

**March 23, 2021**

**AMENDED PETITION**

**on**

**LABOR LAW MATTERS ARISING IN THE UNITED STATES**

**submitted to the**

**LABOR POLICY AND INSTITUTIONAL RELATIONS UNIT  
THROUGH THE GENERAL DIRECTORATE OF INSTITUTIONAL RELATIONS IN  
THE SECRETARIAT OF LABOR AND SOCIAL WELFARE (STPS)**

**UNITED STATES–MEXICO–CANADA AGREEMENT**

**REGARDING THE FAILURE OF THE U.S. GOVERNMENT TO EFFECTIVELY  
ENFORCE ITS DOMESTIC LABOR LAWS AND PROMOTE THE ELIMINATION OF  
EMPLOYMENT DISCRIMINATION IN THE H-2 PROGRAM IN VIOLATION OF  
CHAPTER 23 OF THE UNITED STATES–MEXICO–CANADA AGREEMENT  
(USMCA)**

**NON-CONFIDENTIAL COMMUNICATION**

## I. INTRODUCTION AND STATEMENT OF VIOLATIONS

1. Every year hundreds of thousands of migrant workers travel to the United States (U.S.) to work in essential agricultural and non-agricultural industries<sup>1</sup> using non-immigrant H-2A and H-2B visas. The H-2A visa program allows employers in the United States to petition the U.S. Department of Labor for permission to bring foreign workers to the United States as non-immigrants for temporary agricultural work, while the H-2B visa program authorizes foreign workers to enter the United States to perform temporary, *non-agricultural* work.<sup>2</sup> The mechanisms used to recruit and employ migrant workers in these two visa programs are marred by sex discrimination that significantly and disproportionately impacts migrant worker women.<sup>3</sup> Sex discrimination against migrant women plays out in three principal ways. First, migrant women experience sex discrimination through systemic discriminatory recruitment and hiring practices, where women are excluded from H-2 visa programs as a matter of course. Second, the limited number of women who do get admitted to the H-2 visa program are routinely funneled into the H-2B visa program, which is generally less desirable than the H-2A visa program due to lower wages and fewer benefits, such as free employer-provided housing.<sup>4</sup> Third, within the H-2B program, employers generally assign women to less favorable and lower-paid positions than their male counterparts, despite having equal qualifications as men.<sup>5</sup> Finally, the United States further fails to live up to its commitments in Chapter 23 of the USMCA<sup>6</sup> by: enabling discrimination in the workplace, including pervasive sexual harassment and sexual violence; limiting workers' ability to seek free legal services to support claims for violations of U.S. employment laws; and failing to adequately monitor, investigate, and enforce violations of U.S. employment law, including Title VII violations.

### The Petitioners

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<sup>1</sup> U.S. Department of State, *Nonimmigrant Visas Issued by Classification Fiscal Years 2016–2020* (2020), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf>

<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(a)-(b).

<sup>3</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE AND 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>.

<sup>4</sup> See *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, No. 1:05CV00559, 2008 U.S. Dist. LEXIS 3502 (M.D.N.C. Jan. 1, 2008).

<sup>5</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, AND GEORGETOWN LAW CENTER, *BREAKING THE SHELL: HOW MARYLAND'S MIGRANT CRAB PICKERS CONTINUE TO BE "PICKED APART"* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>.

<sup>6</sup> United States–Mexico–Canada Agreement, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Mar. 11, 2021) [hereinafter USMCA]. See also United States–Mexico–Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

2. The individual petitioners, Adareli Ponce Hernández (Ponce) and Maritza Pérez Ovando (Pérez, and, together, the Petitioners) and their co-workers – other unnamed migrant worker women – suffered discrimination due to the failure of the United States to effectively enforce its domestic labor laws in accordance with Chapter 23 of the USMCA.<sup>7</sup> Petitioners worked in the agricultural industry and the crawfish and chocolate processing industries, respectively, and such goods are traded in Mexico, Canada, and the United States. Petitioners further allege that the violations described herein affected trade under the USMCA.

### Disparate Impact

3. In addition to testimonial evidence referenced in Appendices B and D, which indicate that sex discrimination in the program is rampant, statistical evidence shows that the vast majority of Mexican women are excluded from the H-2 visa program. First, Mexican workers constitute the vast majority of H-2A recipients. Indeed, in 2019, approximately 92% of all H-2A visas were granted to Mexican workers.<sup>8</sup> Notably, in 2018 a mere 3% of all H-2A visas were issued to women,<sup>9</sup> while women made up approximately 25% of all farm laborers in the United States in the same year.<sup>10</sup> The National Agricultural Workers Survey (NAWS) released in 2018 shows that the female crop labor force was approximately 32% of the labor pool.<sup>11</sup> Based on statistical analysis, Petitioners determined that there is evidence of discrimination against women with regards to the distribution of H-2A visas following the adverse impact and the fourth-fifths rule.<sup>12</sup>
4. Indeed, the Petitioners' disparate impact analysis<sup>13</sup> of publicly available data indicates that there is a statistically significant difference between the proportion of women in the agricultural workforce that have H-2A visas and women in the agricultural workforce that do not have H-2A visas. Our analysis calculated an absolute Z score value of 316, which is 162 times larger than the significance threshold of 1.96. As these findings indicate, the probability of there being no adverse impact on women within the H-2A program is approximately zero. This analysis demonstrates that there is an almost 100% chance that women are

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<sup>7</sup> See Appendices B and D. *See also infra* section VI.

<sup>8</sup> U.S. Department of State, Bureau of Consular Affairs, *Nonimmigrant Visas Issues by Nationality (Including Border Crossing Cards): Fiscal Years 2010-2019*, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY19NIVDetailTable.pdf>.

<sup>9</sup> In 2018 the United States issued a total of 298,228 H-2A visas, and 9,582 of those were issued to women. *See* U.S. Department of Homeland Security, *Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age: Fiscal Year 2018* (2020), <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage>.

<sup>10</sup> United States Department of Agriculture, Economic Research Service, *Size and Composition of U.S. Agricultural Workforce* (April 22, 2020), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>.

<sup>11</sup> It is important to note, however, that the NAWS does not include workers with H-2A visas in its sampling. *See* U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016 (2018), [https://www.dol.gov/sites/dolgov/files/ETA/naaws/pdfs/NAWS\\_Research\\_Report\\_13.pdf](https://www.dol.gov/sites/dolgov/files/ETA/naaws/pdfs/NAWS_Research_Report_13.pdf).

<sup>12</sup> *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4 (1978); 43 Fed. Reg. 38,295 (Aug. 25, 1978).

<sup>13</sup> Appendix A.

underrepresented in the H-2A program and shows that such representation could not have occurred but for systematic discrimination against women.

5. Mexican workers also represent the vast majority of workers in the H-2B program. In 2019, approximately 74% of all H-2B visas were granted to Mexican workers.<sup>14</sup> In the same year, male workers made up approximately 90% of those issued H-2B visas, while women made up about 10% of H-2B workers.<sup>15</sup> As these statistics show, structural discrimination is endemic in the H-2B visa program as well.
6. Women are not provided equal opportunity to apply for H-2 temporary work visas and are generally excluded from both H-2A and H-2B work programs. While women make up about 32% of the agricultural workforce in the United States, only about 3% H-2A workers are women.<sup>16</sup> This disproportion shows that exclusion and discrimination are structural components of these programs, embedded in employer preferences, discriminatory recruitment practices, and disproportionate hiring. The few women who are admitted to the H-2 programs are often admitted into the H-2B program only. Unlike the H-2A program, the H-2B program does not provide workers with free housing or access to federally funded legal services.<sup>17</sup> Indeed, unlike H-2A workers, H-2B visa workers have to pay for housing, meals, and sometimes their own transportation and equipment. Additionally, H-2B workplaces are often segregated based on sex, and women are assigned less desirable and lower paid jobs compared to their male counterparts at the same workplace.<sup>18</sup> For example, Ponce describes working in a segregated workplace where only women worked lower-paying assembly line jobs and were excluded as a matter of course from higher-paying jobs that were exclusively reserved for men.<sup>19</sup> H-2A workplaces are often segregated by sex as well: Pérez relates that women at her agricultural workplace were relegated to packing work, which paid less than working in the fields.<sup>20</sup>

#### Violations of Chapter 23 of the USMCA

7. The United States has failed to effectively enforce its anti-discrimination laws by, among other things, failing to enforce Title VII of the Civil Rights Act of 1964

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<sup>14</sup> U.S. Department of State, *Nonimmigrant Visas Issued by Classification Fiscal Years 2016-2020*, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-TableXVB.pdf>.

<sup>15</sup> In 2018 the United States issued a total of 120,351 H-2B visas, and 12,576 of those were issued to women. See U.S. Department of Homeland Security, *Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age: Fiscal Year 2018* (2020), <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage>.

<sup>16</sup> *Id.*

<sup>17</sup> 45 C.F.R. § 1626.

<sup>18</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, AND GEORGETOWN LAW CENTER, *BREAKING THE SHELL: HOW MARYLAND'S MIGRANT CRAB PICKERS CONTINUE TO BE "PICKED APART"* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>, at 26.

<sup>19</sup> See Appendix B, Declaration of Ponce, ¶ 18, ¶¶ 30-31.

<sup>20</sup> See Appendix D, Declaration of Pérez, ¶ 15.

(Title VII). Title VII prohibits discrimination based on sex in hiring, compensation, and the terms and conditions of employment.<sup>21</sup> It further prohibits segregating or classifying employees based on sex in any way that tends to deprive them of employment opportunities.<sup>22</sup> Despite the existence of Title VII, women experience rampant sex-based discrimination during H-2 visa recruitment and employment. The United States has not taken adequate steps to halt discrimination against migrant women, who are excluded from being considered for jobs they are qualified for and pushed into jobs in the H-2B program with fewer benefits and lower pay.

8. Chapter 23 of the USMCA aims to ensure that increased economic integration of workers does not lead to a decline in labor standards. The labor chapter of the USMCA is meant as a tool to improve the enforcement of existing labor laws as well as to monitor enforcement. The USMCA, through implementing legislation, provided resources to the Office of United States Trade Representative (USTR) and United States Department of Labor (DOL) to enforce the new labor standards in the USMCA with the intention of shifting the burden to the government to monitor and enforce labor standards, rather than stakeholders bringing cases.<sup>23</sup> However, despite the USMCA's labor chapter's requirements to monitor and enforce labor standards, the United States has not met its obligations in regards to its own labor and employment laws, including Title VII. Chapter 23 of the USMCA is directly undermined unless the United States government is held accountable for its failure to respond to sex discrimination in the H-2 visa programs.
9. Accordingly, Petitioners request that the United States and Mexico develop cooperative activities which address "gender-related issues in the field of labor and employment, including: (i) elimination of discrimination on the basis of sex in respect of employment, occupation, and wages" pursuant to Article 23.12(5)(j)(i).
10. Petitioners further request that the Labor Policy and Institutional Relations Unit thoroughly investigate the allegations made in this public communication (the Petition), and upon finding them meritorious, recommend consultation as provided for under Article 23.17 of the USMCA regarding the failure of the U.S. government to comply with its own obligation to avoid discrimination on the basis of sex in the issuance of H-2 visas, as well as its obligation to ensure effective enforcement of its equal employment opportunity laws.<sup>24</sup>

## II. STATEMENT OF VIOLATIONS OF THE USMCA

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<sup>21</sup> 42 U.S.C. § 2000e-2(a)(1), (b).

<sup>22</sup> § 2000e-2(a)(2).

<sup>23</sup> U.S. House of Representatives, Committee on Ways & Means, *Trump Administration USMCA Implementation Report Card* (Nov. 3, 2020),

<https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Trump%20Admin%20USMCA%20Implementation%20Assessment%20.pdf>.

<sup>24</sup> USMCA, art. 23.17.

The government of the United States has failed to meet its obligations under the USMCA, violating the following sections of the agreement: Article 23.3: Labor Rights; Article 23.5: Enforcement of Labor Laws; Article 23.7: Violence Against Workers; Article 23.8: Migrant Workers; Article 23.9: Discrimination in the Workplace; and Article 23.10: Public Awareness and Procedural Guarantees.<sup>25</sup>

- **Article 23.3(1)(d): Labor Rights**, which declares that “each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work.”<sup>26</sup> These rights include: “the elimination of discrimination in respect of employment and occupation.”<sup>27</sup> Further, Article 23.3(1) of USMCA requires each Party to “adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work. . . .” Because women recruited into the guestworker program routinely receive lower pay and because the monetary value of housing and travel benefits under the H-2A program is not provided to women who are systematic and discriminatory channeled into the H-2B visa program, the United States is in violation of the Equal Pay Act and the anti-discrimination pillar of the International Labour Organization Declaration.
- **Article 23.5 (1) and (2): Enforcement of Labor Laws**, which declares in Section (1): “no Party shall fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.”<sup>28</sup> Section (2) provides that, “each Party shall promote compliance with its labor laws through appropriate government action” and includes, among others, these specific provisions: “(b) monitoring compliance and investigating suspected violations, including through unannounced on-site inspections, and giving due consideration to requests to investigate an alleged violation of its labor laws; . . . (d) requiring record keeping and reporting;” and “(g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor laws.”<sup>29</sup>
- **Article 23.7: Violence Against Workers**, which provides that “workers and labor organizations must be able to exercise their labor rights in a climate free from violence, threats, and intimidation,” and that it is the imperative of governments to effectively address violence or threats of violence against workers that is directly related to exercising or attempting to exercise labor rights.<sup>30</sup> Each Party must address violence or threats of violence.

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<sup>25</sup> This section reproduces the relevant portions of the USMCA. The full text of the agreement is available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Mar. 11, 2021).

<sup>26</sup> USMCA, art. 23.3(1)(d).

<sup>27</sup> *Id.*

<sup>28</sup> USMCA, art. 23.5(1)-(2).

<sup>29</sup> *Id.*

<sup>30</sup> USMCA, art. 23.7.

- **Article 23.8: Migrant Workers**, which provides that “the Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.”<sup>31</sup>
- **Article 23.9: Discrimination in the Workplace**, which provides, “[t]he Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace.”<sup>32</sup>
- **Article 23.10: Public Awareness and Procedural Guarantees**, which provides that “each Party shall promote public awareness of its labor laws, including by ensuring that information related to its labor laws and enforcement and compliance procedures is publicly available.”<sup>33</sup> Section (2) provides each “Party shall ensure that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labor laws. These tribunals may include administrative tribunals, quasi-judicial tribunals, judicial tribunals, or labor tribunals, as provided for in each Party’s law.”<sup>34</sup>

The United States fails to live up to its commitments in Chapter 23 of the USMCA by enabling gender discrimination at every step of the hiring and recruitment process; by enabling discrimination in the workplace, including pervasive sexual harassment; by limiting workers’ ability to seek free legal services to support claims for violations of U.S. employment laws; and by failing to adequately monitor, investigate, and enforce violations of U.S. employment law, including Title VII violations.<sup>35</sup>

### III. STATEMENT OF JURISDICTION

Mexico has jurisdiction over this matter pursuant to Article 23.11 of the USMCA, which provides that “[e]ach Party, through its contact point designated under Article 23.15 (Contact Points), shall provide for the receipt and consideration of written submissions from persons of a Party on matters related to this Chapter in accordance with its domestic procedures.” The Labor Policy and Institutional Relations Unit, through the General Directorate of Institutional Relations in the Secretariat of Labor and Social Welfare, is the Chapter 23 contact point and has jurisdiction to thoroughly investigate the allegations made in this Petition and to recommend consultation as provided for under Article 23.17.

### IV. STATEMENT OF INTEREST OF THE PETITIONER(S)

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<sup>31</sup> USMCA, art. 23.8

<sup>32</sup> USMCA, art. 23.9.

<sup>33</sup> USMCA, art. 23.10.

<sup>34</sup> *Id.*

<sup>35</sup> *See infra* section VI.

1. Ponce is a female Mexican national who worked exclusively in the crawfish and chocolate industries<sup>36</sup> in the U.S. on H-2B visas, although she was qualified, ready, and willing to perform work in the H-2A program. Additionally, while employed in the U.S., Ponce experienced discrimination in terms of a sex-segregated division of labor that resulted in lower pay because she was a woman. Further, due to general exclusion and under recruitment of women from the H-2 programs, Petitioner Ponce has been unable to access further H-2 employment since 2014 despite her best efforts. But men from Ponce's community are regularly recruited for and receive H-2A jobs, despite having similar or lesser qualifications.<sup>37</sup> Indeed, Petitioner Ponce even filed a petition<sup>38</sup> pursuant to the NAALC on July 15, 2016 alleging that the United States engaged in systemic employment discrimination on the basis of sex because it failed to effectively enforce its labor law “through appropriate government action.” Since Ponce’s 2016 complaint, nothing has changed. Worse still, similar violations continue to occur en masse across the United States and Mexico to the detriment of similarly situated women workers.
2. Pérez is a female Mexican national who worked in the United States in agriculture using an H-2A visa, picking peppers, squash, and cucumbers.<sup>39</sup> Women at her workplace were segregated into lower-paying jobs doing packing work.<sup>40</sup> During her time in the program Pérez was subjected to pervasive and severe sexual harassment, including quid pro quo sexual harassment where her employer and supervisor demanded sex in exchange for higher paying and less physically grueling jobs.<sup>41</sup> When Pérez rebuffed her employer’s demands for sex, her employer punished by assigning her more physically demanding work.<sup>42</sup>

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<sup>36</sup> Certain Chapter 23 violations require a “failure,” “waiver,” or “derogation” “in a manner affecting trade or investment between the Parties.” See USMCA, art. 23.4; see, e.g., USMCA art. 23.5(1). Such violations occur where “(i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.” USMCA, art. 23.4, at n.8. U.S. Census data indicates that the United States imports chocolate from Mexico and Canada and then exports finished chocolate products. See Shelly Hagan, *NAFTA Breakup Would Leave a Bitter Taste on Valentine's Day*, BLOOMBERG NEWS (Feb. 14, 2018), <https://www.bloomberg.com/news/articles/2018-02-14/nafta-breakup-would-leave-a-bitter-taste-on-valentine-s-day>.

<sup>37</sup> See Appendix B, Declaration of Ponce, ¶¶ 7-10.

<sup>38</sup> Attached hereto as Appendix C.

<sup>39</sup> Certain Chapter 23 violations require a “failure,” “waiver,” or “derogation” “in a manner affecting trade or investment between the Parties.” Such violations occur where “(i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.” Here, agricultural products such as squash, cucumbers, and peppers are traded between the United States and Mexico. Mexico accounts for nearly half of the value of U.S. fruit and vegetable trade with the United States. Congressional Research Service, *Seasonal Fruit and Vegetable Competition in U.S.-Mexico Trade* (Dec. 11, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11701/2> (“In 2019, U.S. imports of fresh and processed fruits and vegetables from Mexico amounted to \$15.6 billion, while U.S. exports to Mexico totaled \$1.4 billion . . .”).

<sup>40</sup> See Appendix D, Declaration of Pérez, ¶ 15.

<sup>41</sup> See Declaration of Pérez, attached hereto to as Appendix D.

<sup>42</sup> *Id.* at ¶ 12-16.



3. **Centro de los Derechos del Migrante, Inc. (the Center for Migrant Rights, or CDM)** is a non-profit workers' rights organization that provides a wide range of support to Mexico-based migrant workers who experience problems with their employment in the United States. CDM offers direct legal representation, outreach and rights education in communities of origin, and worker leadership development. CDM aims to remove the border as a barrier to justice for migrant workers. CDM's transnational Migrant Women's Project (ProMu\*Mi) specifically addresses the types of abuse and discrimination that disproportionately affect migrant women. Through ProMu\*Mi, CDM facilitates workshops with migrant women about their treatment in recruitment and employment, cultivates leadership skills, and fosters opportunities to intervene in policy debates.
4. **Alianza Nacional de Campesinas (Alianza de Campesinas)** is the first national farmworker women's organization in the United States founded and led by farmworker women and those who hail from farmworker families. A coalition of 15 grassroots organizations across 11 states and the District of Columbia, Alianza de Campesinas advocates for the civil, constitutional and human rights of our nation's women farmworkers, and other women throughout our food system.
5. The **American Federation of Teachers (AFT), AFL-CIO** represents approximately 1.7 million members employed in K-12 and higher education, public employment, and healthcare. AFT has a long history of civil rights advocacy, including fighting for gender equity and justice and against discrimination and harassment. AFT's members include holders of guest workers visas, such as H, F, and J visas, who are directly affected by discriminatory and exploitative practices that exist under these programs.
6. The **Association of Flight Attendants-CWA (AFA-CWA)** is the flight attendant union organized by flight attendants for flight attendants. AFA represents nearly 50,000 flight attendants at 17 airlines, serving as a voice for flight attendants at their workplace, in the industry, in the media and on Capitol Hill. Simply put, the goal of flight attendants who become part of AFA-CWA is to negotiate better pay, benefits, working conditions and work rules at their airline, and to improve their safety on the job.
7. The **Worker Support Center, A.C. (CAT)** was founded in December 2000 and constituted as a civil association on May 9, 2001. The main objective of the organization is to accompany the demands of workers to promote the validity and defense of rights working humans.
8. **Centro de Apoyo y Capacitación para Empleadas del Hogar, A.C. (CACEH).** We are a civil society organization that empowers and professionalizes domestic workers through technical and political training and research on domestic work in Mexico.

9. The **Center for Human Rights of Women A.C. (CEDEHM)** is a civil association based in Chihuahua, Chihuahua, Mexico. It was founded in 2005 and opened its doors to the public in 2006. We are a secular and feminist human rights organization committed to justice, equality and dignity of people. We believe in democracy and horizontality as the guiding principles of our work.
10. The **Mountain Human Rights Center "Tlachinollan"** is a civil society organization based in the heart of the Guerrero Mountain, one of the poorest and most marginalized areas of Mexico. We accompany victims of serious human rights violations and indigenous families who migrate to agricultural fields in the north of the country and the United States, facing discriminatory treatment by the authorities and employers.
11. For thirty years, the **Fray Francisco de Vitoria Center for Human Rights** has defended, promoted, and protected human rights. The Center was created in October 1984 by the Province of Santiago of the Order of Dominican Friars Preachers of Mexico. Since then, the Center has supported processes to make human rights enforceable.
12. The **Fray Matías de Córdova Human Rights Center** is a non-governmental, nonprofit human rights organization that has worked for more than twenty years to promote and defend the human rights of migrants, asylum seekers, and refugees. Through our defense, we engage in litigation, policy and media advocacy, trainings and guidance on migration, seeking to establish judicial precedents that will change public policy and contribute to minimizing or eradicating human rights violations. Through our framework, we currently work in four strategic areas: Structural Change, dedicated to research-action, communication, and social and political advocacy; Comprehensive Defense, which includes all of our direct work with migrants and refugees; Collective Exercise of Rights, to promote participatory spaces; and Internal Strengthening, which addresses internal and management issues, enabling the organization's proper functioning.
13. The **Miguel Agustín Pro Juárez A.C. Human Rights Center (Centro Prodh)** is a non-governmental organization, founded in 1988 by the Society of Jesus, which seeks to promote structural changes so that society has the conditions to enjoy and exercise in an equitable way all of Human rights Our mission is to promote and defend the human rights of excluded people and groups, in situations of vulnerability or poverty, to contribute to the construction of a more just, equitable and democratic society, in which dignity is fully respected. Since 2001 we have had Consultative Status with the United Nations Economic and Social Council. Since 2004 we are an Accredited Organization before the Organization of American States.
14. The **Victoria Díez Human Rights Center** promotes and defends the human rights of women living in poverty, marginalized women, and excluded women through

socio-educational, legal, and organizational processes enabling them to fully exercise their rights.

15. The **Center for Reflection and Labor Action (CEREAL)** is a nonprofit organization that began in Mexico City in 1988 with the Society of Jesus and Guadalajara, Jalisco, in 1997. Currently, our headquarters is in Guadalajara. CEREAL's mission is to promote and defend workers' human rights and socio-environmental justice. We accompany workers' organizations to improve their living conditions in their productive spaces and reproductive spaces of everyday life. We do this work through research, relationships, and advocacy. Our work's strategic areas include accompaniment and listening to workers in promoting and defending workers' human rights, analysis and research on the Mexican social and labor realities, public policy and business policy advocacy, and sustainability based on our organization's mission. We currently accompany factory workers in the textile-apparel and electronics industries, providing them with legal guidance.
16. The **Interdisciplinary Center for Rights, Childhood, and Parenting** promotes respecting and guaranteeing women's rights, children's rights, the rights of vulnerable groups, and gender equality. Through its Laboratory for Research and Legislative Alignment, the Center has developed research on gender and disability, establishing an intersectional project on violence against girls and women with disabilities. The Center has also developed accessible information and technological tools to prevent and address gender-based violence against women with disabilities.
17. The **Comité de Apoyo a Trabajadores Agrícolas (CATA, or Farmworker Support Committee)** is governed by and comprised of farmworkers who are actively engaged in the struggle for better working and living conditions. CATA's mission is to empower and educate farmworkers through leadership development and capacity building so that they are able to make informed decisions regarding the best course of action for their interests.
18. The **Indigenous Professional Center for Advice, Defense, and Translation** is a civil society organization composed of indigenous professionals that emerged in Oaxaca as a response to the need for speakers of indigenous languages to exercise their linguistic rights in the field of justice. Over its ten-year trajectory, the organization has consolidated its work internally and externally, building a collaborative work dynamic.
19. **Equal Rights Advocates (ERA)** is a national civil rights organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls.
20. **Farmworker Justice**, based in Washington, D.C. and founded in 1981, is an advocacy, education and litigation organization whose mission is to empower farmworkers to improve their wages and working conditions, occupational safety,

health, immigration status and access to justice. Farmworker Justice, since its founding, has helped international migrant workers who labor on farms in the United States address their conditions and government policies that affect them, including under the H-2A temporary foreign agricultural worker program. Farmworker Justice also has a long history of helping farmworker women address sexual harassment, sexual violence and discrimination in their workplaces.

