



Coerced under NAFTA:

Abuses of Migrant Workers in the TN Visa Program and Recommendations for Reform

SUMMARY

Every year, thousands of Mexicans come to work in the United States as professionals on TN visas. Workers report that TN visa employers and their recruiters commit fraud, retaliation, discrimination, wage theft, and economic coercion, among other abuses. A common thread in these abuses is the undue power wielded by employers under the TN visa.

These recruitment and employment abuses are compounded by the TN visa program's lack of oversight. Despite chronic underfunding and other shortcomings in enforcement, the Department of Labor's oversight of other guestworker programs provides a modicum of transparency and basic rights protections that is absent in the TN visa program.

In order to reduce worker abuses in the TN visa program, the U.S. government should create transparency in the recruitment of TN workers, establish meaningful oversight and access to justice, and prohibit fees and hiring practices that result in economic coercion and other labor abuses.

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ABOUT CDM

Centro de los Derechos del Migrante, Inc. (CDM) envisions a world where migrant workers' rights are respected and laws and policies reflect their voices. Through legal support, policy advocacy, and outreach and leadership development, CDM empowers Mexico-based migrant workers to defend and protect their rights as they move between their home communities in Mexico and their workplaces in the United States. www.cdmigrante.org

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BACKGROUND

Created in 1993 under the North American Free Trade Agreement (NAFTA), the TN visa allows citizens of Mexico and Canada to work in the United States for a period of 3 years, subject to extension and limitless renewal. To qualify for the TN visa, an applicant must have pre-arranged employment, and the applicant's experience and education must meet the criteria laid out in NAFTA.¹ TN workers must fit into specific professional categories, such as economist, psychologist, meteorologist, or university professor.

Employers' usage of the TN visa has grown dramatically in the last decade.² Since Canadian workers can enter the U.S. with the more easily acquired TN status, which only requires meeting TN requirements at the port-of-entry rather than at a consular interview, the overwhelming majority of TN visas are granted to Mexicans. Until 2004, NAFTA capped the number of Mexican citizens who could enter the United States on the TN visa at 5,500 per year.³ In 2004, ten years after NAFTA went into effect, the United States eliminated the cap and most oversight requirements, and the number of visas issued began to rise.⁴ Between 2011 and 2016, the number of TN visas issued per year nearly tripled.⁵

1. See North American Free Trade Agreement (NAFTA), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, Appendix 1603.D1 (1993).

2. U.S. Dep't of State, "Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2012-2016" 3, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXVIB.pdf> (showing annual growth in TN issuance).

3. NAFTA, Appendix 1603.D4. There is no cap the number of family members who can enter the United States on TD visas from either country.

4. Eliminating the Numerical Cap on Mexican TN Nonimmigrants, 69 Fed. Reg. 11,287 (Mar. 10, 2004) (codified at 8 C.F.R. pt. 214.6).

5. U.S. Dep't of State, "FY 1997-2016 Nonimmigrant Visa Issuances by Visa Class and by Nationality", https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FYs97-16_NIVDetailTable.xls (outlining nonimmigrant visas issued by country and visa). In 2011, U.S. Dept. of State reported issuing 4,971 TN visas versus 14,768 in 2016.

Authorized Professions under the TN Visa

General: Accountant, Architect, Computer Systems Analyst, Disaster Relief Insurance Claims Adjuster (claims Adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster), Economist, Engineer, Forester, Graphic Designer, Hotel Manager, Industrial Designer, Interior Designer, Land Surveyor, Landscape Architect, Lawyer (including Notary in the Province of Quebec), Librarian, Management Consultant, Mathematician (including Statistician), Range Manager/Range Conservationist, Research Assistant (working in a post-secondary educational institution), Scientific Technician/Technologist, Social Worker, Sylviculturist (including Forestry Specialist), Technical Publications Writer, Urban Planner (including Geographer), Vocational Counsellor.

