2B workers (outside of the forestry industry) to access legal services from organizations that receive funds from the federal government under the Legal Services Corporation program, even though U.S. nationals can receive the same services at no cost.<sup>8</sup>

## II. STATEMENT OF VIOLATIONS OF THE NAALC

### *Article 1: Objectives*

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.

### *Annex 1: Labor Principles*

1. Minimum employment standards: The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements.
2. Protection of migrant workers: Providing migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.

*Article 2: Level of Protection*, which provides that: “[E]ach Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”

### *Article 3: Government Enforcement Action*

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<sup>5</sup> See the case, *Arriaga v. Fl. Pacific Farms, LLC*, 305 F. 3d 1228 (11th Cir. 2002) (which clarifies that the obligation of employers to pay the minimum wage includes reimbursement during the first week of work for the expenses paid by employees as a condition of obtaining their employment, as in visa expenses, travel expenses from the country of origin to the workplace at least to the level of the minimum wage).

<sup>6</sup> MNAO 9802, MNAO 9803, MNAO 2003-1

<sup>7</sup> 42 USC §2996(1)(2)

<sup>8</sup> See Public Communication to the NAO of Mexico (MNAO 2005-1).

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action.

*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.”

The United States has and continues to violate the following articles of the NAALC:

- 1) **Article 1:** By allowing the employers of the petitioners, as well as the majority of employers in the fair industry who employ H-2B workers, to deny minimum wage and overtime payment to their employees, without preventive measures, such as inspections, monitoring and the imposition of fines, necessary to promote compliance and the effective application of minimum wage legislation. As described in this complaint, the workplace conditions and living standards of the H-2B workers in the fair and carnival industry fall far below the standards established by U.S. domestic labor laws.
- 2) **Article 3:** By ignoring, by and large, the fair industry and workplaces with H-2B workers in its inspection, monitoring and workplace rights compliance programs, the United States violates its obligations to promote compliance with its employment laws and its obligation to apply such laws effectively. As described in this complaint, the workers in the fair and carnival industry with H-2B visas have suffered serious violations of their rights to a legal wage, to overtime pay, to payment for all hours worked, to reimbursement for employment-related expenses, and payment without unlawful employer deductions, due to the United States’ failure to comply with this article.
- 3) **Article 4:** By denying migrant workers with H-2B visas the same access to essential legal services that other workers are entitled to, including access to administrative proceedings needed to enforce their labor rights, the United States violates its obligations under Article 4 to open access to its courts and administrative agencies for the resolution of labor complaints. As described in this complaint, H-2B workers in the fair and carnival industry have been denied compensation and legal remedies that they are entitled to under U.S. Law.

### 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.”<sup>9</sup> This submission falls under the NAALC because it involves the failure to enforce minimum wage and overtime

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<sup>9</sup> The procedures for review of submissions by the NAO of Mexico were established by regulation published in the *Diario Oficial de la Federación*.

pay laws as well as the failure to protect the rights of migrant workers in the United States, both of which are contemplated by the definition of labor law under Article 49 of the NAALC.

2. 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 wage and hour laws for migrant workers, are within the scope of the NAALC.
3. 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.

#### **IV. STATEMENT OF INTEREST OF THE PETITIONERS**

1. Petitioners Leonardo Cortez Vitela (Cortez) and Efraín Vásquez Flores (Vásquez) are citizens of Mexico and residents of Zacatecas who worked for J&J Amusements in the United States. J&J is a private carnival amusements company that provides carnival entertainment services primarily at state fairs in various states in the United States. These Petitioners were subjected to unacceptable conditions of work, including violations of their rights to the minimum wage, lack of work breaks, poor and degrading housing conditions, and unsafe working conditions because of which they decided to return to Mexico without completing their work contract period.
2. Petitioner Julián Andrés García Zacarías, a citizen of Mexico and resident of Veracruz, was recruited by JKJ Workforce to work for Reithoffer Shows, Inc. suffered severe violations of his right to the minimum wage, was forced to live in poor living conditions, and was subjected to dangerous working conditions. García had suffered similar violations during his work in other fairs in past years.
3. *Centro de los Derechos del Migrante* (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.
4. Friends of Farmworkers (*Amigos de Trabajadores Agrícolas*) is a non-profit organization whose mission is to improve the living and working conditions of indigent farmworkers, mushroom workers, food processing workers, and workers from immigrant and migrant communities. Friends of Farmworkers offers direct legal services and communication education to farmworkers, mushroom workers, and food processing workers. Friends of Farmworkers is based in Philadelphia, Pennsylvania.