- 21. Indignación, A.C.** We are a nongovernmental organization. We work independently and autonomously of any power, government, political party, etc. Our team organized and began our work in May 1991. Our goal is to promote and defend human rights through a comprehensive, multicultural, and governmental perspective.
- 22. Justice at Work (Pennsylvania)** advances our mission by providing free legal representation on employment-related issues to eligible workers. We also provide community education on legal rights for migrant and immigrant workers throughout the Commonwealth. We serve communities of workers that include workers in industries that rely heavily on seasonal foreign guestworkers brought in under H-2B visas, who often return to work for the same Pennsylvania employers year after year. We also provide legal assistance to income-eligible worker organizations.
- 23. Justice for Migrant Women** protects and advances migrant women's rights through education, public awareness and advocacy. Justice for Migrant Women aims to ensure that all migrant women are guaranteed human and civil rights, including the freedom of mobility, the ability to live and work with dignity, and the right to be free of threats of violence against them and their families, whether they are migrating across borders, around regions or within states.
- 24. Justice in Motion** is a U.S.-based NGO dedicated to protecting migrant rights by ensuring justice across borders. We promote "portable justice" to ensure that migrants can access justice across borders when they challenge an exploitative employer, denounce an abusive government action, or seek refuge from harm.
- 25. The National Employment Law Project (NELP)** is a national worker advocacy organization that fights for policies to create good jobs, expand access to work, and strengthen protections and support for low-wage workers and unemployed workers.
- 26. The North Carolina Justice Center** is a non-profit organization whose mission is to eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services and treatment it needs in order to enjoy economic security. The Justice Center's Workers' Rights Project represents low income workers, including H-2A and H-2B guestworkers, in litigation and administrative advocacy.

27. The **Northwest Workers' Justice Project (NWJP)** exists to support the efforts of low-wage, immigrant and contingent workers to protect their workplace dignity and to improve wages and working conditions in Oregon, the Pacific Northwest and the nation. NWJP has represented H-2B workers in the federal courts and under the North American Agreement on Labor Cooperation. NWJP seeks an end to gender discrimination in the H-2A and H-2B programs.
28. **Red de Abogadas Indígenas, A.C.** We are a national organization composed of indigenous women from diverse ethnicities and indigenous people of Mexico (including Wírrarika, Purépecha, Odami, Maya, Zapoteca, Mixteca, Ayuujk, Triqui, Nahuatl, Chinanteca) with a presence in ten states of the Republic of Mexico. Additionally, we are trained professionally in law. Our cultural belonging combined with our professional training permits us to have a dual perspective of the law—on the one hand, positive law, on the other, indigenous law. Facing this duality, we seek to bridge these two judicial systems, building advocacy mechanisms recognizing and respecting the rights of indigenous people, emphasizing women, girls, boys, and indigenous adolescents. RAI has a presence in the following states: Oaxaca, Michoacán, Puebla, Jalisco, Ciudad de México, Guerrero, Yucatán, Chihuahua, Baja California y Tlaxcala. We assist with and guide gender-based violence cases on behalf of women, girls, boys, and indigenous adolescents before community-based and jurisdictional authorities, prosecutors, and human rights organizations.
29. The **Red de Mujeres Sindicalistas** is an organization of feminist workers made up of both trade union members and nonunion members. Our mission is to contribute to the eradication of discrimination and gender inequality in the workplace, in order to achieve better working and living conditions for working women. The RMS was created in 1997, within the framework of the National Meeting of Women Workers, as a result of reflections and proposals made by women representatives of various union organizations in order to strengthen and promote the leadership of women workers in decision-making positions and defend labor rights and trade unions with a gender perspective. The Network of Trade Union Women was established in 2002 as a Civil Association. Since 2002, the Network established the issue of labor reform as a main axis of its tasks for the 2019 reform, we made important proposals and many of them are already part of the new labor law.
30. **National Network of Civil Human Rights Organizations All Rights for Everyone**, made up of 85 organizations in 23 states of the Mexican Republic.
31. **Alternative Education Services (EDUCA)** is a nongovernmental organization that was formed in 1994 and is based in Oaxaca City. EDUCA advances democracy and development in Oaxacan communities and promotes justice, equity, and social participation.
32. **Red Nacional de Jornaleros y Jornaleras Agrícolas (REJJA)** was born in 2014, with the general objective of contributing with agricultural day laborers and their

families to improve their living conditions, understood as health, housing and education conditions; as well as their working conditions, understood as access to a fair salary and legal benefits, from a gender, intercultural perspective of human rights and childhood. REJJA is located in the states of Sonora, Sinaloa, San Luis Potosí, Guanajuato, Guerrero, Oaxaca, Chiapas, Morelos and Mexico City.

33. **Sin Fronteras, A.C.** is a civil society organization, founded in 1995, faced with an urgent need to address the international migration phenomenon from a comprehensive perspective that guarantees respect for human rights and promotes the improvement of the living conditions of migrants, refugees and with international protection needs, especially for those who travel irregularly. Throughout these 25 years of work, Sin Fronteras has established itself as a professional, sustainable and leading institution in migration and asylum issues that has a model of Solid integration intervention with a human rights approach that articulates actors for advocacy and promotes the autonomy of its target population.
34. The **Sindicato Independiente Nacional Democrático de Jornaleros Agrícolas** is a national union, with sections in Baja California, where it was established in 2015, Sonora, Jalisco and Mexico City. Our main work in the defense of human and labor rights of the Day laborers of Mexico.
35. The **National Union of Domestic Workers (SINACTRAHO)** was founded in 2015 to defend domestic workers' rights in Mexico. The organization is affiliated with the National Union of Workers - Mexico (UNT) and is part of the International Federation of Domestic Workers.
36. **Survivors Know** is a collective of survivors of sexual violence. We see sexual harassment and workplace violence as a collective harm that demands collective action and organizing. We advance a reality where survivors harness our potential to end gender-based violence and set the agenda for a world free of misogyny.
37. **United Food and Commercial Workers International Union (UFCW)** is a labor organization that represents working people across the United States. UFCW's 1.3 million members work in a range of industries, with a majority working in retail food, meatpacking and poultry, food processing and manufacturing, and non-food retail. The UFCW is America's largest meatpacking and food processing union. UFCW's objective is to elevate its members and their families by improving wages, hours, benefits, and working conditions. UFCW also endeavors to advance and safeguard full employment, economic security, and social welfare for workers generally. The UFCW joins petitioners opposing the rampant discrimination in H-2A and H-2B recruiting and employment, and calls for the U.S. government to step up enforcement of employment and labor law violations, including Title VII.
38. **United Food and Commercial Workers Local 27 (UFCW Local 27)** represents over 22,000 members in Maryland, Delaware, Pennsylvania, Virginia and West Virginia. The UFCW is America's largest meatpacking and food processing union. UFCW's objective is to elevate its members and their families by improving wages,

hours, benefits, and working conditions. UFCW also endeavors to advance and safeguard full employment, economic security, and social welfare for workers generally. The UFCW joins petitioners opposing the rampant discrimination in H-2A and H-2B recruiting and employment, and calls for the U.S. government to step up enforcement of employment and labor law violations, including Title VII.

39. Additional organizations that have expressed their support for this Amended Petition include: over 15 members of the Alianza Nacional de Campesinas network, and over 10 members of the Red Nacional de Jornaleros y Jornaleras Agrícolas. Lists of the members of the Alianza Campesina and Red Nacional de Jornaleros y Jornaleras Agrícolas networks are available in Appendix E.

## V. FEDERAL EMPLOYMENT DISCRIMINATION LAW: TITLE VII

Title VII prohibits employers and their “agent[s]” from “fail[ing] or refus[ing]” to hire any individual because of their sex.”<sup>43</sup> Title VII also applies to “employment agencies,” which it defines as “any person regularly undertaking... to procure employees for an employer” or to procure job opportunities for potential employees.<sup>44</sup> Title VII specifically prohibits employment agencies from “fail[ing] or refus[ing] to refer for employment, or otherwise discriminat[ing] against” job applicants based on sex, and from “classify[ing] or refer[ring] for employment” any individual on the basis of sex. At least one court has considered H-2 employment recruiters to be employment agencies within the meaning contemplated by Title VII.<sup>45</sup>

In addition to discrimination in recruitment and hiring, Title VII forbids employers from assigning workers to less desirable work based on sex. In particular, Title VII prohibits employers from discriminating against a worker based on sex “with respect to compensation, terms, conditions, or privileges” of employment.<sup>46</sup> It also states that employers may not “limit, segregate, or classify” workers or job applicants “in any way which would deprive or tend to deprive any individual of employment opportunities” based on their sex or other protected characteristics.<sup>47</sup> Employers are required to make all employment decisions, including the decision to hire, fire, promote, transfer, compensate workers, based on neutral, business-related criteria and not based on sex.<sup>48</sup>

Title VII has been interpreted to prohibit intentionally discriminatory acts, whether openly or covertly committed; such discrimination is usually labeled “disparate treatment” on the basis of, for example, sex. Title VII also prohibits employer use of facially neutral policies that have disproportionately adverse effects, or a “disparate impact,” on protected groups such as women.<sup>49</sup>

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<sup>43</sup> 42 U.S.C. § 2000e(b); § 2000e-2(a)(1).

<sup>44</sup> § 2000e(c).

<sup>45</sup> *Olvera-Morales v. Int’l Labor Mgmt. Corp.*, 246 F.R.D. 250, 256 (M.D.N.C. 2007).

<sup>46</sup> § 2000e-2(a)(1).

<sup>47</sup> § 2000e-2(a)(1)-(2).

<sup>48</sup> § 2000e-2(a)(1).

<sup>49</sup> § 2000e-2(a)-(b), (k). *See also* U.S. Equal Employment Opportunity Commission, 915.003, *EEOC Compliance Manual Section 15, Race and Color Discrimination* (Apr. 19, 2006) (providing examples of disparate treatment

## **VI. FAILURE OF THE UNITED STATES TO PROMOTE COMPLIANCE WITH AND EFFECTIVE ENFORCEMENT OF DISCRIMINATION LAWS IS A VIOLATION OF ARTICLE 23**

The United States falls short of its USMCA Chapter 23 commitments by enabling gender discrimination at every step of the H-2 hiring and recruitment process; by enabling discrimination in the workplace, including pervasive sexual harassment; by limiting workers' ability to seek free legal services to support claims for violations of U.S. employment laws; and by failing to adequately monitor, investigate, and enforce violations of U.S. employment law, including Title VII violations. As a result, these systematic failures to promote compliance and effective enforcement of discrimination laws violate Articles 23.3(1)(d), 23.5, 23.7, 23.8, 23.9, and 23.10 of the USMCA.

### **1. Discriminatory Recruitment and Hiring Practices in the H-2 Programs Violate Title VII and Chapter 23 of the USMCA**

The H-2 programs are rife with discrimination on the basis of sex because women are routinely and systematically shut out of the H-2 programs; disproportionately funneled into lower paying H-2B jobs when they do obtain an H-2 job; and given the lowest paying jobs within the H-2B programs as compared to their male peers. These actions violate Title VII and Articles 23.5(1), 23.8, 23.9, and 23.3(1)(d) of the USMCA.

#### **a. Discrimination in Recruitment**

Both employers and recruiters violate Title VII, and in turn the USMCA, by discriminating against women in recruitment for the H-2A and H-2B programs. Here, both direct and circumstantial evidence indicate that employers and labor contractors routinely and systematically recruit men and not women into the H-2 programs, thereby artificially, and discriminatorily, limiting the applicant pool to men. Indeed, Ponce's declaration outlines that she began looking for an H-2 job in 2000 and it took her a full *three years* before she was able to secure an H-2B position in 2003.<sup>50</sup> Further, Ponce outlined that she has actively sought an H-2A position since 2000 and has never been able to obtain one in over *twenty years*.<sup>51</sup> Ponce was a petitioner in a 2016 complaint brought under the North American Agreement on Labor Cooperation (NAALC). In the complaint Ponce alleged that she suffered discrimination due to the failure of the United States to effectively enforce its domestic labor laws in accordance with the NAALC. Unfortunately, five years after Ponce filed that complaint, nothing has changed. Every year since her 2016 NAALC complaint, Ponce has tried to obtain an H-2 job and has been shut out of the program. Ponce states that the years without access to high-paying H-2A jobs have had a toll on her. Ponce states, "I am 39 years old already. If this goes on, eventually I won't have the will or the health to go work in the United States. I worry that I will get to that point and not have achieved what I wanted to in my life."<sup>52</sup>

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versus disparate impact discrimination, and citing the seminal case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

<sup>50</sup> See Appendix B, Declaration of Ponce, ¶¶ 1-14.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at ¶ 50.



Employers are both directly and vicariously liable for discriminatory hiring practices pursuant to Title VII. First, where an employer *directly* recruits and hires workers and discriminates against women by failing or refusing to hire an individual on the basis of their sex,<sup>53</sup> such employer violates Title VII. Second, an employer may also be liable for the discriminatory hiring practices of recruiters under a theory of vicarious liability. Indeed, nearly all H-2A and H-2B employers rely on United States and/or Mexico-based recruiting agencies to source workers for temporary positions.<sup>54</sup> Under Title VII, employers are liable for the discriminatory actions of their “agent[s].”<sup>55</sup> Recruiters act on behalf of employers, as their agents, making employers legally responsible for their actions. This means that employers are accountable for their recruiter agents’ discriminatory recruitment practices. Employers are aware of the gender makeup of their workers and are complicit in, and liable for, discriminatory hiring when they ignore that their workforces do not have gender balance that is representative of the labor pool.

While employers’ reliance on recruiters may appear facially neutral, employers’ attempts to keep its hiring practices at arms’ length, facilitates the exclusion of women from H-2A and H-2B programs. Such actions violate Title VII under a theory of disparate impact.<sup>56</sup> Indeed, Petitioner Ponce’s story is not an anomaly – her experiences are representative of the experiences of other women. As noted above, Petitioner’s statistical analysis indicates that the underrepresentation of women in the H-2 program is statistically significant and could not have occurred but for systematic discrimination against women.<sup>57</sup>

Next, Title VII also considers H-2A and H-2B recruiters to be “employment agencies.” As noted above, an “employment agency” is “any person regularly undertaking . . . to procure employees for an employer” or to procure job opportunities for potential employees.<sup>58</sup> As a result, H-2 recruiters act as “employment agents” when they recruit and procure workers for an employer. Thus, recruiters are also subject to liability under Title VII.

Finally, because government agencies, such as DOL and the State Department (DOS), “procure”<sup>59</sup> employees for employers, these federal agencies arguably act as “employment agencies.” The fact that recruiters have historically supplied single-sex labor forces is well known to federal agencies, including DOL and DOS. As a result, these agencies are complicit in employers’ procurement of single-sex workforces. Therefore, federal agencies may violate Title VII by administering a program that is widely-known to discriminate on the basis of sex by allowing pervasive employment discrimination to continue, even if it appears facially neutral.<sup>60</sup>

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<sup>53</sup> 42 U.S.C. § 2000e-2(a).

<sup>54</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 3.

<sup>55</sup> § 2000e.

<sup>56</sup> See § 2000e-2(k).

<sup>57</sup> See Appendix A.

<sup>58</sup> See 42 U.S.C. § 2000e(c).

<sup>59</sup> See § 2000e-2(b).

<sup>60</sup> While Title VII addresses the federal government as an employer in § 42 U.S.C. 2000e-16, it does not separately address the federal government as an employment agency.

### **b. The Funneling of Women Into the H-2B Program violates Title VII and the USMCA**

When women are included in the H-2 programs, they are more likely to receive H-2B visas, which, despite 2015 reforms, extend inferior benefits and protections compared to H-2A visas. The United States issues approximately three times as H-2B visas to women as compared to H-2A visas.<sup>61</sup> However, even though women are more likely to get an H-2B visa versus an H-2A visa, women workers' representation in the H-2B program is paltry. For example, in 2018, the United States issued a mere 12,576 visas to women, while it issued 107,775 visas to men.<sup>62</sup>

Generally speaking, women are denied the opportunity to even apply for H-2A jobs. For example, in her declaration, Ponce outlines that she preferred to work in the H-2A program due to the higher wages associated with the program and free housing. However, farm labor recruiters refused to hire her because they maintained that women are not "as productive" in agricultural work; she was instead funneled into jobs in factories and processing plants.<sup>63</sup> Ponce states that her systemic exclusion from the H-2A program kept her from earning higher wages, which, in turn, prevented her from saving enough money to earn a college degree.<sup>64</sup>

Even within H-2B industries, women are often funneled into specific occupational sectors such as food processing, housekeeping, and childcare.<sup>65</sup> An example of an industry that predominantly hires women for certain jobs is the crab picking industry in Maryland, where the vast majority of workers hired for crab picking are women on H-2B visas.<sup>66</sup> While this industry also hires men, they are often hired to fill a variety of jobs such as cleaning, cooking, and supervisory roles, while women are not given the opportunity to apply to these different positions.<sup>67</sup> Though CDM and other advocates hear stories like this with frequency, we are unaware of publicly available data on the sex breakdown of H-2B employment by occupational sector. This lack of transparency inhibits monitoring and accountability.

### **c. Discrimination in Job Assignments with H-2B**

In addition to discrimination in recruitment and hiring, Title VII forbids employers from assigning workers to less desirable work based on sex. However, many H-2B employers violate this

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<sup>61</sup> U.S. Gov. Accountability Office, *GAO-15-154* at 18, <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>62</sup> See U.S. Department of Homeland Security, *Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age: Fiscal Year 2018* (2020), <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage>.

<sup>63</sup> See Appendix B, Declaration of Ponce, ¶ 9.

<sup>64</sup> *Id.* at ¶ 4.

<sup>65</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE AND 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>.

<sup>66</sup> See Appendix B, Declaration of Ponce, ¶ 13 ("Most H-2B jobs available to women are in the crab industry. Women in crab picking jobs typically have five to ten years of experience and they go to the United States every year, so there are few opportunities for new women workers to obtain a job as an H-2B crab picker.")

<sup>67</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, AND GEORGETOWN LAW CENTER, *BREAKING THE SHELL: HOW MARYLAND'S MIGRANT CRAB PICKERS CONTINUE TO BE "PICKED APART"* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>, at 26.

prohibition by maintaining sex-segregated workplaces. For example, the women interviewed for the report *Breaking the Shell: How Maryland's Migrant Crab Pickers Continue to be "Picked Apart,"* explained the work inside the crab houses being segregated by sex. Women were only assigned to crab picking while their male counterparts sometimes worked in crab picking, cleaning, or cooking.<sup>68</sup> Additionally, all the women surveyed in the *Breaking the Shell* report said that their supervisors were male and were often recruited from their own home communities in Mexico.<sup>69</sup> Thus, despite being recruited from the same community to work for the same company, women were recruited and placed in lower paying jobs, suggesting that recruiters were filling positions based on sex—not availability or merit.<sup>70</sup>

In *Covarrubias v. Captain Charlie's Seafood*, Mexican women H-2B workers filed a class action lawsuit and charges of discrimination against a North Carolina seafood company for unlawfully restricting them to certain work solely on the basis of their sex.<sup>71</sup> The plaintiffs were restricted to crab-picking work for which they were paid by the piece.<sup>72</sup> On the other hand, their male counterparts were given “a variety of work,” such as cooking and moving crabs and handling crab traps.<sup>73</sup> This resulted in more hours and greater earnings for the male workers.<sup>74</sup> The plaintiffs and their female coworkers were capable of performing the work assigned to men. As with *Olvera-Morales*, the plaintiffs’ experience is representative of that of many women working in the temporary labor program. Indeed, Ponce had similar experiences while working in the H-2B program in the United States. Ponce states that she was forced to work on a women-only assembly line. When Ponce asked to work a job that involved the operation of machinery, her manager flatly told her no. Ponce’s manager told her that that role was only for men.<sup>75</sup> Notably, the job that was reserved exclusively for men paid \$2 more an hour and provided opportunities to earn overtime.<sup>76</sup>

Accordingly, these discriminatory recruitment and hiring practices violate the following sections of Article 23:

- **Article 23.5(1) Enforcement of Labor Laws** Article 23.5(1) declares that “no Party shall fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.” Footnote 8 to Article 23.5 clarifies that a “sustained or recurring course of action or inaction” is ‘sustained’ if the course of action or inaction is consistent or ongoing, and is ‘recurring’ if the course of action or inaction occurs periodically or repeatedly and when the occurrences are related or the same in nature. A course of action or inaction does not include an isolated instance or case.”

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<sup>68</sup> *Id.* at 27.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *Covarrubias v. Capt. Charlie's Seafood, Inc.*, No. 2:10-CV-10-F, 2011 U.S. Dist. LEXIS 72636 (E.D.N.C. July 5, 2011).

<sup>72</sup> Complaint at 13-14, *Covarrubias*, 2011 U.S. Dist. LEXIS 72636.

<sup>73</sup> *Id.* at 14.

<sup>74</sup> *Id.*

<sup>75</sup> Appendix B, Declaration of Ponce, ¶ 16.

<sup>76</sup> *Id.*

The United States fails to effectively enforce Article 23.5(1) by maintaining a discriminatory hiring system that fails to recruit migrant women on the basis of sex. By its very nature, the United States' maintenance of a hiring system that results in the disparate treatment of women is "sustained and recurring." In fact, many recruiters openly discriminate against women in their job advertisements and specifically advertise to men.<sup>77</sup> Nonetheless, the United States permits these recruiters to continue procuring workers from American employers. Further, as outlined below in Section VI.3., workers in Mexico are hard pressed to bring discrimination claims against recruiters when they are in their home communities, thereby allowing recruiters to discriminate against women in Mexico with impunity. Finally, the United States fails to effectively enforce Article 23.5(1) by maintaining a discriminatory hiring system that funnels migrant women on the basis of sex into H-2B jobs, and then systematically places women in the lowest paying H-2B jobs on the basis of sex. For these reasons, the United States fails to effectively enforce Article 23.5(1) by maintaining a discriminatory hiring system.

- **Article 23.8, Migrant Workers**, states that "the Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party." The United States violates Article 23.8 failing to "ensure migrant workers are protected under its labor laws." Ponce's and Pérez's experiences are indicative of a larger practice where the rights of migrant women workers are not protected in the United States. Indeed, Ponce has been systematically shut out of work in the United States because of her sex, and Pérez was subjected to sexual harassment in the United States also because of her sex. Accordingly, these women, and thousands like them, have not been protected under the United States' labor laws.
- **Article 23.9, Discrimination in the Workplace**, states that "each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex."<sup>78</sup> Footnote 15 states that "[t]he United States' existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article. The Article thus requires no additional action on the part of the United States, including any amendments to Title VII of the Civil Rights Act of 1964, in order for the United States to be in compliance with the obligations set forth in this Article."<sup>79</sup> As noted in their declarations, Pérez's and Ponce's representative experiences are highly probative of an Article 23.9 violation because they, and thousands of other women, have not been protected against employment discrimination on the basis of sex while they work in the United States pursuant to H-2 visas.
- **Article 23.3(1)(d), Labor Rights**, declares that "each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work" which includes, "the elimination of discrimination in

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<sup>77</sup> See Appendix G.

<sup>78</sup> USMCA, art. 23.9.

<sup>79</sup> *Id.* at n. 15.

respect of employment and occupation.” The United States is not in compliance with Article 23.3(1)(d) because it fails to promote the labor principles of elimination of discrimination in respect to employment and occupation by sanctioning a program where employers and recruiters of H-2A and H-2B workers perpetrate sex discrimination and unequal pay for women in comparison to their male coworker. The United States does this in multiple ways: (1) by authorizing employers to facially discriminate in job postings; (2) by under-investigating complaints of workplace discrimination; and (3) by continuing to issue visas while knowing full well that the program has a disparate impact on women and that women are underrepresented in the H-2 workforce. As noted above, this discrimination includes systematically excluding women from the H-2A and H-2B programs, steering women workers to the H-2B program which provides fewer benefits and protections, and providing women within the H-2B program with less desirable and lower-paid work than their male counterparts. In addition, United States government agencies directly further sex-based employment discrimination by continuing to issue visas workers on behalf of employers and recruiters that participate in the programs, with full knowledge that the H-2 programs discriminate against migrant women workers on the basis of sex.

## **2. The United States is in Violation of Chapter 23 Due to Endemic Sexual Harassment in the H-2 Program**

Sexual harassment in the H-2 programs is well-documented. In 2018 the *Atlantic* published an article outlining that sexual harassment directed at women agricultural workers, many of them on H-2 visas, was an “epidemic” on American farms.<sup>80</sup> The article detailed one worker’s plight where her employer, a farm labor recruiter, “promised to pay her more if she had sex with him, grabbed her from behind, and fondled her breasts.” When the worker “rejected [her employer’s] advances and threatened to call the police, he threatened to get her deported.” The employer even went so far as to show the worker a pistol in his waistband after she rejected him in a secluded area among tall tomato plants.<sup>81</sup> Unfortunately, this type of situation is not uncommon. For example, when Pérez traveled to the United States on an H-2A visa she was sexually harassed by her employer, a labor recruiter, and another supervisor.<sup>82</sup> Pérez lived at the same hotel her employer lived and her employer had a key to her room. Thus, Pérez found herself in a terrifying situation where her employer routinely made explicit requests for sex and had access to her room at all hours of the day and night. Additionally, Pérez understood that if she did not have sex with her employer she would be punished with lower-paying, grueling work. In fact, after Pérez rejected her employer’s demands for sex, she lost her job working in the kitchen and was moved to work in the fields. Pérez notes that she was replaced by a worker that was having sex with her employer. Pérez’s story highlights that no woman should be forced into making impossible and dehumanizing choices as part of the conditions of their employment. Pérez’s story is representative of thousands of other women and is indicative of the following violations of Chapter 23 of the USMCA.<sup>83</sup>

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<sup>80</sup> Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, THE ATLANTIC (Jan. 29, 2019), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/>.