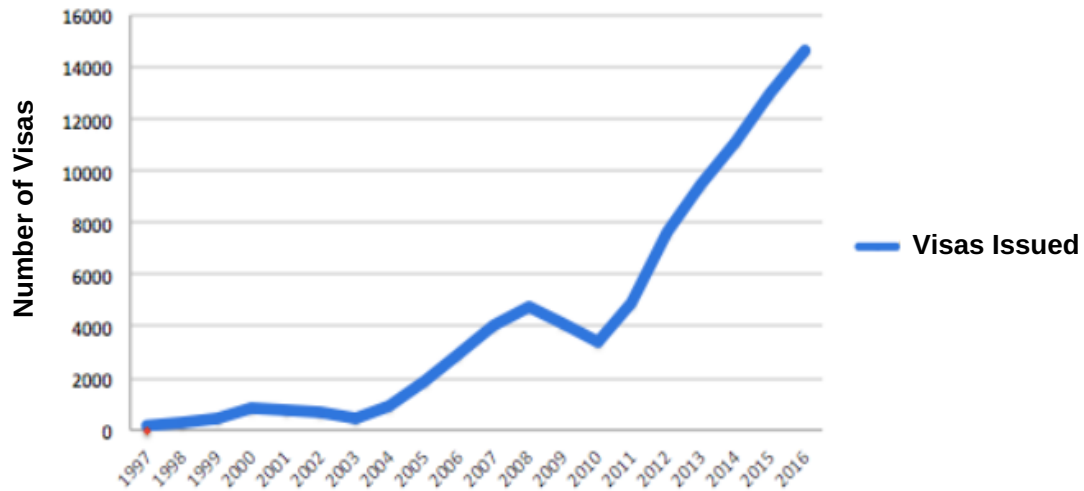
Medical/Allied Professional: Dentist, Dietitian, Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States), Nutritionist, Occupational Therapist, Pharmacist, Physician (teaching or research only), Physiotherapist/Physical Therapist, Psychologist, Recreational Therapist, Registered Nurse, Veterinarian.

Scientist: Agriculturist (including Agronomist), Animal Breeder, Animal Scientist, Apiculturist, Astronomer, Biochemist, Biologist, Chemist, Dairy Scientist, Entomologist, Epidemiologist, Geneticist, Geologist, Geochemist, Geophysicist (including Oceanographer in Mexico and the United States), Horticulturist, Meteorologist, Pharmacologist, Physicist (including Oceanographer in Canada), Plant Breeder, Poultry Scientist, Soil Scientist, Zoologist.

Teacher: College, Seminary, University.

TN Visas Issued to Mexicans: 1997-2016

Data Source: Dept. of State Nonimmigrant Visa Issuances by Visa Class and Nationality



As with other temporary work visas, recruitment for the TN visa takes many forms: workers report being recruited through job fairs, recruitment agencies, individual recruiters, or friends. Mexican TN workers apply for the TN visa at the consulate. If the consulate grants the visa, the TN worker travels to the United States to begin work.



ABUSES AND RECOMMENDATIONS

TN workers report⁶ abuses that begin at the time of recruitment and continue throughout their employment. Many workers return home heavily indebted, having suffered abuses on the job and sacrificed opportunities at home.

ECONOMIC COERCION

Economic coercion of TN workers takes several forms. Recruiters often charge recruitment fees as high as \$1,000 to facilitate job placement, an upfront economic burden on TN workers who arrive to the worksite indebted after taking out loans to cover the fees. In addition to recruitment fees, workers often pay their own transportation, visa, and other travel-related costs that compound their debt. Workers who arrive to the job indebted are particularly vulnerable to abuses: because they owe money in their home countries and because reporting abuses could jeopardize their employment and visa, workers are forced to choose between remaining at an abusive job or returning home to insurmountable debt.

In addition to recruitment fees and costs, some TN workers report that their contracts contain breach fees -- costs they have to pay their employer if they leave the job before the contract term is complete. In some cases, these breach fees are as high as \$10,000 to \$15,000. Workers report that looming breach fees have a chilling effect on reporting abuses. TN workers who thought they were coming to the United States to make economic headway discover that they must either remain in poor working conditions or return home in debt.

TN workers in a range of industries also report being hired by staffing agencies that wield undue economic power over them. Staffing agencies contract workers out to temporary employers as long as workers do not complain about their working conditions. The nature of working at a staffing agency is that work is intermittent. Because the workers' visas are tied to their employers, seeking more consistent work with other employers is difficult if not impossible in practice. Instead, TN workers who work for staffing agencies must take whatever work is given them. In one case, a TN worker was forced to secure his own temporary work on behalf of a staffing agency if he was to have any work. He was only paid for the periods in which he successfully secured work. The contract the worker had with the staffing agency contained breach fees, which empowered the staffing agency to coerce the worker into remaining on the job, despite the oppressive conditions.