5. The *Comité de Defensa del Migrante* (Committee for the Defense of Migrants) is an association of leaders formed of migrants, former migrants and their families who fight to obtain justice through trainings on migrants' rights in their communities and by promoting legal and political changes through their leadership.
6. Interfaith Worker Justice (IWJ) is a network of people of faith that calls upon our religious values in order to educate, organize, and mobilize the religious community in the United States on issues and campaigns that will improve wages, benefits, and conditions for workers, and give voice to workers, especially workers in low-wage jobs. IWJ envisions the religious community, acting on its values in creative and strategic ways, as a powerful leader in creating and sustaining a nation where all workers share in the prosperity of our society, enjoy the fundamental human right to organize, and lead dignified lives as a result of their labor.
7. The North Carolina Justice Center (Justice Center) is the North Carolina's leading progressive advocacy and research organization. The Justice Center's mission is to end poverty in North Carolina by ensuring that every household has access to the resources, services and fair treatment it needs to achieve economic security. The Justice Center works to improve the lives of low- and moderate-income North Carolinians through five main strategies: litigation of cases that will have widespread impact on public policy and protections, analysis of current public policies and research on alternatives that will reduce poverty, advocacy for policy changes that will benefit disadvantaged communities, community Education that empowers individuals and groups to pursue change, and communication that influences state leaders and shapes public opinion.
8. Paso del Norte Civil Rights Project (PCRPP), an arm of the Texas Civil Rights Project, promotes racial, social, and economic justice through education and litigation. PCRPP strives to foster equality, secure justice, ensure diversity, and strengthen communities. PCRPP's Economic Justice Program aims to stem widespread labor abuses occurring in the border region through the organization of community members, public campaigns, and litigation. PCRPP is based in El Paso, Texas.
9. 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, the SPLC is internationally known for tracking and exposing the activities of hate groups. SPLC is based in Montgomery, Ala., the birthplace of the modern civil rights movement, and has offices in Atlanta, New Orleans, Miami, Fla., and Jackson, Miss.
10. 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.

11. *Sin Fronteras* (Without Borders) is a non-partisan, non-religious, not profit organization in Mexico that works in Mexico City to contribute to 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. 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.
13. 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 región 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.
14. The Centro de Apoyo al Trabajador, A.C. (Worker Support Center or C.A.T.) is a democratic non-governmental organization that promotes the exercise, respect and defense of Workers' Human Rights. Its mission is to contribute to the defense and respect of the Human Rights of workers in order to improve their working and living conditions.
15. The Northwest Workers' Justice Project is a nonprofit organization dedicated to improving enforcement of the workplace and organizing rights of low-wage, contingent, and immigrant workers in the Northwest, and especially in metropolitan Portland, Oregon.
16. The Workers' Center of Central New York is a workers' rights center based in Syracuse, NY that seeks to improve the working conditions of the most vulnerable workers in Central New York State.

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

**Federal and State Minimum Wage Laws**

1. In the United States, both federal and state laws establish minimum wage rates. The federal minimum wage was established by Fair Labor Standards Act of 1938 (FLSA). Although certain exemptions apply, the FLSA establishes a minimum wage of \$7.25 per hour for the first 40 hours of work in a week and a time and a half rate for all hours worked over forty hours per week.<sup>10</sup>

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<sup>10</sup> 29 U.S.C. §§ 206-07. Any employee who is involved in interstate commerce or interstate production of products for commerce and who is not explicitly exempt is protected by the FLSA. Any non-exempt employer with at least \$500,000 in annual dollar volume of business each year is subject to its requirements. 29 U.S.C. § 203.