<sup>81</sup> *Id.*

<sup>82</sup> Appendix D, Declaration of Pérez, ¶¶ 12-16.

<sup>83</sup> See Ai-Jen Poo & Monica Ramirez, *Female Domestic and Agricultural Workers Confront an Epidemic of Sexual Harassment*, AMERICAN CIVIL LIBERTIES UNION (May 4, 2018), <https://www.aclu.org/blog/womens-rights/womens->

- **Article 23.7, Violence Against Workers**, which states that no Party shall fail to address cases of violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 (Labor Rights), through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties. As outlined in her declaration, Pérez described that she was subjected to persistent and pervasive sexual harassment at the farm where she worked in the United States. Pérez’s representative experience is highly probative of a violation of Article 23.7.
- **Article 23.9: Discrimination in the Workplace**, provides, “[t]he Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace.” Pérez described be subjected to persistent and pervasive sexual harassment at the farm where she worked in the United States. Pérez’s representative experience is highly probative of a violation of Article 23.9.

### **3. The United States is in Violation of Chapter 23 by Limiting Migrant Workers’ Access to Free Legal Services.**

The United States limits migrant workers access to free legal services, thereby restricting their ability to obtain their own legal counsel and forcing them to rely on overburdened and backlogged administrative agencies for any hope of legal redress. Migrant workers bear unique vulnerabilities due to the nature of their visas. Workers are tied to their employers through their visa. In practice, this means that workers are loath to make complaints related to wages, safety and health, and discrimination due to very real and legitimate fears of retaliation. Indeed, under the current regulatory regime, if a worker engages in lawful protected whistleblowing activities and the employer retaliates by firing them, the worker would lose their ability to lawfully work in the United States because their visa was linked specifically to the employer that retaliated against them. What’s more, most H-2B workers would not qualify for free legal services in order to address such an injustice. In this way, the United States fails to recognize the vulnerabilities of migrant workers by artificially and unnecessarily blocking most H-2B workers’ access to free legal services.

Moreover, without access to free legal services, migrant workers who wish to pursue legal action have to either seek and hire representation at their expense or represent themselves pro se. Obtaining legal representation presents additional structural barriers for migrant workers, who may be less likely to obtain representation due to lawyers’ unwillingness to represent racial minorities or lower income clients.<sup>84</sup> Alternatively, pro se litigants have to navigate the court or administrative system on their own and are less likely to obtain a favorable judgment or a judgment at all. In a study conducted by the University of Chicago between 1998 and 2017, only 3% of pro

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rights-workplace/female-domestic-and-agricultural-workers-confront (discussing a farmworker woman who was fired for reporting harassment).

<sup>84</sup> American Bar Foundation research finds that racial minorities are unable to access legal counsel at the same rate as White litigants in employment discrimination cases due to lawyers’ biases and rejection of cases in which potential clients are of lower income or economic means. Amy Myrick, Robert Nelson, & Laura Nielson, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. LEGIS. & PUB. POL’Y J. 705 (2012).

se plaintiffs in federal district courts had their cases reach a final judgment.<sup>85</sup> Some of the challenges pro se plaintiffs face in court are understanding the legal issues within their claim, accessing the legal system due to language barriers and limited English proficiency, and navigating complex procedural requirements.<sup>86</sup> Finally, even when workers are able to bring successful Title VII claims, they are often unable to enforce court judgments and recover damages and wages from scofflaw employers.<sup>87</sup>

- **Article 23.8, Migrant Workers**, provides that “the Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.”<sup>88</sup> Arbitrarily limiting the class of migrant workers eligible for free legal services, and, therefore, legal remedies, does not “recognize the vulnerability of migrant workers.” This limitation actively works against Article 23.8’s requirement to ensure that migrant workers are protected under U.S. labor law.
- **Article 23.10, Public Awareness and Procedural Guarantees**, provides that “each Party shall promote public awareness of its labor laws, including by ensuring that information related to its labor laws and enforcement and compliance procedures is publicly available.”<sup>89</sup> Section (2) provides each “Party shall ensure that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labor laws. These tribunals may include administrative tribunals, quasi-judicial tribunals, judicial tribunals, or labor tribunals, as provided for in each Party’s law.”<sup>90</sup> By restricting legal services to H-2 workers in specific sectors, namely forestry, the United States fails to ensure appropriate access to its tribunals. Additionally, the EEOC online portal for filing complaints exists only in English, thereby denying migrant workers access to enforcement mechanisms.<sup>91</sup> By restricting legal services to certain H-2 workers and not providing adequate language access, the United States limits access to its tribunals to H-2 workers while they are present in the United States.

Moreover, the United States limits access to its tribunals while H-2 workers are in Mexico. Specifically, the United States fails to ensure appropriate access to its tribunals because some federal courts have been reluctant to apply federal anti-discrimination statutes to transactions occurring outside of the United States.<sup>92</sup> For example, in *Reyes-Gaona v. North*

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<sup>85</sup> Mitchel Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1838 (2018).

<sup>86</sup> Sara Obeidat, *Female Farm Workers Awarded \$17 Million in Florida Abuse Case*, FRONTLINE (Sept. 15, 2015), <https://www.pbs.org/wgbh/frontline/article/female-farm-workers-awarded-17-million-in-florida-abuse-case/>

<sup>87</sup> *Id.*

<sup>88</sup> USMCA, art. 23.8.

<sup>89</sup> USMCA, art. 23.10.

<sup>90</sup> *Id.*

<sup>91</sup> See Appendix F.

<sup>92</sup> *Reyes-Gaona v. North Carolina Growers Assn., Inc.*, 250 F.3d 861, 866-67 (4th Cir. 2001). *But see* *Olvera-Morales ex rel. Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211, 221 (N.D.N.Y. 2004) (declining to apply *Reyes-Gaona*’s logic where the plaintiff “applied to and was hired by” a U.S. employer).

*Carolina Growers Association*, the Fourth Circuit held that Mexican workers who alleged age discrimination in H-2A recruitment could not bring suit under the Age Discrimination in Employment Act.<sup>93</sup> In so holding, the court declared that, “the simple submission of a resume abroad does not confer the right to file an ADEA action” in the United States.<sup>94</sup> While the Equal Employment Opportunity Commission (EEOC) has issued guidance “tak[ing] the position that foreign nationals outside the United States are covered by [equal employment opportunity] statutes when they apply for U.S.-based employment,”<sup>95</sup> the *Reyes-Gaona* decision is indicative of the barriers H-2 workers face in bringing discrimination claims outside of the United States. The H-2 program is structured so that workers spend part of the year *outside* of the United States. Cases like *Reyes-Gaona* create a situation where H-2 workers have limited access to United States tribunals while they are present in the United States and while they are in their home communities in Mexico under the *Reyes-Gaona*, thereby blocking meaningful access to U.S courts year-round.

#### **4. The United States Violates the USMCA Because It Fails to Adequately Monitor and Investigate Title VII and Equal Pay Act Violations**

The EEOC fails to monitor abuses of Title VII on behalf of H-2 workers because it places the onus on vulnerable workers to report Title VII violations. The EEOC further burdens workers by subjecting them to a complicated and bureaucratic complaint process. Additionally, the U.S. Department of Labor fails to enforce the Equal Pay Act pursuant to its enforcement authority under the Fair Labor Standards Act.

First, the very nature of migrant work creates barriers to successfully taking advantage of the EEOC filing procedures. A worker who suffers discrimination must first file a charge within 180 days of the discrimination occurring. If they do so, the EEOC conducts an interview of the worker or applicant filing the charge; then, if the EEOC gives them a Notice of Right to Sue, then there is a 90-day time limit to file a lawsuit.<sup>96</sup> EEOC offices are located exclusively in metropolitan centers which limits access to workers, especially H-2A workers, who are typically located in rural areas performing agricultural labor. Because migrant workers rely on their employers for transportation, the barriers to access these offices are extremely high. This also applies to the EEOC’s partner centers, known as Fair Employment Practice Agencies.<sup>97</sup> These too are located exclusively in urban centers, have differing contact availabilities, and are opaquely listed on the EEOC website under “State and Local Agencies” with no link from the “How to file” page of the EEOC’s website.<sup>98</sup> Second, migrant workers’ addresses and phone numbers in the United States are temporary and many infrequently use email, making it difficult to comply with the requirements

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<sup>93</sup> *Reyes-Gaona*, 250 F.3d at 866-67.

<sup>94</sup> *Id.* at 866.

<sup>95</sup> U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on National Origin Discrimination*, available at [https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#\\_ftnref153](https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_ftnref153).

<sup>96</sup> U.S. Equal Employment Opportunity Commission, *Time Limits for Filing A Charge*, <https://www.eeoc.gov/time-limits-filing-charge> (last visited Mar. 10, 2021).

<sup>97</sup> U.S. Equal Employment Opportunity Commission, *Filing a Charge of Discrimination*, <https://www.eeoc.gov/filing-charge-discrimination> (last visited Mar. 10, 2021).

<sup>98</sup> *Id.*



of filing by mail, which include phone number, email, and address. Third, migrant workers often lack access to the internet—and even if they have access, the EEOC’s online filing form is not translated into Spanish.<sup>99</sup>

Second, the process for filing a Title VII claim against an employer requires a worker or job applicant to first file a charge of discrimination with the EEOC.<sup>100</sup> Charges can be filed in person by mail, or through an online portal. Notably, the EEOC does not permit workers to file charges by phone and the online portal is only available in English.<sup>101</sup> As a result, the process for filing an EEOC charge may be prohibitive for many H-2 workers, who often live in remote locations, lack transport separate from that provided by their employer, do not have access to computers, and are likely to have limited English proficiency. While information on the number of EEOC complaints filed by H-2 workers is not publicly available, many advocates believe that these barriers cause few to be submitted.

Third, United States law denies H-2B workers outside of the forestry industry the opportunity to receive free legal services from organizations that receive funding from the Legal Services Corporation – in many instances, what would be the only option for legal representation for these workers.<sup>102</sup> Because women admitted to the H-2 programs are disproportionately funneled into H-2B, and are very unlikely to be recruited as forestry workers, this restriction falls more heavily on them. Thus, the majority of women H-2B workers are systematically denied access to the legal system and have fewer opportunities to seek legal assistance in making Title VII complaints to the EEOC.

In 2014, the EEOC signed a National Memorandum of Understanding (MOU) with the Mexican government.<sup>103</sup> The MOU sought to train Mexican citizens to understand their rights under the various federal anti-discrimination laws of the United States and establish a relationship allowing the EEOC to contact Mexican citizens who return to Mexico in the event of a follow up on their EEOC investigation.<sup>104</sup> Unfortunately, the national MOU is no longer in effect, and there is little data to suggest its efficacy.<sup>105</sup> While it is encouraging that the EEOC would develop policies and further ties with the Mexican government, the issue workers face remains the enforcement of already existing laws.

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<sup>99</sup> See Appendix F. See also U.S. Equal Employment Opportunity Commission, *Public Portal*, <https://publicportal.eeoc.gov/Portal/Login.aspx> (last visited Mar. 10, 2021).

<sup>100</sup> U.S. Equal Employment Opportunity Commission, *Filing a Lawsuit*, <https://www.eeoc.gov/filing-lawsuit> (last visited Mar. 10, 2021).

<sup>101</sup> U.S. Equal Employment Opportunity Commission, *Public Portal*, <https://publicportal.eeoc.gov/Portal/Login.aspx> (last visited Mar. 10, 2021).

<sup>102</sup> 45 C.F.R. § 1626 (2021) (last visited Mar. 10, 2021).

<sup>103</sup> U.S. Equal Employment Opportunity Commission, *Memorandum of Understanding Between the U.S. Equal Employment Opportunity Commission, and the Ministry of Foreign Affairs of the United Mexican States* (Aug. 29, 2014), <https://www.eeoc.gov/mou/memorandum-understanding-mou-between-us-equal-employment-opportunity-commission-and-ministry>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Next, even if a complaint is successfully filed, the EEOC often fails to adequately investigate discrimination cases as it can decide to limit or close an investigation for several reasons. Since 2008, the EEOC has doubled the number of complaints that get placed on its lowest-priority track, which means there is an increasing number of complaints that are not investigated, mediated, or resolved by providing relief for the workers submitting the complaints.<sup>106</sup> In fiscal year 2018, the EEOC closed only about 13% of all complaints with a settlement or other relief for workers who filed them.<sup>107</sup> In fiscal year 2019, the EEOC received 23,532 charges of workplace discrimination based on sex and determined that discrimination did not occur in 62.7% of these complaints.<sup>108</sup> By contrast, within a group of 100 H-2A workers interviewed by CDM, 67% of women workers reported that their employers discriminated against them on the basis of sex.<sup>109</sup> Additionally, there is evidence that the EEOC deprioritizes cases that may be difficult to win or prove.<sup>110</sup>

Finally, the fact that H-2 workers' visas are tied to their employers makes it particularly intimidating for them to speak about against sex discrimination or other abuses while they are present in the U.S. Even workers who suffer severe abuse are unlikely to be able to change employers while maintaining lawful status, creating a barrier to reporting and addressing abuses. Moreover, the scarcity of jobs available to women in the H-2 program makes changing employers in future seasons virtually impossible. Ponce outlines this dilemma in her declaration outlining that the scarcity of H-2 jobs for women means that women "don't have the freedom to leave [sic] abusive job[s]." Ponce states, "If women had more work opportunities, we would face less abuse and harassment. For example, if an employer abuses me at work and I have an opportunity to work somewhere else, I can leave and take another job. But when there are no other opportunities, I have to put up with abuse because it is the only job available."<sup>111</sup> Ponce explained that she has "spoken with women who have spent years going to work as crab pickers in Maryland. Every year they face harassment on the job and their health suffers. I ask why they keep going to work there if it hurts them. They tell me, 'There are no other opportunities for work, so what can I do?'"<sup>112</sup> 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. Extended

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<sup>106</sup> Maryam Jameel, *More and More Workplace Discrimination Cases are Being Closed Before They're Even Investigated*, VOX NEWS (June 14, 2019), <https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination>.

<sup>107</sup> *Id.*

<sup>108</sup> U.S. Equal Employment Opportunity Commission, *EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data* (Jan. 24, 2020), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data>. See also U.S. Equal Employment Opportunity Commission, *Sex-Based Charges (Charges filed with EEOC) FY 1997-FY 2019*, <https://www.eeoc.gov/statistics/sex-based-charges-charges-filed-eeoc-fy-1997-fy-2019> (last visited Mar. 11, 2021).

<sup>109</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM*, <https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf>, at 5.

<sup>110</sup> Jameel, *supra* note 106.

<sup>111</sup> Appendix B, Declaration of Ponce, ¶¶ 47-50.

<sup>112</sup> *Id.* at ¶ 47.

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.<sup>113</sup>

Additionally, women are also forced to shoulder abuse and refrain from making complaints due to adverse case law in the United States concerning victims of retaliation. Specifically, the United States Supreme Court ruled in *Hoffman Plastics* that an undocumented worker who was fired for union organizing was not entitled to back pay, or the wages he would have earned if he had not been fired, even though the National Labor Relations Board found that the worker's employer broke the law when they fired him for union organizing.<sup>114</sup> Case law like this creates a catch-22 for H-2 workers because their work status is tied to their employers. If, for example, an H-2 worker makes a complaint about sexual harassment and then they are unlawfully fired, they may lose their work authorization and a court may be unwilling to order their employer to pay the worker back pay or reinstate them to their old job. This creates an absurd and unworkable situation for workers where women are placed in an impossible situation: either complain and risk permanently losing your job, or say nothing and continue to be subjected to discrimination and harassment.

- Article 23.5, Enforcement of Labor Laws. The United States violates Section 23.5(1) of the USMCA because the EEOC fails to adequately monitor and investigate Title VII complaints. Additionally, the EEOC fails to initiate timely proceedings seeking appropriate sanctions or remedies for Title VII Violations in Violation of Article 23.5(2). The United States permits discriminatory recruitment in the H-2 process itself, thereby *maintaining* a facially discriminatory program, which from start to finish, systematically funnels women into the lowest paid and most undesirable H-2 jobs by failing to enforce its labor law in violation of Article 23.5(1).<sup>115</sup> Additionally, the United States separately and uniquely violates Article 23.5 by failing to take appropriate government action by failing to adequately monitor and investigate Title VII violations with respect to the H-2 program and by failing to timely initiate proceedings to seek appropriate sanctions or remedies for such violations as required by Article 23.5(2).

Article 23.5(2), among other things, requires signatories to appoint and train inspectors, monitor compliance, investigate suspected violations, and seek appropriate sanctions or remedies for violations of its labor laws.<sup>116</sup> First, the United States fails to effectively monitor and investigate labor conditions at H-2 work sites. Second, because the federal agencies that enforce labor laws, the EEOC and the DOL, are chronically under-resourced, the United States systematically fails to perform its investigatory duties – indeed, it simply does not have enough investigators to perform workplace investigations related to Title VII and federal wage and hour laws.

Finally, the fact that H-2 workers' visas are tied to their employers makes it particularly intimidating for them to speak about against sex discrimination or other abuses while they

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<sup>113</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, AND GEORGETOWN LAW CENTER, *BREAKING THE SHELL: HOW MARYLAND'S MIGRANT CRAB PICKERS CONTINUE TO BE "PICKED APART"* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>, at 16.

<sup>114</sup> 535 U.S. 137 (2002).

<sup>115</sup> See *supra* section VI.2.

<sup>116</sup> USMCA, art. 23.5(2).

are present in the U.S. Even workers who suffer severe abuse are unlikely to be able to change employers while maintaining lawful status, creating a barrier to reporting and addressing abuses.

- **Article 23.9: Discrimination in the Workplace**, provides, “[t]he Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace.” The bureaucratic inefficiencies described above in this section are indicative of the fact that the very system designed to protect women workers from discrimination is not capable of reaching Article 23.9’s goal of “promoting equality” of women in the workplace.

## **VII. SUGGESTED ENFORCEMENT AND STANDARD-SETTING MEASURES IN THE UNITED STATES**

The Petitioners recommend that Mexico encourage the United States to make the following policy and regulatory changes:

1. DOL should implement H-2 program regulations, such as the following, to address sex-based discrimination through the recruitment chain.
  - i. H-2 program regulations should be amended to address discrimination against non-U.S. workers. Currently, both H-2A and H-2B program regulations explicitly prohibit sex-based discrimination but only against U.S. workers.<sup>117</sup>
  - ii. H-2 program regulations should expressly require employers to apprise everyone in their recruitment chain that they must comply with U.S. anti-discrimination laws. In addition, employers should require their recruiters to affirmatively demonstrate that they are not discriminating against workers because of sex. To effectuate this purpose, the regulations should clarify that employers are directly liable for the discriminatory actions carried out by their agent recruiters.
  - iii. Just as H-2 employers are required to attempt to recruit U.S. workers before recruiting temporary foreign workers, DOL should require that employers ensure that recruiters H-2 employers take affirmative action to recruit women workers. For example, DOL could require that job postings be circulated to non-profit and government organizations that seek to promote women’s advancement. Further, DOL could require labor contractors and recruiters to have a balanced workforce based on local labor market conditions.
  - iv. Additionally, the DOL should require employers to submit an accounting of job assignment by sex as a condition of receiving future visas. The DOL should then adopt internal policies that call for the rejection of future visa requests from employers whose hiring and job assignment results for H-2 workers are so disproportionately

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<sup>117</sup> 20 C.F.R. § 655.135(a); § 655.20(r).

adverse to women so as to establish a prima facie case of sex discrimination.

- v. The H-2 regulations should be amended so that employees' work authorizations are not linked to specific employers. In particular, the regulations should specify that a worker will not lose lawful immigration status and their work authorization will be valid for the duration of the labor certification period, if they engage in protected activities including making complaints to employers or the EEOC. While workers who file retaliation complaints may also apply for deferred action, which allows recipients to stay in the United States lawfully for a temporary period of time and apply for employment authorization during that period, the process is not uniform or transparent and remains largely inaccessible to many workers. Further, whether or not a particular agency is willing to grant deferred action to a complainant is largely dependent on the political whims of political appointees at the EEOC and other federal agencies. Thus, workers need greater statutory protections to protect them from retaliation when they engage in lawful protected activity.
  - vi. H-2 employers should be required to post a bond sufficient to cover the value of the workers' legal wages. Absent a requirement to post a bond or otherwise demonstrate solvency before certification, employers have avoided paying workers back wages owed by filing for bankruptcy.<sup>118</sup>
2. The EEOC, the DOL, and state agencies charged with implementing anti-discrimination policy should make their complaint processes more accessible to H-2 workers. For example, advocates have suggested setting up a 24-hour complaint hotline in multiple languages, including indigenous languages.<sup>119</sup> Additionally, the EEOC should make its complaint form available in Spanish. In addition, the EEOC should improve the accessibility of its complaint process to workers and job applicants abroad.
  3. Furthermore, access to legal services, including federally funded legal services should be extended to all H-2 workers. Currently, only H-2A workers and a small subset of H-2B workers can receive services from organizations funded by the Legal Services Corporation. The "super restriction" found at 46 C.F.R § 1626.11 that prohibits Legal Services Corporation-funded entities from representing many H-2 workers should be eliminated through notice and comment rulemaking.<sup>120</sup>

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<sup>118</sup> SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES, <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states>, at 40 (discussing a case in which SPLC won damages of over \$11 million for former H-2B workers, but the company declared bankruptcy).

<sup>119</sup> José R. Padilla and David Bacon, *Protect Female Farmworkers*, NEW YORK TIMES (Jan. 19, 2016), <https://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html>. While this article specifically addresses sexual harassment, its recommendations are applicable to sex discrimination as well.

<sup>120</sup> SOUTHERN POVERTY LAW CENTER, *supra* note 118, at 45.

4. In addition to attempting to address the barriers to workers' seeking justice, EEOC and DOL should affirmatively allocate more resources to investigating and monitoring H-2 workplaces for sex-based labor segregation. Further, DOL should debar employers and recruiters found to have discriminated against workers on the basis of sex from participating in the H-2 program for a specific period of time. EEOC and DOL should also take affirmative steps to address sexual harassment, gender-based violence, and other work environment conditions in H-2 workplaces.
5. The DOL, DOS, and United States Citizenship and Immigration Services (USCIS) should improve record keeping and data transparency to allow for better monitoring of sex distribution in the H-2 programs, including by occupation and wage. In particular:
  - i. The DOS should publish the overall gender breakdown of H-2A and H-2B visas issued on an annual basis. This data should include a geographic identifier such as the employer's postal code. Similarly, USCIS should publish the overall sex breakdown of H-2A and H-2B visa holders to enter the country on an annual basis. Currently, this data is public, but only accessible via federal Freedom of Information Act (FOIA) requests, which are often subject to long delays and heavy redactions due to the government's exercise of governmental privileges.
  - ii. USCIS and the DOL should coordinate with one another so that their databases track and publish aggregate data on the number of H-2A and H-2B positions filled by sex, occupation, and wage.
6. The United States should adopt high labor standards, such as the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), as well as Violence and Harassment Convention, 2019 (No. 190).
7. The United States should comply with its commitments under the International Labour Organization's Declaration on Fundamental Principles and Rights at Work which require the [elimination of discrimination in respect of employment and occupation](#) with respect to sex discrimination within the H-2A and H-2B programs.

#### **VIII. COMPLIANCE WITH ITS RESPONSIBILITIES UNDER THE USMCA REQUIRES THE U.S. GOVERNMENT TO EFFECTIVELY ENFORCE ITS LABOR LAWS, PARTICULARLY WITH RESPECT TO EMPLOYMENT DISCRIMINATION.**

The government and people of Mexico have the right to require the United States to abide by its obligations under the USMCA. When domestic labor laws are not enforced in the United States, temporary workers are harmed, as well as competing employers who are placed at an economic disadvantage when they remain in compliance with federal law while their competitors run afoul of federal regulations without consequence. Additionally, failure to enforce domestic labor laws

in the United States also impacts and disrupts free trade is disrupted, which harms employees in Mexico and the United States.

The United States Government is failing to effectively enforce its employment discrimination law. The Petitioners ask that Mexico take the following steps to bring the United States Government into compliance with its obligations. Accordingly, the Petitioners request the following actions to remedy the aforementioned Chapter 23 violations:

- The Petitioners request that the United States and Mexico develop cooperative activities which address “gender-related issues in the field of labor and employment, including: (i) elimination of discrimination on the basis of sex in respect of employment, occupation, and wages” pursuant to Article 23.12(5)(j)(i).<sup>121</sup>
- Petitioners further request that Secretariat of Labor and Social Welfare thoroughly investigate the allegations made in this Amended Petition, and upon finding them meritorious, recommend consultation as provided for under Article 23.17 of the USMCA regarding the failure of the U.S. government to comply with its own obligation to avoid discrimination on the basis of sex in the issuance of H-2 visas, as well as its obligation to ensure effective enforcement of its equal employment opportunity laws.<sup>122</sup>
- Petitioners seek an independent report analyzing how the United States can equally include women in work opportunities under H-2A and H-2B visa programs. We further recommend that the United States and Mexico seek the assistance of the International Labour Organization to provide expert advice in analyzing how to eliminate sex discrimination from the H-2A and H-2B programs.

These actions are necessary because United States fails to live up to its commitments in Chapter 23 of the USMCA by: permitting systemic discriminatory recruitment and hiring practices against women, where women are excluded from H-2 visa programs as a matter of course, enabling discrimination in the workplace, including pervasive sexual harassment, limiting workers’ ability to seek free legal services to support claims for violations of U.S. employment laws, and failing to adequately monitor, investigate, and enforce violations of U.S. employment law, including Title VII violations.

