



BREAKING THE SHELL:

HOW MARYLAND'S MIGRANT CRAB PICKERS CONTINUE TO BE "PICKED APART"

ABOUT THE AUTHORS

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, IMMIGRANT JUSTICE CLINIC

The Washington College of Law Immigrant Justice Clinic provides representation on a broad range of cases and projects, serving migrants and their communities in the D.C. metropolitan area, the greater United States, and beyond. Student attorneys handle matters that develop core lawyering skills, such as interviewing, counseling, negotiation, and trial advocacy, while cultivating complementary skills in the areas of policy and legislative advocacy, community organizing, and working with the media.

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This report is dedicated to the migrant worker women that gave their time to participate in this study. Wherever possible, we have tried to minimize the risk to these women, including by changing all of their names and identifying information within the report. We are indebted to each worker we surveyed for trusting us with her perspective and experience. We hope that by giving those experiences voice, this report will support these women on their journeys towards a better future for themselves and their loved ones.

For questions, media inquiries, or additional report copies, please contact Sulma Guzmán at sulma@cdmigrante.org.

The report is based on data collected as part of a research protocol overseen by American University’s Institutional Review Board for Protection of Human Subjects Research (IRB).

Please direct protocol questions to IRB Coordinator, Matt Zembruski at irb@american.edu.

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WORKER PROFILE:
“GABRIELA”

“I have been going to Maryland’s Eastern Shore to work as a crab picker for the past seven years. A neighbor recommended it to me because otherwise paying jobs are limited in my community near San Luis Potosi. The only jobs available are at the local corn husk processing plant. I used to work there until I had the opportunity to start working as a crab picker in the Eastern Shore. My husband and I support our three children and my father.

My current employer almost fired me during my first work season with them. There used to be quota rules in the job contracts that required workers to pick at least 20 pounds of crab meat or we would be automatically terminated. When my coworkers and I didn’t meet the quota, we were fired. One of my coworkers who speaks English asked to speak with our boss. We demanded we get paid for at least what we had worked. The employer changed his mind and told us to stay. These types of clauses demanding crab picking quotas from workers are no longer in the contract.

Since I started working as a crab picker, I have always traveled with other women from my community. These are women who have been going to work in Maryland for years, some even decades. In 2019, we traveled together on a bus from Ciudad del Maiz to Monterrey for about eight hours. In Monterrey, we waited for two to three days to receive our visas. Once we had our visas, we paid for transportation and traveled three days and three nights in a bus all the way to Maryland. We paid \$220 for the costs and were reimbursed by our employer.

During the work season in Maryland, I live in housing provided by my employer. We have to pay rent. I share a room with 11 coworkers. I share a house with 17 coworkers -- it has one kitchen, three rooms, and a bathroom with several shower stalls in it. All of us sleep in bunk beds.

At work, I suffer from allergies triggered by the crab picking. These allergies make me sneeze. My coworkers and I usually travel to a clinic in Cambridge which is roughly a forty-five-minute drive away. We usually pay \$15 to access these clinic services. If our ailment is considered something more ‘personal’ in nature, it’s on us to

pay for medical care. Our employers consider our crab-related allergies a personal illness.

This year I am worried about the trip to the U.S. because of everything we hear about how contagious the COVID-19 virus is. However, I don’t feel capable of saying no to the opportunity to work. If I want the opportunity to work, I have to keep obeying by participating when it’s available. “

“Gabriela”, Maryland H-2B crab picker from San Luis Potosi, Mexico, early forties

**Name changed out of fear of retaliation*



What are the human costs of the crab cake you ate last night?
Photo Credit: CDM Outreach Team.

INTRODUCTION

Ten years ago, CDM and American University Washington College of Law published *Picked Apart: The Hidden Struggles of Migrant Worker Women in The Maryland Crab Industry*.¹ The report surveyed the labor conditions of H-2B workers hired to pick crab on Maryland’s Eastern Shore. U.S. immigration law and the U.S. Departments of Labor and State authorize these foreign workers to enter the U.S. solely for temporary work at U.S. employers’ petition.² The report documented a number of problematic aspects of the crab industry’s treatment of H-2B workers, leading to considerable media coverage in outlets including the Washington Post³ and the Baltimore Sun.⁴ *Picked Apart* drew attention from lawmakers at the state and national levels and increased awareness of the plight of migrant crab pickers.

As a result of these and other advocacy efforts, crab pickers have seen important improvements in their living and working conditions. Nevertheless, there continue to be significant challenges and opportunities for improvement going forward.

Even as Maryland H-2B employers complain of labor shortages, H-2B cap limits, and most recently, the COVID-19 economic downturn, the human face of crab pickers – and their struggles – remain mostly hidden from media, political, and public scrutiny. The women and men who travel from Mexico each season to pick and process crabmeat are not nameless – many have come forward, sometimes at great personal risk, to share their stories and demand change. Now, a decade after these brave workers first spoke out about their working conditions for *Picked Apart*, we returned to survey their experiences and to learn that many of their long-standing demands have remained unmet. Despite important steps forward, there is still much for employers and policymakers to do to assure that the workers – and their families – are safe, secure, and healthy.

Today, more than ever, migrant workers’ rights must be a top priority for the public, lawmakers, and the government. The outbreak of COVID-19 has amplified the precarious conditions under which H-2B crab pickers labor. Sadly, while writing this report the

authors received news that crab picker workers had begun to experience symptoms typical of COVID-19. Like so many other low-wage and migrant workers, the workers in Maryland’s packing houses have always received a paradoxical welcome in the United States: at the same time that they are hailed as one of the country’s most essential workforces, they are historically among the most underpaid and unprotected populations.

During the current global pandemic, government officials have shut down borders, closed businesses, and ordered millions of residents to stay home, yet H-2 workers are laboring harder than ever to support food processing and other critical industries in Maryland and across the nation. As the public health crisis wears on with no end in sight, it has become increasingly clear that all too many “essential” workers are laboring without adequate protections or government oversight and in conditions that make social distancing impossible. As one tragedy after another grips national headlines, COVID-19 has cast its light upon millions of people working at the front lines of our economies doing the most dangerous jobs with the fewest protections. These developments deepen the urgency with which policymakers must act to advance long-overdue structural changes to protect H-2B workers in Maryland’s crab industry. If government officials and employers do not act now, the wellbeing of the workers and the industry that relies on their labor will remain picked apart.

WHY CRAB PICKERS?

In 2019, over 400 workers traveled to Maryland to work as crab pickers. This workforce is disproportionately female. Although this group is just a portion of the more than three thousand H-2B seasonal workers who come to Maryland each year, their struggles are emblematic of systemic problems that characterize temporary work programs in the state and across the country.⁵ Despite the symbolic importance of the blue crab in Maryland, many in government remain unaware of the working and living conditions of crab pickers on the Eastern Shore. These conditions are less than ideal and fall short of treating crab pickers with dignity.

OVERVIEW OF 2020 FINDINGS

As the Maryland crab industry fights to stay profitable in the face of worker shortages,⁶ the environmental degradation of the Chesapeake Bay,⁷ and the COVID-19 outbreak,⁸ employers’ efforts to cut costs frequently fall on the crab pickers themselves.⁹ The interviews revealed crowded housing conditions, widespread asthma, and limited access to healthcare, putting crab pickers at increasing risk of lethal exposure to COVID-19. From transportation, to housing, to workplace safety equipment and healthcare, the migrant worker women coming to Maryland continue to make a substantial financial investment toward being able to work in the H-2B temporary visa program. This report explores how these financial pressures, combined with low wages and variable hours, can leave crab pickers in a precarious position.

While the research found some improvements for workers (for example, no worker paid an outright recruitment fee as was nearly universal in 2010), ongoing challenges and new issues outweighed those gains. Guestworker employers and recruiters tend to discriminate heavily based on sex, enabling men access to both H-2A agricultural and H-2B non-agricultural visas, while limiting women’s opportunities to jobs that usually pay less.¹⁰ These jobs often include food processing, housekeeping, and childcare.¹¹ Despite a growing number of women H-2B workers in the past decades, policymakers have failed to reform the H-2B program in ways that meaningfully accommodate women and their families.¹² This report explores the many ways in which the structure of the H-2B program, created by and for men, disproportionately disadvantages migrant women.



Images like the one above that combine the Maryland flag with the outline of a crab demonstrate the close association the state has with this industry.

METHODOLOGY

This report is based on qualitative research conducted on the Eastern Shore of Maryland and in Mexico pursuant to an approved research protocol by American University’s Institutional Review Board for Protection of Human Subjects in Research (IRB).¹³ The authors conducted primary research in Maryland during the fall of 2019 with interviews of 19 workers, to gain an understanding of the migrant women’s experiences living and working on Maryland’s Eastern Shore. The authors then supplemented research in Maryland with additional interviews in Mexico. In developing an approach to gather specific insight from the workers, the authors looked to the methodology of the original *Picked Apart* report.¹⁴ In keeping with the 2010 report methodology, the authors prioritized maintaining the research subjects’ anonymity to ensure that employer retaliation would not jeopardize the workers’ livelihoods. A departure of the methodology from 2010, was the authors’ decision not to cite to individual surveys in the course of this report. The authors made

1 Am. U. Wash. C. of L. Int’l Hum. Rts. L. Clinic & Centro de los Ders. del Migrante, Inc., *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* (2010), <https://cdmigrante.org/wp-content/uploads/2018/02/PickedApart.pdf> [hereinafter *Picked Apart*].
2 29 C.F.R. § 503.5 (2015).
3 Tara Bahrapour, *Report Criticizes Treatment of Mexican Women Recruited to Pick Md. Crabs*, WASH. POST (Jul. 15, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071402977.html>.
4 Michael Cross-Barnet, *Crab Pickers Deserve Protection*, BALT. SUN, (Jul. 15, 2010, 12:53 PM), https://www.baltimoresun.com/bs-mtblog-2010-07-post_67-story.html.
5 Off. of Foreign Lab. Certification, Annual Report, U.S. Dep’t of Lab. 47 (2016), https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf (reporting the number of H-2B positions certified in Maryland in 2015 at 3,290 and 2016 at 3,408); Nationwide, the Department of Labor certified more than 100 thousand H-2B positions in 2015 and 2016. Id. at 45.

6 See Scott Dance, *Maryland’s Crab Industry Again Faces Massive Shortage of Foreign Workers Unless Trump Raises Visa Limits*, BALT. SUN (Mar. 2, 2020, 4:49 PM), <https://www.baltimoresun.com/news/environment/bs-md-crab-worker-visas-20200302-qytcgrnrafdllphhkmtyocal4-story.html> (“In a survey sponsored by the state agriculture department and the Chesapeake Bay Seafood Industry Association, most of the crab processing companies said they could be forced to shut down their operations for the season if they don’t get their visas.”); Jeff Barker, *Amid Immigration Debate, Maryland Crab Industry Looks for Rebound After Getting Few Foreign Workers Last Year*, BALT. SUN (Mar. 14, 2019, 2:00 PM), <https://www.baltimoresun.com/business/bs-md-crab-industry-visas-20190312-story.html> (describing the dependence of crab houses in Maryland on H-2B workers in part due to reported shortages of domestic workers, noting “[v]isa shortages have been a perennial issue since the last generations of Eastern Shore women who once picked crabmeat aged out of the tedious seasonal work” and the difficulty of recruiting domestic workers “for seasonal, manual-labor jobs in the remote watermen’s villages on the Eastern Shore”).
7 See John Roach, *Can the Chesapeake Bay (and its Signature Blue Crabs) Survive?*, NBC (Apr. 26, 2013, 4:22 AM), <https://www.nbcnews.com/science/environment/can-chesapeake-bay-its-signature-blue-crabs-recover-n343741> (“A lethal combo of overharvest, pollution, and weather resulted in more than a decade of consistently low numbers of crabs beginning in the early 1990s.”); see also CHESAPEAKE BAY FOUNDATION, BAD WATER AND THE DECLINE OF BLUE CRABS IN THE CHESAPEAKE BAY, (Dec. 2008), https://www.cbf.org/document-library/cbf-reports/CBF_BadWatersReport6d49.pdf (describing the causes of the “near record low[.]” level of the blue crab population).
8 Lowell Melser, *Maryland Seafood Industry Affected by Coronavirus Outbreak*, WBAL-TV11 (Mar. 24, 2020), <https://www.wbal.com/article/maryland-seafood-industry-affected-coronavirus-outbreak/31902136#>.
9 See Scott Dance, *supra* note 6 (noting that without H-2B workers, crab processing companies are forced to sell their crabs whole, rather than selling the picked meat, which is much less expensive and results in less profits for the companies).
10 CENTRO DE LOS DERS. DEL MIGRANTE & U. OF PENN. L. SCH. TRANSNATIONAL L. CLINIC, *ENGENDERING EXPLOITATION: GENDER INEQUALITY IN U.S. LABOR MIGRATION PROGRAMS* (2018), <https://cdmigrante.org/wp-content/uploads/2018/01/Engendered-Exploitation.pdf> [hereinafter *Engendering Exploitation*].
11 Id. at 4.
12 See Thurka Sangaramoorthy, *Liminal Living: Everyday Injury, Disability, and Instability Among Migrant Mexican Women in Maryland’s Seafood Industry*, 33 MED. ANTHROPOLOGY Q. 557, 558 (2019) (“Using temporary guest worker programs, industries such as commercial crab processing have recruited foreign workers to perform difficult and dangerous jobs since the 1980s. Such labor policies...have expanded global labor networks and the economic mobility of foreign workers, especially women. Concomitantly, these processes have also deepened existing gendered, racial, and ableist dynamics of labor segmentation....”).
13 American University approved research study IRB-2020-101. The certificate of approval is on file with the authors.
14 *Picked Apart*, *supra* note 1, at 42-43.

this choice as an effort to anonymize the responses of the research subjects as completely as possible and in order to protect them from potential retaliation for their participation in the research.

First, the authors devised a bilingual consent form that is consistent with protocols for human subject research and that guaranteed workers’ anonymity.¹⁵ The consent form also explained the purpose of the interviews and any risks of participation. The authors also employed a secondary form that workers could sign to consent to use any photos, reveal identifying information, give direct quotes, or provide a profile of their experiences in the report. The workers signed Spanish-language versions of the consent forms prior to participating in formal interviews.

Second, through direct interviews with migrant worker women, the authors recorded first-hand information regarding the H-2B workers’ employment and living conditions. The interviews – all conducted in Spanish – covered workplace safety and health, transportation, housing, wages, pregnancy, and family separation. Workers provided information on the topics they felt comfortable discussing.

The authors also developed follow-up questions for workers to answer during the off-season while they were in their home communities in Mexico. CDM’s outreach team conducted short-form follow-up interviews in order to confirm or elaborate on responses the workers provided during the primary interviews on the Eastern Shore. The authors were aware that some workers were not fully comfortable participating in the interviews during their work season and while living in employer-provided housing. The follow-up questions provided a second opportunity for workers to share additional details about their experience.

Finally, the authors supplemented worker interviews with research from secondary sources.

CHANGES WITHIN THE H-2B PROGRAM SINCE *PICKED APART*

The publication of *Picked Apart* in 2010 drew strong responses from the public, lawmakers, and the seafood processing industry alike, generating both important changes and sparking policy battles. Newspapers like the Washington Post covered the report and the working conditions for migrant worker women in Maryland’s seafood processing industry.¹⁶ In the decade since the publication of the report, H-2B employers and H-2B migrant workers have exerted substantial pressure on lawmakers and government agencies with authority over the program.