Recommendations: Recruitment and contract breach fees should be prohibited in the TN visa

6. For purposes of this paper, reports are based on complaints made to CDM between 2014 and publication in December 2017. Additional evidence of abuses: The National Human Trafficking Hotline, maintained by Polaris, reports that from June 30, 2016 to June 30, 2017, it received 12 complaints from TN workers who were victims of labor exploitation.

program. The TN visa should be legislatively reformed to give workers control over their visas. If employer sponsorship of visas is maintained, staffing agencies should be prohibited from hiring workers on TN visas. The Department of Labor should certify TN employers after verifying non-abusive contract terms and posting the terms in a database of certified TN employers. The Department of Labor should work with the Department of Homeland Security U.S. Citizenship and Immigration Services to facilitate the process by which workers change employers.

CONTRACT MISREPRESENTATION AND FRAUD

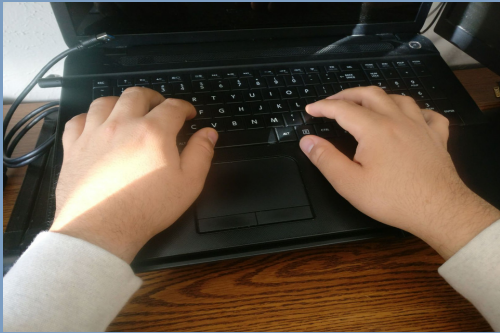
In addition to proof of the requisite experience and professional education, NAFTA requires that TN applicants provide an employment letter or contract at the consular interview to prove an employment relationship.⁷ However, workers recruited for a TN visa often report not receiving a written contract, and when a contract has been provided, it is almost always vague or misleading. Workers report receiving employment letters that are similarly vague and misleading. Workers are often reliant upon employer letters for information about the nature of their work, and these vague letters, which often fail to spell out the nature of the employment, give employers undue leeway to manipulate job assignments once workers have arrived in the United States.

Contracts and employment letters for TN visas are not maintained in any public database, nor are their contents meaningfully regulated. In one case, the employer did not identify the job position or the visa category. In another case, the employer listed a range of potential job duties, including farm labor and child care, which are not professions designated under NAFTA as qualifying for the TN visa. The consular officer nevertheless approved the visas. In other cases, the employer made verbal promises about the terms and conditions of the job, which led to enforceability problems for the workers. After being promised professional positions, some workers found themselves performing menial tasks. There is no remedy or complaint mechanism built into the TN visa program for this type of misrepresentation and fraud.

Recommendations: *The Department of Labor should oversee the TN visa program and should require vetting and certification of TN employers and their contracts before they can hire TN workers. The Department of Labor should create a database of certified TN employers and available jobs so that workers can verify the existence of jobs, ensure the jobs meet their professional qualifications, and verify the terms of their employment. The database should be available in real time so that workers can verify favorable contract terms and so that they do not fall victim to fraud. The database should enable workers to apply for positions directly with employers rather than using recruiters.*

7. 8 C.F.R. 214.6(d)(3)(ii); 9 FAM 402.17-5(B) Evidence of Professional Employment.

Workers' Stories



"TLACAELEL"

Position: Computer Systems Analyst

Duties: Seeking Work

I am a TN visa worker who has faced and continues to face many obstacles while seeking to improve my life and that of my family. I first arrived in the United States on June

2015 after obtaining an employment offer as a computer systems analyst from a Florida-based company. I arrived with the expectation that I would be working on various projects under the company hiring me and that I would be making \$60,000 a year. However, as soon as I arrived I discovered that the company who had helped me obtain my TN visa had taken advantage of me.

It quickly became clear that all the promises they had made to me were false. First, the company that had brought me over was not going to give me an assignment as they had promised, but rather they were an intermediary company. For months I was forced to undergo interview after interview in an effort to find a job -- a job that I thought I already had when I left my home country for the United States. Additionally, while I tried to find a job, I would only receive \$250 every two weeks. After months of interviews and as a result of my hard work, I was able to find temporary employment with a company in California. This unfortunately, was only a short-term contract, and after I completed my project, I once again was left empty handed. The company that had brought me to the United States once again offered me \$250 every two weeks but only if I returned to Florida. I decided to stay in California to continue my job search without success. By June 2016, I was forced to return to Mexico.

In July 2016, a company I had interviewed with previously contacted me offering me a position. I made the necessary changes to my visa with the U.S. embassy and headed back to the United States. I thought everything had finally worked itself out, but upon landing I received a message from my previous company claiming that I had violated the terms of my contract and threatening to take legal action not only against me but also against my new employer.