Respectfully submitted this 23<sup>rd</sup> day of March 2021 on behalf of the named Petitioners Maritza Pérez Ovando and Adareli Ponce Hernández:

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Comité de Defensa del Migrante  
Organizational Petitioners Listed in *supra* Section IV and Appendix E.

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<sup>121</sup> USMCA, art. 23.12(5)(j)(i).

<sup>122</sup> USMCA, art. 23.17.

## **IX. APPENDICES**

Appendix A: Disparate Impact Analysis

Appendix B: Declaration of Ponce

Appendix C: 2016 North American Agreement on Labor Cooperation (NAALC)  
Complaint and Supplement

Appendix D: Declaration of Pérez

Appendix E: List of Member Organizations of Supporting Networks

Appendix F: English-Only EEOC Complaint Form

Appendix G: Discriminatory Job Advertisements



# APPENDIX A

DISPARATE IMPACT ANALYSIS

## APPENDIX A: DISPARATE IMPACT ANALYSIS

### H-2A Visas Disparate Impact

While both the H-2A and H-2B temporary work programs heavily rely on Mexican workers, statistical and anecdotal evidence indicates that the vast majority of Mexican women are excluded from the H-2 visa program. First, Mexican workers constitute the vast majority of H-2A recipients. Indeed, in 2019, approximately 92% of all H-2A visas were granted to Mexican workers.<sup>1</sup> Notably, in the year prior, in 2018, a mere 3%<sup>2</sup> of all H-2A visas were issued to women, while women made up approximately 25% of all farm laborers in the United States in 2018.<sup>3</sup> The National Agricultural Workers Survey (NAWS)<sup>4</sup> released in 2018 shows that women in the crop labor force was approximately 32%, however, it is important to note that the NAWS does not include workers with H-2A visas in its sampling. This analysis will demonstrate evidence of discrimination against women with regards to the distribution of H-2A visas following the adverse impact and the fourth-fifths rule.<sup>5</sup>

#### *Impact Ratio*<sup>6</sup>

“The basic statistic used in the four-fifths rule is the Impact Ratio (IR), which is the ratio of the selection rate for the minority group ( $SR_{min}$ ) to the selection rate for the majority group

( $SR_{maj}$ ).”<sup>7</sup>

$SR_{min}$ : Proportion of women in the agriculture workforce with H-2A visas

$SR_{maj}$ : Proportion of women in the agriculture workforce without H-2A visas

$$IR = \frac{SR_{min}}{SR_{maj}}$$

$$IR = \frac{0.03212978}{.32} = 0.100405562 * 100 \approx 10\%$$

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<sup>1</sup> U.S. Department of State, Bureau of Consular Affairs, Nonimmigrant Visas Issues by Nationality (Including Border Crossing Cards): Fiscal Years 2010-2019, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY19NIVDetailTable.pdf>.

<sup>2</sup> In 2018 the United States issued a total of 298,228 H-2A visas, and 9582 of that total were issued to women. See Nonimmigrant Admissions by Selected Classes of Admission and Sex and Age, <https://www.dhs.gov/immigration-statistics/readingroom/NI/NonimmigrantCOAsexage>.

<sup>3</sup> United States Department of Agriculture, Economic Research Service, Size and Composition of U.S. Agricultural Workforce, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/>.

<sup>4</sup> Hernandez, Trish, and Susan Gabbard. “Findings from the National Agricultural Workers Survey (NAWS) 2015–2016. A Demographic and Employment Profile of United States Farmworkers,” at 7. Dep Labor Employ Train Adm Wash Dist Columbia (2018).

<sup>5</sup> SECTION 1607.4, UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURE (1978); 43 FR38295 (AUGUST 25, 1978).

<sup>6</sup> Title VII, 29 CFR Part 1607, <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines>.

<sup>7</sup> Morris, S. B. (2001). Sample size required for adverse impact analysis. Applied HRM Research, 6(1-2), 13-32.

The impact ratio is much less than 80%, so per the four-fifths rule there is evidence of disparate impact. Given the evidence of disparate impact a more rigorous analysis using the 2 Independent-Sample Binomial Z-Test per the Office of Federal Contract Compliance Programs standard<sup>8</sup> was done to test whether the proportion difference is statistically significant.

### *Independent-Sample Binomial Z-Test*

$SR_{min}$ : Proportion of women in the agriculture workforce with H-2A visas

$SR_{maj}$ : Proportion of women in the agriculture workforce without H-2A visas

$SR_T$ : Proportion of all women in the agriculture workforce

$N$ : Total number of people in the agriculture workforce  $\approx 1.18\text{million}$  [3]

$$P_{min} = \frac{\text{Total Agriculture Workforce with H - 2A Visas}}{\text{Total Agriculture Workforce}}$$

### Z Test

$H_{Null}$ : There is no difference between the proportion of women in the agriculture workforce with H-2A visas compared to the proportion of women in the agriculture workforce without H-2A visas ( $SR_{min} = SR_{maj}$ )

$H_{Alternative}$ : There is a difference between the proportion of women in the agriculture workforce with H-2A visas compared to the proportion of women in the agriculture workforce without H-2A visas ( $SR_{min} \neq SR_{maj}$ )

$$Z_D = \frac{SR_{min} - SR_{maj}}{\sqrt{\frac{SR_T(1 - SR_T)}{(N)(P_{min})(1 - P_{min})}}}$$

$$Z_D = \frac{0.03212978 - 0.32}{\sqrt{\frac{0.25(1 - 0.25)}{(1,180,000)(0.252735593)(1 - 0.252735593)}}} = -316.3409$$

### Conclusion

$$|Z_D| > 1.96, \alpha = 0.05$$

The test statistic exceeds 1.96, which is the decision boundary at  $\alpha = 0.05$ . Therefore we should reject the null hypothesis,  $H_{Null}$ . This is evidence that there is a statistically significant difference between the proportion of women in the agricultural workforce that have H2-A visas and women in the agricultural workforce that do not have H2-A visas.

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<sup>8</sup> <https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures>

# APPENDIX B

DECLARATION OF ADARELI PONCE HERNÁNDEZ

## **APPENDIX B: DECLARATION OF ADARELI PONCE HERNÁNDEZ**

1. I, Adareli Ponce Hernández, am a citizen of Mexico and resident of Chapulhuacán, Hidalgo, Mexico.
2. I am 39 years old.
3. My parents are elderly and I support them financially. I also provide financial support to my nephews and nieces.

### My Recruitment Experience

4. Around 2000, I began to seek opportunities to obtain an H-2A visa to work in the United States (U.S) so that I could finance my education and support myself and my family. My dream is to study communication sciences at a university in Mexico, but because I have not had access to high paying work in the H-2 programs, I have not yet been able to obtain this dream.
5. When I began seeking work in the United States I knew that if I was going to make the sacrifice to migrate in order to work and leave my family and home community behind, I wanted the best job I could find.
6. I sought an H-2A visa specifically because the H-2A program requires employers to provide free housing to employees. Also, H-2A jobs are generally better paid than H-2B. Financially, an H-2A visa job is far superior to an H-2B visa job.
7. Unfortunately, I knew that it was effectively impossible to get an H-2A job because those jobs are only offered to men. I knew that H-2B jobs were not as lucrative, but that my best chance at a work visa in the U.S. was an H-2B job because of my sex.
8. Nonetheless, I tried repeatedly to obtain H-2A jobs.
9. On two separate occasions I spoke with H-2A recruiters who told me that I shouldn't apply for an H-2A job because I was a woman. The recruiters told me that agricultural work was men's work that I was not physically capable of, even though I knew that wasn't true. The recruiters told me that women in H-2A jobs "don't produce" as much as men and are more suited for crab picking work.
10. The recruiters would not even accept my application for an H-2A job, so I was blocked from even applying.

11. The recruiters' actions discouraged and angered me because those men limited my financial wellbeing and ability to reach my educational goals solely because I was a woman.

12. Because I could not get an H-2A job as a woman, I had to start searching for an H-2B position. But that wasn't easy because there are very few H-2B jobs available to women. In my home community, if a recruiter is looking to recruit fifty H-2B jobs, only five will be for women.

13. Also, most H-2B jobs available to women are in the crab industry. Women in crab picking jobs typically have five to ten years of experience and they go to the United States every year, so there are few opportunities for new women workers to obtain a job as an H-2B crab picker.

14. In 2003, a full three years after I began my search for an H-2 position, I finally obtained an H-2B visa to work in a chocolate factory in Louisiana.

#### H-2B Work in Chocolate Factory (2003 - 2009)

15. I traveled to the United States to work in a chocolate factory on H-2B visas from 2003 to 2006.

16. In order to start work, the managers forced the women workers to take pregnancy tests. I thought this was dehumanizing and disgusting.

17. The manager at the chocolate factory would tell the women to work faster, or he would send us back to Mexico. The manager mistreated the women working by acting controlling and threatening to send us back to Mexico. He didn't respect our dignity as women or as human beings.

18. When I started working at the chocolate factory, I noticed that certain jobs, like jobs that involved the operation of machinery, were better paid. I asked my manager if I could learn to operate a machine used to store large boxes because that job paid a higher hourly rate. My manager told me that that role was only for men. I was disappointed because that job paid \$2 U.S. dollars more an hour than my job packing chocolates on the assembly line. I also noticed that only women worked on the assembly line, and all of the men in the factory had higher paying jobs. The men also had the opportunity to earn overtime and the women did not.

19. In addition to the discrimination I faced in my working conditions, the housing conditions my employer subjected me to were also discriminatory and sexist. I was forced to live with 16 women coworkers in an extremely overcrowded, small trailer.

20. We were not allowed to have guests and the manager watched our every move because he monitored when we came and left the trailer. The company kept the men and women apart in the housing and at work. They would not let us have guests. If one of us had a guest, the company would scare them off, call the police, and threaten to call immigration officials. These actions showed me that the company tried to control women's bodies and autonomy both at work and in our homes.

21. As women, we knew that this was one of the very few H-2 jobs available to us, if not the only one. I had struggled for three whole years to find an H-2 job that would hire me even though I am a woman, and then, once I finally got a job, I was discriminated against because I was a woman.

22. Finally, along with 70 coworkers I decided to complain about this discrimination to management. We decided that things had to change. Other women workers were afraid to complain because they knew our employer could retaliate against them.

23. After we spoke out, my employer saw us as troublemakers and he fired several of my colleagues who had spoken out. I had to return to Mexico.

24. In 2007 and 2008, I kept trying to find H-2 jobs. In those years, I was defrauded three times because I tried applying to H-2 jobs that turned out to be fake. This meant that I paid a recruiter my hard earned money for H-2 jobs that didn't even exist.

25. In 2009, I went back to work at the chocolate factory because I could find no other job opportunities.

26. When I arrived, the manager locked me in a room and told me that he would be keeping me under observation because I was part of the group that had asked for working conditions to improve. His face was angry. I felt terrified and intimidated. He saw us women as troublemakers just because we had defended our rights and asked for things to get better at work.

27. I worked there until 2011, when my employer told me, without further explanation, that I was no longer wanted in the factory. I believe this was in retaliation for having spoken out before.

28. After I lost my job in the chocolate factory, I returned to Mexico and began the process of looking for work all over again.

#### H-2B Work in Crawfish Factory (2011-2014)

29. In 2011, a friend helped me get an H-2B job at a crawfish processing plant in Louisiana. This is the only way women who are able to get H-2 jobs, no matter how much experience we have. You have to know someone who can help you get your foot in the door.

30. I spent four years going to the crawfish plant to work. I worked on the lines, picking crawfish.

31. Men had the chance to earn overtime, but women almost never did. They even let men work double shifts because supposedly they could handle staying up all night. The women just worked on the line.

32. The men could work in storage, loading trucks, but they told us that this job was dangerous and for men only. I felt uneasy hearing this. I knew I could load crawfish sacks on trucks—they weren't very heavy—but just hearing them say this was discouraging. We were stuck inside, picking crawfish, segregated into just jobs for women.

33. A coworker from Sinaloa was a member of an organization that defends the rights of women at work. In 2013, our employer found out and fired her. The next year, he refused to hire her again.

34. Everyone working in the crawfish plant was incensed at how unjust her firing was. In 2014, many of my coworkers came to the crawfish plant to protest our employer's retaliation and blacklisting practices. The employer saw and became angry. He came into the plant and told us all that it was unacceptable to protest at work.

35. At the same time, I myself was a member of the Migrant Defense Committee, another organization that fights for the rights of migrant workers. My coworkers warned me that our employer would find out and retaliate against me, like he did with the coworker from Sinaloa.

36. I believe he did find out and that I was taken off the recruitment list for the crawfish plant, because all my coworkers still work there. I believe they took me off the list because the employer found out I was a member of the Migrant Defense Committee, fighting for the rights of migrant workers.



37. Now, every year my former coworkers go back to work at the crawfish plant, from January to June, and I stay here in Mexico. I feel extremely sad and ask myself, what did I do wrong?

#### Experiences with the H-2 Program after 2014

38. Since 2015, I have not found job opportunities in the H-2 program. I want to work, but there are no opportunities for women. I have focused on finding work here in Mexico, but it's not the same. I cannot earn anywhere near the amount of money that I could earn working in the United States (U.S.) with an H-2 visa.

39. It is wrong and painful for recruiters to recruit only men and not women. I am young, and I am willing and capable. But I am discouraged because there are no opportunities for women to work, even though men have opportunities.

40. In 2016 I, along with another woman, Elisa Tovar Martínez, were named petitioners in a complaint brought under the North American Agreement on Labor Cooperation ("NAALC"). In the complaint I alleged that I suffered discrimination due to the failure of the United States to effectively enforce its domestic labor laws in accordance with the North American Agreement on Labor Cooperation ("NAALC").

41. Now, a full five years after I filed the NAALC complaint, nothing has changed. It is still very rare for a woman to be able to go to the US through the H-2 program and I still don't have an H-2A job.

#### H-2 Program and Recruitment Fraud

42. I have looked for other H-2 jobs, but I live in a rural area far from the city where there are no trustworthy, established recruiters who we can go to. This means we are very vulnerable to fraud. Fraudulent recruiters prey on many people here, giving them false hope that they will be recruited to work in the US on an H-2 visa. But the jobs they offer don't really exist.

43. An equal number of men and women fall victim to recruitment fraud. But this is troubling because there are so many more men applying for these jobs. Of every ten women who try to find an H-2 job, about five are defrauded. Women have told me about getting cheated out of 15,000 pesos, a huge amount of money, trying to secure a job that turned out not to exist.

44. Every year, more and more women want to go and work in the US because they see it as an opportunity for growth for themselves and their families. But when they try to go, they end up victims of fraud.

45. Now I dedicate myself to fighting fraudulent recruitment in my community. When someone tells me about a job offer, I make note of the name of the recruiter and the company that's hiring. I then call the Centro de los Derechos del Migrante so they can help me verify whether the job really exists or if it's fraudulent.

#### Lack of Opportunities Makes Women Vulnerable to Workplace Abuse

46. I dream of a day when women can also choose what job we want to take. Because men have job opportunities, they can leave jobs that turn out to be abusive, or just because they don't like them. Women don't have job options, so we don't have the freedom to choose our jobs. That means we don't have the freedom to leave an abusive job, either.

47. I have spoken with women who have spent years going to work as crab pickers in Maryland. Every year they face harassment on the job and their health suffers. I ask why they keep going to work there if it hurts them. They tell me, "There are no other opportunities for work, so what can I do?"

48. If women had more work opportunities, we would face less abuse and harassment. For example, if an employer abuses me at work and I have an opportunity to work somewhere else, I can leave and take another job. But when there are no other opportunities, I have to put up with abuse because it is the only job available.

49. I am 39 years old already. If this goes on, eventually I won't have the will or the health to go work in the United States. I worry that I will get to that point and not have achieved what I wanted to in my life.

50. I am not just fighting for myself. I am fighting for so many women and their stories, too. This discrimination must end so my punishment for speaking out will have been worth it.

# APPENDIX C

2016 NAALC PETITION AND SUPPLEMENT

July 15, 2016

PETITION

on

LABOR LAW MATTERS ARISING IN THE UNITED STATES

submitted to the

National Administrative Office of Mexico

under the

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

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

**NON-CONFIDENTIAL COMMUNICATION**

## I. INTRODUCTION AND STATEMENT OF VIOLATION

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

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

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

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

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

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

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

4. As noted above, discriminatory recruitment and hiring practices result in women being largely excluded from the H-2 programs. Over the five-year period spanning fiscal year 2009 and fiscal year 2013, 96 percent of H-2A workers were male.<sup>7</sup> By comparison, women made up approximately 28 percent of farmworkers in the United States in fiscal years 2011-2012.<sup>8</sup> Similarly, in fiscal year 2013, 88 percent of H-2B workers were male.<sup>9</sup> The gender breakdown of H-2B workers by industry is not publicly available.
5. Women who are admitted to the H-2 programs are likely to be funneled into the H-2B program, rather than provided equal opportunity to apply for H-2A and H-2B work.<sup>10</sup> Both H-2A and H-2B programs provide for worker protection, but despite 2015 reforms to the H-2B program, the protections and benefits offered by the H-2A program are stronger. For example, H-2A workers are entitled to free housing and federally funded legal services while H-2B workers generally are not.<sup>11</sup> Furthermore, many H-2B workplaces are marked by sex-based segregation, with women doing less desirable, lower-paid work while men have a wider variety of options.<sup>12</sup>
6. The United States has failed to, and continues to fail to, effectively enforce its anti-discrimination laws with regards to women workers and job applicants in the H-2 programs. U.S. law prohibits discrimination based on sex in the hiring of employees, as well as in compensation or terms and conditions of employment.<sup>13</sup> It further prohibits segregating or classifying employees based on sex in any way that tends to deprive them of employment opportunities.<sup>14</sup> As described in Section V of this complaint, the U.S. has taken inadequate action to cease discriminatory recruitment, hiring, and employment practices within the H-2 programs.
7. The NAALC aims to ensure that increased economic integration does not lead to a corresponding decrease in labor standards. This objective is undermined unless the United States government is held accountable for its failure to respond to sex discrimination in the H-2 visa programs. Petitioners accordingly request that the Mexican National Administrative Office (NAO) thoroughly investigate the allegations in this public communications, and upon finding them meritorious, recommend ministerial

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

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

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

<sup>9</sup> U.S. Gov. Accountability Office, *GAO-15-154* 18.

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

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

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

<sup>13</sup> 42 U.S.C. § 2000e-2(a)(1), (b).

<sup>14</sup> § 2000e-2(a)(2).

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

## II. STATEMENT OF VIOLATIONS OF THE NAALC

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

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

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

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

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

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

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

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

### III. STATEMENT OF JURISDICTION

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

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



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

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

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

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

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

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

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

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

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

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

### **Federal and State Employment Discrimination Laws**

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

<sup>17</sup> 42 U.S.C. §§ 2000e, 2000e-2.

<sup>18</sup> § 2000e(c).

<sup>19</sup> § 2000e-2(b).

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

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

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

## **Systemic Violations of Employment Discrimination Laws**

### *Discrimination in recruitment*

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

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<sup>21</sup> § 2000e-2(a)(1)-(2).

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

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

<sup>24</sup> Fla. Stat. Ann. § 760.10(1); Office of Foreign Labor Certification, *H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2015* (accessed Jul. 8, 2016), available at [https://www.foreignlaborcert.doleta.gov/pdf/H-2A\\_Selected\\_Statistics\\_FY\\_2015\\_Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY_2015_Q4.pdf); Office of Foreign Labor Certification, *H-2B Temporary Non-Agricultural Labor Certification Program – Selected Statistics, FY 2015* (accessed Jul. 8, 2016), available at [https://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_Selected\\_Statistics\\_FY\\_2015\\_Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Selected_Statistics_FY_2015_Q4.pdf).

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

<sup>26</sup> 42 U.S.C. § 2000e-2(a).

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

<sup>28</sup> *See* § 2000e-2(k).

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

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

#### General exclusion of women from temporary labor programs

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

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<sup>29</sup> § 2000e.

<sup>30</sup> See § 2000e-2(b).

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

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

<sup>33</sup> Farmworker Justice, *Selected Statistics on Farmworkers 2*, *supra* note 8.

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

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

<sup>36</sup> *Id.* at 12.

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

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

#### Funneling of women into H-2B work

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

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

<sup>38</sup> See, e.g. Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* 35-36, (2013), available at [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) (telling the story of a female H-2B worker who learned upon arrival that she had been hired to be the plant manager's mistress).



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

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

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

<sup>40</sup> *Olvera-Morales*, 2008 U.S. Dist. LEXIS 3502.

<sup>41</sup> *Id.* at \*6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*34-35.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*34.

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

#### *Discrimination in job assignments*

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

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

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

<sup>48</sup> *Id.* at 14.

<sup>49</sup> *Id.*

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

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

### **Failure to Effectively Enforce Employment Discrimination Laws**

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

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<sup>50</sup> *Id.*

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

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

<sup>53</sup> Padilla, *Protect Female Farmworkers*, *supra* note 37.

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

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<sup>54</sup> 42 U.S.C. § 2000e-3(a)

<sup>55</sup> See 45 C.F.R. § 1626.

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

<sup>57</sup> *Reyes-Gaona*, 250 F.3d at 866-67.

<sup>58</sup> *Id.* at 866.

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

<sup>60</sup> U.S. Const. amend. V, XIV.

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

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

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

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<sup>61</sup> See Equal Employment Opportunity Commission, *supra* note 59.

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

<sup>63</sup> 20 CFR § 655.135(a); 20 CFR § 655.20(r).

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

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

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

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

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

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

## VII. CONCLUSION

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

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

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

## **VIII. ACTIONS REQUESTED**

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

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

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



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

Respectfully submitted,

Adareli Ponce Hernández  
Barrio del Carmen  
Chapulhuacan, Hidalgo  
MEXICO

Elisa Tovar Martínez  
Miguel Barragan # 70  
Ejido Palomas, San Luis Potosi 79320  
MEXICO

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

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

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

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

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

Instituto de Estudios y Divulgación Sobre la Migración (INEDIM)  
Mexicali 4, Dpto. 6  
Col. Hipódromo, Del. Cuauhtémoc  
06170 Ciudad de México, D.F.  
MEXICO

Unión Nacional de las Trabajadoras y Trabajadores (National Union of Workers, or UNT)  
Villalongín 50  
Col. Cuauhtémoc, Del. Cuauhtémoc  
06500 Ciudad de México, D.F.  
MEXICO

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

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

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

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

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

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

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

Community Food & Justice Coalition  
398 60th Street

Oakland, CA 94618  
UNITED STATES

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

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

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

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

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

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

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

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

Rural Coalition  
1029 Vermont Ave NW Suite 601

Washington, DC 20005  
UNITED STATES

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

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

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

## **IX. APPENDICES**

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

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

11/5/2015

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### ?Tienes experiencia en piscas? ¿quieres ir a estados unidos con visa de trabajo?

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



TRABAJO #PREPARATE #VISAH2A #INMIGRACION #EDUCACION

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

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

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1/3

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

11/5/2015

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

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

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

Requisitos del Registro:

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

Temas del Curso:

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

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

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

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

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

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

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2/3

## Appendix 2: List of member organizations of supporting networks

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

## **Appendix 2: List of member organizations of supporting networks**

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



January 22, 2018

National Administrative Office of Mexico,  
North American Agreement on Labor Cooperation  
Dirección General de Asuntos Internacionales  
Secretaría del Trabajo y Previsión Social  
Av. Paseo de la Reforma 175 piso 15  
Col. Cuauhtémoc, C.P. 06500  
Ciudad de México, México

**RE: SUPPLEMENT TO PETITION /PUBLIC COMMUNICATION MEX 2016-1**

To Whom It May Concern:

Petitioners respectfully submit the enclosed supplement to the Public Communication MEX 2016-1 on labor matters arising in the United States submitted to the National Administrative Office (NAO) of Mexico under the North American Agreement on Labor Cooperation (NAALC). On July 15, 2016, Elisa Tovar Martínez and Adareli Ponce Hernández, two former H-2B visa-holding workers in the crawfish, chocolate, and crab-picking industries in the United States, along with supporting U.S. and Mexican nongovernmental organizations (Petitioners), submitted a petition (MEX 2016-1) on behalf of themselves, individuals in the H-2B program, and other unnamed migrant worker women. Petitioners alleged that the United States has failed to comply with its obligations under the NAALC by taking inadequate action to combat sex discrimination in recruitment, hiring, and employment practices within its H-2 temporary visa programs. As of January 22, 2018, MEX 2016-1 remains under review by the Mexican NAO. Besides confirmation that the submission met the requirements and was accepted for review, no response has been issued.