The group Migration that Works – co-founded by CDM in 2011 – was created with the vision of reforming U.S. guestworker programs. It is now a functioning coalition of labor unions, academics and non-profit organizations. Since its formation, Migration that Works and its members have worked towards addressing the systemic flaws of the problematic guestworker programs in the United States. Over the years, the industries and employers that rely on the H-2B program have used their money and lobby power to sway lawmakers or block attempts to strengthen protections of workers in the program. One such ally for the seafood processing industry was Maryland’s U.S. Senator Barbara Mikulski, who served on the powerful Senate Appropriations Committee from 1987 to 2017 and was the first woman to serve as its chair.¹⁷ During her time in the U.S. Senate, Mikulski was a champion for the seafood processing industry who took great strides in expanding the H-2B visa program. One of her many contributions to the seafood processing industry was the “returning worker” exemption. This exemption allowed H-2B employers to hire additional guestworkers that would not count towards the H-2B visa program’s annual cap.¹⁸ In 2015, Senator Mikulski was also a lead co-sponsor on a bill in the Senate which proposed significant changes to the H-2B temporary work visa program.¹⁹ Dubbed the Save our Small and Seasonal Businesses Act, the bill aimed to:

Expand the size of the H-2B program while reducing oversight; [r]educe wages and hours for H-2B workers... [r]educe requirements for recruitment of U.S. workers... [e]liminate transparency in international labor recruitment...[i]ncrease upfront costs borne by workers, resulting in their prolonged indebtedness on the job; and [r]emove protections for workers who seek to access legal support.²⁰

Mikulski also used the legislative strategy of attaching riders to appropriations bills to make substantial changes to the H-2B program. One such effort was in 2015, when Mikulski was Vice Chair of the Senate Appropriations Committee. In 2015, the Senate included language in the FY2016 Labor, Health and Human Services, Education, and Related Agencies Appropriations Bill that rolled back many basic protections for workers contained in the H-2B 2015 Interim Final Rule.²¹ In 2016, the same rider popped up again attached to the appropriations bill.²² H-2B industry champions in Congress continue to employ riders to expand the number of H-2B visas and make changes to the program.²³

Since the publication of *Picked Apart*, migrant worker advocates have developed policy and legal strategies that target many different spheres of influence. At the federal level, CDM – in coordination with Migration that Works – was successful in including pro-migrant-worker provisions in an immigration reform bill in 2013.²⁴ When it passed in the Senate, the bill required foreign labor contractors to register with the U.S. Department of Labor (DOL); mandated that employers notify the DOL when using a foreign labor contractor; prohibited recruitment fees; and required contractors

to pay a bond to cover legal claims.²⁵ Unfortunately, the bill failed in the House.²⁶

At the state level in Maryland, the publication of *Picked Apart* offered advocates and lawmakers the opportunity to highlight migrant worker women’s issues. Prior to its publication, the Maryland General Assembly had created a commission to study immigrant workers in Maryland.²⁷ By 2012, the Commission published its report and cited expert testimony from American University Washington College of Law faculty member Jayesh Rathod on the poor working conditions of migrant worker women in Maryland’s Eastern Shore.²⁸ The commission also cited *Picked Apart* and its findings.²⁹

Since then, CDM, in conjunction with allied organizations, continues to work with state lawmakers on legislation to address the lack of transparency in guestworker programs in Maryland. Most recently, during the 2020 Maryland General Assembly session, CDM pushed for the introduction of the Fair Recruitment and Transparency Act (SB 742). If enacted, the bill would establish a database of registered, licensed recruiters; strengthen anti-discrimination provisions to ensure that recruiters and employers operating in these programs follow state laws; and require H-2B employers and recruiters to provide temporary workers with job contracts specifying the terms and conditions of employment.³⁰

Advocates have also fought for stronger worker protections through strategic litigation. Following a series of federal lawsuits that challenged deficient oversight and lack of protection for H-2B workers, in 2012, the DOL issued new H-2B program regulations

15 45 C.F.R. § 46.116 (describing the requirements for informed consent for human research subjects, which include disclosure of the purpose of the research, risks in participating, how confidentiality measures are maintained, and researcher and independent oversight contact information and a statement that participation is voluntary); *see also* INSTI. REV. BODY, AM. U., INFORMED CONSENT CHECKLIST, <https://www.american.edu/irb/upload/irb-ic-checklist.pdf> (last visited June 9, 2020) (outlining the requirements at American University).

16 *See supra* notes 3-4.

17 Rachel Weiner, *Barbara Mikulski, First Female Chair of Senate Appropriations, Returns to Minority*, WASH. POST (Nov. 16, 2014), https://www.washingtonpost.com/local/md-politics/barbara-mikulski-first-female-chair-of-senate-appropriations-returns-to-minority/2014/11/16/94d07c34-6c15-11e4-b053-65cea7903f2e_story.html; *See also* Barbara Mikulski: A Featured Biography, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Mikulski.htm (last visited June 9, 2020) (noting her retirement from the Senate in 2017).

18 The exemption applied to returning H-2B workers who had been counted against the cap in any one of the three prior fiscal years. Consolidated Appropriations Act 2016, Pub. L. No. 114-113, § 565, 129 Stat. 2259 (2015) (amending § 214(g)(9)(A) of the Immigration and Nationality Act) (expired 2017). Senator Mikulski first advocated for a temporary exemption for returning H-2B workers in 2005; John Fritze, *Maryland Crab Processors Battle Federal Wage Rule*, BALT. SUN (Sept. 15, 2011, 9:47 PM), <https://www.baltimoresun.com/maryland/bs-md-crabs-labor-rule-20110914-story.html>. She introduced the appropriations rider with the exemption again in 2015; Jed Lipinski, *Foreign Guest Workers to Triple Under New Federal Budget Bill*, WASH. POST (Dec. 22, 2015, 3:00 AM), https://www.nola.com/news/politics/article_bb137e39-5ce6-5364-88ac-29177c585772.html.

19 Save Our Small and Seasonal Businesses Act of 2015, S. 2225, 114th Cong. (2015).

20 *Oppose the Save Our Small and Seasonal Businesses Act of 2015 (S. 2225)*, INT’L. LABOR RECRUITMENT WORKING GRP., <https://fairlaborrecruitment.files.wordpress.com/2015/11/s-2225-ilrwg-advocacy-paper.pdf> (last visited June 9, 2020).

21 *See* Rachel Luban, *Proposed House and Senate Bills Would Roll Back New Worker Protections in Guestworker Program*, IN THESE TIMES (Dec. 10, 2015, 4:27 PM), <https://inthesetimes.com/working/entry/18670/guestworker-protections-h2b-visa> (explaining that the proposed language included restrictions the U.S. DOL’s oversight of the program and cuts to protections including minimum wage standards and the right of workers to receive three-fourths of the payment promised in their contract, among others).

22 Seung M. Kim, *New Immigration Fight Looms in Congress*, POLITICO (May 30, 2016, 9:02 PM), <https://www.politico.com/story/2016/05/h2b-riders-222737>.

23 *See* CONG. RESEARCH SERV., R44849, H-2A and H-2B Temporary Worker Visas: Policy and Related Issues 18 (June 9, 2020) (“H-2B cap relief has taken two different forms in recent years. For FY2016, Congress enacted an H-2B returning worker exemption that provided that a returning H-2B worker who had been counted against the 66,000 cap in FY2013, FY2014, or FY2015 would not be counted again in FY2016. For FY2017, FY2018, FY2019, and FY2020, Congress enacted a different type of H-2B cap-related provision. These provisions authorized DHS, after consultation with DOL, to make additional H-2B visas (beyond the 66,000 cap) available in a fiscal year, subject to certain constraints, upon a determination that the needs of American businesses could not be satisfied with available U.S. workers. DHS rules implementing these provisions made 15,000 additional H-2B visas available annually for FY2017 and FY2018, and 30,000 additional H-2B visas available for FY2019.86 For FY2020, DHS had planned to issue a rule making 35,000 additional H-2B visas available, but announced on April 2, 2020, that it was putting that rule on hold.”).

24 Border Security, Economic Opportunity, and Immigration Modernization Act S. 744, 113th Cong. § 3601 (2013) (granting additional protections to curb trafficking and labor abuses during the recruitment of foreign works for U.S. visa programs, including: disclosure requirements, antidiscrimination provisions, an explicit prohibition of recruitment fees, employer registration requirements, and enforcement provisions, among others).

25 Int’l Labor Recruitment Grp., *Senate Passes Critical Protections to Prevent Recruitment Abuse* (June 28, 2013), <https://fairlaborrecruitment.files.wordpress.com/2013/06/ilrwg-statement-6-28-13.pdf>.

26 *Id.*

27 The Maryland General Assembly passed HB 1602 in June 2008 authorizing the Commission to Study the Impact of Immigrants in Maryland. Ch. 553, Acts 2008.

28 COMM. TO STUDY THE IMPACT OF IMMIGRANTS IN MD., THE IMPACT OF IMMIGRANTS IN MARYLAND FINAL REPORT (Feb. 8, 2012), http://www.inforum.umd.edu/mdimmigration/content/md_immigration_commission_finalreport.pdf

29 COMM. TO STUDY THE IMPACT OF IMMIGRANTS IN MD., STATUS REPORT (Jan. 21, 2011), http://www.inforum.umd.edu/mdimmigration/content/immigration_commission_status_report_v.pdf.

30 S.B. 742, 2008 Leg., 425th Sess. (Md. 2008). A related version of this legislation was introduced in 2017 and 2018. S.B. 1016, 2017 Leg., 437th Sess. (Md. 2017); S.B. 526, 2018 Leg., 438th Sess. (Md. 2018).

that would have provided enhanced worker protections, including requiring employers to provide workers with job contracts in the workers’ primary language; protecting workers from retaliation for filing complaints; and requiring that H-2B employers pay workers at least three-quarters of the hours promised in the work contract in a specified time period.³¹ Had they been fully implemented, the 2012 H-2B regulations would have prohibited employers from burdening H-2B workers with pre-employment costs such as recruitment fees and visa and travel expenses that often cause workers to assume considerable debt.³² However, in 2014, a district court in the Northern District of Florida vacated and enjoined the 2012 H-2B regulations nationwide based on the DOL’s purported inability to promulgate such rules.³³ Known as the *Bayou* litigation, this lawsuit was led by a landscaping company and the U.S. Chamber of Commerce, who argued that the 2012 H-2B regulations imposed significant added costs and burden on small H-2B employers.³⁴

Despite this setback, 2015 turned out to be a crucial year for advancing protections for migrant workers in the H-2B program. That year, the U.S. Government Accountability Office (GAO) issued a report – *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*. The report listed several findings: (1) the charging of prohibited fees during recruitment may increase the likelihood of workers tolerating abuse during employment; (2) some workers experience abuse; and, (3) workers may fear coming forward with complaints because they fear retaliation. The report called for more protections for H-2B workers and recommended that the DOL increase its enforcement efforts.³⁵

Advocates continued to push forward³⁶ and finally, on April 29, 2015, the DOL and the U.S. Department of Homeland Security (DHS) announced the 2015 H-2B Interim Final Rule.³⁷ The 2015 H-2B regulations included many worker protections: they required employers to provide, without charge or deposit, all tools,

supplies, and equipment needed to perform the job;³⁸ mandated that employers keep accurate pay and hours records and supply workers with earnings statements;³⁹ and established the three-fourths guarantee.⁴⁰ The three-fourths guarantee was a significant provision that addressed “benching,” a reoccurring problem for H-2B workers employed in seasonal industries like seafood processing. For decades, H-2B workers like the Maryland crab pickers interviewed for *Picked Apart* have reported that their employers recruited them to the United States only to “bench” them – leaving them without work or pay – for days, weeks, or even months. The new three-fourths guarantee would require employers to compensate migrant workers in the H-2B program at least three-fourths of the compensation promised in their job contracts.

Unwilling to concede even limited contractual guarantees, H-2B employers and industry lobbyists once again mobilized their power and resources to expand the program and to hollow workers’ rights within it. In 2016, industry representatives in Congress succeeded in passing the Consolidated Appropriations Act (P.L. 114-113), which included several riders on the H-2B program. One such item was the returning worker provision, which allowed the agency to issue more than 66,000 H-2B visas that year.⁴¹ The Act also included a staggered entry provision, which allowed seafood industry employers to bring in workers after the approved start date.⁴² Finally, the Act prohibited the use of funds for certain DOL enforcement provisions in the 2015 H-2B Interim Final Rule, including the three-fourths guarantee.⁴³ With this appalling maneuver, the H-2B industry and their congressional allies succeeded in preventing the DOL from holding employers accountable for their contractual promises to workers – a fundamental right for which workers and advocates had strenuously fought. Ultimately, workers and advocates succeeded in forcing the government to enact a comprehensive H-2B regulation with robust protections, but the industry undermined those efforts

by pressuring lawmakers to strip the agency of the ability to enforce those protections.

The Maryland seafood processing industry deeply values the H-2B program. In 2020, the industry continues to pressure policymakers to expand the number of visas available to the H-2B program.⁴⁴ In March of 2020, the Trump Administration ordered an additional 35,000 visas to be added to the annual cap of 66,000 allotted to the H-2B program.⁴⁵ Ultimately, the order was withdrawn in light of rising unemployment due to the impact of the COVID-19 pandemic.⁴⁶ In a further nod to the industries that use the H-2B program, the Administration exempted the nonimmigrant visa programs from the Immigration Executive Order of April 22, 2020, which otherwise halted all immigration into the U.S.⁴⁷ Initially, the Order contemplated a complete prohibition, but ultimately the Administration changed its position and the exception for non-immigrant visa programs was added.⁴⁸ At the time of this writing, the House Appropriations Subcommittee has voted favorably on an amendment to the fiscal bill mandating the Department of Homeland Security to grant additional H-2B visas as needed in fiscal year 2021. The fiscal bill has yet to be taken up for a vote in the House.⁴⁹

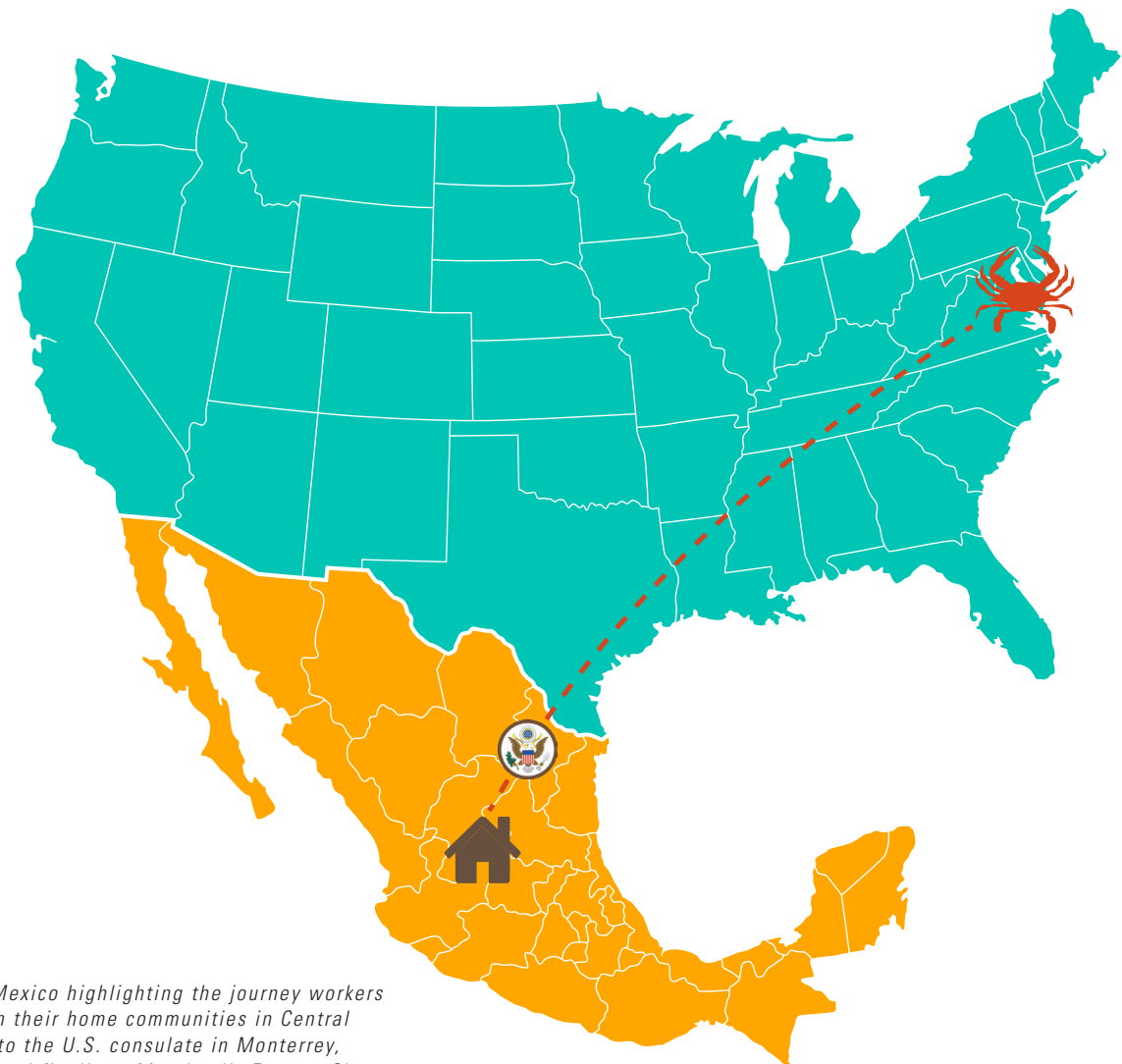
While the H-2B program presents important opportunities for employers and migrant worker women alike, industry lobbyists and their champions in Congress continue to privilege industry profits over meaningful worker protections. Employers’ efforts to expand the program are at times at odds with workers’ basic rights, including protections such as contract guarantees for workers. Although workers and advocacy groups have made important gains for H-2B workers’ rights in Maryland and nationwide, workers’ voices must continue to take center stage in policy debates, in courts, and in the media.