2. Additionally, most of the fifty U.S. states have their own minimum wage rate. When a job is exempt from the FLSA or when the state minimum wage is greater than the federal minimum, the state minimum wage must be paid.
3. Beyond the employment laws that apply generally, like the FLSA, there are also regulations that apply exclusively to workers with H-2B visas that require employers to pay wages established by the Department of Labor as a wage that will not have the effect of reducing the wage levels of local workers in the industry. Workers with the H-2B visa must receive the highest of the federal, state, or local minimum wage or the prevailing wage.<sup>11</sup> Prevailing wages are the “average wage[s] paid to similarly employed workers in a specific occupation in the area of intended employment.”<sup>12</sup> The prevailing wages typically, although not always, are higher than the federal minimum wage. The purpose of this wage is to protect the working conditions of U.S. workers and avoid reducing their wage level because foreign workers are doing the same work for lower wages.
4. Under U.S. law, employers must reimburse workers for certain pre-employment expenses. Expenses paid by the employees determined to be “primarily for the benefit of the employer” must be partially or fully reimbursed within the first workweek to ensure that at the end of the first workweek, each worker has received the minimum wage taking into account the pre-employment expenses the worker paid.<sup>13</sup> If a worker earns only the minimum wage, his or her expenses should be reimbursed completely. Before arriving at the workplace, most H-2B workers incur substantial expenses for visas and passports; food, lodging, and transportation costs from their hometown to the U.S. consulate; a border crossing fee; travel expenses to the worksite; and recruitment fees and other recruitment-related expenses. All of these expenses are considered primarily for the benefit of the employer and must be reimbursed. When this reimbursement requirement is not enforced, migrant workers may spend months or even years repaying the pre-employment debt.

### **Systematic Violations of Minimum Wage Laws**

5. Employers are required to reimburse most pre-employment expenses during the first pay period. The Petitioners who worked for J&J incurred an average of \$330.00 USD in expenses that should have been covered by their company. Petitioner García, who was recruited by JKJ and worked for Reithoffer, incurred approximately \$950.00 USD in pre-employment expenses that should have been covered by the employer. None of the Petitioners or their co-workers ever received the reimbursements required by law.
6. Many employers of H-2B workers illegally withhold a percentage of wages from each payment as a means to ensure that workers do not resign before the end of their

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<sup>11</sup> 20 C.F.R. § 655.22(e) (2009).

<sup>12</sup> Employment and Training Administration, Foreign Labor Certification, *Information and Resources, Online Wage Library, Background Revised April 20, 2010*, UNITED STATES DEPARTMENT OF LABOR, <http://www.foreignlaborcert.doleta.gov/wages.cfm>.

<sup>13</sup> 29 C.F.R. § 531.36(b) (2011); *See also* Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1236 (11th Cir. 2002); *Rivera v. Brickman Grp., Ltd.*, U.S. Dist. Ct., No. 05-1518., 2008 WL 81570, at \*15, 17 (E.D. Pa.).

employment period.<sup>14</sup> Companies such as Reithoffer Shows describe this unlawful withholding practice as a “bonus” system that will be paid at the end of the employment period if the worker stays for that entire period. Workers who leave their jobs because of unsafe and unfair conditions before the end of their contract period never received their withheld payments. Reithoffer Shows withheld \$50 USD per week from Petitioner García’s pay. After Petitioner García escaped from his workplace due to severe violations of his rights, he never received his withheld payments.