Petitioners now submit the attached report, *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs*, as a supplement to the petition MEX 2016-1 in order to further detail the abuses and discrimination that women in temporary labor migration programs face. As the original petition alleges, and this supplement confirms, the United States government fails to protect women from discrimination under all temporary work programs and remedy the discrimination that has already occurred, violating its obligations under the NAALC. The report, produced by Centro de los Derechos del Migrante, Inc. (CDM), the Comité de Defensa del Migrante (Migrant Defense Committee, or Comité), and the University of Pennsylvania Law School's Transnational Legal Clinic (TLC), draws on a combination of desk research and interviews with workers to highlight the continued discrimination and abuse women in the H-2 visa programs confront in their recruitment and employment in the United States, and adds to the original petition the parallel experiences of women in four other temporary visa programs: the H-1B, C-1/D, TN, and J-1 Exchange Visitor programs. The report also includes a sampling of narratives from Mexican women across visa programs, voices that have thus far been excluded or marginalized in government efforts to protect migrant worker rights.<sup>1</sup>

The evidence in this supplement supports the petitioners' allegations of violations under Articles 1, 3, and 4 of the NAALC, as laid out in the original petition. Under Article 1, the United States is obligated to "promote, to the maximum extent possible, the labor principles set out in Annex 1[.]" which include the elimination of employment discrimination on the basis of sex and equal pay for men and women. The U.S. government continues to enable program

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<sup>1</sup> While the majority of women interviewed for the report are from Mexico, some are from other countries in Central and South America. The chosen narratives are representative of the experiences of many participants across visa categories.

recruiters and employers in all temporary visa categories to funnel women into lower-paying jobs and visa categories with fewer rights and benefits or to deny jobs to women entirely.<sup>2</sup> As one example, a Mexican H-2B worker reports that she and her female co-workers were given tasks in the crab industry paid at a piece rate, while her similarly-situated male co-workers were assigned different work paid at an hourly rate and earned more.<sup>3</sup>

Article 3 mandates that “[e]ach Party [] promote compliance with and effectively enforce its labor law through appropriate government action.” In addition to discrimination in hiring and pay, migrant worker women experience wage theft, an inability to access basic services, sexual harassment, and human trafficking, evidence that the U.S. government has failed to meet its obligation to promote compliance with and effective enforcement of its domestic anti-discrimination laws.<sup>4</sup> In the attached report, interviewees across visa categories report experiencing or witnessing harassment, aggressive behavior by supervisors, and sexual assault in their workplaces.<sup>5</sup>

Finally, under Article 4, the United States is required to “ensure that persons with a legally recognized interest . . . have appropriate access to administrative, quasi-administrative, judicial or labor tribunals for the enforcement of the Party’s labor laws.” As the report describes, migrant worker women face numerous barriers to seeking justice, including explicit statutory or judicial exclusions of rights to redress and compensation. The structure of temporary visa

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<sup>2</sup> See, e.g., Centro de los Derechos del Migrante, Inc. & University of Pennsylvania Law School Transnational Legal Clinic, *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs: Policy Brief*, 5 (Sept. 2017), available at <http://www.cdmigrante.org/wp-content/uploads/2017/09/Engendered-Exploitation.pdf>.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* at 9.

programs as a whole also limits women workers' access to the legal system; for example, employers, sponsor agencies, and government authorities fail to inform workers of their rights, while workers labor in physical and linguistic isolation.<sup>6</sup> As a result, the U.S. government disproportionately denies access to legal services to migrant worker women in violation of Article 4. As one Mexican B-1 worker notes, describing how she struggled to secure legal redress, "the lack of information about our rights and access to legal services leaves us in a vulnerable position."<sup>7</sup>

With this submission, petitioners renew their call for the U.S. government to comply with its obligations under the NAALC to protect migrant worker women from discrimination in all temporary visa programs. Petitioners request that the Mexican NAO consult with the U.S. government to develop an enforcement strategy to address gender discrimination in these programs at all stages of the recruitment and hiring process and to urge compliance with the NAALC. Petitioners also request a prompt reply to the petition filed in July of 2016.

Respectfully submitted,

Adareli Ponce Hernández  
Barrio del Carmen  
Chapulhuacan, Hidalgo  
MEXICO

Elisa Tovar Martínez  
Miguel Barragan #70

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<sup>6</sup> *Id.* at 12.

<sup>7</sup> Centro de los Derechos del Migrante, Inc. & University of Pennsylvania Law School Transnational Legal Clinic, *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs: Worker Stories*, 13 (Sept. 2017), available at <http://www.cdmigrante.org/wp-content/uploads/2017/09/Engendered-Exploitation-Worker-Stories.pdf>.

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

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

Catholic Relief Services Mexico  
Indiana 260, Int. 503  
Col. Ciudad de los Deportes, Del. Benito Juárez  
03710 Ciudad de México, D.F.  
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Sin Fronteras  
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Washington, DC 20006  
UNITED STATES

American Federation of Government Employees Local 3354  
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St. Louis, MO  
UNITED STATES

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

Community Food & Justice Coalition  
398 60th Street  
Oakland, CA 94618  
UNITED STATES

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

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

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

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

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

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

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

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

Rural Coalition 1029  
Vermont Ave NW Suite 601  
Washington, DC 20005  
UNITED STATES

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

UNITED STATES

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

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





Photo Credit: Mateya Kelley

# ENGENDERING EXPLOITATION:

Gender Inequality in U.S. Labor Migration Programs

## POLICY BRIEF

### INTRODUCTION

Each year, thousands of women are recruited to work in the United States on temporary work visas intended to fill gaps in the labor market or to provide the opportunity for employer-sponsored cultural exchanges. While systemic flaws in U.S. temporary labor migration programs negatively impact the rights of both men and women,<sup>1</sup> labor migration is not a gender-neutral phenomenon. Instead, women's stories illustrate how gender bias and discrimination are deeply entrenched in the temporary labor migration programs, which facilitate women's exclusion from equal employment opportunities and foster gender-based discrimination in the workplace.

Women describe how employers and their recruiter agents frequently shut women out of equal employment opportunities or track them into jobs with less pay and fewer rights and benefits. In their worksites, they recount exploitation and abuse, ranging from wage theft to sexual harassment to human trafficking. And those who stand up to their abusers by seeking legal redress all too frequently confront retaliation, employer-biased institutions, and/or insurmountable barriers to justice. Unfortunately, these women's stories of exploitation and abuse frequently go unheard. The exclusion of worker women's voices leads to the continuation of the status quo or reforms that exacerbate discrimination and privilege businesses' interests above all others.

<sup>1</sup> For an in-depth review of temporary labor migration programs in the United States, and an outline of characteristics unique and common to the multitude of non-immigrant work visas, see International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment* (Feb. 2013), available at: <https://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf>.

For more than a decade, Centro de los Derechos del Migrante, Inc. (CDM, or the Center for Migrant Rights) has worked with and provided legal representation to workers from Mexico recruited for jobs in the United States through diverse visa programs, or without work authorization. In 2014, CDM launched *Contratados.org*, the “Yelp” for migrant workers, providing a platform for migrant workers to safely share their experiences with specific employers and recruiters and access know-your-rights information for the most common temporary labor programs.<sup>2</sup> Both online and in-person, migrant worker women have reached out to CDM about the discrimination they encountered at all stages of the temporary labor migration programs. In 2016, CDM filed a petition under the North American Agreement on Labor Cooperation (NAALC) regarding the failure of the United States to promote gender equality and equal pay for men and women under the H-2A and H-2B programs.<sup>3</sup> Over the past year, CDM has sought to more systematically document the experiences of migrant worker women seeking access to, and ultimately employed through, temporary labor migration programs to better understand how the programs operate in service - and to the detriment

- of women. This brief contains findings to date from CDM’s ongoing, cross-visa and cross-sector study on women in temporary labor migration programs,<sup>4</sup> highlighting ways in which temporary labor migration programs systematically serve to directly and indirectly foster discrimination against women throughout the labor migration process. The United States’ failure to track and make available data disaggregated by gender, visa category, and industry means that the unique issues confronting women in temporary labor migration programs are often absent from policymaking and public debate. The findings and recommendations set forth herein interject women workers’ voices<sup>5</sup> into the ongoing debates on comprehensive immigration reform and existing temporary labor migration programs.

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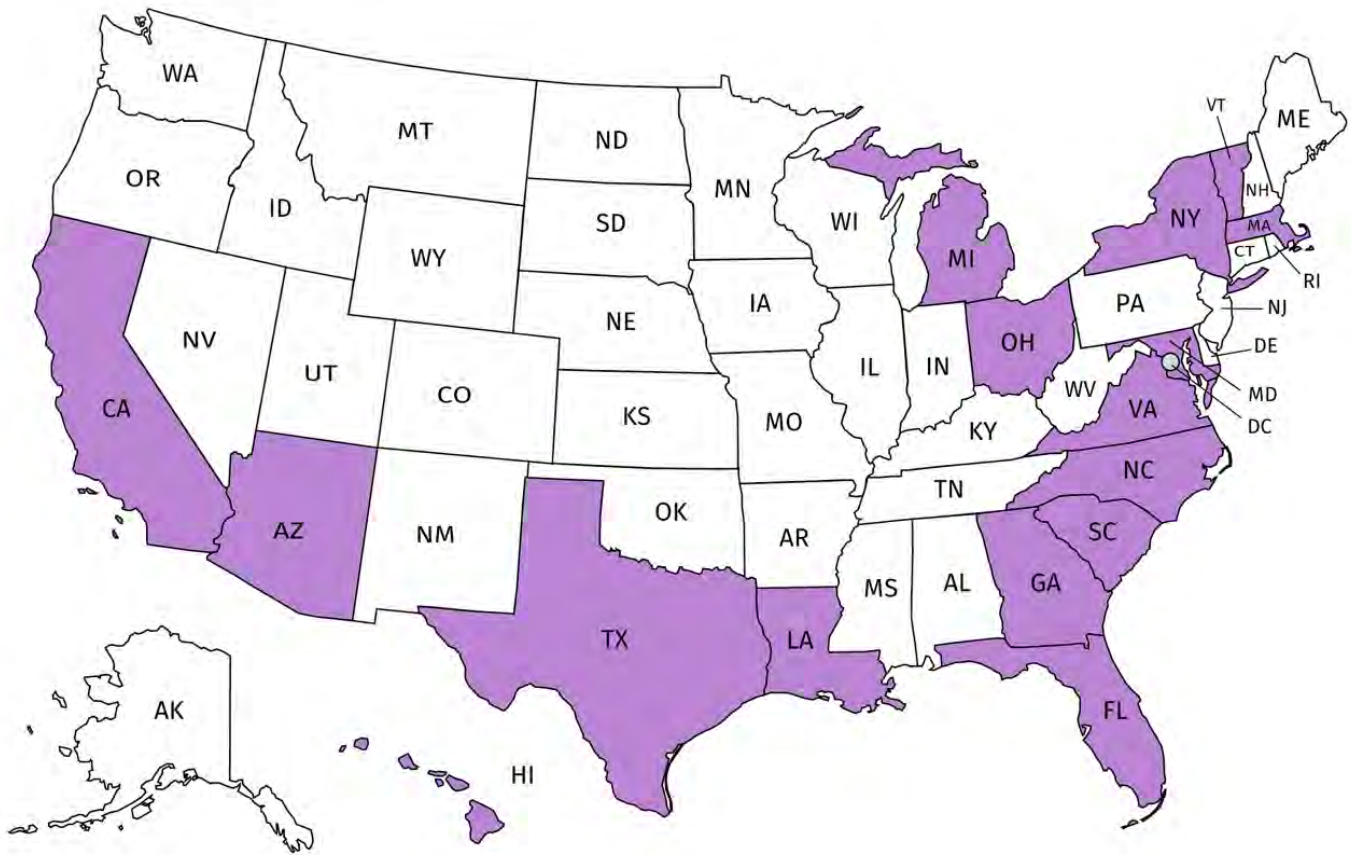
<sup>2</sup> See <http://www.cdmigrante.org/contratados/>.

<sup>3</sup> The non-confidential communication was submitted to the National Administrative Office of Mexico on July 15, 2016, reporting on the persistent tracking of women into jobs under the H-2B program and away from the H-2A program, abuses in employment, and denial of access to justice. A copy of the petition is available at: <http://www.cdmigrante.org/wp-content/uploads/2012/01/NAALC-Petition-2016-English.pdf>.

<sup>4</sup> This policy brief is based on extensive desk research, as well as detailed surveys of 34 women who participated in one of 5 labor visa programs: the H-1B, deemed a “skilled” visa for individuals in a specialty occupation, such as nursing; the H-2A, for temporary agricultural workers; the H-2B, for temporary non-agricultural workers in seasonal industries; the J-1 Exchange Visitor Program, an initiative of the Department of State, for the purported purpose of increasing cultural exchanges, and through which the Au Pair program is run, as well as the Summer Work Travel Program; the TN visa, created under NAFTA, which permits qualified Canadian and Mexican citizens temporary entry into the United States to engage in professional-level business activities; and the C-1/D visa for persons employed as crewmembers on a vessel or aircraft, typically issued for cruise ship workers. It also draws on questions, conversations, and intakes with thousands of workers that CDM has reached through legal services, community outreach, and policy advocacy over the past twelve years.

<sup>5</sup> While some interviewees cited consented to the use of their real names, others who chose to remain anonymous are identified by pseudonyms using quotation marks.

## Surveyed Womens' States of Employment

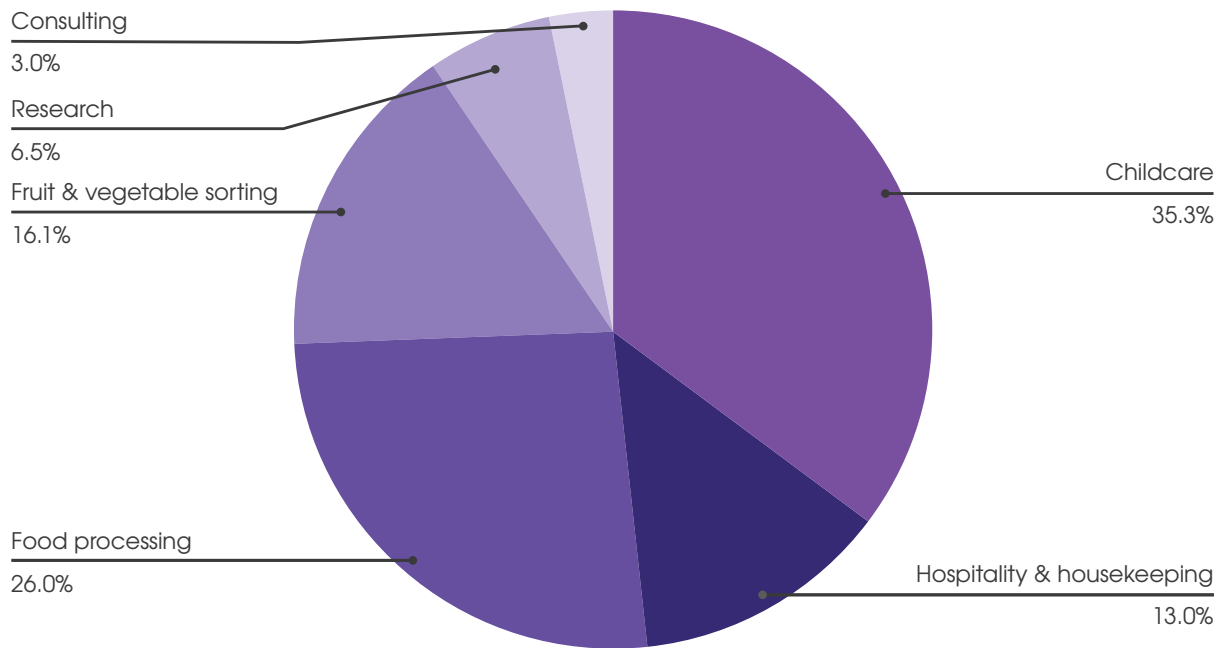


## THE EXISTING TEMPORARY LABOR MIGRATION PROGRAMS FACILITATE GENDER-BASED DISCRIMINATION AND EXPLOITATION

Women who are prospective, current, and former participants in U.S. temporary labor migration programs share stories of gender-based discrimination that begins with recruitment, continues throughout their employment in the United States, and negatively impacts their ability to access justice. These stories reveal that

systemic flaws in the programs, coupled with restrictions on access to justice, disproportionately impact migrant women while empowering unscrupulous employers and recruiters with the means to ensnare them in exploitation and trafficking schemes.

## Surveyed Women, by U.S. Industry of Employment\*



\*percentages may not add up to 100% due to rounding

# A.

Employers use the recruitment process to discriminate against women, to defraud them, and to channel them into a limited range of gendered industries and roles.

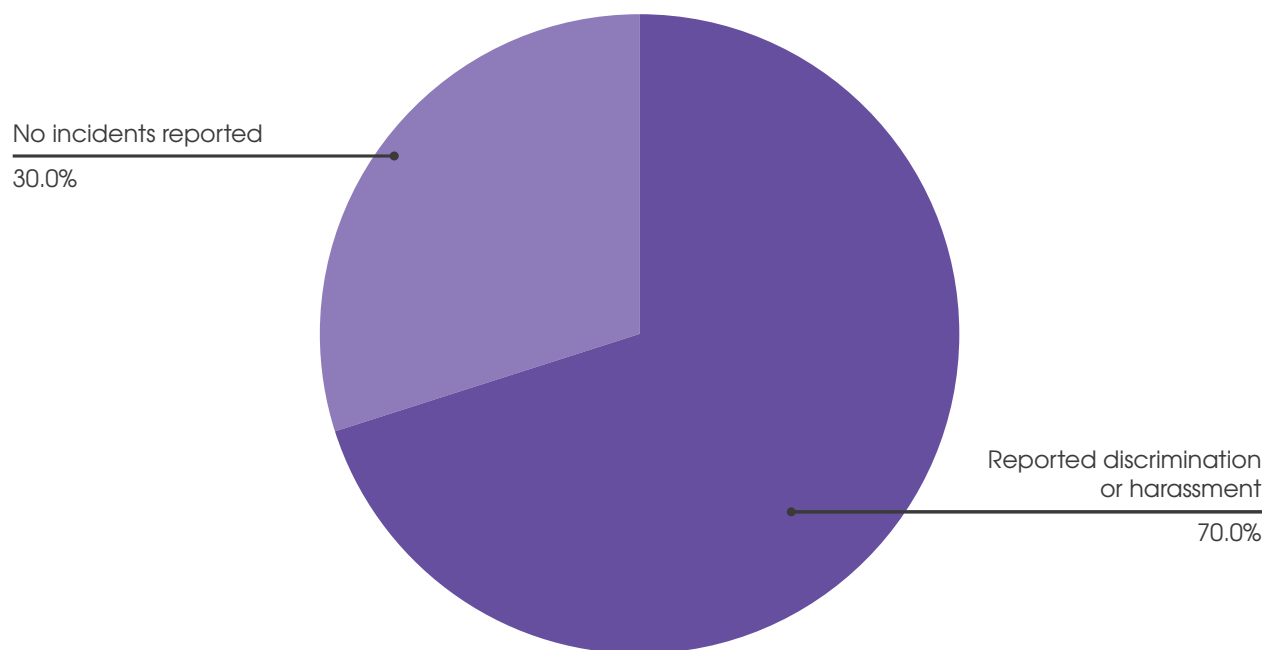
*“They hired me as an Animal Scientist but had me cleaning food bins and bathrooms. They paid me less than the other workers. I didn’t do anything that required a degree.”*

“Rosa” (Mexico), employed on a dairy farm under the TN visa for skilled professionals, was assigned to clean water troughs, unload animals, perform housekeeping and other menial tasks she was told were more suited to women, and paid well below the minimum annual salary she had been promised.

Persistent gender bias, lack of government oversight over recruitment, and the failure of the United States to enforce anti-discrimination and other labor and employment laws extraterritorially, conspire to permit employers and their recruiter agents to track women into visa categories and job sectors with lower wages, unequal income-earning opportunities, and fewer rights protections than their male counterparts. Employers using temporary labor programs tend to prefer women for employment in childcare, education, health care, personal and household services, and secretarial jobs, while selecting men instead for more labor intensive and often higher-paying jobs, like construction, utilities, transport, and communications. Over half of the workers that CDM surveyed observed some form of sex-based discrimination in their recruitment or employment experiences, which took one of four shapes: 1) visa distribution by sex, e.g., men are more frequently offered and provided jobs under either the H-2A or H-2B visas, while women are more likely to be tracked exclusively into jobs under the H-2B visa;<sup>6</sup> 2) segmentation into gendered occupations

within the visa category, e.g., men under the H-2B program are offered and hired for landscaping jobs, while women are hired for housekeeping or domestic service; 3) assignment of gendered workplace roles, e.g., in agriculture, men harvest crops while women are tasked with crop sorting and maintenance; and 4) inequality in corresponding rates of pay, benefits, or opportunities for advancement within the same workplace resulting from 1-3, e.g., in the crab-picking industry, women assigned to crabmeat picking receive piece-rate pay, while men assigned to cooking and hauling crab earn hourly salaries. Gender-tracking is not limited to the H-2 programs. As “Rosa” shares in her story, employers participating in the TN visa program for skilled professionals regularly relegate women to gendered jobs, such as housekeeping duties and secretarial work, denying them both the earning and professional development opportunities employers and recruiters promise during the recruitment process.

### Reported Incidents of Sex-Based Discrimination or Harassment in Recruitment or U.S. Employment



<sup>6</sup> See, United States Government Accountability Office, H-2A and H-2B visa programs, Increased Protections Needed for Foreign Workers, March 2015 (reissued May 30, 2017) (noting there are approximately three times as many women given H-2B visas compared to H-2A), available at: <https://www.gao.gov/assets/690/684985.pdf>. As detailed in the Communication filed under the NAALC, *supra* n. 4, the H-2B visa program extends inferior benefits and protections as compared with H-2A visas, despite 2015 reforms.



In many of these scenarios, women felt that recruiters and employers had misled them during the recruitment process, concealing the true nature of their jobs until the women arrived in the United States. In other cases, women were denied outright the ability to apply for jobs under the H-2A visa program and were instead funneled into jobs under the H-2B program. As with their male counterparts, many women report being charged unlawful recruitment fees and incurring significant travel expenses for which they are not reimbursed by the employer. As gatekeepers to U.S. jobs, labor recruiters wield significant power over workers' economic prospects; this unequal power dynamic is heightened with respect to women, whose employment options are scarce. Because recruitment happens internationally, workers face barriers to accessing justice in the United States for fraud, discrimination, or unlawful fees charged by recruiters in their home countries, despite these agents' ties to U.S. employers. Moreover,

abusive recruitment practices often follow workers to their jobsite, where recruitment debt, fear of retaliation, and blacklisting can coerce workers to withstand unsatisfactory, unhealthy, or unfair conditions. For example, Adareli,<sup>7</sup> an H-2B chocolate worker, was blacklisted by her employer after speaking out about unjust treatment in her Louisiana workplace. Another H-2B worker, Silvia, found herself unemployed for years after falling out of favor with the sole recruiter in her town who was willing to hire women; today, she works hard to keep her current job, because even if it is not ideal, "it's the only thing there is." For the vast majority of workers in U.S. temporary labor programs, job mobility is not a right; instead, it is a privilege bestowed upon a lucky few according to the criteria of employers and their recruiters. And when employers are permitted to select their workforce by sex, nationality, or race, women and other minorities can be doubly burdened by the pressure to accept or maintain jobs at any cost.

*"We don't like the work, but we don't question it. Why would we, when it's the only thing there is?"*

Silvia (Mexico), an H-2B seafood worker who supports her family through seasonal migration to Maryland's Eastern Shore. Losing this job would leave Silvia unemployed and unable to provide for her two children.

**B.**

**Women working in the United States on temporary visas confront the full range of workplace abuse and exploitation common to all guestworkers, including sexual harassment and assault. Combined with discrimination, these factors can exacerbate the conditions that contribute to human trafficking.**

Gender discrimination is compounded by workers' multiple identities as women, non-citizens, and temporary workers, who are often additionally subjected to race and national origin discrimination. Recruiters and employers often seek women to fill jobs in industries with a history of abuse and exploitation, such as food processing, housekeeping, and live-in childcare. Women endure discrimination, abuse and exploitation within all categories of visas, whether classified

as "unskilled," like the H-2A and H-2B visas, or "professional," such as the H-1B and TN visas. For example, women recruited with TN visas, a program created for professionals under the North American Free Trade Agreement (NAFTA), similarly reported suffering recruitment fraud, exploitation, demeaning working conditions, and psychological harm as a result of their employment.<sup>8</sup>

<sup>7</sup> Survey 2459.

<sup>8</sup> Surveys 2366, 2386, and 2649.

*“It’s false advertisement. It feels like hell on earth, but it’s advertised as an amazing experience. It’s sold to the au pairs as a cultural exchange, but to the family as free/cheap labor. We are too vulnerable. We should feel like we have freedom.”*

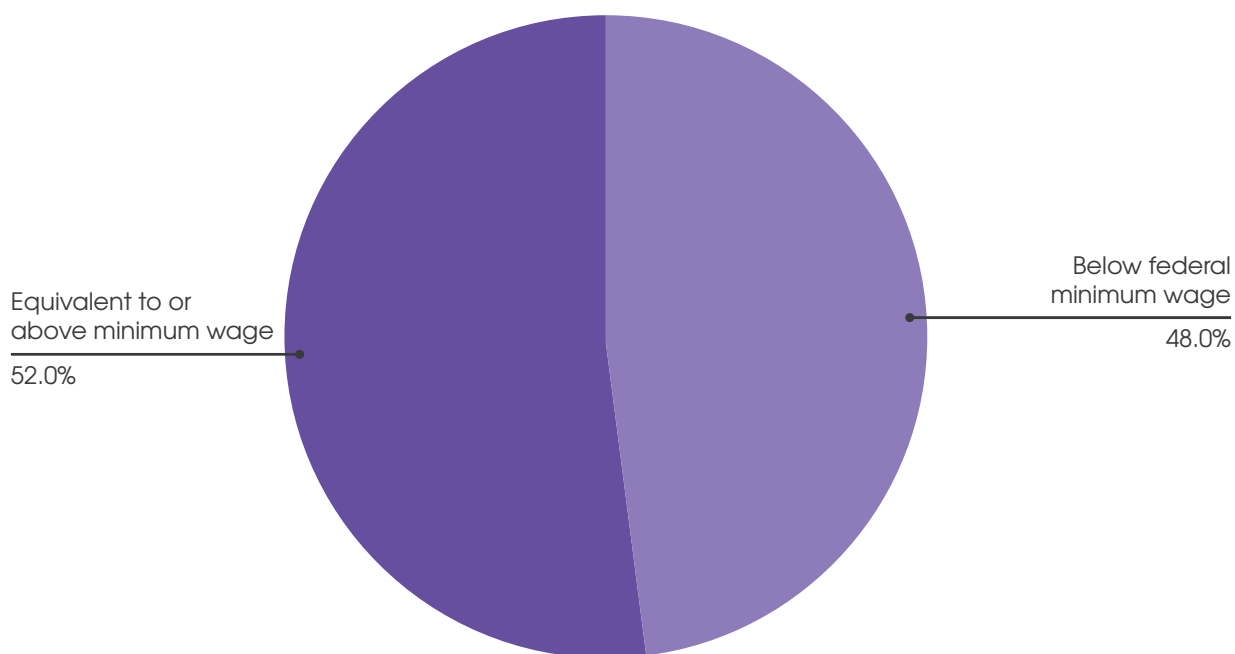
Estefani (Brazil), employed as Au Pair under J-1 visa, required to do laundry, housekeeping, and yard work, in addition to providing for the children, and suffered from a verbally aggressive employer who closely monitored her actions and made both sexist and racist comments to her regarding her Brazilian heritage.