ABOUT THE WORKERS

Even though Mexico has the 11th largest economy in the world, as of 2018, 48.8% of its population was living in poverty.⁵⁰ Only four out of ten women are employed outside of the home.⁵¹ Young women between 15 and 29 are four times more likely than their male counterparts to be unemployed and this problem is particularly exacerbated in rural communities.⁵² The lack of opportunity leads many rural Mexican women to seek employment opportunities outside of their communities and outside Mexico. Pressing financial need to provide for their families and pay for their children’s school fees has pushed women into the H-2B temporary visa program to work in the United States. Of the hundreds of Mexican women recruited for employment to work in seafood processing companies on Maryland’s Eastern Shore, many have been migrating for decades.

The majority of women hired to work in Maryland’s blue crab industry hail from rural communities in Central Mexico. The majority of workers interviewed for this report reside in states that have high rates of poverty and limited opportunities for economic advancement.⁵³ Remittances from family members abroad are one of the key ways that households from these states sustain themselves. Recent data shows that remittances from workers abroad are currently the top source of foreign income for Mexico – greater even than oil exports.⁵⁴ Indeed, most of the women interviewed for this report indicated supporting their families in Mexico to be their primary reason for migrating to the United States.

31 Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,061 (Feb. 21, 2012).
32 Temporary Non-Agricultural Employment of H-2B Aliens in the U.S., 77 Fed. Reg. 10,061, 10,076 (Feb. 21, 2012); *see also Picked Apart*, *supra* note 1, at 14.
33 Bayou Lawn & Landscape Services v. Solis, 3:12-cv-00183-MCR-CJK (N.D. Fla. Dec. 18, 2014).
34 *Id.*
35 U.S. Gov’t Accountability Off., REPORT TO CONGRESSIONAL COMMITTEES, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS (Mar. 2015), <https://www.gao.gov/assets/690/684985.pdf>.
36 Letter from Rachel Micah-Jones, Chair/Convener, Int’l Lab. Recruitment Working Grp., to Thomas Perez, Sec’y, U.S. Dep’t of Lab. and Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Security (Mar. 11, 2015), https://www.uscis.gov/sites/default/files/files/nativedocuments/H-2B_-_2008_H-2B_rule.pdf.
37 Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 24,042 (April 19, 2015) (to be codified at 29 C.F.R. pt. 503).
38 29 C.F.R. 503.16(k) (2020).
39 29 C.F.R. 503.16(i) (2020).
40 29 C.F.R. 503.16(f) (2020).
41 Pub. L. No. 114-113, § 565, 129 Stat. 2599 (2015) (amending §214(g)(9)(A) of the Immigration and Nationality Act) (expired 2017).
42 *Id.*
43 *Id.*
44 Jeremy Cox, *H2B Visa Shortage Threatens Chesapeake Bay Crab Industry*, DELMARVA NOW (Mar. 5, 2020), <https://www.delmarvanow.com/story/news/local/maryland/2020/03/05/chesapeake-bay-crab-industry-appeals-more-h-2-b-visas/4939751002/> (Maryland’s Governor Larry Hogan sent a letter this year to federal agencies seeking “immediate action to increase the number of H-2B” visas); Letter from Larry Hogan, Governor, Md., to Chad Wolf, Sec’y, Dep’t of Homeland Security (Jan. 21, 2020), <https://governor.maryland.gov/wp-content/uploads/2020/01/PDF-Letter-to-Wolf-and-Scalia-re-H2B.pdf>.
45 DHS to Improve Integrity of Visa Program for Foreign Workers, DEP’T. OF HOMELAND SECURITY (Mar. 5, 2020), <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.
46 DHS Puts Supplemental Visas on Hold, NAT. L. REV. (Apr. 6, 2020), <https://www.natlawreview.com/article/dhs-puts-supplemental-h-2b-visas-hold>
47 Proclamation No. 10014, 85 Fed. Reg. 23,411 (Apr. 27, 2020).
48 Brett Samuels, et al. *Trump’s vow to suspend immigration leaves key questions unanswered*. THE HILL (April 21, 2020), <https://thehill.com/homenews/administration/493939-trump-vow-suspend-immigration-leaves-key-questions-unanswered>.
49 Press Release, House Committee on Appropriations, Appropriations Committee Approves Fiscal Year 2021 Homeland Security Funding Bill (July 15, 2020), available at: <https://appropriations.house.gov/news/press-releases/appropriations-committee-approves-fiscal-year-2021-homeland-security-funding> (“Rep. Pingree, cosponsored by Reps. Harris and Cuellar – The amendment directs the Secretary of Homeland Security to make available additional H-2B visas. The amendment was adopted by voice vote.”).
50 *See Mexico Overview*, WORLD BANK GRP. (Oct. 10, 2019), <https://www.worldbank.org/en/country/mexico/overview>.
51 Jude Webber, *Career Prospects for Mexican Women Still Stuck in the Slow Lane*, FIN. TIMES (Jan. 24, 2019), <https://www.ft.com/content/9292240a-1d68-11e9-b2f7-97e4dbd3580d>.
52 *See* Claudia Altamirano, *En El Campo, Las Mujeres Jóvenes Se Quedan Sin Oportunidades Por Cuidar A Otros*, ANIMAL POLITICO (Mar. 8, 2018), <https://www.animalpolitico.com/2018/03/campo-las-mujeres-jovenes-se-quedan-sin-oportunidades-cuidar-otros/>.
53 *See* Juan José Li Ng & Carlos Serrano, *Income in Mexico and Evolution of Poverty: Notes on the New ENIGH 2016*, BBVA RES. (Sep. 6, 2017), https://www.bbvaresearch.com/wp-content/uploads/2017/09/170906_ENIGH_2016.pdf.
54 *See* Patrick Gillespie, *Mexicans in U.S. Send Cash Home in Record Numbers*, CNN (Jan. 3, 2019), <https://money.cnn.com/2018/01/02/news/economy/mexico-remittances/index.html>.



Map of Mexico highlighting the journey workers take from their home communities in Central Mexico; to the U.S. consulate in Monterrey, Mexico, and finally to Maryland's Eastern Shore.

RECRUITMENT – FROM MEXICO TO MARYLAND

RECRUITMENT - TEN YEARS AGO

Ten years ago, *Picked Apart* surveyed women to understand the circumstances leading to their journeys to the United States. Ninety-nine percent of the women surveyed stated that their migration started with a recruiter, who connected them with an opportunity to work in the Maryland seafood processing industry.⁵⁵ Although at that time, both U.S. and Mexican laws prohibited recruiters and employers from charging fees to workers, all of the women surveyed reported that they had paid fees directly to the recruiters for their job opportunity. These recruitment fees were in addition

to the costs of the visa paperwork and all other travel expenses. In total, workers at that time reported having paid their recruiters up to 10,000 pesos (more than \$750). The report discussed how the failure of U.S. and Mexican officials to adequately enforce laws governing recruitment allowed recruiters to leverage these costs against the workers.

CONTEXT

The federal regulations and enforcement mechanisms have evolved over the last ten years to provide better, but still not adequate, protections against recruitment costs. These changes stem in part from organizing efforts following *Picked Apart*, as discussed in the section above.

THE EXPERIENCES OF H-2B WORKERS TODAY

The prohibition on recruitment fees was a huge win for migrant workers in the H-2B program. After paying hefty recruitment fees for many years, migrant workers saw a change in the program as a result of this reform. In the United States, H-2B program regulations increasingly strengthened their prohibition of recruitment fees. The H-2B Interim Final Rule issued by the DOL and DHS in 2015 further curtailed illegal recruitment fees that evaded enforcement under earlier regulations.⁵⁶ Current H-2B regulations both prohibit recruitment fees and mandate that employers of H-2B temporary visa workers contractually prohibit recruiters from charging workers directly or indirectly for their services.⁵⁷ These services could be any of the following: recruitment, job placement, processing, maintenance, attorneys’ fees, agent fees, application fees, and/or petition fees.⁵⁸ The regulations additionally require employers to collect and share recruitment contracts for oversight with the Office of Foreign Labor Certification (OFLC).⁵⁹ The OFLC publishes the data collected on recruiters through the quarterly Foreign Labor Recruitment List.⁶⁰ Comparing the recruiters on the List for 2019 with the 2019 public disclosures of H-2B applications, however, shows that there were no registered recruiters tied to the OFLC case numbers of Maryland seafood processing employers.⁶¹ Federal regulations also prohibit employees and agents of the sponsoring company from charging workers for any costs that benefit the employer, further limiting recruiters’ ability to demand fees if the recruiters work directly for the company.⁶²

While officials in the Mexican labor department have expressed their intentions to reform the federal regulation of employment agencies to address a number of widespread recruitment abuses, meaningful reforms have yet to materialize. Recruitment agencies in Mexico must now register with the Mexican Secretary of Labor and Social Welfare when they recruit Mexican nationals to work abroad.⁶³ The Mexican Federal Labor

Inspectorate monitors these recruiters, but there is little enforcement.⁶⁴ Mexico also reformed its Federal Labor Law in 2019, focusing on collective bargaining and discrimination protections.⁶⁵ These improvements did not address foreign labor recruitment practices and did not increase enforcement of recruitment laws.⁶⁶ At the time of this writing, only nine foreign recruitment agencies were registered in Mexico.⁶⁷ Many recruitment agencies are actively recruiting workers yet they are not registered.

TODAY

None of the women surveyed for this report stated that they had paid recruitment fees. This is in stark contrast to the first report, where all the women reported paying recruitment fees. With regulatory changes and increased public scrutiny of H-2B employers and labor recruiters, the challenges that migrant workers face during labor recruitment have evolved. Some women surveyed reported that recruiters expect that job seekers will purchase goods that the recruiters sell. For example, “Andrea” felt pressure to buy expensive lotions from a recruiter to stay in the recruiter’s good graces. These goods are sometimes more expensive than the fees their recruiter would have charged in previous years. One woman stated that, while she used to pay a \$45 recruitment fee, she and her co-workers are now expected to buy around \$150 dollars’ worth of products from the local recruiter’s family business. Such purchases serve to guarantee workers’ employment for the next work season amidst increasing demand for H-2B jobs. These reports reveal how a lack of oversight allows some recruiters to sidestep legal prohibitions on recruitment fees and continue to leverage power over jobseekers for the recruiters’ own enrichment.

55 See *Picked Apart*, *supra* note 1 at 14-15.

56 See Pub. L. No. 114-113, § 565, 129 Stat. 2599 (2015) (amending §214(g)(9)(A) of the Immigration and Nationality Act) (expired 2017).
57 See 29 C.F.R. § 503.16(p) (2015).
58 *Id.*
59 See 29 C.F.R. § 503.16(aa) (2015).
60 *Foreign Labor Recruiter List*, Dep’t of Labor, https://www.foreignlaborcert.doleta.gov/Foreign_Labor_Recruiter_List.cfm (last visited May. 7, 2020).
61 See *id.*; Off. of Foreign Lab. Certification, ANNUAL REPORT, U.S. Dep’t. of Lab. 47 (2016), https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf.
62 See 29 C.F.R. § 503.16(o) (2015).
63 Ley Federal del Trabajo [LFT] Artículo 28, Diario Oficial de la Federación [DOF] 1-4-1970, últimas reformas DOF 2-7-2019 (Mex.).
64 *Id.*
65 Oscar de la Vega & Martínez Rojas, *Mexico - An Overview of the Recent Labor Law Reform in Mexico*, ABA (May 6, 2019), https://www.americanbar.org/groups/labor_law/publications/ilelc_newsletters/issue-may-2019/an-overview-of-the-recent-labor-law-reform-in-mexico/.
66 *Id.*
67 UNIDAD DE SERVICIO NACIONAL DE EMPLEO, SECRETARÍA DE TRABAJO Y PREVISIÓN SOCIAL, REGISTRO CENTRAL DE AGENCIAS DE COLOCACIÓN DE TRABAJADORES CON Y SIN FINES DE LUCRO (March 2020), https://www.gob.mx/cms/uploads/attachment/file/544352/REGISTRO_CENTRAL_AGENCIAS_COLOCACI_N_MAR_2020.pdf.



Ejido Palomas, a small town where some crab pickers begin their journey
Photo Credit: CDM

TRANSPORTATION TO THE UNITED STATES

TEN YEARS AGO

In addition to recruitment costs, workers often have to incur additional expenses and debt along their journey to the United States. Migrant worker women interviewed for *Picked Apart* reported having to pay for their food and lodging as they traveled to Maryland.⁶⁸ This trip consisted of two parts. During the first leg of the trip, women left their home community and traveled to Monterrey, Mexico for visa processing at the U.S. Consulate. The women then spent approximately three days in Monterrey to undergo biometric processing and consular interviews. Once they had received their visas, the women would then take a bus from Monterrey to Maryland – a trip that could take an additional three days. For these six days, women were responsible for their own food. One woman reported that she did not know that the employer would not provide food on the

trip and thus had to rely on the kindness of others for food until she reached Maryland.