7. Migrant workers are often required to purchase their own work tools and supplies, which violates the minimum wage law.<sup>15</sup> For example, the employees of Reithoffer Shows were required purchase the company’s uniforms for \$100 USD. These purchases were paid with involuntary deductions from earnings, which reduced wages below the required minimum wage.
8. Many migrant workers are employed in industries that require them to work more than forty hours per week. With few exceptions, H-2B workers have the right to time and a half pay for each overtime hour. Fair workers, such as the Petitioners, routinely work seventy or more hours per week. Their employers frequently certify to the U.S. Department of Labor that they offer a prevailing hourly wage rate and a forty-hour workweek to their employees. Despite the certification, fair and carnival employers routinely pay workers a flat weekly wage regardless of the hours worked and in spite of their obligation to pay time and one-half for overtime. This practice reduces workers’ hourly wages well below the minimum wage.
9. For example, workers employed by J&J, including the Petitioners, earned \$20 USD per day, and worked at least twelve hours each day. They received one-time payments of \$240 USD on the fifteenth day of work and \$80 on their final day of work. Although the applicable prevailing wage rate was \$6.61 per hour for the J&J workers, they earned approximately \$3.14 per hour. Taking into account the unreimbursed pre-employment expenses the J&J workers paid, the J&J workers earned a net wage of approximately \$1.61 per hour. The Petitioner García earned \$210 USD per week with Reithoffer Shows, or approximately \$1.98 USD per hour, due to the number of hours he was required to work. The failure to compensate H-2B workers for actual hours worked violates the minimum wage laws of the United States.
10. Centro de los Derechos del Migrante has received reports from many H-2B workers in the fair and carnival industry who have been required to work without compensation and receive deductions from their wages for rest and lunch breaks that they could not take. These wage violations result in chronically lowered wages and disregard for minimum wage laws.

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<sup>14</sup> FLSA requires that employees be paid for all hours worked. See the “FLSA Hours Worked Advisor” from the Department of Labor at <http://www.dol.gov/elaws/esa/flsa/hoursworked/default.asp>.

<sup>15</sup> Employers must provide workers’ weekly wages at a rate no lower than the minimum wage rate free and clear of any improper deductions or kick-backs that go directly or indirectly to the employer or to another individual for the employers’ benefit. 29 C.F.R. § 531.35. In addition, costs associated with facilities that are found to be primarily for the benefit or convenience of the employer are not considered reasonable and may not be included when computing wages.

11. Several H-2B fair employers fine workers for arriving late to work, for “bad behavior,” or for using the bathroom while not on an authorized break, and for complaining about rights violations. Reithoffer Shows, for example, fined Petitioner García \$30 for having arrived five minutes late to his job and \$40 for having used the bathroom.

#### **Failure to Effectively Enforce Minimum Wage Laws**

12. The NAALC requires each Party to promote compliance with and effectively enforce its labor law “through appropriate government action.”<sup>16</sup> The systematic violations of minimum wage laws described in the last section are 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.
13. In addition to the failures described in the paragraphs above, the number of labor law enforcement actions in general for all workers has declined. The most recent investigation on the subject conducted by the U.S. Government Accountability Office (GAO) found that “[f]rom fiscal years 1997 to 2007, the number of . . . enforcement actions decreased by more than a third, from approximately 47,000 in 1997 to just under 30,000 in 2007.”<sup>17</sup> It also found that in cases where the Wage and Hour Division of the Department of Labor does respond to complaints, their investigations are inadequate, unsophisticated, and seriously delayed. Despite knowledge of the enforcement shortcomings, the U.S. government continues to disregard its obligation to effectively enforce its regulations.

#### **VI. SYSTEMATIC FAILURE TO PROTECT MIGRANT WORKERS IN VIOLATION OF ARTICLE 49 AND ANNEX 1, PRINCIPLE 11 OF THE NAALC**

1. The NAALC obligates Parties to protect migrant workers and to provide them with the same legal protection as the Party’s nationals in respect to working conditions. Article 49; Annex 1, Principle 11.
2. U.S. labor laws establish minimally acceptable labor standards for wages and working conditions for all workers; however, migrant workers who are entitled to protections under applicable minimum wage laws consistently fail to receive the same level of protection as U.S. citizens. Several reports illustrate that the failure to effectively enforce labor laws and regulations creates a distinct and detrimental impact on migrant workers.<sup>18</sup> Low-wage migrant workers suffer minimum wage violations at nearly twice

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<sup>16</sup> NAALC, Article III.