Despite the many obstacles I faced and continue to face, I am grateful for my TN visa. Although, I know that the reason these companies hire TN workers is because the process is not difficult for them and they can take advantage of us, I am still thankful for the existence of a visa that permits me to demonstrate my abilities and what I am worth. I only wish that this visa would allow for family stability. Although my wife is able to come to the United States with a TD visa, she cannot work. It doesn't matter that she is a professional that could contribute so much to the United States.



BEATRIZ

Position: Management Consultant

Duties: Secretarial duties

My name is Beatriz. Because my husband had a TN visa, my daughters and I first moved to the United States in 2013 as his dependents on TD visas. The TD visa did not permit me to work in the United States, but I remained successfully employed with my Mexico City employer with whom I had worked for 13 years. In November 2014, a Texas company offered me a position as a management consultant on a TN visa. I decided to accept the offer in order to travel less between Mexico and the United States and to spend more time with my family.

Having worked for so many years as a consultant for companies from nine different countries, I never imagined the nightmare I would face working for a U.S. employer. I began my new job in December 2014 and quickly realized that, despite what I had been told about the leadership role I would play, I was one of only two company employees. There was no room for me to apply my skills or knowledge. In contravention of my written work offer, I worked as a secretary, working many hours of overtime and doing the work that would have been appropriate for six employees. I was forced to study for various IRS exams that would allow the company to get a license to serve customers. About a month into my job, I suggested to my boss that he hire more employees so that I could start doing the work that I had been hired for. My boss responded that the company did not have any money to hire any more employees, but his response to my suggestion did not end there. For various hours he kept me locked up in the office, yelling at me, insulting me, and saying that I could not leave until he said so because he paid my salary. Shortly after this incident, the office abruptly closed, and only then did I learn that even prior to offering me a job, the company had already filed for bankruptcy. I could not believe that I was in this situation. I had spent so much time proving my qualifications to the U.S. government in order to get the visa, and yet the U.S. government had not held itself to the same standard by investigating my employer, ensuring that the offer was valid, and verifying that the company was in good standing.

I found myself in an impossible position: I had lost my job, I was unable to seek other employment because of the terms of my visa, and my husband had recently left me, which meant I had no TD visa to fall back on. In a matter of months I had lost everything. I tried to seek legal help but was unable to find legal counsel that knew enough about the TN visas to take my case. Instead, I was forced to sell everything I owned to cover the debt due to high costs I had incurred traveling back and forth to process my TD and then TN visas, and I returned to Mexico empty handed.

This situation ended my financial autonomy and my human right to provide for my daughters and myself. It put us in a devastating economical, psychological, and emotional position, forcing us to live a nightmare for months and nullifying our possibility to worthily repatriate to Mexico.

RETALIATION

Workers report an unequal power relationship with employers, who use the binding nature of contracts with TN workers to coerce workers. Workers report a hostile work environment and fear of retaliation if they complain about their working conditions. Recruitment fees charged to workers for access to a job and breach fees triggered if a worker leaves a job exacerbate workers' concerns about retaliation.

Although in theory a TN worker who feared retaliation could change employers, the reality is that finding another employer willing to hire a worker on a TN visa is difficult if not impossible. There is no database of employers willing to hire workers on TN visas. Because the visa is tied to the sponsoring employer, a worker who wants to change employers not only needs to locate another willing employer but also has to file an application with U.S. Citizenship and Immigration Services or a U.S. consulate to change employers. Thus, instead of being able to freely change employers, TN workers are bound not only by their unfair contracts but also by their fear of losing their jobs or their visas if they complain. Indeed, nearly all workers who did complain reported that their working conditions worsened afterwards.

Recommendations: *The Department of Labor should oversee the TN visa program and should rigorously protect whistleblowers and enforce anti-retaliation law. The Department of Labor should create a database of certified TN employers and available jobs so that workers can easily change employers. The Department of Labor should work with the Department of Homeland Security U.S. Citizenship and Immigration Services to facilitate the process by which workers change employers.*

DISCRIMINATION

Both men and women workers on TN visas report sex discrimination against women with respect to the job duties assigned at the worksite. One TN worker's supervisor explicitly told her that she received a particular job assignment because she was a woman. Another TN worker reported being required to care for her supervisor's children during her days off, ostensibly because she was a woman.