CONTEXT

There are federal regulations that cover inbound and outbound transportation expenses for the H-2B program. These regulations require employers to provide or reimburse H-2B workers for the transportation and subsistence costs of traveling to the United States. The the DOL reiterated this requirement in a March 2019 Notice in the Federal Register.⁶⁹ While employers may choose to either advance these costs or reimburse workers afterwards, regulations require that they cover all “reasonable costs” that workers incur.⁷⁰ These “reasonable costs” must cover food and lodging for the journey.⁷¹ Employers who do not pay these costs in advance must reimburse workers within the first week of work.⁷² The employer must also keep records of the amount reimbursed.⁷³

TODAY

Women coming to work in Maryland still undergo the same journey from their home communities to Monterrey, Mexico, and then to Maryland’s Eastern Shore. Employers reimburse workers for their travel and subsistence expenses once they arrive in Maryland, but the reimbursements rarely cover all expenses. Many women shared that they try to minimize out-of-pocket expenses and thus pack as much food as they can for these six days of travel to Maryland knowing that their employers will not fully reimburse them for these expenses.

Although federal regulations state that employers must reimburse workers on arrival at their job location, many of the women surveyed stated that it can take up to a month to receive these payments. Many of the employers’ reimbursements do not fully cover the expenses workers incurred during their travel to Maryland. Employers often pay a flat fee despite the fact that workers travel from many different parts of Mexico and incur varying costs along the way. These costs include the varying price of travel to Monterrey, Mexico from different hometowns as well as the cost of food for the different journey lengths. On average, workers reported that employers reimbursed approximately \$450 dollars, which workers stated only covered

about seventy-five percent of their travel costs. While returning workers may have money saved from the previous year of seasonal work to front the costs for the journey, first-time workers still report having to take out loans – sometimes from informal lenders charging rates as high as 15% - to afford the outbound journeys. For the return trip home, workers reported that their employers gave them a one-time payment of \$280 dollars, regardless of their actual travel costs. Flat-rate travel reimbursements mean that many H-2B workers lose money on both inbound and outbound travel - and that they routinely start the job in debt.

TRANSPORTATION DURING COVID-19

COVID-19 is a serious and ongoing concern for global health and safety. During a typical work season, women depart Mexico for the United States by the end of March in time for the crab-picking season to begin on April 1, but the pandemic altered the journey this year. During March and April 2020, U.S. government agencies issued statements that caused confusion and generated concern from workers, advocates, and H-2B employers alike. First, on March 16, 2020, the DHS issued an order stating it would not process new visas for entry into the country but exempted the H-2B program from this visa ban.⁷⁴ At the same time, the DHS rescinded its order of an additional 35,000 H-2B visas for 2020.⁷⁵ Without this increase in visas, there were at most 33,000 visas offered to H-2B workers in the first half of 2020.⁷⁶ Throughout this period, the government modified the H-2B approval process to allow U.S. consulates to continue processing H-2B workers’ visas. These modifications included waiving the interview requirement for all H-2B applicants, including first-time applicants, to limit in-person interviews at the consulate.⁷⁷ Unfortunately, these changes also generated additional logistical challenges for some workers, who reported having to make more than one trip to the consulate for visa issuance, resulting in extended travel, greater costs incurred, and heightened risk of exposure to COVID-19.

Even before arriving in the United States, H-2B workers often face a precarious situation in Monterrey due to

pandemic-related changes. CDM has responded to calls from desperate workers who spent nearly two weeks in Monterrey at their own expense awaiting visa adjudication amidst processing delays and uncertainty surrounding travel reimbursements. In March 2020, the staff of a hotel in Monterrey evicted H-2 guests into the streets due to overcrowding.⁷⁸ The hotel did not reimburse the evicted guests, and H-2 workers took on the additional time and expense to find a new place to stay.⁷⁹ These examples demonstrate how the U.S.-government’s chaotic response to the COVID-19 crisis has generated additional obstacles for migrant workers, who may now endure longer stays, incur higher costs, face greater exposure risks, and gamble their futures on a great deal of uncertainty.

The crab worker women who complete their visa processing in Monterrey will face additional challenges traveling to the Eastern Shore. Women risk contracting COVID-19 on the bus during their three-day journey. While some bus companies put health measures in place, the impact of the long bus journey puts workers at risk.⁸⁰ Precautions may limit the risk of infection, but given the highly contagious nature of COVID-19, the risk of falling ill during this journey to Maryland remains a serious concern.

RECRUITMENT & TRANSPORTATION CONCLUSION

Despite important steps forward in reducing recruitment and travel expenses, coercive pressure from recruiters and out-of-pocket travel costs mean that migrant worker women continue to arrive in Maryland indebted. While the United States has tightened federal regulations to limit recruitment fees, workers report that recruiters and employers still do not fully comply with the letter of the law. Migrant worker women are also limited in their ability to seek redress for these practices. Because their recruiters and employers continue to wield absolute power over their employment opportunities, women often have little option but to keep quiet about coerced payments and unreimbursed expenses. Speaking out exposes them to the risk of being blacklisted indefinitely from future H-2B employment.

68 See *Picked Apart*, *supra* note 1, at 16.

69 Labor Certification Process for the Temporary Employment of H-2A and H-2B Foreign Workers in the United States, 85 Fed. Reg. 16,133, 16,134 (Mar. 20, 2020) (to be codified at 29 C.F.R. pt. 503).

70 *Id.*

71 29 C.F.R. § 503.16(j) (2015) (“The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer”).

72 See 29 C.F.R. § 503.16(j)(1)(iv)(2) (2015).

73 See 29 C.F.R. § 503.16(j)(1)(i) (2015).

74 U.S. Mission to Mexico, *Status of U.S. Consular Operations in Mexico in Light of COVID-19*, U.S. EMB. & CONSULATES IN MEXICO (Apr. 13, 2020), <https://mx.usembassy.gov/status-of-u-s-consular-operations-in-mexico-in-light-of-covid-19/>.

75 Genevieve Douglas, *Extra Seasonal Guestworker Visas on Hold Due to Pandemic*, BLOOMBERG L. (Apr. 2, 2020), <https://news.bloomberglaw.com/daily-labor-report/extra-seasonal-guestworker-visas-on-hold-due-to-pandemic>.

76 *Count Cap on H-2B Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants> (last visited Apr. 17, 2020).

77 *Important Announcement on H2 Visas*, U.S. DEP’T. OF STATE – BUREAU OF CONSULAR AFFS. (Mar. 26, 2020), <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html>.

78 Uriel Vélez, *Desalojan a Huéspedes de Hotel por Hacinamiento*, ABCNOTICIAS.MX (Mar. 24, 2020, 9:19PM), <https://abcnoticias.mx/desalojan-huespedes-de-hotel-por-hacinamiento/162020>.

79 *Id.*

80 See e.g. *Travel with Ease: Out Commitment to Safety*, GREYHOUND, <https://www.greyhound.com/en/help-and-info/travel-info/peace-of-mind> (last visited May 7, 2020) (discussing health measures implemented, including no direct contact for tickets, suggested seat separation, and more frequent sanitations).

This year more than ever, migrant women are risking their health and possibly incurring additional expenses due to the COVID-19 pandemic. To build a better system for these workers, government officials must enforce the law and hold employers liable for both direct and indirectly-solicited recruitment costs, all reasonable travel expenses (including additional lodging fees due to bureaucratic delays), and costs for workers’ personal protective equipment on the journey. Employers have an increased duty in this time of crisis to provide prompt and full reimbursement and protection to the migrant worker women arriving to work in Maryland’s Eastern Shore.

HOUSING CONDITIONS IN MARYLAND



The Bridge to the isolated Hoopers Island, where many crab pickers live and work. - Photo Credit: Wikicommons.

TEN YEARS AGO

Picked Apart exposed the living conditions of H-2B migrant worker women in Maryland’s Eastern Shore. On top of charging weekly rent, employers packed workers into small houses or apartments. Employer-provided housing lodged more workers than could be reasonably accommodated. Dozens of women shared a single bathroom and stove in houses that did not meet Dorchester County, Maryland’s minimum habitability code. During visits to the Eastern Shore, the authors of this report found that some H-2B worker housing was easily identifiable as compared to other dwellings due to its poor upkeep, dilapidated exteriors, rotten wooden siding in need of paint, and roofs that were not up to housing code standards. Though housing conditions and experiences varied by employer, across the board, employers owned and managed housing that was often substandard and charged H-2B employees rent to live there.

TODAY

While the H-2A visa program mandates that employers provide housing at no cost to the worker, the H-2B visa program does not. In fact, U.S. federal law does not address housing for H-2B workers at all. Ten years after *Picked Apart*, women who have been coming to work in Maryland for over a decade reported some favorable changes to the housing. For example, they reported that employers had conducted renovations and had installed air conditioning in some units. Nevertheless, many of the housing complaints reported ten years ago persist today, including a lack of privacy, crowding, and poor habitability.

Seafood processing employers in Maryland continue to operate as landlords for H-2B workers. Employers present their workers with contracts at the start of the work season that state that employer-provided housing will be made available at a price. Yet, these contracts make no mention of housing conditions or necessary appliances such as washers and dryers.

Women surveyed for this report described uncomfortable living conditions, such as crowded housing, pests, allergy-inducing mold, and no heating systems. The women from one house reported a bedbug infestation. They also revealed that during the hot and humid summer months, flies would swarm their houses. It is also not unusual for mice to be found in some housing. Overcrowding is also concerning. During the interviews, the authors spoke with a group of twenty-one women sharing a three-bedroom, two-bathroom house.

Other women shared concerns about safety. Some reported that the main doors to their group houses were often left open, and that some did not have locks. Several mentioned that employers and employers’ agents have open access to the houses and can enter without notice.

Despite these issues, each woman interviewed for the report made weekly payments to her employer ranging between \$40-\$45 to cover rent costs, transportation, and even internet fees. The women described the internet connection as unreliable, despite it being their only way of staying in touch with their families in Mexico. Women reported that housing is still segregated by gender for the most part. The transportation to the worksite depends on where the women live. Women working for one company reported that their employer provides transportation to the worksite in the morning but that in the afternoon they walk home.

All of the workers surveyed for *Picked Apart* and this report reside in Dorchester County, Maryland. Dorchester County’s minimum livability code requires houses to be maintained in good repair and free of insects and rodents.⁸¹ While the code does not address occupancy limits for homes, overcrowding figured as just one of several persistent housing problems the authors identified. Many of these problems have continued since *Picked Apart*, despite being addressed in the County’s housing code. For example, the authors’ observations confirmed that many houses still lack heat and are in need of exterior and interior upgrades. Although most of the women interviewed did not report issues with pests, authors observed cans of roach and ant spray in various homes.

Although the local housing code requires residential structures to have heating equipment, women reported living in housing with no heat, sometimes to the detriment of their health. Women from one house shared that a foul smell had persisted in the house for several work seasons. At one point, the women had to use medical inhalers. The women believed their respiratory ailments were caused by the foul smell. Because employers own and manage the properties where most women live, workers typically must inform their employer or supervisor when a housing issue arises. However, employers did not always respond to serious housing complaints. For example, several workers shared that they reported cold air seeping in through holes in the walls of a structure in which they were housed. Unfortunately, the employer failed to make any repairs to address the problem.

Authors’ observations confirmed that many houses still lack heat and are in need of exterior and interior upgrades. Regardless of the number of workers living in each home, whether it was nine women or twenty-one, almost all homes have only one bathroom.

“**Eight persons share one bathroom. We have to make a line in the morning. Twelve people share one kitchen-- it’s hard.**”

–“Liliana”

81 DORCHESTER COUNTY CODE, § 110-17(A-F) (2019), <https://ecode360.com/10454397>.

HOUSING CONCLUSIONS

A decade after *Picked Apart*, housing conditions for migrant worker women on the Eastern Shore have improved but there is still room for improvement. While employers are not required to provide housing to H-2B workers, the housing they rent to workers is often overcrowded and in poor condition. Although some employers have made minor repairs and upgrades to workers’ accommodations, workers continue to cite overcrowding and lack of privacy as overwhelming concerns. In interviews, some women felt that employers appear to maintain worker housing just shy of bare-minimum housing code standards.

Now, more than ever, overcrowding poses a serious risk of COVID-19 contagion. Housing is an important determinant of health, and substandard housing contributes to an increase in chronic illnesses and transmission of infectious diseases.⁸² With so many migrant workers sharing very limited spaces, it is impossible to maintain social distance and limit viral spread should a resident become ill. Even following social distancing guidelines from the Centers for Disease Control (CDC) poses a challenge for migrant workers. The CDC recommend that individuals living in close quarters avoid riding in cars with members of different households, avoid sharing food or drinks, and that they separate household members who are sick from other occupants by providing a separate bedroom and bathroom for the ill.⁸³ In Interim Guidance regarding the protection of seafood workers from COVID-19, the CDC and OSHA recognize that “if workers dwell in employer-provided housing or shared living quarters, it may not be possible to safely send them home to isolate and recuperate.”⁸⁴ The guidance encourages employers to develop isolation plans such as private sleeping spaces, but only for workers who are suspected of having COVID-19. Unfortunately, there has been no enforcement of these guidelines. Without proper guidelines from state and local officials supported by reasonable enforcement on permissible occupancy of employer-provided housing, housing practices will remain unchanged and will continue to expose women to unsanitary conditions.

WORKPLACE HEALTH AND SAFETY



Crab picker’s hands bear the brunt of workplace hazards, facing frequent exposure to injury and allergic reactions. - Photo Credit: CDM.

71% of workers said they suffer or have suffered from work-related injuries.

100% said they paid for their own access to health care.

SAFETY- TEN YEARS AGO

Crab-picking is skilled work. Workers have to use sharp knives to pry open jagged crab shells and extract the crabmeat at breakneck speed. In 2010, *Picked Apart* revealed how employer requirements that workers pick as much as twenty pounds of crab per day created a hurried and hazardous work environment.⁸⁵ Crab pickers suffered cuts, scrapes and rashes so frequently that most did not consider them injuries. In order to keep up with the pace of the work, women often did not treat their wounds, risking harmful – and even deadly – infection from bacteria. Employer-imposed rules against bandages meant women turned to home remedies to treat their wounds, such as dipping them in bleach. Despite these dangers, employers took few efforts to mitigate risks. The few employers who did provide protective gloves used ones of poor quality that slowed workers down or caused rashes. Without protective gear, women reported other common maladies ranging from chemical burns to asthma and allergic reactions.

CONTEXT

Maryland Occupational Safety and Health (MOSH) governs workplace health and safety matters in the state and sets the standards that employers must follow.⁸⁶ To avoid applying dual standards to employers, Maryland has adopted the federal Occupational Safety and Health Act (OSH Act).⁸⁷ With regard to hand protection, employers must “select and require employees to use appropriate hand protection when employees’ hands are exposed to hazards such as . . . severe cuts or lacerations . . . [or] punctures [and] chemical burns.”⁸⁸ OSHA employs a General Duty Clause that employers provide a safe workplace and uses a reasonableness standard to

More than one-third of women interviewed mentioned that they had developed allergies or asthma after exposure to water or vapor from the cooking process...

82 See generally James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUBLIC HEALTH 758 (May 2012).
83 *Households Living in Close Quarters: How to Protect Those that are Most Vulnerable*, CTNS. FOR DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/living-in-close-quarters.html> (last visited May 6, 2020).
84 See *infra* note 107.