<sup>17</sup> Department of Labor: Wage and Hour Division Needs Improved Investigative Processes and Ability to Suspend Statute of Limitations to Better Protect Workers Against Wage Theft GAO-09-629 June 23, 2009, available at <http://www.gao.gov/products/GAO-09-629>.

<sup>18</sup> “Federal law and U.S. Department of Labor regulations provide some basic protections to H-2 guestworkers - but they exist mainly on paper. Government enforcement of their rights is almost non-existent. Private attorneys typically won’t take up their cause.” Close to Slavery, page 3; “Under the H-2 program, employers are obligated to offer full-time work when they apply to import foreign workers; anything less will not be approved by the

the rate of their U.S.-born counterparts,<sup>19</sup> and according to one report, immigrant workers are disproportionately subject to punishment, instead of protection with respect to their employment.<sup>20</sup> The violations described in paragraphs 1 through 5 in Section I of this complaint are examples of the disproportionate impact that the U.S.'s failure to effectively enforce its labor laws has on migrant workers.

3. Migrant workers are inherently more vulnerable than their U.S. counterparts to applicable minimum wage violations for numerous reasons, including the lack of English skills.<sup>21</sup> These vulnerabilities are even more acute when employers fail to comply with the law and do not provide migrant workers with written documents, such as the terms of their employment, in their native language. For example, the Petitioners never received a copy of their employment terms in Spanish, which frustrated their ability to assert their legal rights.
4. Migrant workers also face disproportionate impediments in accessing administrative or judicial resources because they are frequently employed in industries that require work seven days per week and constant moving from location to location. Petitioners' experiences are typical; they never worked in any one town for more than a few weeks at a time and had very few days off.
5. Migrant workers holding H-2B visas, such as the Petitioners, face additional obstacles. H-2B workers are tied to a specific employer, and if they are terminated or choose to quit, workers must immediately return to their home countries. This reality makes workers understandably hesitant to complain to their employer or law enforcement about adverse employment conditions such as wage violations for fear of retaliation.<sup>22</sup> There are no simple provisions under U.S. immigration law to allow an H-2B worker to remain in the U.S. or change jobs if he or she is illegally fired in retaliation for having complained about violations of the minimum wage. Similarly situated U.S. workers are not subject to such a dynamic and have different options if they are discontented with working conditions.
6. The lack of compliance with U.S. labor laws creates a dangerous atmosphere of employer impunity where the costs of violating workplace laws are lower than the costs

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DOL. There is virtually no enforcement of this requirement in practice, however." *Id.* at 21. "[Rule abiding] employers, and the workers who regularly experience workplace violations, urgently need a new national commitment to full enforcement of labor standards." *Broken Laws*, page 9.

<sup>19</sup> *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, UIC Center for Urban Economic Development, National Employment Law Project and UCLA Institute for Research on Labor and Employment, page 46; See also, *Broken Labor Standards at 22. Broken Laws*, page 9.

<sup>20</sup> *Confronting the Gloves-off Economy: America's Broken Labor Standards and How to Fix Them*, July 2009, Association of Labor and Employment Relations, page 19.

<sup>21</sup> "Limited English proficiency is another barrier migrant workers face when they attempt to enforce, or even understand, their rights." *Broken Labor Standards*, page 27.