*Job duties, rates of pay, and working conditions reveal gender-bias and discrimination.*

As noted above, employers and their recruiter agents regularly channel women into certain jobs where they are responsible for carrying out specific, gendered tasks. Women interviewed found that these jobs often paid less and provide fewer hours of work than those available to men. Generally speaking, wages within those sectors predominated by women participating in temporary

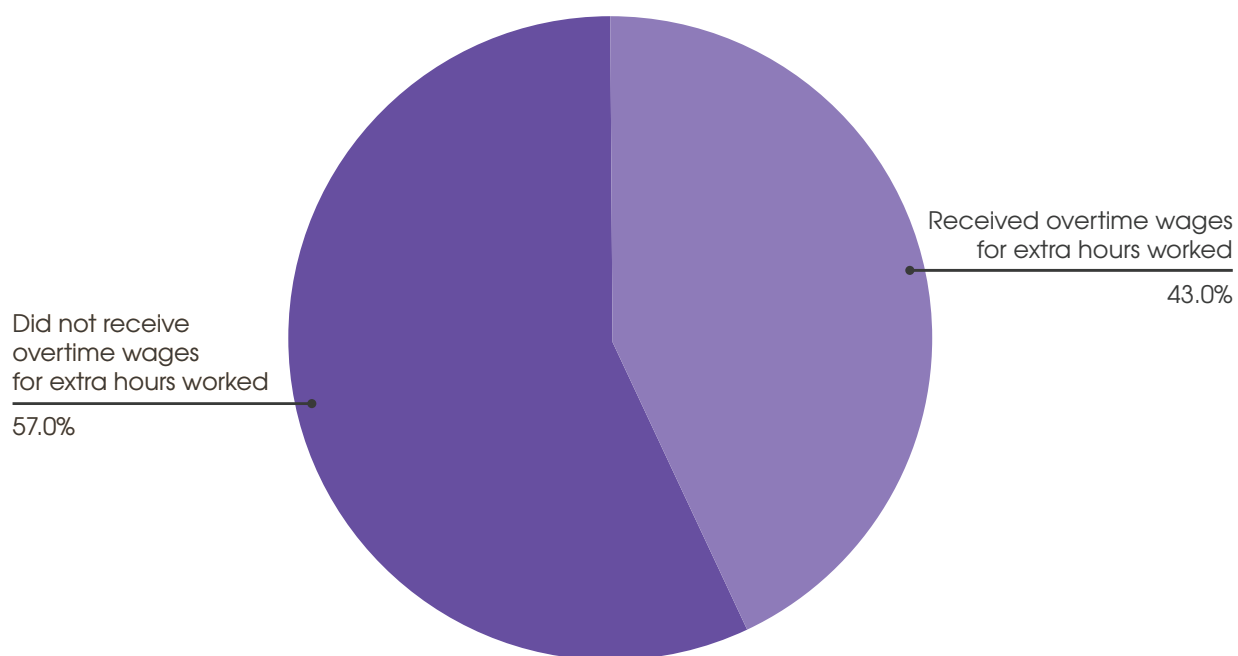
labor migration programs are exceedingly low. A J-1 Au Pair, who chose to remain anonymous, reported her employer paid her \$3.09 in hourly wages,<sup>9</sup> while J-1 Au Pairs overall reported average earnings of \$3.83 per hour. Unfortunately, this trend is indicative of the systemic wage theft women confront across visa categories: of the women surveyed, nearly half (48%) were paid below the federal minimum wage at their time of employment, and 43% reported not having been paid for overtime hours.

## Reported Earnings Relative to Minimum Wage at Time of Employment



<sup>9</sup> Survey 2560.

## Reported Overtime Earnings



Workers reported wage disparities between men and women in their workplaces, regardless of industry or gender ratio of the workforce. For example, one female H-2B worker working in the crab picking industry reported that women in her worksite were tasked with picking crabs at a piece rate, whereas men were paid at an hourly rate to wash, cook, and clean the crabs and had greater earning opportunities.<sup>10</sup> Daria, a worker employed in the fruit and vegetable packing industry, noted that despite having been recruited to work in a tomato packing company working eight hours a day, she was sent to sort cucumbers and was given just three to five hours per week; by contrast, the men who had been hired at the same worksite held H-2A visas and were given more work.<sup>11</sup> “Sandra,” employed in housekeeping services with a J-1 Summer Work Travel visa, reported that while men at her workplace were paid \$12 per hour, women earned a mere \$9.75.<sup>12</sup>

*A hostile work environment, sexual harassment, and sexual violence are pervasive in many of the worksites and in many of the job sectors that rely on women workers on temporary labor migration visas.*

Factors like physical and social isolation, language barriers, migration status, and lack of access to legal services contribute to migrant worker women’s increased vulnerability to workplace hostility, sexual harassment, and sexual assault. A significant number of women participating in the study reported experiencing or witnessing harassment on the job, aggressive behavior by supervisors and others in position of authority within the workplace, and sexual assaults in the workplace. One survey participant employed on a J-1 visa for work as a housekeeper and cook reported that a supervisor would get close to her and touch her, saying, “you are a very good girl.”<sup>13</sup> Another H-2B crab worker described watching her male supervisor brazenly harass female workers, putting his hands down their pants, grabbing their underwear, and openly bragging about his exploits.<sup>14</sup> Lissette, who was recruited to work on a cruise ship through the C 1/D visa program, reported that her supervisors put tremendous pressure on her and subjected her to hostile, authoritarian treatment. She explained that supervisors were known to demand sexual favors of her female shipmates, some of whom suffered sexual assaults. These aggressions, coupled

<sup>10</sup> Survey 2455.

<sup>11</sup> Survey 2441.

<sup>12</sup> Survey 2390.

<sup>13</sup> Survey 2385.

<sup>14</sup> Survey 2455.



with inadequate food, insufficient breaks, the confinement of a ship and limited contact with the outside world, left her so physically and psychologically distressed that she suffered hair loss.<sup>15</sup> “Leticia,” a TN worker, says she and her son have had to receive ongoing therapy for post-traumatic stress disorder (PTSD) resulting from her employers’ treatment.<sup>16</sup> Many women participating in this ongoing study expressed hesitation at confronting the abusers or reporting

the abuse to supervisors, citing concerns over retaliation, fear, disillusionment with institutional authorities, or disorientation resulting from isolation and/or psychological manipulation.

*Women living in employer-owned and operated housing reported a combination of deplorable living conditions, lack of security and privacy in their living quarters, or exorbitant deductions from pay for the cost of their housing.*

*It was a pigsty. There was no door. I cried a lot because everything was terrible – I had to sleep on the floor and I suffered backaches and couldn’t sleep. The floor was very dirty.*

Daria (Mexico), recruited on H-2B visa for work in vegetable packing, had to pass through the men’s dormitory to use the bathroom, creating an environment that left the women feeling extremely uncomfortable and insecure.

Women who lived in employer-provided housing reported that accommodations often offered inadequate privacy and security, were unhygienic, or were generally ill-equipped for women living in mixed-sex environments. One woman, who chose to remain anonymous, was hired to pack vegetables under the H-2B program, where she was forced to live as the sole woman amongst thirteen men.<sup>17</sup> Daria, who packed vegetables at a worksite that was 30% men and 70% women, reported having to pass through the men’s dormitory to access the bathroom, which had no doors to the stalls. “Leticia,” a TN worker, reported having to pay her employer such exorbitant rent that she

barely had enough money left over to support herself and her son.<sup>18</sup> A woman who worked with an H-2B visa in a chocolate factory reported that the women’s trailers were so crowded that they were forced to improvise living space, sleeping on couches and among their belongings. At that time, eighteen women shared only two bathrooms.<sup>19</sup>

*Several women also reported on the negative physical and emotional impact of their experiences with the temporary labor migration programs, compounded by difficulties in accessing affordable and safe medical care and other basic services.*

<sup>15</sup> Survey 2407.

<sup>16</sup> Survey 2367.

<sup>17</sup> Survey 2405.

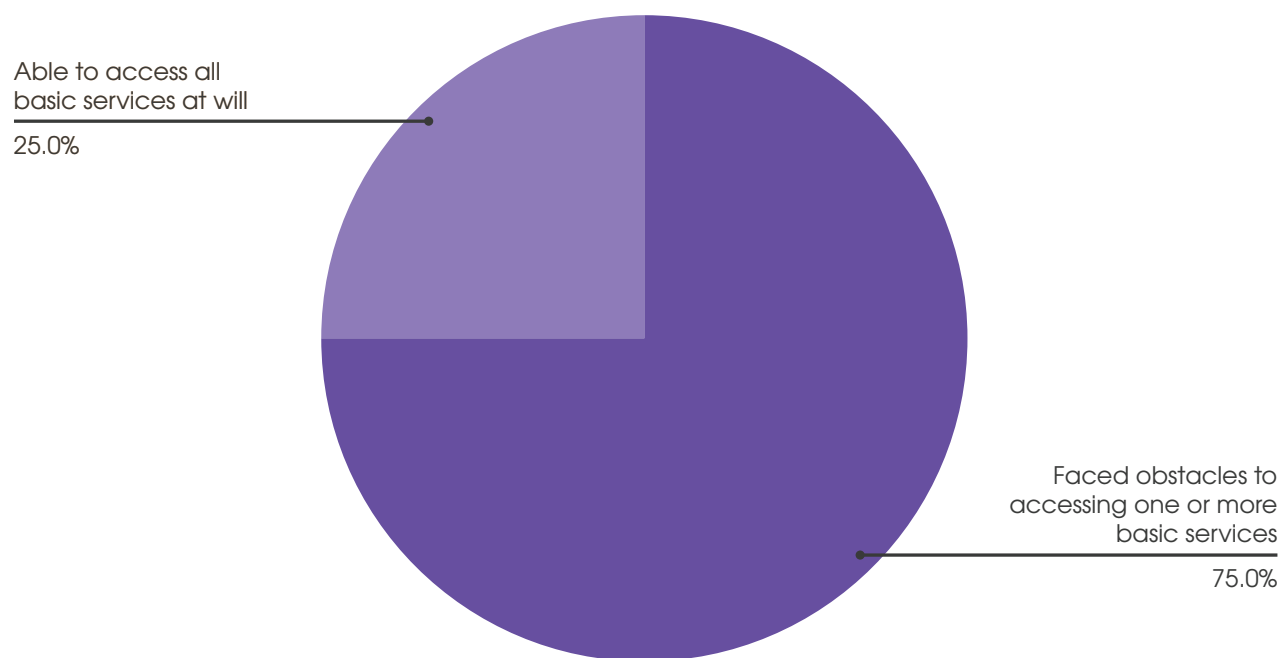
<sup>18</sup> Survey 2366.

<sup>19</sup> Survey 2668.

The industries that employ migrant worker women often combine poor health and safety records with time- or quota-pressured production standards. Physical isolation, limited mobility and transportation, and lack of access to health care benefits, all take their toll on workers' physical and psychological wellness. 75% of the study participants to date reported barriers to accessing one or more basic services, such as food, telephone, medical and legal services, while employed in the United States. "Sandra," who was recruited for a promised cultural exchange opportunity through the J-1 program, reported that her employer forced her to work long hours at minimum wage, and she suffered from physical and mental exhaustion, as well as lesions to her hands, as a result.

Unable to access any care, and closed off from interaction with the outside world, she sought medicine from her employer, who told her the hotel had no medicine available. Instead, she was forced to treat her lesions with leftover lotions found in the hotel's guestrooms.<sup>20</sup> Another woman reported that her employer docked her pay for using the bathroom.<sup>21</sup> Yet another interviewee reported that her employer reserved the right to scrutinize her confidential, medical paperwork as a condition of granting her permission for prenatal doctor's visits. The same employer publicly mocked her female coworker's visit to a psychologist, telling other employees that she was "bad in the head."<sup>22</sup>

### Reported Ability to Access to Basic Services (Food, Medical, Legal, Telephone) at Will

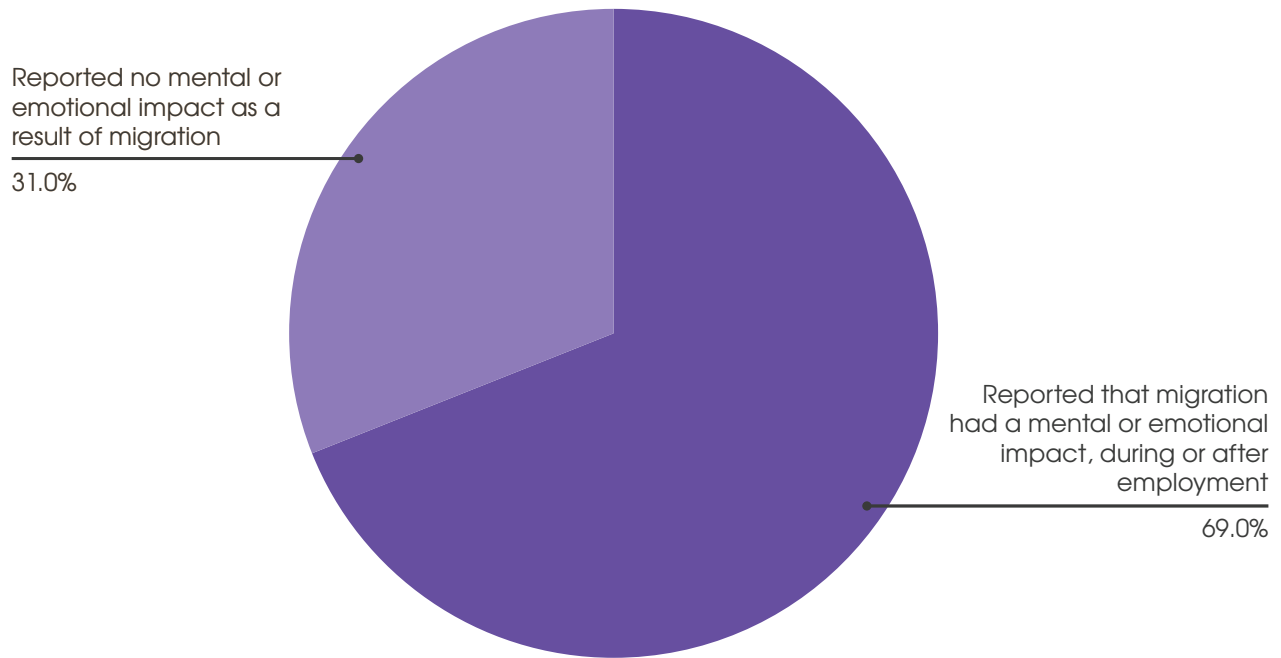


<sup>20</sup> Survey 2390.

<sup>21</sup> Survey 2405.

<sup>22</sup> Survey 2649.

## Reported That Migration Had a Mental or Emotional Impact, During or After Employment



### *Conditions giving rise to human trafficking:*

Several women participating in the study reported that their employers and/or recruiter agents conducted practices or instituted policies that left them feeling trapped, unable to report abuses, and/or unable to leave. These included applying heavy recruitment fees that left workers in debt, excessive monitoring and scrutiny of workers' personal matters and relationships, coercive conditions in employer-controlled housing, document

retention, denial of access to transportation or communication, and threats of retaliation, among others. Several workers also expressed concerns at their employer's and/or sponsor agency's control over their legal status in the United States, which heightens workers' dependency on their goodwill and limits their freedoms. These factors, when combined with limited transportation and communication, inadequate access to basic services, and seclusion from the world beyond the workplace create conditions ripe for human trafficking.

*There is no freedom. I felt trapped. The problem with the work visa system is that your boss holds over your head that he brought you to America. I will never apply to get a work visa again because of the horror that I have been through.*

"Leticia" (Guatemala), employed on a TN visa for work as a biotech researcher, who had a significant amount deducted from her pay each month for employer-provided housing, leaving her with just \$400/month to care for herself and her son.

C.

The United States fails to ensure full and equal access to justice for women in temporary labor migration programs.

The United States is obligated to ensure equal rights under the law as well as full and equal access to judicially-enforceable remedies to all persons, regardless of their gender and migration status. Women participating in temporary work programs, however, are often denied their right to redress and compensation before the courts either because of explicit statutory or judicial exclusions, or because of the way guestworker programs are structured. The problems begin with deception in recruitment, where employers and their recruiter agents misinform or mislead women about the true nature of their work. Once in the United States, employers, sponsor agencies, and responsible government authorities fail to adequately inform workers of their rights. Workers subsequently find themselves working in physical and linguistic isolation with limited access to legal, medical, and

other basic services. The sex-based discrimination that begins in recruitment further impacts workers' access to justice: for example, many workers participating in the H-2B program and several other temporary worker programs are ineligible for access to free, government-funded legal services. By contrast, H-2A agricultural workers in the United States are eligible for these free legal services but tend to be overwhelmingly (96%) male.<sup>23</sup> For worker women in the J-1 au pair program, isolation in the home makes it difficult to connect with others, share experiences, and learn of opportunities for redress. In addition, the majority of women surveyed shared concerns that reporting their employers for workplace rights violations meant risking retaliation, job termination, deportation, blacklisting, and other retaliatory actions; many had first-hand experiences with retaliation in their workplace.

*I would talk to my female colleagues about our rights so that we would defend our dignity. But I realized, in that environment, fear was still preventing us from standing up for ourselves like we were meant to do; fear of losing our job, having to return to Mexico, and not being able to support our families.*

*Ignorance about this type of visa is the biggest problem. I lost everything we have because I am not able to work for another company. I was not able to defend my rights.*

Adareli (Mexico), who worked four seasons packing chocolates on an H-2B visa, was afraid to speak up about the mistreatment and discrimination. She noted the lack of access to jobs under the H-2A visa program for women and pay disparities, the debts she incurred to obtain the visa, and the fear that she would lose the chance to work those debts off and support her family if terminated or blacklisted from future opportunities.

Beatriz (Mexico), recruited to work on a TN visa as a management consultant, put to work performing secretarial tasks. Unbeknownst to her, the company was bankrupt, and it soon shut down.

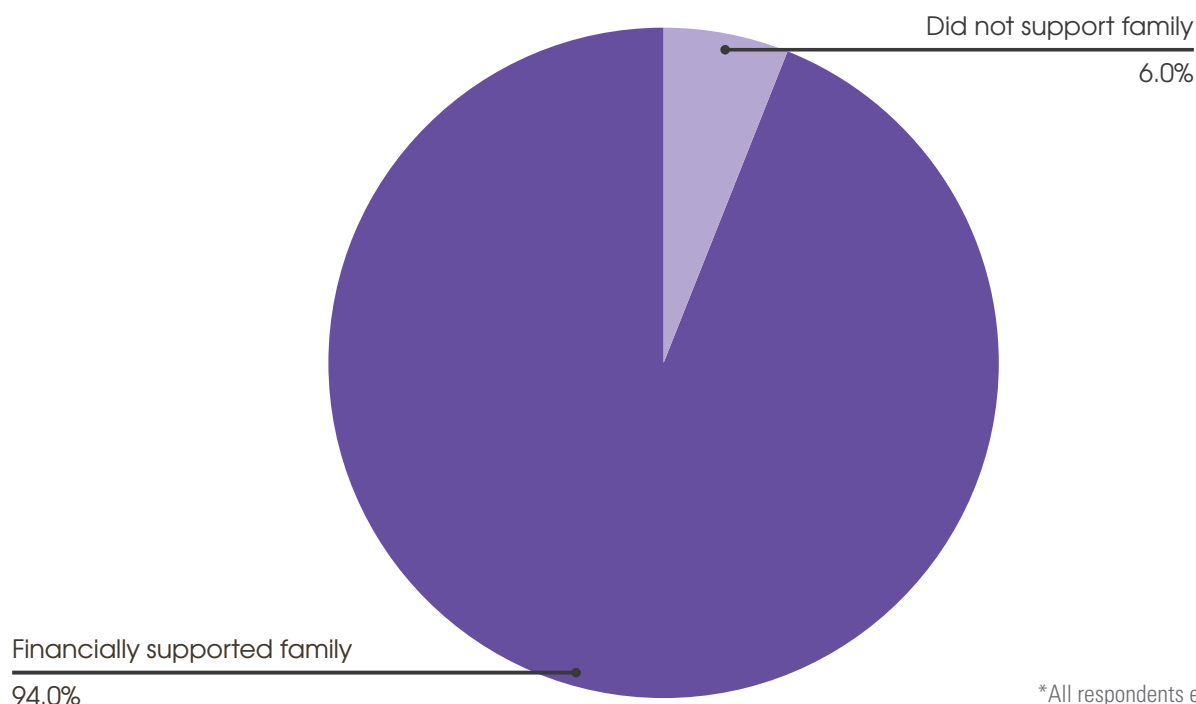
<sup>23</sup> FY2013 is the most recent year for which data on the gender breakdown of the H-2A and H-2B programs is publicly available. U.S. Gov. Accountability Office, GAO-15-154, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers 18 (Mar. 2015), available at <https://www.gao.gov/assets/690/684985.pdf>.

## U.S. TEMPORARY LABOR MIGRATION PROGRAMS FAIL TO ACCOUNT FOR THE ROLE WOMEN PLAY AS CHILD CARE PROVIDERS AND OTHER FAMILY SUPPORT RESPONSIBILITIES THEY SHOULDER.

By and large, U.S. temporary labor migration programs and the employers that use them deny women equal employment opportunities by inadequately accounting for women's multiple social and economic responsibilities not only as workers, but as mothers and primary family caregivers as well. Worldwide, women disproportionately bear the burden of unpaid care work, which places them at a comparative disadvantage to their male counterparts with regards to full economic participation in the labor force.<sup>24</sup> While several U.S. states have passed childcare subsidy laws to provide women with equal economic opportunity, the failure to guarantee women on temporary labor migration programs access to these benefits further interferes with their access to the range of opportunities available under these programs. This exclusion creates additional barriers for migrant worker women seeking to enforce their rights and obtain judicial remedies for rights violations.

Ninety-four percent of study participants who were not J-1 Au Pairs (who are under 28, per program requirements) reported that they were financially supporting family members during and through their U.S. employment; these workers spent an average of 70% of their earnings on childcare and other family support. While several interviewees volunteered that access to childcare and childcare subsidies would open up their ability to participate in the temporary labor migration programs, many also noted that their working and living conditions were so poorly equipped that they could not possibly consider bringing their children. Still others observed that coworkers who were able to care for their children under adequate circumstances appeared happier and more productive in their environments.

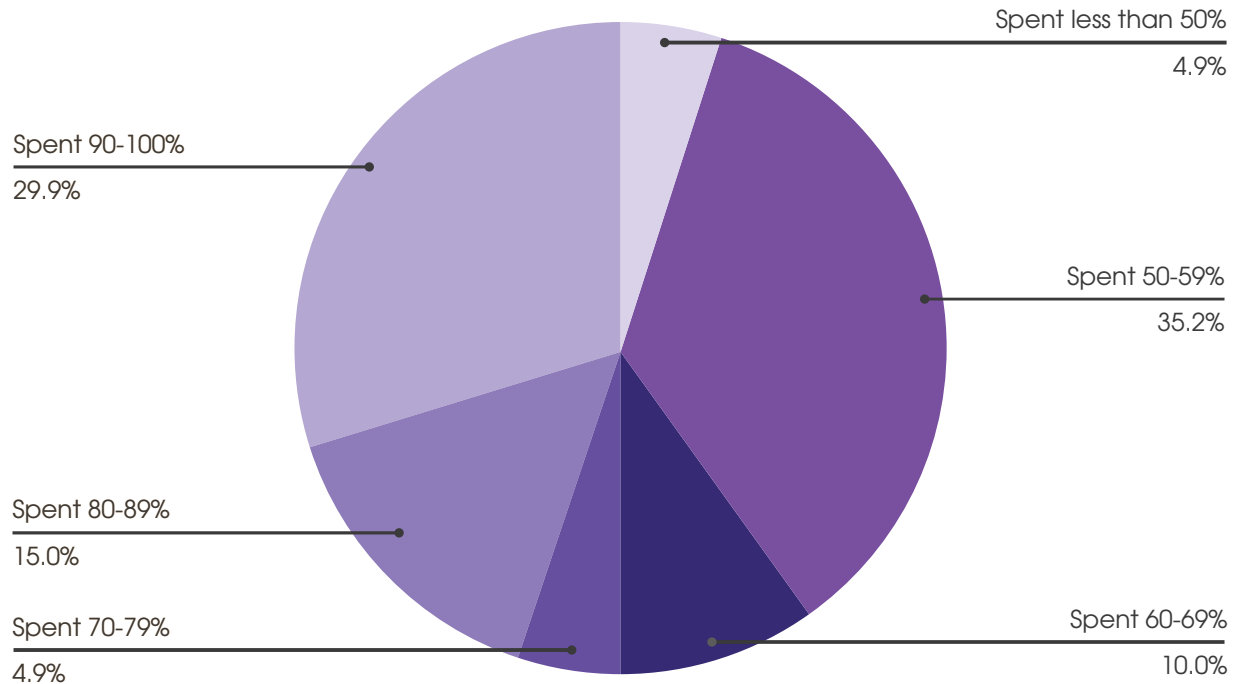
### Financially Supported Family with U.S. Earnings\*



\*All respondents except J-1's.