85 See *Picked Apart*, *supra* note 1, at 27-29.
86 See *Maryland Occupational Safety and Health (MOSH) – Division of Labor*, MD. DEP’T. OF LABOR, <https://www.dllr.state.md.us/labor/mosh/> (last visited June 18, 2020).
87 See *Frequently Asked Questions - MOSH*, MD. DEP’T OF LAB. <https://www.dllr.state.md.us/labor/mosh/moshfaqs.shtml> (last visited Mar. 1, 2020); see also 29 C.F.R. § 1910.
88 29 C.F.R. § 1910.138(a) (2020).

determine whether employers have complied, including in the provision of appropriate safety gear. Factors in the standard include the existence of past injuries, employee input, and the presence of other protections against harm, such as training and safety procedures.⁸⁹

Small employers have a responsibility under the American with Disabilities Act to provide reasonable accommodations to workers with food allergies.⁹⁰ Reasonable accommodations include (1) changes to a job application process; (2) changes to the work environment, or to the way a job is usually done; and, (3) changes that enable an employee with a disability to enjoy equal benefits and privileges of employment.⁹¹

TODAY

Crab pickers interviewed in 2019 described work environments with increased production standards that put women’s health and safety at significant risk. Women reported that the crabs they were harvesting were much smaller than in prior years, likely as a result of climate change and the degradation of the Chesapeake Bay.⁹² Although some women reported that their employers had abandoned the quota system, other women reported that their employers maintained quotas that required them to pick between 18-24 pounds of crab meat per day. These quotas are just as high, if not higher, than picking quotas ten years ago. In order to earn a sufficient wage and meet employer quotas, women described having to work faster when cutting open and picking through smaller crabs with less meat. The crab meat is harvested with sharp knives, and the crab shells themselves have many sharp edges.⁹³ In this fast-paced and high-pressure environment, most of the women interviewed reported that cuts on their hands were common. Women reported their employers leaving crab pickers to their own means to treat these injuries, just as they did ten years ago. At least one worker was hospitalized after suffering an infection from repeated untreated hand wounds.

Asthma and allergies were the most pervasive and severe occupational hazards identified among the women interviewed for this report. A 2018 study in the

American Anthropologist found that Maryland crab pickers regularly sought medical treatment for ailments such as skin rashes, fungal infections and respiratory diseases like asthma.⁹⁴ Recent occupational health and safety research confirms that certain seafood-borne bioaerosols contribute to allergies, chronic and acute respiratory conditions, and other ailments that commonly afflict seafood workers.⁹⁵ Indeed, workers in Maryland often complain of occupational asthma, or “crab asthma,” which can develop over time in workers exposed to processes such as “cooking, steaming, washing, sawing, scrubbing or scraping crab,” all of which release proteins into the air.⁹⁶ Extended exposure to these proteins can lead to the long-term development of asthma, which can impede workers’ ability to process crab without provoking an allergic reaction. More than one-third of the women interviewed mentioned that they had developed allergies or asthma after exposure to water or vapor from the cooking process. Multiple women reported hospitalizations as a result of these allergies. Others expressed their fears that harmful byproducts from the worksite had contaminated their housing. These concerns about respiratory ailments are heightened by the severe symptoms of COVID-19 and the complications the virus can cause to the respiratory system. This concern is more than hypothetical. CDM has learned of multiple women in the Maryland crab industry exhibiting COVID-like symptoms.

In the face of these workplace hazards, some employers have taken steps to make their workplace safer and to respond to injuries, while others have resisted. At least one woman reported that her employer had devised a system to keep the vapor from the crab cooking process out of the room where the crab pickers worked. Multiple women said that their employers now provide free gloves and masks in the workplace to combat the frequency of allergic reactions. However, one employer still requires workers to pay approximately eight dollars every two weeks for their own gloves. Production standards also promote a relentless work pace that discourages the use of gloves. Women stated that the poor quality of the gloves their employers provide make it difficult

for them to work with precision while picking the crab meat, slowing them down and impacting their earnings. Several women who had paid their employer for gloves stated that they were not worth the price.

ACCESS TO HEALTH CARE

TEN YEARS AGO⁹⁷

Interviews with crab pickers ten years ago highlighted how reliance on employers for access to health care services created a significant power imbalance between the women and their employers. For workers in remote locations like Hoopers Island, making the long journey to visit a doctor or filing a workers’ compensation claim was virtually impossible without employer cooperation. An injured worker’s ability to continue to pursue a workers’ compensation claim was also extremely uncertain once the women returned to Mexico, leaving the uninsured workers saddled with healthcare costs.

CONTEXT

Although Maryland is home to several leading healthcare institutions such as Johns Hopkins, Walter Reed National Military Medical Center, Howard Hughes Medical Institute, and others, access to health care on Maryland’s Eastern Shore is inconsistent and precarious. With only two federally qualified health centers serving its nine counties, much of Maryland’s Eastern Shore is in a federally designated health professional shortage area.⁹⁸ In her study of the region’s healthcare systems, University of Maryland’s Dr. Thurka Sangaramoorthy revealed how the Eastern Shore is a perfect storm of impoverished, uninsured, and chronically ill patients, who rely on overworked, underfunded healthcare providers trying to fill service gaps with “band-aid” care.⁹⁹

H-2B visa holders qualify to purchase Affordable Care Act (ACA)-compliant health insurance within sixty days of their arrival to the United States.¹⁰⁰ Under the ACA, employers with fifty full-time employees or more qualify as an “Applicable Large Employer” and are required to offer health insurance coverage.¹⁰¹ However, because the crab processing industry is seasonal, most employers are not required to provide health insurance. For example, an employer who has ten full-time, year-

round employees and fifty seasonal crab workers would not be an Applicable Large Employer because the average of the combined months (typically May to November) is less than fifty individuals.¹⁰² As a result, the majority of the employers on the Eastern Shore are not required to extend minimum coverage to their full-time H-2B workers, leaving these migrant workers uninsured.

TODAY

Consistent health care remains out of reach for most migrant worker women. Crab pickers in Cambridge and in remote places like Hoopers Island overwhelmingly reported that they relied on services from Choptank Community Health’s Migrant Program (Migrant Program), which provides access to medical services for \$15 dollars a season. The Migrant Program also sponsors a makeshift mobile clinic, a van outfitted with limited medical equipment, that provides medical services to migrant workers at their worksites, their homes, or, if necessary, out of a tent.¹⁰³ A Choptank Community Health staff member confirmed with the authors that employers coordinate with the program on worker enrollment and scheduling. Women reported that the mobile clinic visited their places of employment on Hoopers Island once per week, and staff at Choptank Community Health noted that the clinic also delivers medications every Friday. Choptank Community Health’s Cambridge clinic also operates evening hours to accommodate workers’ schedules and holds educational events to address other major health issues amongst the workers, such as hypertension and diabetes.

“Rapid immigration to such areas already struggling with poverty, weak public infrastructures, and high concentrations of uninsured residents has given way to an increasingly precarious landscape of care.”
-Dr. Thurka Sangaramoorthy, taken from “Putting Band-Aids on Things That Need Stitches”: Immigration and the Landscape of Care in Rural America¹⁰⁴

89 See OCCUPATIONAL HEALTH & SAFETY ORG., INTERPRETATION OF THE PERSONAL PROTECTIVE EQUIPMENT STANDARD, U.S. DEP’T OF LAB. (Jul. 3, 1995), <https://www.osha.gov/laws-regs/standardinterpretations/1995-07-03>; see also Eric Conn, *Cut Resistant Gloves in Restaurants, Delis and Grocery Stores - Not a Clear Cut Requirement*, EPSTEIN, BECKER & GREEN, P.C.: WORKFORCE BULLETIN (Mar. 18, 2013), <https://www.oshalawupdate.com/tag/1910-138/>; see also 29 U.S.C. 654 §5(a)(1) (“General Duty Clause”).
90 See generally C.R. Div., SETTLEMENT AGREEMENT BETWEEN THE U.S. OF AM. AND OC KIDS INFANT AND PRESCHOOL UNDER THE AM. WITH DISABILITIES ACT, U.S. DEP’T. OF JUSTICE (Sep. 21, 2017), https://www.ada.gov/oc_kids_sa.html.
91 29 C.F.R. § 1630.2(o)(1)(i-iii) (1997); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-1999-1, SMALL EMPLOYERS AND REASONABLE ACCOMMODATION (1999).
92 Timothy Wheeler, *Poor Crab Harvest in Upper Bay, Low Salinity To Blame*, CHESAPEAKE BAY MAG. (Aug. 20, 2019), <https://chesapeakebaymagazine.com/poor-crab-harvest-in-upper-bay-low-salinity-to-blame/>.
93 See *Picked Apart* supra note 1, at 27.
94 See Thurka Sangaramoorthy, *Putting Band-Aids on Things That Need Stitches: Immigration and the Landscape of Care in Rural America. Supplementary Material*, 120 AM. ANTHROPOLOGIST 487, 492 (2018).
95 See generally Jakob Bonlokke, et. al., *Exposures and Health Effects of Bioaerosols in Seafood Processing Workers - a Position Statement*, J. AGROMEDICINE 441 (2019).
96 See *A Second Wind - Questions and Answers*, MEMORIAL UNIVERSITY, <https://www.mun.ca/secondwind/QandA/#q1> (last visited Mar. 1, 2020).

97 *Picked Apart*, supra note 1, at 28-29.
98 Sangaramoorthy, supra note 98, at 495.
99 *Id.*
100 Enrollment in the Affordable Care Act occurs during the open enrollment period or special enrollment period. The latter being triggered by a “qualifying life event.” Moving from a foreign country is a “qualifying life event.” <https://www.healthcare.gov/coverage-outside-open-enrollment/special-enrollment-period/>.
101 Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8,543, 8,544 (Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 1, 54, 301).
102 *Id.*
103 A staff member at Choptank Community Health confirmed that this fee is increasing to \$20 for the 2020 season. Interview on file with the author.
104 Sangaramoorthy, supra note 98, at 488.

“
[seafood] processing
stations and other
areas in busy factories
where [workers]
have close contact
with coworkers and
supervisors – may
increase their risk of
getting infected with
the virus.”

According to CDC
and OSHA Interim
Guidance on COVID-19
in the seafood
processing industry,

Despite the benefits these crucial services provide, major healthcare gaps still remain. The mobile clinic only provides services April through August. This leaves many workers who remain in the area through late November dependent on their employer to take them to Cambridge for medical care. The drive to Cambridge is roughly 26 miles one way, which can take up to 45 minutes to reach. One worker identified an incident in which a former employer refused to take her to town to receive medical treatment for an illness, so she opted to wait to return to Mexico to seek medical care. When more serious medical complications arise, this patchwork of care is inadequate for protecting the health of many workers. Women who were hospitalized or required surgery reported having to rely on their hospital’s medical aid program, on the Choptank Community Health’s Migrant Program, or on their employer’s insurance. At least one woman reported using the Migrant Program to help pay for a work-injury related surgery while still having to pay out-of-pocket for half of her medical costs.

Although research into the short and long-term effects of COVID-19 remains preliminary, there is reason to believe that the working conditions in Maryland’s crab houses render crab pickers particularly vulnerable to COVID-19 exposure and severe disease. Social distancing is currently impossible for crab pickers, who work shoulder to shoulder during the day and return home to crowded living conditions at night. In addition, the Centers for Disease Control (CDC) has warned that people of all ages with underlying medical conditions, including chronic lung disease and asthma, may be at higher risk for severe illness from COVID-19.¹⁰⁵ The respiratory problems that regularly plague women in this industry suggest that they are at heightened risk for contracting the illness, leading to serious health consequences. According to the CDC, “people with asthma may be at higher risk of getting very sick from COVID-19. COVID-19 can affect [the] respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease.”¹⁰⁶ These two factors, in combination with irregular access to healthcare, merit concern regarding a COVID-19 outbreak in Maryland’s crab-picking community.

HEALTH AND SAFETY CONCLUSIONS

On June 24, 2020, the CDC and OSHA issued guidelines to protect workers in the seafood processing industry.¹⁰⁷ The recommendations are favorable to workers and recognize the potentially increased risk for infection caused by the crowded housing and work environments in the industry. But, there is still no enforcement from OSHA to truly ensure that workers are safe at their worksites. Ten years since *Picked Apart*, crab-picking remains a fast-paced, physically arduous job with many occupational health and safety hazards. Despite the availability of proven ways¹⁰⁸ to prevent injuries and mitigate harm to workers’ health, such as abandoning quota systems, providing protective gear, and venting crab vapors away from workers, some employers lag behind in implementing these solutions. Although increased government funding for migrant health service programs has helped to improve worker health outcomes, major service gaps remain. The isolated crab pickers on Hoopers Island remain largely dependent upon their employers for access

105 *People who are at Higher Risk for Severe Illness*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited May 19, 2020).
106 *People with Moderate to Severe Asthma*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/asthma.html> (last visited Apr. 20, 2020).
107 *Protecting Seafood Processing Workers from COVID-19: Interim Guidance from CDC and the Occupational Safety and Occupational Safety and Health Administration (OSHA)*. Developed in consultation with the Food and Drug Administration (FDA), CDC, (June 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-seafood-processing.html>.
108 *Picked Apart*, *supra* note 1.

WORKER PROFILE:
“Andrea”

There are few employment opportunities in my community in Mexico. That’s why I had to go to the U.S. to do crabpicking work under the illusion that I would make much more.

I don’t have to pay a recruitment fee, but the recruiter now sells some expensive face and body lotions that I feel obliged to pay for in order to secure a job. I have to pay for my transportation, meals, and lodging from the time I leave my home until I arrived in Maryland. Although I incur all these expenses, my employer only gives me a partial refund. It does not cover the full costs of transportation and hotel and meal expenses while I wait for our visas in Monterrey for at least 3 days.

The first time I went to Maryland, I cut myself quite a lot. My hands became inflamed with sores and I developed blisters on my skin. Many of my coworkers also suffer from allergies from crab harvesting. But we work through our hand ailments and allergies knowing that our communities of origin lack employment opportunities; we have no choice but to continue working thinking that we have a family in Mexico that we have to support.

We buy gloves and tape to protect our hands, which is necessary for our job. To deal with the allergies, we often take our own medicine from Mexico. I usually spend 1000 Mexican pesos [approximately \$40 USD] out of my own pocket to pay for these items. Due to the English language barriers, we don’t know what medicine to take or ointment to use in our hands when we become sick because of the crab. Our employer permits us to go to medical appointments at the local clinic for illnesses and sometimes will even take us. However, I do wish our employers provided us with medicine at no cost.

While we do get paid more in the United States than in Mexico, we don’t always get the number of hours promised-- if we got the number of hours stated in the contract, we would do much better.

I have gone to work in the U.S. while being pregnant. I informed my employer from the moment I arrived at the island and had my baby mid-season. I was told to have my baby, take the baby to Mexico, and then return to work. While my employer did allow me

to take the time to go to my medical appointments, there is no childcare on Hoopers Island and our housing doesn’t accommodate a baby since there is a certain amount of women assigned to each house provided by the employer

After I had given birth and before I left for Mexico, my employer told me ‘no more babies,’ essentially telling me I could not go while being pregnant again. However, I have seen other women that have had babies be hired back by the same employer.

Right now I don’t have anyone to take care of my children on Hoopers Island. I worry I may not be able to go next work season if I can’t find anyone for childcare while I’m away. I worry I won’t be able to help support my family.”

“Andrea”, Maryland H-2B crab picker from San Luis Potosi, Mexico,

*Name changed out of fear of retaliation

to healthcare resources, including transportation into town for treatment. Without consistent access to affordable, on-site services, crab pickers cannot proactively care for their own health, and problems ranging from infected cuts, to hypertension, and now to COVID-19 are more likely to go untreated.

FAMILY AND PREGNANCY

FAMILY SEPARATION
CONTEXT

While Maryland’s seafood processing industry employs workers in a variety of roles, crab-picking is primarily done by women. This is in part because U.S. employers often exclude women from other employment opportunities, leaving the H-2B program one of the only options available to them.¹⁰⁹ The H-2B visa commonly employs workers in food processing industries like seafood and crab-picking.¹¹⁰ Unsurprisingly, a significant number of crab pickers are, or may someday become, mothers. Regarding the topic of parenthood, 88% of the women reported currently having children. This means that for at least half the year, many crab pickers are apart from their children.