<sup>22</sup> It's improbable that H-2A workers complain about violations of labor protections like the three-fourths guarantee because of fear that they will lose their jobs or will not be hired by the employer or the association for future employment. *Changes Could Improve Services to Employers and Better Protect Workers*. GAO/HEHS 98-20, pages 60-61; "There is no question that many H-2 employers take full advantage of the power they hold over guestworkers." *Close to Slavery*, page 17.

of complying.<sup>23</sup> Migrant workers are disproportionately subject to violations of their workers' rights because, as indicated in the examples above, they are circumstantially more reliant on U.S. government enforcement of labor laws. In addition, under this environment of impunity, U.S. law denies H-2B workers 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.

## **VII. SUGGESTED ENFORCEMENT MEASURES IN THE UNITED STATES**

The Petitioners recommend that the Mexican NAO encourage the United States NAO to advocate for the following measures with respect to the U.S. Department of Labor (DOL).

1. The United States federal government, through the DOL, should dedicate greater attention and funding to training inspectors to enforce minimum wage, reimbursement, and overtime laws effectively, particularly with respect to H-2B workers.
2. The DOL should improve and expand its inspection and monitoring of workplaces, particularly in the fair and carnival industry and other industries that employ H-2B workers, including regular visits with workers to verify their wage levels, conditions of work, and housing.
3. The DOL should investigate a higher percentage of its complaints and provide effective remedies for victims of workplace violations, including workers who are no longer in the U.S. due to the expiration of their work contracts.
4. The DOL should conduct outreach to workers' communities to promote workers' understanding of their workplace rights.
5. The DOL should provide employers with more education about their workplace responsibilities as well as the consequences of violating these responsibilities.

## **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 the workers who are harmed. Competing employers are placed at an economic disadvantage, free trade is disrupted, and employees everywhere are harmed.
2. The United States government is failing to effectively enforce its minimum labor standards and protect migrant workers in its territory. The Petitioners ask that the Mexican NAO take the following steps to bring the United States government into compliance with its obligations.

## **IX. ACTIONS REQUESTED**

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<sup>23</sup> Broken Labor Standards, page 29.

Compliance with its responsibilities under the NAALC requires the U.S. government to effectively enforce its labor laws, particularly with respect to minimum labor standards, and to afford migrant workers in the United States the same legal protections that United States citizens have.

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

- A. 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 methodologies of compliance articulated in Section VII of this Communication:
  1. That the Mexican NAO initiate a review pursuant to Article 16(3);
  2. That the Mexican NAO commit to undertaking cooperative consultations with the NAO of the United States as stipulated under Article 21 of the NAALC;
  3. Pursue investigative measures, in accord with Section 6 of the Regulation published in the Diario Oficial de la Federación of April 28, 1995, by:
    - a. Accepting additional information from other interested parties;
    - b. Engaging an independent Mexican expert in the aforementioned matters to assist the Mexican NAO with the review;
    - c. Arranging for on-site investigations by the expert on what impedes migrant workers from ensuring respect for their right to the minimum wage guaranteed by the FLSA and other relevant laws;
    - d. Arranging for a detailed study by the expert on what impedes migrant workers from enforcing their guarantees to the minimum wage under the FLSA and other relevant laws;
  4. 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 minimum labor standards with respect to migrant workers, 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 Zacatecas, Veracruz, and Mexico City; and in Washington, D.C.
- B. 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;

- C. If ministerial consultations do not resolve these issues, Petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico require the establishment of an Evaluation Committee of Experts (ECE) under Article 23 of the NAALC regarding all matters that may be properly considered, and that such proceedings be transparent and involve public participation of employees, employers, worker advocates, and government officials;
- D. If, after a final ECE report, the matter remains unresolved, Petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico request consultations under Article 27 of the NAALC, and utilize the mechanisms specified in Article 28 of the NAALC to reach a satisfactory resolution, and that such a Dispute Resolution Action include the participation of those organizations which participated in earlier public communications;
- E. In the event that the matter remains unresolved after these consultations, Petitioners respectfully request that the Secretary seek the support of the Minister of Labor of Canada to request an arbitral panel under the Article 29 of the NAALC to consider the United States' failure to enforce minimum labor protections; and
- F. 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.

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