<sup>24</sup> See <http://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>.

## Reported Percentage of Earnings Dedicated to Family Support\*



\*Of those respondents who indicated they support family back home. Percentages may not add up to 100% due to rounding.

## RECOMMENDATIONS

Ending abuses of women migrant workers requires interagency data collection and publication, consistent monitoring, and meaningful enforcement. Where the agencies lack authority to effectively protect workers, Congress must delegate authority for effective oversight. Congress should mandate that the Department of State, Department of Labor, Department of Homeland Security, and Equal Employment Opportunity Commission (“the Agencies”) create an integrated response to abuses of women migrant workers. Moreover, all temporary labor migration programs should be subject to the same rules and protections so that unscrupulous employers and recruiters do not use the patchwork of visa regulations to evade liability or to obscure the nature of abuses against women.

### Data collection and publication:

- To ensure transparency and accountability throughout the temporary labor migration programs, the Department of State should work with the Department of Labor, Department of Homeland Security, and the Equal Employment Opportunity Commission to collect and publish current and complete

data in a manner that allows for comprehensive analysis of systemic abuses that permeate the labor migration programs, and serve to identify areas for congressional, administrative, and judicial action. Such data includes, but is not limited to:

- Data disaggregated by gender, age, and national origin of all workers who apply for temporary labor migration visas, and of all workers who ultimately come to the United States for employment, as well as sector of work into which they are recruited.
- Data disaggregated by gender, age, and national origin of all complaints filed by workers employed through the temporary labor migration programs, the visa category, the industry of work, and the name of the employer against whom the complaint was lodged, the nature of the complaint, and what, if any, resolution was reached.
- The Agencies should create an interagency database, available in real time, that allows women to verify the existence of a job, the entire chain of recruiters between the employer and the worker, and the terms of their employment.

The database should also enable women to review the terms of a visa and status of the visa's approval, review their rights under the visa, self-petition for jobs, and avoid jobs and visa categories that would leave them vulnerable to abuses, exploitation, and human trafficking.

**Protect against gender-based discrimination in recruitment:**

- In the above-mentioned database, the Department of Labor should publish detailed job offers and terms of employment for all temporary labor migration programs in order to ensure employer visa petitions contain bona fide job requirements, rather than requirements that serve to deny women access to employment.
- The Agencies should ensure women are granted full and equal participation in the temporary labor migration programs through rigorous monitoring and enforcement. Congress should create childcare subsidies that support migrant women in gaining equal access to job opportunities.
- The Department of Labor should protect women who report abuses from retaliation, including blacklisting for future recruitment.
- Congress should pass legislation that holds employers strictly liable for discrimination and other abuses committed by recruiters.
- The Agencies should be fully funded to prosecute and sanction noncompliant recruiters. The Agencies should bar noncompliant recruiters from all temporary labor migration programs.

**Protection against gender-based discrimination in employment:**

- The Agencies should monitor the practices of employers and recruiters in order to guard against discrimination, sexual harassment, and sexual assault in the workplace.
- The Agencies should protect women who report abuses from retaliatory job assignment, firing, deportation, and blacklisting for future job opportunities.
- The Department of Labor should protect women who report abuses from retaliation at the workplace.
- The Agencies should be fully funded to prosecute and sanction noncompliant employers. The Agencies should bar noncompliant employers from all temporary labor migration programs.

**Protect against human trafficking:**

- Congress should ban recruiters from charging workers recruitment fees, across all visa categories, and Congress should hold employers liable for any fees that are charged. The Agencies should ensure that workers who acknowledge being charged fees are reimbursed and hired without delay and that they do not face retaliation for reporting recruitment fees.
- The Department of Labor should vet and certify contracts for all temporary labor migration programs. The Department of Labor should ensure that contracts are provided in language that workers understand. The Department of Labor should ensure that contract terms do not contain breach fees or other liquidated damages clauses that serve to coerce workers into remaining in abusive employment.

**Ensure Access to Justice, Information, and Support Services:**

- The Agencies should ensure access to information for women migrant workers so that they can evaluate job offers and avoid efforts to channel them into abusive, gendered positions.
- Congress should ensure equal access to legal services across all visa categories. Congress should ensure that women who experience gender-based discrimination, either in recruitment or employment, can access legal services both within and outside the United States. Until Congress acts, the Agencies should ensure that women are not unfairly tracked into visa categories that lack access to legal services.
- The Agencies should ensure access to meaningful complaint processes. The Department of Labor and the Equal Employment Opportunity Commission should work with the Department of Justice to ensure access to justice for women, both within and outside the United States, who experience gender-based discrimination in recruitment or employment.
- The Agencies should ensure women are provided adequate protections and are granted access to social and other support services to facilitate reporting gender-based violence and other trauma.



This report was made possible in part due to generous funding from the **Ms. Foundation for Women**.



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Photo Credit: Mateya Kelley

# ENGENDERING EXPLOITATION: Worker Stories



Transnational Legal Clinic



# ENGENDERING EXPLOITATION: Worker Stories

Justice for Migrant Worker Women was born of a collaboration between Centro de los Derechos del Migrante, Inc. (CDM) and the University of Pennsylvania Transnational Legal Clinic (TLC). Together, we envisioned a comprehensive, cross-sector, cross-visa study of U.S. labor programs that allow U.S. employers to recruit foreign workers for temporary employment, focusing especially on the impact of these programs on migrant women. The research conducted for this effort reflects substantial desk research combined with in-depth interviews. The study is also informed by questions, conversations, and intakes with thousands of workers that CDM has reached through legal services, community outreach, and policy advocacy over the past twelve years.

Worker Stories is a brief, diverse sampling of narratives collected through qualitative interviews with migrant worker women. The interviews were developed in collaboration with migrant worker women leaders

belonging to the CDM-supported Comité de Defensa del Migrante (Migrant Defense Committee, or Comité) in a series of workshops and focus groups conducted in July and August of 2016. Comité leaders also led efforts to identify interview subjects, and some participated in interviews themselves. Interviewees were asked about their experiences in labor recruitment, during employment in the United States, and afterwards. They also shared their resilience strategies and provided recommendations for the future of these programs and migrant workers' rights.

Many thanks to the students and professors of the New England School of Law's Human Rights and Immigration Law Project, and American University Washington College of Law's Civil Advocacy and International Human Rights Clinics for conducting surveys. CDM also thanks our many dedicated volunteers who contributed to this project in 2016-2017.



**Centro de los Derechos del Migrante, Inc.** is a transnational, non-profit organization dedicated to improving the working conditions of migrant workers in the United States. Headquartered in Mexico City, Mexico and with offices in Juxtlaahuaca, Oaxaca and Baltimore, Maryland, CDM's innovative approach to legal advocacy and organizing accompanies workers in their hometowns, at the site of recruitment, and in their U.S. worksites through legal services, community education and leadership development, and policy advocacy. Our Migrant Women's Project (Proyecto de Mujeres Migrantes, or "ProMuMi") promotes migrant women's leadership in advocating for just labor and immigration policies that respond to the particular challenges that women face when migrating to the United States for work.



**The Comité de Defensa del Migrante** (Migrant Defense Committee or Comité) is a group of community-based leaders who organize and empower migrant workers to defend themselves and educate their co-workers. Founded in 2006 and comprised of current and former migrants and their family members, the Comité forms a human chain across Mexico and the United States. Comité leaders train other migrants in human rights, building a culture of informed migrants to protect workers' rights all along the migrant stream.



Since its founding in 2006, the University of Pennsylvania Law School's **Transnational Legal Clinic** (TLC) has represented individuals seeking asylum and other forms of immigration relief from across the globe and has worked alongside and on behalf of international human rights and community-based organizations on a range of rights-based issues, particularly as they relate to migrants.



This report was made possible in part due to generous funding from the **Ms. Foundation for Women**.

Name: **Rosa**

Visa: **TN**

Country of origin: **Mexico**

U.S. state(s) of employment: **Wisconsin**

Position: **Animal Scientist**

Duties: **Empty water troughs, feed and vaccinate calves, unload animals, clean company bathrooms, kitchen, and closets**

Ratio men/women in workplace: **95:5**



**A** licensed veterinarian, Rosa was thrilled when a Wisconsin-based dairy farm offered her a three-year, professional position working as an Animal Scientist. As a recent graduate from one of Mexico's top universities, she was able to qualify for a TN visa, created by NAFTA to allow U.S. employers to hire qualified professionals in one of sixty-three occupations. In the application letter supplied to the U.S. Embassy, the dairy farm described Rosa's would-be responsibilities as "sophisticated," "professional," and requiring "advanced theoretical and practical knowledge and skills." Upon arrival in Wisconsin, however, Rosa discovered that her duties – and those of the other TN workers in her workplace – were far from those described. Instead of developing nutrition and breeding programs, Rosa spent her workdays cleaning water troughs, unloading animals, and performing other menial tasks for well below the \$30,000 minimum annual salary her employer had promised. Eager to prove her abilities, Rosa's continued efforts to advance her career were met with ridicule from supervisors. As the only woman in her area, Rosa was told to perform housekeeping duties, and even laundry, considered "women's work." Her supervisors constantly told her that women are slower, weaker, and less skilled than men; she watched as they

trivialized and dismissed incidents of chronic sexual harassment against another female co-worker. And despite their qualifications, Rosa found that she and her other TN-holding co-workers were relegated to the lowest positions in the company with the least pay. When she questioned her role, her supervisor simply responded, "you come here with this visa, and you have to do what you're told." Beyond her sponsorship letter, Rosa had received no formal employment contract.

Unable to switch employers due to the terms of her visa, Rosa continued to endure her conditions. She eventually developing gastritis as a result of constant ridicule and stress. Taking matters into her own hands, Rosa struggled to find legal counsel, unable to afford consultation fees.

Rosa believes that U.S. employers hiring TN workers should be held accountable for the promises they make for employment and pay that accurately reflect workers' skills and abilities: "so that one can genuinely say – 'I put into practice what I knew, and learned what I didn't.'" She decries the sex-based discrimination she faced, saying, "pure and simple, men and women should be allowed to do the same job."

*They hired me as an Animal Scientist but had me cleaning food bins and bathrooms. They paid me less than the other workers. I didn't do anything that required a degree.*

Name: **“Sandra”**

Visa: **J-1 Summer Work Travel**

Country of origin: **Peru**

U.S. state(s) of employment: **Vermont**

Position: **Housekeeper**

Duties: **Housekeeping**

Ratio men/women in workplace: **90:10**



Sandra was looking forward to learning English, immersing herself in American culture, and earning a decent wage through the J-1 Summer Work Travel program. An authorized, U.S. J-1 sponsor agency, working through a local partner in Sandra’s native Peru, had promised her an enriching, three-month cultural experience at a ski resort in Vermont, where she would have access to sufficient transportation and opportunities to take full advantage of her surroundings and community. In addition, they said, she would earn enough take-home pay to easily cover the more than \$2000 she spent in visa costs, travel expenses, and agency fees. Once in the United States, she became concerned, however, when her hours and housing conditions fell far short of those established. It was only after contacting the Peruvian Embassy that the sponsor agency, who had been largely unresponsive to her complaints, placed her in another position as a housekeeper. Burdened with loans for her recruitment process and at the mercy of the whims of her sponsor agency, Sandra was forced to accept the employment offer, or return home to mounting debt. Her new place of employment was a far cry from the cultural exchange the program described: instead, she toiled long hours at minimum wage that caused her physical and

mental exhaustion. Suffering lesions to her hands from gruelling work, she was told that the hotel had no medicine available; as such she treated her wounds with leftover lotions found in hotel guests’ rooms. Living in a substandard room in the hotel, she worked under isolating conditions with no opportunity for cultural immersion, meeting only a few of her co-workers. She had to request permission from her employer for transportation to town, which was often denied. She had limited access to the outside world, amenities, or food. Sandra felt that she was constantly starving and found herself scavenging for pieces of fruit that customers left behind. When another female co-worker suffered a sexual assault by an hotel employee, she and Sandra kept silent – with nowhere else to turn, Sandra feared retaliation in the place she lived and worked.

After returning to Peru, Sandra successfully sought a reimbursement from her sponsor for program fees with the help of a non-profit legal services organization. All the same, she feels she would not return to work again under similar circumstances. She argues that there should be greater government oversight over the J-1 programs and sponsor agencies to ensure that others like herself will not experience the same problems.

*“I initially participated in this program to learn about U.S. culture, amongst other things. Throughout my employment, I was essentially isolated within my room, unable to experience any aspect of American culture.”*

Name: **Beatriz**  
Visa: **TN**  
Country of origin: **Mexico**  
U.S. state(s) of employment: **Texas**  
Position: **Management Consultant**  
Duties: **Secretarial duties**  
Ratio men/women in workplace: **0:100**



Unbeknownst to Beatriz, her employer had declared bankruptcy before she was even hired. A native of Mexico, Beatriz and her two daughters had travelled to the United States as dependents of her husband, who had received a TN visa. Unfortunately, the terms of the TN visa were not designed for families, and the dependent status Beatriz and her teenage daughters received did not allow her to legally work in the United States. While she maintained her consulting job in Mexico from abroad, when a Texas-based management consulting firm offered her an attractive TN visa sponsorship, she quit her consulting position, which she had held for 13 years. In the employment offer, Beatriz's new firm described her "significant business management and consulting experience" as a prerequisite to her skilled employment. On her first day of work, however, she was shocked to discover that she had been deceived. Although hired to train and supervise other staff, Beatriz was the company's sole employee, besides her supervisor. There was no place for her to apply her skills or knowledge. Instead, she was forced to work as a secretary, putting in extensive overtime hours to compensate for six vacant positions. When she suggested that her supervisor hire additional staff, he became aggressive, holding her hostage in their office as

he humiliated and berated her for hours. She felt scared, humiliated, and disrespected. During this time, her spouse abandoned her and her children, leaving Beatriz as the sole provider for her family. Only three months after beginning her employment, the firm closed, leaving her without an income or options for employment. Unable to legally work for another company under the terms of the TN visa, she suffered heavy financial loss and emotional distress.

Seeking legal help for herself and her daughters, Beatriz reached out to the Mexican consulate, who advised her to simply return home to Mexico. The nonprofit organizations she contacted were at capacity, and she did not have money for a private lawyer. Those she contacted said they did not have enough information about TN visas to assist her. A church in Texas provided her with assistance for food, gas, and money.

Despite having read about the TN visa in detail, Beatriz was gravely deceived. She urges government agencies to properly regulate TN businesses and employers, ensure that they are financially solvent, and ensure that they respect workers' terms of employment.

*Ignorance about this type of visa is the biggest problem. I lost everything we have because I am not able to work for another company. I was not able to defend my rights.*

Name: **“Mara”**

Visa: **J-1 Au Pair**

Country of origin: **Brazil**

U.S. state(s) of employment: **Massachusetts**

Position: **Au Pair**

Duties: **Child care, housekeeping, transportation, homework help, meal preparation**

Ratio men/women in workplace: **N/A**



**M**ara had dreamed of coming to the United States to pursue an acting career. A friend put her in touch with an authorized J-1 sponsor agency. After meeting the J-1 Au Pair Program requirements, she paid the sponsor agency \$300 and was placed with a family in a small town in Massachusetts. Before departing Brazil, Mara received a contract describing her duties, but not her pay. Once in Massachusetts, Mara lived in her employer's home and worked for 45 hours per week caring for their children, transporting them to school and other activities, helping with their homework, and preparing meals. For this work, she was paid \$195.75 per week. On the occasion that she was required to work additional hours, Mara's employers compensated her in-kind with presents or gift cards. Her employers told her that eating with the children counted as her "break." Having had no prior contact with the family before her placement, Mara soon began to have difficulties working with the children charged to her care, who began to mistreat her. She complained to the sponsor agency, which ignored her pleas. After three months, Mara's family terminated her employment, and she

scrambled to find another placement. She lost two weeks' of work and income during this time, but considered herself lucky to have been placed with another employer in a different state: according to Mara, in her experience, it was common for au pairs to be kicked out of their placements and sent home.

Despite being the only au pair in her household, Mara sought comfort in her friendship with other au pairs she met in her classes and online. She found that finding a "good" family was entirely based on luck, and she heard about families that "really wanted to enslave the au pair." She recommends that the au pair program establish higher pay, especially in households with more children, and set more clearly-defined work schedules and duties that strike a better balance between workers' and employers' interests. She felt it was unfair that her host family had the sole power to set her schedule and sometimes left her in charge of the kids, alone, full-time. She lived in constant fear of being sent home for complaining.

*“Even if you're not working in your free time, you don't have rights to do whatever you want to do. You're being watched all the time. Some families put a curfew.”*



Name: **Lisette**

Visa: **C1/D**

Country of origin: **Mexico**

U.S. state(s) of employment: **California, Hawaii**

Position: **Buffet steward**

Duties: **Prepare and serve meals, clean up, provide room service**

Ratio men/women in workplace: **50:50**



A recent college graduate, Lisette was eager to improve her English, learn a new language, and travel. Working on a cruise ship seemed like a perfect match. Program coordinators at her university put her in contact with a recruitment agency, which connected her with a California-based cruise line. Shortly thereafter, she was ready to embark. Upon arrival in California, Lisette was assigned to a route, not knowing where the cruise ship was going. Although she struggled to read her English language contract, Lisette trusted that that a reputable, American company would provide her with a positive experience. She never could have imagined what awaited her.

For the next two months, Lisette suffered exhaustion and psychological distress under a hostile environment she described as “authoritarian.” Tasked with meal service duties, Lisette worked day and night. The breaks she had been promised turned out to be as short as four to six hours – the only time she could use for sleep. With no overtime pay, her earnings amounted to less than \$4 per hour. Having received insufficient job training, she lived in constant fear of her supervisor, who ridiculed staff and berated their errors without mercy. She did not always have access to her visa and passport, which were held for “safekeeping” in a company office.

Living in “constant confinement” and having little communication with her family only made the situation worse. Lisette watched as the work took its toll on her workmates, who self-medicated with drugs, alcohol, or sex. Fearing retaliation, most kept silent about their treatment. She heard about sexual assaults perpetrated by supervisors, who would freely ask female staff for sexual favors. She and her shipmates found brief respite while in port, when those with visas were allowed six-hour visits to the mainland. All the same, Lisette’s hair began to fall out. Months later, after returning home to Mexico, Lisette was shaken to learn that one of her shipmates had committed suicide.

Although Lisette herself has actively sought justice for her case, she has been told that the odds are stacked against her. Today, she advocates for more breaks, overtime pay, and improved living conditions for cruise ship workers. She is outspoken about the dangers of misleading recruitment, wishing recruiters would thoroughly explain workers’ contractual rights and responsibilities so that prospective workers could make informed decisions about their employment.

*“I had so much confidence going with an American company... I thought they were going to pay me for the extra hours I worked. I thought I was going to have more control. I was very deceived.”*



Name: **Estefani**  
Visa: **J-1 Au Pair**  
Country of origin: **Brazil**  
U.S. state(s) of employment: **Massachusetts**  
Position: **Au Pair**  
Duties: **Caring for children, laundry, housekeeping**  
Ratio men/women in workplace: **N/A**



**E**stefani learned about cultural exchange opportunities in the United States from a teacher at school, and decided to apply. Although she consulted various visas, the only one she could afford was the J-1 au pair program. Altogether, she estimates having paid between \$1500-\$2000 up front in program fees and travel costs, excluding additional costs for six course credits upon arrival. Estefani was placed with a divorced couple in Massachusetts, where she split her time between two homes caring for children, doing laundry, and providing transportation to school. Although her terms of employment did not include housework, Estefani's employers soon insisted that she do laundry, dishes, cleaning and yard work. In one home, the host parent stopped hiring a housekeeping service, expecting Estefani to clean instead. In the other, her employer became so verbally aggressive with her over housework that Estefani tried to quit. Earning \$195.75 for 35 hours of work per week, Estefani paid her own telephone bill, educational expenses, and occasionally bought food when her employer failed to do so. She found that her salary barely allowed her to purchase necessities like shampoo, let alone pay for travel and cultural activities. One of the host parents kept her under watch, frequently entering Estefani's room and monitoring her social activities during her free time. Facing a constantly shifting schedule and requests for weekend hours, Estefani found herself postponing her classes and falling behind on her English goals. When she was unable to complete her credit requirements on time, her host family only reprimanded her for wanting to prioritize

schoolwork. She occasionally endured sexist or racist comments from her employers about her Brazilian heritage. Overall, Estefani found that her au pair experience was contrary to the cultural exchange program she had been sold.

Estefani noticed that the local childcare consultant (LCC) charged with overseeing her placement was highly biased toward her employers, whom she had known for eight years; when Estefani complained about her conditions, the LCC would only tell her to be more "understanding." Changing sponsor agencies seemed to be impossible. Estefani felt both her legal status and race placed her at a disadvantage to advocate for herself against the powerful interests of sponsor agencies. "If I need the government to help me," she explained, "I would be the weakest person dealing with a big entity and lobbyists ... I feel like it's convenient for the government to continue with this au pair program." Instead, Estefani dedicated time to educating herself online about her rights. She felt trapped in the program, worried that her visa would be taken away if she tried to change her circumstances.

Estefani feels that her experience has made her feel depressed. She believes that au pairs should have access to affordable mental health services and other types of local resources. Moreover, Estefani wishes that au pairs' work would be clearly defined in a contract, and that host families should be held to the same standards and vetting process to which au pairs themselves are subjected.

*"It's false advertisement. It feels like hell on earth, but it's advertised as an amazing experience. It's sold to the au pairs as a cultural exchange, but to the family as free/cheap labor. We are too vulnerable. We should feel like we have freedom."*

Name: **Daria**  
Visa: **H-2B**  
Country of origin: **Mexico**  
U.S. state(s) of employment: **Anonymous**  
Position: **Vegetable packer**  
Duties: **Sort and pack cucumbers**  
Ratio men/women in workplace: **30:70**



**D**aria had to fight to find a recruiter that would give her the opportunity to work in the United States. Recruiters charged money for the opportunity to work, so Daria had to take out loans. She landed an agricultural position, but soon found that opportunities for men and women were not equal at her worksite; while men were sent to harvesting jobs with H-2A visas, women like Daria were given H-2B visas and were assigned to sorting vegetables.

Immediately, Daria found that her work, and pay, did not meet expectations. Earning 10% less per hour than promised, Daria and her female colleagues also only worked three to five hours per week – a far cry from the forty hour workweek described. When work was scarce, Daria watched as the company supervisor would come by and pick up the men for work, leaving the women behind to clean their dormitories. She described the supervisor as a crass and intimidating man, who would yell at the women for being slow. The company took her passport from her, retaining it until the end of the season.

Daria's worksite was so remote that she and her colleagues had no choice but to live in company-provided farmworker housing, for which they paid monthly rent. The dormitories were poorly equipped for mixed-gender living. To reach the bathrooms, for example, Daria and the other women would have to walk through the men's dormitories. The bathroom itself, shared by both men and women, was a common room of stalls, with only a door to the outside. This experience made Daria excruciatingly uncomfortable, especially when some of the men had been drinking.

Far from town, and with no telephone, Daria and her female co-workers had little communication with their families or with the outside world. They were always waiting for work. The stress and isolation finally took its toll, and one day, Daria collapsed, unconscious. At the hospital, she was diagnosed with deep emotional distress. Eventually, she found strength in a church group, whose members prayed with her and gave her encouragement.

*"It was a pigsty. There was no door. I cried a lot because everything was terrible – I had to sleep on the floor and I suffered backaches and couldn't sleep. The floor was very dirty. Those who had worked there longer were better off because they managed to buy mattresses."*

Name: **Heidi**

Visa: **J-1 Au Pair**

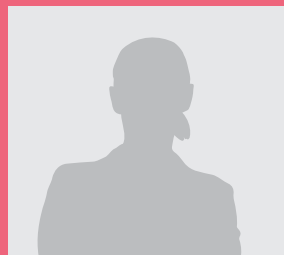
Country of origin: **Mexico**

U.S. state(s) of employment: **Massachusetts**

Position: **Au Pair**

Duties: **Cleaning, cooking, childcare, transportation, laundry, pet care**

Ratio men/women in workplace: **N/A**



**A**s a J-1 au pair, Heidi was told that she would be treated to a year-long cultural exchange as a member of an American family. Soon after arrival, she began to see things differently. What started as childcare quickly snowballed into full-blown housework. Heidi found herself cooking for not only the children, but for the whole family; cleaning; taking care of the dog; and working seven days per week. Wanting to fit in with her host family, Heidi was eager to be extra-helpful, but soon she began to feel exploited. She took care of four children and earned the same \$197.75 weekly wage as au pairs who cared for one. She was only allowed breaks on days that she worked more than ten hours, and sometimes, not at all. Her employer even asked her to teach the children Spanish, requiring Heidi to develop a curriculum and measuring results. When she tried to set boundaries, Heidi's employers told her she was not doing her job. On one occasion, she and the employer argued. The employer told her, "I hired you so you could work 24/7 so I don't have to worry." Although Heidi's J-1 program entitled her to a partial academic subsidy, she was forced to pay her education back to her employers through deductions on her pay check.

Heidi also struggled with racist overtones in her employer's communication, like when she explained she "would

never hire a European au pair because they don't work as hard as an Hispanic." Her employer's use of the phrase "you Mexicans" made her uncomfortable. And there were times when Heidi felt that the family was spying on her. Her employer would go into her room and make comments about the state of her bed. When Heidi was out of the house, her employer would sometimes call her, her boyfriend, or even her boyfriend's family, to check up on her whereabouts.