109 *Id.*
110 *See* OFF. OF FOREIGN LAB. CERTIFICATION, ANNUAL REPORT, U.S. DEP’T OF LAB. 47 (2016), https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf.



A child from a worker community in Mexico - Photo Credit: CDM

TODAY

Family separation is an inevitable consequence of the structure of the H-2B visa program. Even though spouses and unmarried children of H-2B visa holders can apply for H-4 visas, obtaining these visas is extremely difficult. First, the application and information to apply for an H-4 visa is not readily available online.¹¹¹ To qualify, an applicant for an H-4 visa must meet a number of criteria, including demonstrating the validity of their marriage to the H-2B spouse, and the H-2B spouse's underlying visa eligibility.¹¹² Obtaining H-4 visas can also create a financial hardship for workers because family members are not automatically eligible for employment while in H-4 status,¹¹³ which can result in a family relying on a single income from crab-picking wages. Further, housing restrictions and the lack of information readily available may deter H-2B migrant workers from even thinking they have an option in bringing their family with them to the United States. Many women shared that their employers do not permit children or non-crab pickers to live in the employer-provided housing, creating an additional challenge for women who wish to live with their families during their work season. The only employer that currently permits co-ed housing to accommodate family members requires that they all be H-2B workers. In sum, crab pickers and their families have very limited options to live together whether in independent or employer-provided housing.

Of the women surveyed who are currently married, the majority reported that their spouse remained in Mexico while they worked in Maryland. Currently, although crab pickers pay rent to their employers, employers generally do not permit workers' children or spouses to live in the employer-provided housing. Of all the women surveyed, only one said that her employer allows married couples to share a bedroom. Other respondents stated that employer-provided housing is neither co-ed nor family-friendly. This limitation means that most women must make the difficult decision to leave their children in Mexico in order to have a job. Most of the women reported that they leave their children in the care of their spouses and family members. However, in families where both parents are H-2B workers in Maryland, children in Mexico may spend half the year or more without either parent, living instead with relatives or family friends. In addition to school fees and living expenses, some women reported that they pay additional childcare fees. Some women reported that while being separated has affected their parent-child relationships and their emotional health, the need to pay for their children's school fees and provide support for their families compels them to continue working seasonally in Maryland as a crab picker.

The few migrant women who are accompanied by children in Maryland face unique challenges in balancing work and childcare. For the women who

work and live on Hoopers Island, for example, finding alternative housing for themselves and their children would require living in Cambridge with their children and navigating long, costly commutes to work. Given these limitations, 77% of the workers surveyed on this topic reported their children remain in Mexico while they work in Maryland.

PREGNANCY AS A CRAB PICKER CONTEXT

Pregnant migrant worker women are vulnerable to discrimination and face challenges throughout the H-2B process. Typically, a woman has to go through a recruiter and pass an interview to get an H-2B job. Due to the fear of retaliation or visa denial, women do not feel that they can speak freely about being pregnant. Women worry that their work history or qualifications will be overlooked if they are pregnant and that they will not be granted a work visa. This issue is prevalent among the crab picker women in Maryland's seafood processing industry. In the surveys, 38% of the women reported having been pregnant at some point while they worked as a crab picker. However, 77% of the women reported having met at least one pregnant coworker in past seasons. The majority of the women surveyed who had been pregnant did not feel like they could share their status until after arriving in Maryland and telling their employer directly. One woman related the story of a former coworker who was pregnant at the time of her consular interview and was ultimately denied a visa after she had told her recruiter that she was pregnant. While the authors could not verify these events, stories like this demonstrate the perception among workers in the industry that pregnancy is unwelcome, or even illegal, under the H-2B program. Even though DOL states that all workers in the H-2B program are entitled to be free from discrimination or discharge for exercising their rights in any way, this does not assuage the women's concerns and fears of retaliation.¹¹⁴

38% of the women reported having been pregnant at some point while they worked as a crab picker.

However, 77% of the women reported having met at least one pregnant coworker in past seasons."

TODAY

Pregnant workers not only face fears of discrimination in the recruitment and hiring process, they also face safety and health concerns while they are in Maryland. None of the women in this survey reported receiving pregnancy-specific safety training or warnings, nor did workers receive information on the risk that crab-borne bacteria could pose to their pregnancies. Some women did share, however, that their employer encouraged pregnant workers to wear non-slip shoes to prevent slipping on wet floors. While one in three women reported concerns about developing a type of allergy or asthma from crab exposure, none reported receiving information on how this could affect their pregnancies.

Lack of access to sufficient health care is another challenge for pregnant workers. As detailed above, women working as crab pickers have limited healthcare options. These options include the Choptank Community Health's Migrant Program's permanent and mobile clinic as well as the local hospital in Cambridge. Several of the women reported not knowing the mobile clinic's business hours or if it provided any specific services for pregnant workers, such as prenatal care. After reviewing the services provided by the mobile clinic and migrant health center, it is clear that the clinics do not provide any prenatal care - only gynecological and health check-ups.¹¹⁵ The mobile clinic is run by its corresponding Migrant Health Center but funded by the Bureau of Primary Health Care (BPHC), a federal program within the Health Resources and Services Administration (HRSA).¹¹⁶ The funding from HRSA does not prohibit Migrant Health Centers from providing prenatal services, suggesting that this migrant clinic has either not recognized prenatal care as a necessary service in this community or may not have the resources to provide it.¹¹⁷

111 *Employment Authorization for Certain H-4 Dependent Spouses*. The USCIS webpage has information on the H-4 visa for H-1B workers. There is no mention of the availability of this visa to H-2B workers. Accessed at: <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses> (last visited Aug. 31, 2020).

112 9 U.S. DEP'T OF STATE FOREIGN AFF. MANUAL 402.10-14.

113 *Id.*

114 *See Employee Rights Under the H-2B Program*, DEP'T OF LABOR WAGE AND HOUR DIV., <https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/H2B-eng.pdf> (last visited Mar 1, 2020); <https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/pregnancy-discrimination#1>.

115 A staff member of the Choptank Community Health Migrant Program confirmed which services they provided in 2019 and continue to provide in 2020. Interview on file with the authors.

116 *See Health Resources & Services Administration*, BUREAU OF PRIMARY HEALTH CARE, <https://bphc.hrsa.gov> (last visited Mar. 1, 2020).

117 *See Health Center Program Requirements*, HEALTH RES. & SERVICES ADMINISTRATION, <https://bphc.hrsa.gov/programrequirements> (last visited Mar. 1, 2020).

FAMILY AND PREGNANCY CONCLUSIONS

For H-2B migrant worker women on Maryland’s Eastern Shore, family separation has become a practical condition of employment. Those who seek to live in housing other than that provided by the employer have to navigate the limited rental market in another language, coordinate their own transportation to the United States and to their worksites, and pay higher rental costs for short-term leasing. Crab pickers are often left with no option but to accept that providing for their children or families comes at the cost of being apart from them. The work culture around the H-2B visa program does not support pregnant women, as illustrated by the fact that pregnancy-specific healthcare is not provided, and pregnancy can place women at a disadvantage for recruitment. The authors found that while pregnancy is commonplace, women feel compelled to hide their pregnancy from recruiters due to fear of discrimination and retaliation. A lack of available prenatal healthcare due to scarce medical resources also makes women feel like they must ignore the reality of their health needs. Currently, women reported that it is a common practice for pregnant workers to leave their jobs as crab pickers once they reach the end of their pregnancy terms and return to Mexico to take care of their babies. Additionally, the majority of pregnant workers are also required to move out of employer-provided housing close to the end of their pregnancies. A couple of women did report that one employer has provided a form of maternity leave in the past; however, this appears to be the exception.

WAGES & DISCRIMINATION

CRAB-PICKING WAGES

TEN YEARS AGO¹¹⁸

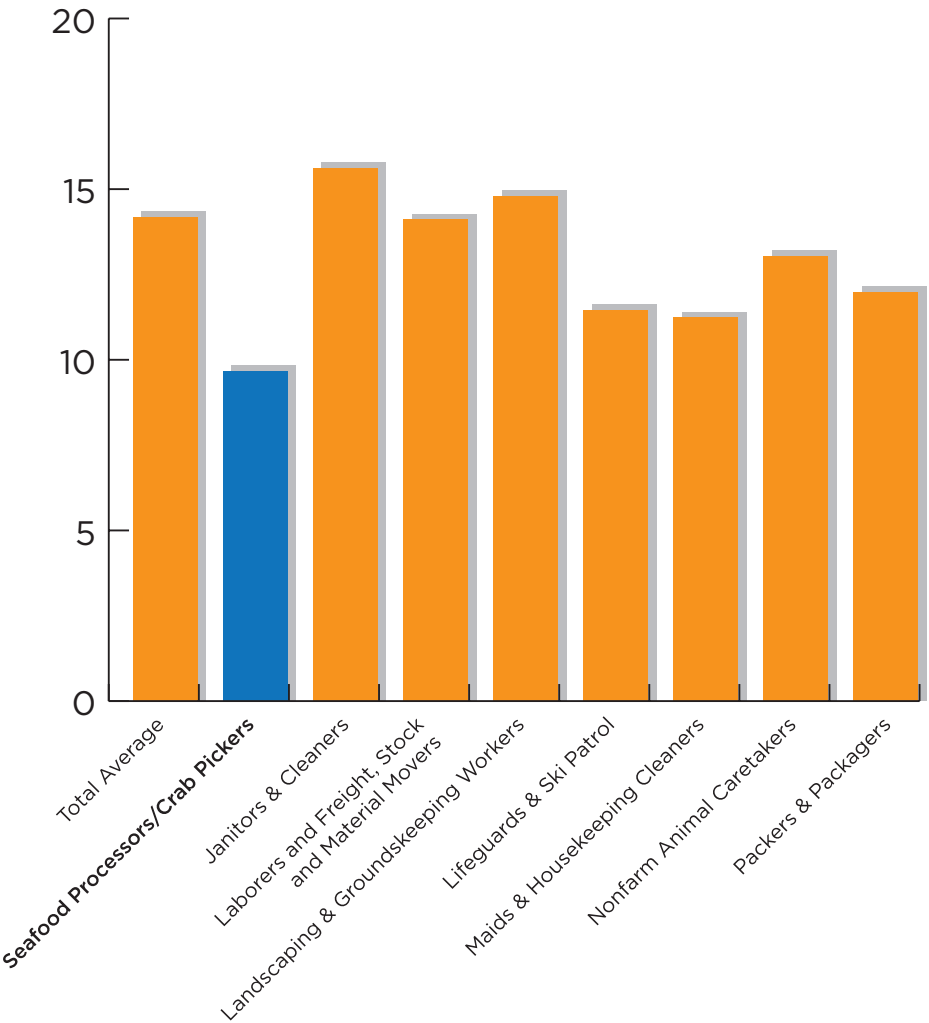
Picked Apart revealed that employers denied migrant women fair and legally required wages for their work in the crab industry. The low wages were the result of highly fluctuating work hours, a piece rate wage system, inconsistent crab availability, and a low pay rate.

Many of the women surveyed at that time reported that both recruiters and their employment contracts guaranteed a forty-hour workweek. Despite these promises, workers’ actual weekly hours varied greatly because crab fishing yields dictated the amount of work available. When the crabs were plentiful, the women could work for up to seventy-two hours in a week, but crab pickers who worked more than forty hours per week were often not paid overtime wages as required. When fewer crabs were available, women sometimes worked only ten hours in a week. These unpredictable hours made it difficult for workers to save money or pay off debts incurred in traveling to the Eastern Shore. Although the women were relying on the promises of recruiters and their contracts, there were no regulatory protections for the discrepancies between these promises and the reality of the work. At the time *Picked Apart* was published, DOL took the position that H-2B contracts explaining “full-time” employment “should not be construed as an actual obligation of the number of hours that must be guaranteed each week.”¹¹⁹ This standard differed from the H-2A regulations for agricultural workers that required payment for at least three-quarters of the hours promised in the contract.¹²⁰

In addition to experiencing wildly varying schedules, the women interviewed in the original report faced volatility in their wages because they were paid by a piece rate wage

118 *Picked Apart*, *supra* note 1, at 23-26.
119 *Id.* (quoting H-2B Final Rules and Regulations, 73 Fed. Reg. 78,024 (Dec. 19, 2008)).
120 20 C.F.R. 655.122 (2020).

Averages for Basic Rate of Pay for Maryland H-2B Workers 2019



system. Employers paid workers per pound of crab picked, which increased pressure to perform and discouraged breaks. Depending on the season, women reported earning between \$1.00-\$2.50 per pound of crab picked. If they did not pick the required poundage, their employer either switched them to an hourly wage rate of \$7.25 or sent them back to Mexico. The variations in crab size and availability greatly affected workers’ total earnings. In the slower parts of the season, when there were fewer crabs to pick, workers earned far less money.

In addition, employers paid the crab-picking women at the lowest required rate, and sometimes below that. Regulations required that employers pay the prevailing wage, meaning the average wage for that occupation within the same geographic area. All workers must earn this wage regardless of whether they worked at a piece rate or at an hourly rate. However, DOL took the

position that they did not have the authority to enforce this prevailing wage regulation.¹²¹ Because of this loophole, some Eastern Shore employers did not pay their workers the prevailing wage as required. Crab pickers also stated that the deductions their employers took out of their paychecks for tools reduced their effective wages below even the low rates promised.

CONTEXT

After the release of *Picked Apart*, the 2015 DHS and DOL regulations established greater wage and hour protections for H-2B workers. Unfortunately, those greater protections exist largely on paper and are very difficult to enforce, allowing employers to circumvent their purpose to pay workers less than the prevailing wage rate.

121 See, e.g., SOUTHERN POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 9-11, 32-33 (2007), http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf

“
There’s been fewer hours of work lately. Also, lately, the crab meat hasn’t been good--barely any. Weeks without work as we begin the season. We arrive in March and leave in May.”
- “Liliana”

70% of workers responded saying they suffer when they are not given the hours promised during the crab-picking season.

The 2015 regulations provided the same three-fourths guarantee for work hours as promised to H-2A workers.¹²² In theory, this rule would force employers to provide an average of at least thirty hours per week for the entirety of the workers’ time in Maryland if they were working a full-time position.¹²³ However, because of the implementation issues explained earlier in this report for the enforcement of this guarantee, DOL cannot force employers to comply with this regulation.¹²⁴ Instead, the rule can only be enforced through litigation, something that is incredibly difficult for workers to do.¹²⁵

The 2015 regulation also established an enforceable prevailing wage rule for H-2B workers. As discussed above, this rule stated that employers must pay H-2B workers at or above the average rate paid to any worker in their area doing the same type of work.¹²⁶ However, H-2B employers blocked the effects of this rule by pushing Congress to enact a provision to allow for private wage surveys to be used as the basis for setting wage rates in the H-2B program.¹²⁷ This provision, which has been attached in the congressional appropriations bill every year since the 2015 regulation was enacted,¹²⁸ allows states to determine the average wage based on private surveys instead of public data.¹²⁹ Because these private wage surveys are conducted by employers who have a powerful incentive to establish wage rates that are as low as possible, wage rates for employees are likely to remain below the prevailing wage in the industry.

TODAY

With weak or unenforceable protections, crab pickers’ wages are far less than they should be to comply with statutory protections. As they did ten years ago, the women continue to suffer from unpredictable hours throughout the season. Some women can only afford to work during the most plentiful months of crab season. Climate change and overfishing have also produced fewer, and generally smaller, crabs than there were ten years ago.¹³⁰ One crab picker reported, “There’s been fewer hours of work lately. Also, lately, the crab meat hasn’t been good--barely any. Weeks without work as we begin the season. We arrive in March and leave in May.” Workers also lose money during the busiest times of the season, as some crab pickers who worked more than forty hours per week still were not receiving the overtime premium required by law.