Unscrupulous employers use the process of international labor recruitment to evade U.S. anti-discrimination law, across visa categories and industry sectors. Employers specify to recruiters the race, gender, age, and other discriminatory bases for selection and hiring of workers overseas. Although internationally recruited workers are protected by U.S. anti-discrimination law, they experience barriers to reporting violations and accessing the legal system. During their employment, workers often fear retaliation if they report violations, since their visas are tied to

their employers. Upon returning home, reporting violations, finding legal support, and accessing justice is even more complicated.

Recommendations: *The Department of Labor should work with the Equal Employment Opportunity Commission to rigorously monitor and enforce anti-discrimination law. Data regarding race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, and disability for TN workers should be collected and maintained in a publicly available database so that discrimination can be monitored and the law can be enforced. U.S. Consulates should provide prospective TN workers with information on filing complaints of discrimination with the Equal Employment Opportunity Commission.*

WAGE THEFT

TN workers report a range of wage abuses including being paid significantly less than what was promised at the time of recruitment or in their offer letters, prolonged periods of nonpayment during their contracts, underpayment compared to other workers in their field and geographic region, and even payment below the federal minimum wage. An analysis of the wages of TN workers compared to the mean prevailing wage for the applicable industry and region shows that TN workers were paid as little as a quarter of what similarly situated U.S. workers earned.⁸ One TN worker was hired as a professional but worked 10 to 15 hours per day as a chauffeur at a rate of \$6 per hour.

Recommendations: *The Department of Labor should oversee the TN visa and should rigorously monitor and enforce wage protections for TN workers. The Department of Labor should maintain a database of certified TN employers in relation to jobs offered so that workers can verify the terms of their employment, including the wages offered. TN workers should be provided with information on filing complaints of wage abuses with the Department of Labor Wage and Hour Division.*

8. Analysis based on a comparison of wages in reports to CDM with the mean wage listed on the Foreign Labor Certification Data Center Online Wage Library, available at <http://www.flcdatcenter.com>.

CONCLUSION

The parties to NAFTA should reform the TN visa to better protect workers and inform them of their rights. The U.S. government should establish oversight of the program such that workers' rights are enforced, the recruitment process is transparent, and workers gain meaningful access to justice when their rights are violated.

COMPREHENSIVE RECOMMENDATIONS

PROHIBIT FEES AND HIRING PRACTICES THAT RESULT IN ECONOMIC COERCION: Recruitment and contract breach fees should be prohibited in the TN visa program. The TN visa should be legislatively reformed to give workers control over their visas. If employer sponsorship of visas is maintained, staffing agencies should be prohibited from hiring workers on TN visas.

CREATE OVERSIGHT AND ENSURE ACCESS TO JUSTICE: The Department of Labor should oversee the TN visa program and should require vetting and certification of TN employers before they can hire TN workers. The Department of Labor should rigorously protect whistleblowers and enforce anti-retaliation law. The Department of Labor should work with the Equal Employment Opportunity Commission to rigorously monitor and enforce anti-discrimination law with respect to TN workers.

The Department of Labor Wage and Hour Division should rigorously monitor and enforce wage protections for TN workers. The Department of Labor should work with the Department of Homeland Security U.S. Citizenship and Immigration Services to facilitate the process by which workers change employers.

U.S. Consulates should provide TN workers with information on filing complaints based on violations of their rights with the Department of Labor and the Equal Employment Opportunity Commission.

CREATE TRANSPARENCY: The Department of Labor should create a database of certified TN employers and available jobs so that workers can verify the existence of jobs, apply for jobs directly rather than through recruiters, ensure the jobs meet their professional qualifications, verify the terms of their employment, verify their wages, view other available jobs while in the U.S., apply for positions directly with potential employers, and change employers. The database should be available in real time so that workers can ensure they do not fall victim to fraud.

Data regarding race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, and disability for TN workers should be collected and maintained in a publicly available database so that discrimination can be monitored and the law can be enforced.

Addendum: Relevant Law

Authorizing Statute: North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103-182 (1994)

Relevant Sections of the Immigration and Nationality Act: INA 214(e) (8 U.S.C. 1184(e)); INA 214(j) (8 U.S.C. 1184(j)).

Governing Regulations: 22 CFR 41.59; 8 CFR 214.6(c).

Relevant Sections of the Foreign Affairs Manual: 9 FAM 402.17



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