The smaller size and number of crabs directly affect the workers’ wages. While the per pound rate has increased in the past ten years to between \$2.50 and \$4.00, workers have not seen a dramatic increase in their wages. In fact, their take home pay has not increased because the decreasing size of the crabs they process means the workers produce less crabmeat. In addition, as mentioned above, employers are relying on the use of private wage surveys to effectively pay less than the prevailing wage rate. The DOL’s Foreign Labor Certification Data Center reports that the average wage for meat, poultry and fish cutters and trimmers on the Eastern Shore is \$13.59 per hour.¹³¹ The H-2B crab pickers are routinely making far less per hour

122 29 C.F.R. 503.16(f) (2020).
123 *Id.*
124 Daniel Costa, *H-2B Crabpickers Are So Important To The Maryland Seafood Industry That They Get Paid \$3 Less Per Hour Than The State Or Local Average Wage*, Econ. Pol’y Inst. (May 26, 2017), <https://www.epi.org/blog/h-2b-crabpickers-maryland-seafood-industry-paid-less-than-average/>.
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 See also Wheeler, *supra* note 96 (“Poor crab harvest in upper bay, low salinity to blame.”).
131 *FLC Wage Library Search*, FOREIGN LAB. CERTIFICATION DATA CTR., <https://www.flcdatacenter.com/OesQuickResults.aspx?code=51-3022&area=2400006&year=20&source=1> (last visited Apr. 16, 2020).



Supervisory jobs in the crab industry are mostly limited to men. - Photo Credit: CDM.

than that. In 2019, the DOL approved crab employers’ requests to pay workers at a wage rate of \$9.60, which is \$4 less per hour than the prevailing wage.¹³² Crab pickers are also earning less than H-2B workers in other industries: according to employer petitions in 2019, H-2B yard-workers and maids in Maryland were paid an average of \$14.78 and \$11.23 respectively.¹³³

In addition, many workers reported that they continue to be required to purchase necessary tools or gear to do their work, bringing their effective wages even lower. If employers continue to charge for safety equipment during the COVID-19 era, they are essentially forcing workers to pay for their health.

DISCRIMINATION
TEN YEARS AGO¹³⁴

Picked Apart found Maryland’s blue crab industry to be highly segregated by sex. Workers described how companies employed male workers to wash and clean crabs while relegating women to pick meat. As a result, women complained of the wage disparities they faced earning lower hourly rates than their male counterparts. The report described how a lack of oversight and accountability in H-2B recruitment made it difficult to hold U.S. employers responsible for employing age and sex-based criteria during hiring in Mexico.

While the report did not directly interview crab pickers about sexual harassment at work, several migrant rights’ advocates shared concerns that sexual harassment was prevalent in the Maryland crab industry, citing specific cases. At the same time, the report highlighted the numerous challenges and risks women faced in filing claims or speaking openly about sexual harassment, including barriers to accessing legal counsel, risks of blacklisting, and cultural stigma.

132 OFF. OF FOREIGN LAB. CERTIFICATION, ANN. REP., U.S. DEP’T. OF LAB. 47 (2016), https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2016.pdf.
133 *Id.*
134 *Picked Apart*, *supra* note 1, at 32-33.

65% of workers surveyed said they wore gloves while working. But of that group,
63% reported having to pay their employer or buy their own gloves.

69% of workers reported being assigned to different jobs based on their gender

61% of workers reported that men and women are paid differently, with men usually making more

CONTEXT

The crab pickers are protected from workplace discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).¹³⁵ Title VII applies to all United States employers who employ fifteen or more workers.¹³⁶ Under this standard, all workers surveyed were employed by businesses covered by the protections of Title VII.

Title VII dictates that workers cannot be discriminated against in the workplace on the basis of sex.¹³⁷ Employers are required to make all employment decisions, including the decision to hire, fire, promote, transfer and compensate workers, based upon neutral, business-related criteria rather than upon someone’s sex or their gender.¹³⁸ Employers are also prohibited from limiting, segregating or classifying employees based on gender in a way that deprives them of employment opportunities.¹³⁹ The Act prohibits both intentional discrimination and actions that have a disparate impact on one gender.¹⁴⁰ For example, if eighty percent of men passed an exam, but only ten percent of women passed the same exam, this disparate impact could violate Title VII even if there was no evidence of intent to discriminate against women.¹⁴¹

Title VII also protects against sexual harassment in the workplace. Sexual harassment under the Act is defined as harassment “so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision.”¹⁴² Employers may also be liable when a worker is harassed by a fellow employee.¹⁴³

TODAY

Crab pickers in Maryland are almost entirely women with H-2B visas. Several women surveyed for this report stated that while men would occasionally have the option of assisting with the crab-picking during the busy portion of the season, the majority of the crab pickers are women. By contrast, workers who cook and clean the crabs are almost exclusively men. Women report that men earn a higher wage for the crab-cleaning than their women counterparts in crab-picking. While men are occasionally offered the chance to switch between

crab-picking and crab-cleaning, women are not afforded the same mobility. Women interviewed also reported that the supervisors on the job were male, often from their home communities in Mexico. None of the women reported having a woman supervisor. These responses corroborate the finding in the CDM 2018 *Engendering Exploitation* policy brief where over half of the women surveyed experienced discrimination in recruitment or employment.¹⁴⁴

In several interviews, women even reported having to do a disproportionate amount of unpaid domestic work in their shared, employer-provided housing. In several interviews, women explained that crab-worker men, who routinely worked long hours, were left with little time to clean the workers’ shared, employer-provided housing. Under pressure to maintain housing up to employers’ and other residents’ standards of cleanliness, housework often fell exclusively upon women, who worked comparatively fewer hours as crab-pickers. As a result, multiple women reported performing free housework on their employers’ property at the same time that their male co-workers worked extra hours at overtime wages.

These conditions suggest systemic discrimination in violation of Title VII. Women are relegated to gendered, lower-paying positions, and nearly all supervisory positions are filled by men. Women are also at great risk of harassment on the job. A 2017 article by Michelle Chen detailed how women on temporary work visas are often harassed and silenced because of their tenuous status in the United States.¹⁴⁵ Given the profound power imbalance between workers on temporary visas and their employers, women remain vulnerable to abuse and harassment.¹⁴⁶ If they speak up about inappropriate treatment at work, they risk losing their position and their visa.¹⁴⁷ And in a context where H-2B crab work is one of the few employment opportunities available to migrant worker women in their home communities, losing one job may mean never working again.

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII for

workers, including migrant workers, covered by the Act.¹⁴⁸ The EEOC signed a Memorandum of Understanding (MOU) with the Mexican government in 2014 to better protect Mexican workers in the United States from discrimination.¹⁴⁹ The Mexican government and the EEOC created a program based on this MOU to educate workers on their workplace protections in the United States and to better coordinate their response to on-the-job discrimination.¹⁵⁰ Despite these efforts, the workers did not share stories of seeking relief through the EEOC for discrimination or harassment in the workplace. Finally, under Maryland law § 3-403 seafood processing workers are exempted from state minimum wage standards. This further compounds the labor protections unavailable to these vulnerable workers.

WAGES & DISCRIMINATION CONCLUSION

The migrant women of the Maryland crab industry do not earn the wages they deserve and to which they are entitled under law. Despite legal requirements that workers be paid the prevailing wage, women are earning a deflated wage due to employers’ use of private wage surveys. Some women are not paid overtime wages when they work more than forty hours per week, and many workers were required to pay for their work-related equipment. Women also experience long periods with far less work than promised in their contracts. Because DOL does not enforce the three-quarters guarantee, there is little oversight or recourse when that happens. These conditions make women vulnerable and dependent upon employers. As a result, few are in the position to complain about wages or working conditions.

These women also experience systemic gender discrimination. H-2B companies overwhelmingly employ men in supervisory positions and pay them higher hourly wages. This discrimination reduces women’s wages, limits their decision-making power, and increases the risk of sexual harassment. Without significant changes to enforce anti-discrimination laws, crab-picking women lack pathways to justice and equality.

CONCLUSION

The impact of *Picked Apart* and subsequent advocacy efforts resulted in important improvements for migrant workers in the crab industry, but these regulations did not go far enough. Significant challenges still limit the ability of crab pickers to enjoy safe working conditions, equitable treatment, and respect and dignity on the job.

Working in Maryland’s crab industry comes at a tremendous price for Mexican women. For some, this sacrifice pays off, giving them the resources they need to support their families. For others, it is a loss, leaving them sick, injured, or in debt. Interviews have revealed that in the past ten years, some employers have proven that a safe, fair, and non-discriminatory crab industry is possible, while others refuse to leave the exploitative and cruel practices of the past behind. With commonsense changes from both government officials and employers, Maryland can finally protect workers from the policies and employment conditions that have picked them apart.

RECOMMENDATIONS

The H-2B temporary visa program is flawed and is the root of exploitation for many migrant workers. There are a number of recommendations to reform and improve this guestworker program.

“I would like to see a raise in salary, improvements in housing in the other companies, and for there to be more space in the kitchen.”

-“Petra”

Crab Pickers & COVID-19: Federal and state agencies need to enact emergency rules to protect migrant workers during this global pandemic.

135 42 U.S.C. 2000e.
136 42 U.S.C. 2000e(b).
137 42 U.S.C. 2000e-2(a)(1).
138 *Id.*
139 42 U.S.C. 2000e-2(a)(2).
140 42 U.S.C. 2000e-2(k)(1)(A).
141 *See generally* Lewis v. City of Chicago, 560 U.S. 205 (2010) (finding that a cutoff score that has a disparate impact on the basis of race violates Title VII).
142 *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Apr. 11, 2020).
143 *Id.*
144 *Engendering Exploitation*, *supra* note 11.
145 Michelle Chen, *How Temporary Work Visas Hurt Migrant Women*, NATION (Nov. 9, 2017), <https://www.thenation.com/article/archive/how-temporary-work-visas-hurt-migrant-women/>.
146 *Id.*
147 *Id.*

148 42 U.S.C. 2000e-5.
149 *Memorandum of Understanding (MOU) Between the U.S. Equal Employment Opportunity Commission, and the Ministry of Foreign Affairs of the United Mexican States*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Aug. 29, 2014), https://www.eeoc.gov/laws/mous/eeoc_mexico_mou.cfm.
150 *Id.*



Over the years, workers’ interests have been outweighed by the interests of employers in the crab industry. These inequities can be solved with commonsense policy and legislative reforms. – Photo Credit: CDM

RECOMMENDATIONS TO IMPROVE THE WORKING CONDITIONS OF MIGRANT WORKER WOMEN CRAB PICKERS

COVID-19 – IMMEDIATE ACTION

STATE AND LOCAL RECOMMENDATIONS

- (1) Women in this report described living and working conditions that leave them susceptible to COVID-19 infection. Lawmakers and government agencies should ensure that migrant workers are covered by and can readily file a claim under the state workers’ compensation program. Information should be made readily available to workers in multiple languages, and government agents should investigate these claims immediately.
- (2) Lawmakers and government agencies should ensure that migrant workers are covered and can readily file a claim for state unemployment benefits in case of COVID-19-related job loss or unjust firing. Information should be made readily available in multiple languages and government agents should be prompt in investigating these claims.
- (3) Ensure that migrant workers have access to justice. Under Legal Services Corporation regulations, H-2B workers cannot access free legal services unless they meet certain criteria. It is crucial that the state ensures that everyone that needs legal help receive it, regardless of immigration status in the country.
- (4) Maryland’s Governor and Office of Safety and Health (MOSH) should set rules or an emergency standard to ensure workers’ health and safety during this pandemic, that includes specific guidance on personal protective equipment and social distancing. This emergency standard has to be enforceable and should ensure a healthy and safe worksite for all workers that are working in “essential” jobs.
- (5) State agencies should educate employers and workers on the dangers of the coronavirus and how to minimize the risks of contagion. Resources for outreach and inspections at these worksites are much-needed critical steps in order to protect the lives of these workers.

NATIONAL RECOMMENDATIONS

- (1) Lawmakers should ensure that migrant workers are included in federal relief legislative packages addressing the impacts of COVID-19. Migrant workers need to be able to access COVID-19 testing at no cost. Lawmakers should mandate that protective gear is provided to all workers, regardless of status in the country, free of charge.
- (2) Workers in the food supply chain have been deemed essential workers. They should receive premium pay - additional compensation - for working and exposing themselves and their families to the coronavirus. Congress needs to pass legislation that gives premium pay to all essential workers.
- (3) The Occupational Safety and Health Administration (OSHA) should issue an Emergency Temporary Standard that will provide health and safety protections to workers during this global pandemic. On June 24, 2020, the Centers for Disease Control and OSHA issued health and safety guidelines for workers in the seafood processing industry. OSHA should fulfill its public mandate and enforce these guidelines.

GENERAL RECOMMENDATIONS

STATE AND LOCAL RECOMMENDATIONS

HOUSING

Workers continue to report issues with substandard housing. The remarks about housing conditions have remained largely unchanged over the past decade. Prevalent overcrowding and poor habitability make impossible the social distancing measures needed to keep workers safe during the COVID-19 pandemic. In joint interim guidance, the CDC and OSHA recognized that these housing conditions create a hazard for workers and make self-protection difficult. At the same time, the H-2B program has no regulations on employer-provided housing. Adequate housing is fundamental to ensuring migrant workers’ safety and health.

Ensure regular, pre-season inspections of rental housing provided by employers to H-2B crab workers in Dorchester County, Maryland.

Many of the H-2B workers interviewed for this report complained of crowding, lack of privacy, and at times, nearly uninhabitable conditions in rental housing owned by the crab companies. The Planning and Zoning Department of the Dorchester County government should take a more active role in monitoring the conditions of rental housing offered to H-2B migrant workers. H-2B workers are particularly vulnerable as tenants, given the dual control exercised by the crab companies, over housing and working conditions. The county government should adopt a regular practice of inspecting rental housing in the early months of the year, prior to the beginning of the crab season and the arrival of the H-2B workers.

Educate H-2B crab workers at the beginning of each season about their basic rights as tenants in the state of Maryland.

In order to respond to workers’ reported concerns about housing, a mechanism is needed to allow workers to identify their options as tenants. As a complement to regular housing inspections, H-2B crab workers should receive basic rights trainings from the county government, state government, or another suitable entity, focused on their rights as tenants. Housing conditions may deteriorate, or other concerns may arise over the course of the workers’ months-long stay on the Eastern Shore of Maryland. The workers may simply be unaware of their rights as tenants and the basic conditions of habitability that their landlords must maintain. Educational efforts focused on tenants’ rights would serve this purpose, and could also inform the workers of possible approaches and resources for resolving landlord-tenant concerns.

ECONOMIC SECURITY

Extend Maryland minimum wage and overtime protections to crab pickers and other seafood workers.

Currently, crab pickers and other seafood workers are exempted from minimum wage and overtime protections under Maryland wage and hour law. Although federal law does offer these protections to crab pickers, the Maryland exemption devalues their work and minimizes their rights. The lack of minimum wage and overtime protections for these workers has undoubtedly contributed, over time, to the low wage rates that historically have been paid to crab pickers – wage rates that typically hover right around the federal minimum. Crab companies often lament the inability to recruit U.S. workers to perform the arduous task of extracting crabmeat; yet, the current state of Maryland law exacerbates this concern by contributing to the devaluation of this important work. The Maryland General Assembly should act promptly to repeal this long-standing exemption.

Protect the Chesapeake Bay.

Some workers reported decreased crab yields and less work as a result of environmental degradation. Poor crab harvests caused by environmental degradation leave migrant workers and the seafood processing industry without sufficient work. Migrant workers that have worked for many years in Maryland’s Eastern Shore have shared anecdotal observations about the decrease in the amount of crabs. Fewer crabs means less work for these migrant workers and the Eastern Shore community that depends on a successful crabbing season.

HEALTH & SAFETY

Promote greater engagement by Maryland Occupational Safety & Health (MOSH) with the crab industry, through consultative programs, cooperative efforts, and unplanned inspections.

The frequency and variety of injuries and illnesses experienced by the crab-pickers signals the need for greater engagement by Maryland Occupational Safety & Health (MOSH), the state agency charged with regulating such matters. There are a range of approaches to promote greater oversight of health and safety matters, including unplanned inspections at crab houses, or collaborative partnerships between employers and MOSH. Given the unique nature of crab-picking work, and the particularized risks involved, all parties may benefit from the use of MOSH’s consultative programs, which provide a holistic assessment of safety and health concerns and outline possible improvements.

Implement comprehensive, bilingual occupational health and safety trainings for new and returning H-2B crab workers.

Many women described having to handle health and safety issues for themselves. While MOSH should certainly have a more prominent oversight role, the H-2B workers themselves must be trained on how to perform their work safely and effectively, and how to handle work-related injuries and illnesses. Employers, perhaps in consultation with MOSH or other appropriate entities, should offer a comprehensive training to all crab pickers on occupational health and safety matters. It is critical that the training be conducted in a linguistically and culturally appropriate manner.

Ensure year-round access to bilingual health care services on the Eastern Shore, to assess, on a periodic basis, work-related injuries, prenatal care, or other health concerns of the H-2B migrant workers.

Many of the women interviewed had experienced health problems – including both work-related issues and personal health matters – during their time on the Eastern Shore of Maryland. Geographic isolation, language and cultural barriers, and the pressure to please employers all create disincentives to seeking and obtaining regular medical care. While crab pickers do have access to basic health services provided by Choptank Community Health’s Migrant Program, these services are only available between April and August. They also do not provide prenatal healthcare services, leaving most women on their own for care during pregnancy. To address these gaps, state agencies or not-for-profit organizations with health care personnel should perform year-round outreach among the H-2B workers on the Eastern Shore and specifically cover prenatal care. Conducting such outreach will yield more precise information about the types of institutions and services needed to address the health care needs of the migrant worker population in Maryland.

RECRUITMENT ABUSE

Ensure that only licensed, ethical recruiters are working with employers and migrant workers doing business in Maryland.

Some of the women reported having to pay coerced fees in order to better their chances for employment with certain recruiters who operate in their own self-interest. Maryland policymakers should implement oversight mechanisms for the recruitment process to ensure that employers and recruiters are not denying visas to workers based on sex, gender, pregnancy status, or other illegal criteria by passing legislation similar to the proposed SB 742 – Fair Recruitment and Transparency Act. This legislation was introduced during the 2020 Maryland General Assembly and provides that the Maryland Department of Labor require recruiters to be licensed and registered.

DISCRIMINATION

Ensure that migrant worker women are covered by Maryland’s civil rights and anti-discrimination laws and have extended statutes of limitations to access justice via these statutes.

Many of the women reported concerns about gender discrimination in their employment. These reports suggest that employers and recruiters may discriminate against migrant worker women during the recruitment process and at work for being pregnant or for their sex, gender, or race. Lawmakers and government agencies should ensure that Maryland’s anti-discrimination and civil rights laws effectively apply to these workers by extending the statute of limitations to access justice. U.S. employers should be contractually obligated to prohibit discriminatory acts in their contracts with foreign labor recruitment agents or agencies. U.S. employers should be held responsible for any discriminatory actions that foreign labor recruiters commit while engaging in recruitment activities on behalf of, as agents of, in representation of, or otherwise in the interest of the employer. Migrant workers face challenges to accessing legal services and sometimes it is too late to act once they have managed to find help. An extended statute of limitations would permit migrant workers to seek justice via these statutes. Migrant workers could also benefit from a hotline where they could report incidents of sexual discrimination or harassment happening to them while working in the H-2B program.

NATIONAL RECOMMENDATIONS

H-2B VISA PROGRAM REFORMS

Provide funding to the DOL to enforce the three-fourths guarantee pursuant to the 2015 H-2B Interim Final Rule.

Workers reported concerns about the lack of guaranteed work as contemplated at the outset of their employment agreements. Federal lawmakers need to fully fund the DOL to enforce the three-fourths guarantee included in the 2015 H-2B Interim Final Rule. For more than a decade, crab processors have continuously flagged concerns about income uncertainties due to variable hours and inconsistent workload. These are issues that principally affect women, who are overwhelming relegated to piece-rate jobs, while their male counterparts enjoy hourly and even overtime wages. Because H-2B workers are already excluded from seeking legal support from LSC-funded legal services organizations, defunding DOL’s enforcement ability has left H-2B crab picker women without any remedy for this commonly-violated rule. By contrast, the three-fourths guarantee is a commonsense provision long afforded to H-2A workers. Legislators should stop prioritizing employers’ profit margins over workers’ wellbeing and should fully fund DOL’s ability to do the job it was established to do.

Regulate recruitment practices, and sanction employers who utilize recruiters that charge excessive or improper fees to workers.

Some of the women reported a sense of obligation to spend on products sold by their potential recruiters in exchange for a U.S. job opportunity. Regulations governing the H-2B recruitment process prohibit recruiters from charging any fees to workers, recognizing that these costs often leave workers in a state of effective indenture. Nonetheless, there is little enforcement of this prohibition, and employers are often able to evade any consequences of contracting with recruiters who charge such illegal fees to workers. Recruiters who charge these fees to vulnerable workers often have an incentive to fraudulently misrepresent the job opportunity offered, and to recruit workers for job opportunities that do not in fact exist.

H-2B regulations should promote transparency in the recruitment process, requiring employers to disclose any recruiters with whom they do business and to affirmatively guarantee that those recruiters will not charge recruitment fees to workers. In addition, regulations should provide a private remedy to enable H-2B workers to recover any improper recruitment fees from the employers themselves.

Strictly enforce the requirement that employers reimburse H-2B workers for transportation and visa expenses to the extent that these costs reduce the workers’ wages below the federal minimum wage.

Many of the workers interviewed incurred significant pre-employment costs in order to work in Maryland on H-2B visas. Pursuant to an August 21, 2009, Field Assistance Bulletin from the DOL, employers may not require H-2B workers to pay visa expenses or the costs of their transportation from their home countries to their worksites in the United States to the extent that these expenses reduce wages earned during their first workweek below the federal minimum wage. This requirement should be strictly enforced by the DOL. H-2B workers who are paid less than the minimum wage after accounting for these expenses should be provided with a clear remedy by which to recover these expenses from their employers, including visas that permit workers to remain in or return to the United States to pursue these claims in U.S. courts.

Treat H-2B work orders as job contracts that are enforceable by workers.

During the recruitment process, many of the workers interviewed signed contractual documents, known as work orders, which specify the wage to be paid and the hours to be worked. The H-2A regulations, applicable to agricultural guestworkers, provide that such work orders submitted to the DOL are enforceable as contracts between the employer and the guestworker. H-2B regulations should similarly provide, in explicit terms, that the H-2B work orders constitute actionable contracts. H-2B workers who are not paid the wages that their employer has represented that they will pay, or who work fewer hours than promised, should have a clear enforcement remedy.

Routinely inspect H-2B employer payroll records for compliance with wage provisions.

The H-2B workers interviewed reported deductions from their paychecks for protective equipment such as gloves. These items are primarily for the benefit of the employer; consequently, any such deductions that effectively reduce the workers’ wages below the required minimum are unlawful under federal law. Unauthorized deductions may likewise be unlawful under state law. The federal Fair Labor Standards Act and corresponding state laws require employers to maintain accurate payroll records. H-2B regulations should be revised to provide for more active monitoring and review of these records by the DOL (or other appropriate agency) to ensure that employers reimburse their H-2B workers for any improper deductions. Employers who have been shown to violate wage requirements within the previous five years should be selected for more careful review.

Restructure guestworker visas so that workers are not tied exclusively to one employer, which will allow workers to leave abusive working conditions and still seek employment in the United States.

Many of the women reported that they felt they could not raise employment-related issues out of fear of employer retaliation. Because H-2B visas currently permit the visa holder to remain in the United States only to work for a specific employer, workers who suffer abusive working conditions have no choice but to remain in that situation or return to their countries of origin. Because many H-2B workers incur significant debt to simply obtain their H-2B visas, they cannot afford to return mid-season to their home countries and are, in effect, shackled to any terms of employment that their employer unilaterally imposes. The H-2B visa process should be reformed so that visas are not linked exclusively to specific employers. H-2B workers must be allowed the opportunity to find alternative employment when they report unsafe or unfair working conditions to an appropriate agency. This flexibility would help ensure that employers who flout H-2B regulations are sanctioned. It would also ensure that worker exploitation does not remain unreported because workers fear losing both their jobs and their rights to remain in the United States.

ACCESS TO JUSTICE

Make available to H-2B workers a broader range of free legal services, including services provided by Legal Services Corporation grantees.

While the question of access to legal services was not specifically asked in the surveys, the responses from workers indicated a range of potential legal issues related to their employment. The workers also repeatedly expressed concerns about their economically precarious situations. By and large, H-2B workers across the United States continue to be ineligible to receive free legal services from organizations funded by the Legal Services Corporation. This stands in contrast to H-2A workers who can, in fact, receive such services. Given the geographic placement of legal service providers in Maryland, this restriction effectively prevents H-2B crab workers from seeking legal advice and obtaining appropriate remedies for violations of regulations and other labor laws. Lawmakers should reform H-2B regulations to provide that H-2B workers will have access to appropriate legal services.

Allow H-2B workers to access the U.S. justice system, and remove litigation barriers for workers who comply with the terms of their visas and return to their home countries.

In order to ensure access to justice for resolution of the kinds of legal issues described by the women in the survey, adjustments must be made to the legal process to account for migration. An H-2B worker’s visa expires when the employer indicates that the need for their labor has terminated. Workers who have claims for unpaid wages, workers’ compensation, or other claims against their employers are often required to leave the United States or risk deportation if they remain to pursue these claims in U.S. courts. Employers often rely on the fact that once a worker returns to her home country, litigating a claim becomes exponentially more difficult or, in some cases, completely impossible. For instance, many states – including Maryland – require workers seeking worker’s compensation to be present in person to attend worker’s compensation hearings. These presence requirements are manifestly unfair to migrant workers who return to their home countries and have difficulty obtaining a visa to return to attend the required hearings.

The Department of Homeland Security should implement a policy under which H-2B visas may be extended and deportation deferred for workers who remain in the U.S. to pursue legitimate claims arising from their employment. Moreover, the Department of State should streamline its visa process for workers who must re-enter the U.S. to present testimony or appear at hearings relating to their claims. Finally, reforms to H-2B regulations should support the rights of injured migrants to testify remotely when they are unable to remain in or return to the U.S. to pursue their claims. This could be accomplished by requiring that individual courts or administrative bodies clearly establish a protocol through which workers may testify telephonically or via videoconference. In times of social distancing related to COVID-19, these remote hearings are even more important.

RECRUITMENT ABUSE

Support federal legislation on recruitment reform.

Some workers described a recruitment process involving unscrupulous recruiters, workers’ fears of retaliation, and inequitable divisions of labor based on sex. A fair recruitment process would include regulations to protect workers and ensure transparency in the terms and conditions of employment. The fears of being blacklisted from future employment in the United States if workers speak out on recruitment abuses are real concerns for those who depend on these jobs for economic security. Requiring a public recruitment registry could ensure that only legitimate recruiters are approaching workers with potential jobs. Recruitment practices should also comply with all state and federal anti-discrimination laws. Regulating recruitment and providing workers with these kinds of strong protection measures through federal legislation would promote a fair and transparent recruitment process.

DISCRIMINATION

Ensure that migrant workers access relief under anti-discrimination laws.

Many of the women described an industry where men do certain kinds of work and women are recruited for different employment. Lawmakers and government agencies can solve these problems by ensuring that recruiters, and the employers that contract with them, abide by anti-discrimination laws in Mexico and in the U.S., including the Civil Rights Act of 1964. Government agencies should require that job postings and hiring meet Title VII standards even when posted in Mexico, meaning they must not directly discriminate nor have a disparate impact on the basis of sex, and these job postings should be made available to the public. Migrant workers could also benefit from a hotline where they could report incidents of sexual discrimination or harassment happening to them while working in the H-2B program. Employers and recruiters found to be in violation of U.S. and Mexican anti-discrimination laws should be sanctioned.

INTERNATIONAL RECOMMENDATIONS

Urge the U.S. government to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Underlying their specific experiences, many of the workers expressed apprehension that their voices or concerns would be well-received or even valued by their employers. Advocacy groups and lawmakers should urge the United States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW), which seeks to create an understanding of migrant workers’ inalienable human rights, and to guarantee that domestic and migrant workers are treated equally. To more comprehensively protect the human rights of guestworkers employed in the U.S., the U.S. government should not only ratify the ICPRMW, but should also integrate its provisions into federal law.

Hold the U.S. government accountable for violations of relevant norms in international, regional, and multilateral treaties ratified by the U.S.

As detailed in the legislative history of the H-2B program, government concern for certain industries has at times overshadowed concerns for the protection of workers. The U.S. has ratified the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to be free from forced labor, the right to liberty and freedom of movement, and the right to due process and equal access to the courts to all persons within a signatory nation’s territory, regardless of their immigration or documentation status. Although courts in the United States have held that private individuals cannot directly bring claims to enforce rights provided by the ICCPR,¹⁵¹ an international Human Rights Committee evaluates periodic reports assessing whether those rights are generally respected in signatory nations. Guestworker abuses should be highlighted in these reports, with particular focus on the regulatory failure to provide visas to workers who wish to pursue legitimate claims arising from their employment in the United States in U.S. courts. This deficiency effectively deprives workers of their rights of equal access to justice.

The U.S. has also ratified the Organization of American States (OAS) Charter, which requires signatories to devote their “utmost efforts” toward providing “fair wages, employment conditions and acceptable working conditions for all.”¹⁵² Individuals may submit complaints about violations of rights provided by OAS governing documents directly to the Inter-American Commission on Human Rights (IACHR). Migrant worker advocates should utilize this procedure to expose both the failure of guestworker regulations to effectively ensure that migrants are provided with fair wages or working conditions, and the systematic exploitation of migrant and immigrant labor that has been institutionalized in the United States.

On July 1, 2020, the U.S.-Mexico-Canada Agreement (the USMCA or “NAFTA 2.0”) went into effect. In 2016, CDM in conjunction with migrant workers and allied organizations filed a petition requesting action on rampant sex-based discrimination in the H-2 guestworker programs. Although the petition is now considered resolved by the Mexican government, the issues migrant worker women face in these programs remain ongoing. Signatories to the USMCA need to implement a strong enforcement mechanism that truly ensures that workers are free from abuse.

¹⁵¹ See e.g., *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002) (holding that the ICCPR is not self-executing and therefore not binding on United States courts); *Macharia v. United States*, 238 F. Supp. 2d 13, 29 (D.D.C. 2002) (finding no private right of action under non-self-executing ICCPR).

¹⁵² Organization of American States, Charter of the Organization of American States, art. 34, Dec. 13, 1951, O.A.S.T.S. No. 41, 119 U.N.T.S. 3, available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

*For questions, media inquiries, or additional report copies,
please contact Sulma Guzmán at sulma@cdmigrante.org.*

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Please direct protocol questions to IRB Coordinator, Matt Zembruski at irb@american.edu.

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