When Heidi tried to tell her local childcare consultant (LCC) that she was working overtime and never getting a day off, the LCC sided with the employer. Heidi felt harassed by her LCC, who addressed Heidi's concerns with a "it's not me, it's you" attitude. Once, the LCC threatened her. Heidi felt that she did not know her rights. Another time, when a teacher at the child's school asked if she was being treated well, Heidi was too scared to respond.

Heidi recommends that host families undergo the same psychological tests, criminal record checks, and other evaluation to which the J-1 Au Pair Program subjects au pairs. She argues that the rate of pay – \$195.75 per week – should increase with the number of children in the home, or for additional activities. She herself had paid her sponsor agency more than \$1500 in program fees.

*"[My employer] works as a police officer and told me if she finds out I'm breaking any rules there will be consequences... things got so bad that I had to see a therapist."*

Name: **Adareli**

Visa: **H-2B**

Country of origin: **Mexico**

U.S. state(s) of employment: **Louisiana**

Position: **Chocolate packer**

Duties: **Sort and pack chocolates on assembly line**

Ratio men/women in workplace: **10:90**



**G**rowing up, Adareli never understood why anyone would want to leave her hometown in Hidalgo, Mexico to work in the United States. It was not until she graduated from high school and struggled to find employment that she considered migrating. The recruitment process was competitive and difficult, and especially so for women: while men in her community were able to apply for both H-2A and H-2B jobs in different industries, women were only offered H-2B factory work. Her local recruiters argued that women's physical limitations disqualified them from certain jobs.

When Adareli arrived at the factory in Louisiana, she found that her supervisors did not respect her and her colleagues' dignity as women or human beings. Her male counterparts would earn more, carrying and stacking boxes, while women packed chocolates on assembly lines. In the words of her boss, H-2B workers' only role was to work – the

company would not tolerate complaints or illnesses. Having paid transportation and visa costs, Adareli continued working to pay back her debts. On her fourth season of work, Adareli and seventy colleagues implemented a work stoppage, demanding fair labor standards. Afterwards, the working conditions mildly improved; nevertheless, Adareli's fear of retaliation was realized when the company decided not to hire her or her coworkers again.

Adareli has dedicated much of her time and energy to fight for workers' rights and transparency in recruitment. She wishes that recruiters would be up front with migrant workers about employment terms, and that employers would give women an equal chance to prove their abilities. She advocates for greater job mobility, arguing that migrant workers should be able to switch employers to escape exploitative working conditions and seek fair employment in the United States.

*"I would talk to my female colleagues about our rights so that we would defend our dignity. But I realized, in that environment, fear was still preventing us from standing up for ourselves like we were meant to do; fear of losing our job, having to return to Mexico, and not being able to support our families... I wish that as migrants, we wouldn't be tied to an employer, wouldn't lived bound and unable to change jobs in the face of unjust conditions."*

Name: **Mayra**

Visa: **B-1**

Country of origin: **Mexico**

U.S. state(s) of employment: **Florida**

Position: **Domestic worker**

Duties: **Housekeeping, cooking, household shopping, caring for pets**

Ratio men/women in workplace: **N/A**



**M**ayra responded to an online advertisement: a wealthy family was looking to hire a domestic worker over 35 years of age at their Florida home through a Mexico-based recruitment agency. Although the agency provided only vague information about her employment, Mayra was attracted to the prospect of earning a U.S. salary far above what she could earn as a domestic worker in Mexico. She understood only that her primary responsibility would be to care for children. She wouldn't learn about her schedule, or even the name of the family, until she arrived in the United States and began work. To discourage her from changing her mind before departure, the recruitment agency representatives held onto Mayra's passport and visa, returning it to her at the airport on the day of her flight. Feeling pressed by a family illness and mounting financial concerns, Mayra trusted that the opportunity was worthwhile.

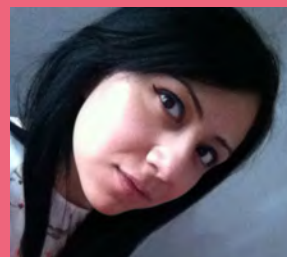
Once in Florida, Mayra quickly realized she had been misled. Working fifteen-hour days, she was paid \$5 per hour or less. Besides caring for the children, she performed all household duties, including cleaning, cooking, shopping,

and caring for the dog. Mayra was only permitted to leave the house on Sundays – after walking the dog – and she had to let her employer know where she was at all times. Through psychological manipulation, her employer made Mayra feel too helpless to take any action against her deplorable working conditions. She had little contact with the outside world. It was months later, when she began to speak with other domestic workers in her neighborhood about her situation, that Mayra realized her employers were exploiting her.

Mayra is determined to ensure that others are not subject to the conditions she experienced. She is now certain that employers understand, and take advantage of, some workers' economic needs. She wishes migrant workers would have access to legal services, which she has struggled to secure. She is also critical of the recruitment agency's obscure dealings and its lack of accountability, and believes that recruiters should be held accountable for their role in exploitation.

*“The lack of information about our rights and access to legal services leaves us in a vulnerable position. I wish I could tell other domestic workers that they should fight for fair compensation... It's worth it to inform yourself. Know that you have rights.”*

Name: **Barbara**  
Visa: **J-1 Au Pair**  
Country of origin: **Mexico**  
U.S. state(s) of employment: **Ohio**  
Position: **Au Pair**  
Duties: **N/A**  
Ratio men/women in workplace: **N/A**



Barbara wanted to be an au pair, but she never got the chance. Instead, she experienced first-hand how obscure and bureaucratic the J-1 recruitment process can be. A native of Mexico, Barbara was hoping to travel to the United States through the Au Pair Program in order to learn English and gain professional experience abroad. She sought out one of the few sponsor agencies that are licensed to manage au pair hiring and placement, and which charge participation fees to both prospective au pairs and host families alike.

Three days after arriving in the United States for her requisite au pair training, Barbara's dreams came to a screeching halt. For reasons that still remain unclear to her, the sponsor agency confronted Barbara, accusing her of being unfit for work and citing a medication she was no longer taking. Having been initially cleared for participation, Barbara was taken aback. She felt targeted and alone. She did not have access to a lawyer who could defend her, nor a doctor who could conduct the needed tests to make her case. She wanted to reach out to her family for help, but

she was unable to communicate with them due to limited phone access. Back home, her family struggled to contact her and became increasingly worried when they received no response.

After a long legal process that challenged the sponsor agency, Barbara managed to recover a percentage of the program fee. Intent on starting anew, she applied once again to be an au pair through a different licensed agency. Nevertheless, after making her payment, her application was denied. Barbara learned that the first agency had accused her of misusing her visa and filed a report. As a result, Barbara was marked delinquent.

Today, Barbara is a vocal advocate for greater recruitment transparency for J-1 workers. She argues that the agencies responsible for au pair recruitment should be monitored and held accountable for the conditions they promise. She also believes that the program could be improved by guaranteeing access to legal and health services for program participants and by providing workers with independent, workers' rights education and support.

*"They do not give correct information. There's a lack of transparency and accuracy in the recruitment process, and everybody is interested in money. Recruiters only try to generate commissions from applicants."*

Name: **“Leticia”**

Visa: **TN**

Country of origin: **Guatemala**

U.S. state(s) of employment: **Massachusetts**

Position: **Researcher**

Duties: **Research**

Ratio men/women in workplace: **N/A**



Leticia hoped that working in the United States would provide her young, Autistic son with a better life. Living in Guatemala, she found there was little public awareness of autism, let alone public schools or programs to meet her son’s needs. The few private school opportunities available were more expensive than she could afford. When a biotechnology firm in Massachusetts offered her a temporary research position, the monthly salary was well above similar positions in Guatemala. With a letter of support from her would-be employer, Leticia was able to apply for a TN visa, which allows U.S. employers to hire workers possessing certain qualifications and skill sets for temporary positions. With the promise of a stable income, Leticia was willing to cover her own and her son’s travel and visa expenses, which her employer promised to reimburse. However, upon arrival, Leticia discovered that her job was not what she expected. Instead of a reimbursement, her employer began to deduct hefty fees

from her paycheck for her shared housing and other costs, leaving her with barely \$400 per month to live on. When she brought her economic hardship to her employer’s attention, he gave her a “child bonus,” only to take the money back a few weeks later. Her employer, who was also her landlord, became verbally abusive, and he kept her emails and online activity under constant surveillance. Feeling isolated, exploited, and struggling to make ends meet, Leticia was eventually diagnosed with Post Traumatic Stress Disorder (PTSD).

Leticia eventually sought legal assistance, but she was told she did not have any recourse without jeopardizing her immigrant status. She feared taking legal action. Tied to her employer by the terms of her TN visa, Leticia’s only option was to quit and seek emotional assistance for herself and her son.

*“There is no freedom. I felt trapped. The problem with the work visa system is that your boss holds over your head that he brought you to America. I will never apply to get a work visa again because of the horror that I have been through. I am grateful to have the opportunity to warn women about my situation so they know that they have the right to not be treated poorly.”*

Name: **Claudia**  
Visa: **J-1 Au Pair**  
Country of origin: **Colombia**  
U.S. state(s) of employment: **Massachusetts**  
Position: **Au Pair**  
Duties (actual): **Care for children, light housework**  
Ratio men/women in workplace: **N/A**



Claudia was certain that the J-1 Au Pair Program would help her fulfill her wish to travel to the United States and learn English. Her terms of employment specified she would work 45 hours per week providing childcare, and that she should keep the house, and her personal space, reasonably organized. Once at work, Claudia felt her employer was taking advantage of her; she was often asked to do housekeeping and management, and her weeks frequently exceeded 45 hours. Rarely could she take weekends off, as initially promised, because living in the same house as her employers meant she was frequently on call. Claudia was never paid for extra hours she worked.

Four months into the program, Claudia's employers began to withhold her paycheck. When Claudia asked for her salary, her boss refused, saying he had lost his income. He became upset, even hostile, and he made threatening calls. When her employer restricted Claudia's access to the internet,

she felt isolated and scared. Claudia reported the incident to her local childcare consultant (LCC), who reminded the family to pay. In response, the family put Claudia's clothes in a trash bag and kicked her out of the house. She had to stay at the LCC's home for two weeks and was given an ultimatum: either find another host family, or risk being sent back to Colombia.

Claudia recommends that the United States government closely monitor the J-1 Au Pair Program, and notes that lack of oversight means "au pairs are being exposed to families who are abusing other au pairs." During her employment, Claudia felt she had "absolutely zero" protection, and she urges the program to report rampant abuses to authorities. She also wants both families and au pairs to understand au pairs' rights under the law, especially in regard to overtime hours and pay.

*"The program needs to educate the families about how to treat au pairs and what the laws are with regards to au pairs [and] make sure they understand the law and what abuse means. We never knew who would protect us."*



Name: **Silvia**

Visa: **H-2B**

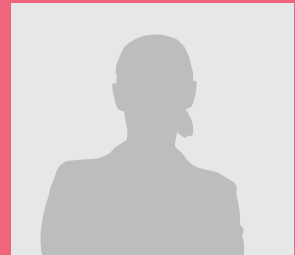
Country of origin: **Mexico**

U.S. state(s) of employment: **Maryland**

Position: **Seafood processor / Crab picker**

Duties: **Remove crab meat from shells**

Ratio men/women in workplace: **50:50**



The only employment in Silvia's Mexican hometown is seasonal corn husk processing for tamales. The process uses strong, pungent chemicals that many suspect are unhealthy; even then, those jobs are sporadic and difficult to come by. Silvia needed to provide for her parents and two children, and so, like many women in her community, she decided to apply for a job processing crab meat on Maryland's Eastern Shore. Labor recruitment was politically challenging, as many women vied for the few available spots. The H-2B application process was expensive and complicated, but with the need to support her family, Silvia had no other choice. Without clear information to distinguish between genuine and fraudulent recruiters, Silvia lost money on several false offers. Out of ten recruitment attempts, Silvia succeeded in obtaining work in the United States five times.

As she applied for different jobs, Silvia realized men and women were not offered the same opportunities: year after year, most men had their choice of H-2B seafood

processing jobs or H-2A harvesting positions, where they earned higher wages and free housing. Women would simply be appointed to pick crab.

Discrimination followed Silvia to her workplace in Maryland, where she discovered that men and women were assigned different roles. While Silvia and other migrant worker women scraped crab meat from jagged shells, men would lift and empty buckets and cook crab. She noticed that her male counterparts also frequently worked more hours given the tasks they were assigned to do.

During her time in Maryland, being away from her children had an emotional impact on Silvia. While she would have liked to bring her kids along to Maryland with her, she knew that her salary would not be enough to support them financially. After paying her rent and food expenses, she would send her remaining salary home to her family. She wishes that the men in her community who had access to different, better-paying jobs would use their influence to recommend women to their employers.

*"We don't like the work, but we don't question it. Why would we, if it's the only thing there is?"*

Name: **Johanna**

Visa: **J-1 Au Pair**

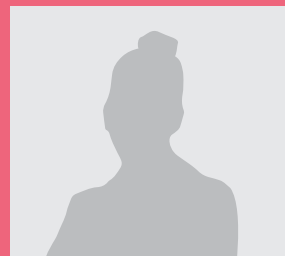
Country of origin: **El Salvador**

U.S. state(s) of employment: **California, New York**

Position: **Au Pair**

Duties: **Care for, bathe, feed children**

Ratio men/women in workplace: **N/A**



Johanna, a teacher, wanted to follow her dream of working with children with disabilities, but she could not find relevant employment in El Salvador. Upon discovering the J-1 Au Pair Program, she thought it would be an opportunity to focus on her field while having an adventure, too. Reading the cultural exchange program's description, she was willing to pay the program fee required for participation. Johanna believed the sponsor agency's publicity that she would be regarded as a "big sister" in an American family, and that she would be able to go to school.

Before starting work caring for three children with a host family in New York, Johanna had been told she would be entitled to two days off each week, no questions asked. Her new employers soon informed her that, aside from sick days, any days off must be requested and approved. Faced with so many kids – one of them Autistic and requiring special care – Johanna felt like she could never take a break. Even though the job was supposed to include room and board, her employers would cook for themselves only, protect their food with labels, and avoid taking her to the store. Her employers provided her with an additional \$20 weekly allowance, with which she was expected to

feed herself. She brought her troubles to the attention of her local childcare consultant (LCC), who "didn't seem to care." Her location and lack of access to transportation left her feeling isolated and alone. Homesick and constantly worried about money, she struggled with her decision to stay, but felt ashamed of returning home with no money and no improvement in her English. Finally, fed up with her situation, Johanna left four months before her program ended.

Johanna wishes that J-1 recruitment agencies would be transparent on expectations for both the au pairs and host families, and that employers should be better educated. Her greatest frustration is that recruitment agencies characterize the program in an unrealistic way, selling "two different realities" to families and au pairs. She feels that "both sides are being sold something unrealistic – the families think they are getting cheaper nannies, and the au pairs want to explore. The company says you'll be [an] extra [set of] hands, not an employee."

*"When you come to the U.S., you think you'll meet people, make money, and learn English. But you cannot do any of that. You're with a baby the whole time – being paid very little. I left the program because it was not helping me achieve the goals for which I came to the U.S."*





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10 E. North Avenue, #9

Baltimore, MD 21202

<http://www.cdmigrante.org/>



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**Transnational Legal Clinic**

**Transnational Legal Clinic**

University of Pennsylvania Law School

Gittis Center for Clinical Legal Studies

3501 Sansom Street

Philadelphia, PA 19104

<https://www.law.upenn.edu/clinic/transnational/>

# APPENDIX D

DECLARATION OF MARITZA PÉREZ OVANDO

## **APPENDIX D: DECLARATION OF MARITZA PÉREZ OVANDO**

1. I, Maritza Pérez Ovando, am a citizen of Mexico and resident of Tuxpan, Veracruz, Mexico.
2. I am 30 years old.
3. I came to the United States in June of 2018 on an H-2A visa to work for a labor contractor (Employer) who provides workers for various agriculture growers in the United States.

### **Sexual Harassment in the Workplace**

4. While employed by Employer, I worked in Florida and Alabama. I was supervised by my Employer as well as another supervisor (my Supervisor). While I worked for my Employer, I harvested squash, peppers, and cucumbers, which was very hard work. We worked from sunrise to sunset.
5. My Employer provided housing to all of the workers at a hotel. My Employer and my Supervisor also lived at the hotel.
6. I knew my Employer had the key to all the worker's hotel rooms, and he would use any pretext at all as a reason to come into my room. I felt afraid because sometimes I would come home to my room after work and I could tell that someone other than the hotel staff had come in and gone through my things. Sometimes my Employer and my Supervisor would mention things to me that they could only know about from coming into my room.
7. Most of the workers and supervisors were men, and the working environment was very toxic. Every day that I went to work I was subjected to sexual harassment in the form of sexual commentary and innuendo, as well as explicit requests for sex that made me very uncomfortable and afraid.
8. For example, my Supervisor frequently made sexual comments to me, such as "I'll be waiting for you in my room later." This scared me because I knew he had keys to all of the hotel rooms.
9. On another occasion, my Supervisor asked me why I didn't "want" him, referring to his body and questioning why I would not have sex with him.
10. I repeatedly rejected my Supervisor's sexual advances by saying that I wasn't looking for a relationship. In response, my supervisor responded that having sex with him would not be "serious" and would just be a "hook up."
11. My Employer also made comments about my body, saying that I was too thin on several occasions. And, one time, my Employer grabbed my shoulder and pulled me towards him while saying I was "too thin." This incident made me very uncomfortable.

### Quid Pro Quo Retaliation

12. I was constantly fearful while I worked for my Employer, because I knew that if I wanted fair treatment at work, I was expected to have sex with my Employer and Supervisor to receive better treatment.
13. I felt pressured by them to accept their sexual advances because I knew that I would be punished with low pay and especially difficult work assignments if I did not.
14. This expectation of sex in exchange for fair treatment was so prevalent that I believe that my Employer and Supervisor were having sex with my female coworkers. The women that my Employer and Supervisor had sex with received preferential treatment by being assigned easier jobs. For example, I used to work in the kitchen preparing food for the workers, which was easier than field work, but after I told my Supervisor that I did not want to have sex with him, I was replaced by a female worker with whom my Supervisor was having sex. My Supervisor gave her my job in the kitchen as a reward for having sex with him, but it was also retaliation against me because I was forced to work in the fields after I rejected him. After this point, all of the bosses were harsher on me.
15. Another example of unequal treatment and retaliation occurred when one of my coworkers told me that my Supervisor said that if she had sex with him, he would make sure she could continue working in the packing shed putting boxes together. Women were relegated to packing work, which paid less than working in the fields with men. But my coworker really liked that job and my Supervisor knew it. However, when my coworker rejected my Supervisor, he moved her to picking in the fields as punishment.
16. Another time, I believe Employer retaliated against me because he thought I told his wife that he was having sex with his employees. My Employer punished me by moving me into the fields again.

### Attempted Resignation

17. My Employer exploited the workers by underpaying us and regularly threatening to contact immigration or have us blacklisted from the H-2A program if we complained about the job or threatened to quit. I believe my Employer did this because we were Mexican and knew we were in a vulnerable situation. For most of us, this was the first time we had worked in the United States, and many did not have a strong formal education. This vulnerability was even greater for me because I was a woman working in a hostile work environment.
18. Despite my fear of further reprisal, I found this treatment offensive and I knew I had to stand up for myself. On or around September 22, 2018, I went with two other female workers to my Employer to try to quit because we couldn't handle the terrible working conditions any longer. When we met with him in his office, which was also his bedroom at the hotel, my Employer implied that he had "dirt" on me and all of the workers, so that we would stay.

19. Because my Employer told me that he would not accept my resignation, I ended up staying at the job.
20. I kept trying to raise complaints about the working conditions. I wrote a note to the farm owner to let him know how awful the working conditions were. I gave the note to the farm owner's brother and asked him to pass it on. My Employer found out and became extremely upset. My Employer made all of the workers write down our names on a piece of paper in order to compare our handwriting to the note. Eventually, my Employer found out that I wrote the note and he fired me on October 18, 2018.

#### Post H-2A Work

21. After I was fired, I returned to Mexico to support my parents, because I did not want to continue working in the H-2A program. However, I wasn't able to find a job until 2020.
22. Now, I work at a shipping company in a port terminal in my hometown of Tuxpan, Veracruz, Mexico. Cars arrive by truck and then are exported by ship to other places, like Europe and the United States. I make about \$1,000 pesos a week, less than I made working in the United States.
23. At my current job in Mexico, I do not experience sexual harassment and I do not have to do manual labor.
24. I would only consider participating in the H-2A program again if I didn't have to work for my former Employer or anyone who abuses his workers by exploiting them or sexually harassing them.

#### EEOC Charge

25. After my Employer fired me, I decided to make a complaint to the Equal Employment Opportunities Commission (EEOC) because I knew that what happened to me and my coworkers was not right. I knew that we were discriminated against because we were women and we were Mexicans.
26. I filed my EEOC complaint in March 2019. Now, two full years later, my complaint is still pending at the EEOC and I have not received justice for the way I was treated in the United States as an H-2A worker.
27. The most disappointing part is that my former Employer still recruiting and hiring workers for the H-2A program. In fact, he is seeking to recruit around 170 H-2A workers for the current 2021 season.
28. I am filing this complaint because I do not want people like my former Employer to be able to continue hiring people and turning the American dream into a nightmare.





# APPENDIX E

LIST OF MEMBER ORGANIZATIONS OF SUPPORTING  
NETWORKS

## **APPENDIX E: LIST OF MEMBER ORGANIZATIONS OF SUPPORTING NETWORKS**

### **1. *Alianza Nacional de Campesinas, Inc.* members include the following organizations:**

Amigas Unidas; Asociación Campesina De Florida; Campesinos Sin Fronteras; Centro de Justicia del Trabajador de Nueva York; Centro De Los Derechos Del Migrante, Inc.; Centro de Trabajadores del Centro de Nueva York; Coalición Rural; Colonias Development Council; Esfuerzos Multiculturales Para Poner Fin Al Acoso Sexual (MESA); La Mujer Obrera; Mujeres Campesinas Unidas De Florida; Mujeres Divinas; Mujeres Luchadoras Progresistas; Organización En California De Líderes Campesinas; Pineros Y Campesinos Unidos Del Noroeste (PCUN).

### **2. *Red Nacional de Jornaleros y Jornaleras Agrícolas* members include the following organizations:**

Centro de Acompañamiento a Migrantes A.C. (CAMINOS); Centro de Derechos Humanos de la Montaña Tlachinollan A.C. (CDHM Tlachinollan); Centro de Desarrollo Indígena Loyola A.C. (CDIL); Centro de Estudios en Cooperación Internacional y Gestión Pública A.C. (CECIG); Coalición Indígena de Migrantes de Chiapas (CIMICH); Dr. Celso Ortiz Marín, académico de la Universidad Autónoma Intercultural de México; El Soc. José Eduardo Calvario Parra, académico de El Colegio de Sonora y de la Universidad de Sonora; Enlace, Comunicación y Capacitación A.C. (ENLACE); Mixteco Yosonuvico de Sonora Cerro Nublado A.C.; Pastoral Social y Migrantes de la Diócesis de Matehuala; Respuesta Alternativa A.C., Servicio de Derechos Humanos y Desarrollo Comunitario (RA).

# APPENDIX F

ENGLISH-ONLY EEOC COMPLAINT FORM

<div>CHARGE OF DISCRIMINATION</div> <div>This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.</div>		<div>Charge Presented To: Agency(ies) Charge No(s):</div> <div> <input type="checkbox"/> FEPA                     <input type="checkbox"/> EEOC                 </div>	
<div>_____ and EEOC</div> <div>State or local Agency, if any</div>			
Name (Indicate Mr., Ms., Mrs.)		Home Phone (Incl. Area Code)	Date of Birth
Street Address		City, State and ZIP Code	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two are named, list under PARTICULARS below.)			
Name		No. Employees, Members	Phone No. (Incl. Area Code)
Street Address		City, State and ZIP Code	
Name		No. Employees, Members	Phone No. (Incl. Area Code)
Street Address		City, State and ZIP Code	
DISCRIMINATION BASED ON (Check appropriate box(es).) <div> <input type="checkbox"/> RACE                     <input type="checkbox"/> COLOR                     <input type="checkbox"/> SEX                     <input type="checkbox"/> RELIGION                     <input type="checkbox"/> NATIONAL ORIGIN                     <input type="checkbox"/> RETALIATION                     <input type="checkbox"/> AGE                     <input type="checkbox"/> DISABILITY                     <input type="checkbox"/> GENETIC INFORMATION                     <input type="checkbox"/> OTHER (Specify)                 </div>			DATE(S) DISCRIMINATION TOOK PLACE <div>                     Earliest                     Latest                 </div> <div> <input type="checkbox"/> CONTINUING ACTION                 </div>
THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)): <div>                     For illustration Purposes Only                 </div>			
I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.		NOTARY – When necessary for State or Local Agency Requirements	
I declare under penalty of perjury that the above is true and correct.		I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.	
<div>_____</div> <div>Date</div>		SIGNATURE OF COMPLAINANT	
<div>_____</div> <div>Charging Party Signature</div>		SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)	

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

- ☐ FEPA
- ☐ EEOC

and EEOC

State or local Agency, if any

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

For illustration Purposes Only

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Date

Charging Party Signature

NOTARY – When necessary for State or Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE  
(month, day, year)

**PRIVACY ACT STATEMENT:** Under the Privacy Act of 1974, Pub. Law 93-579, authority to request personal data and its uses are:

**1. FORM NUMBER/TITLE/DATE.** EEOC Form 5, Charge of Discrimination (11/09).

**2. AUTHORITY.** 42 U.S.C. 2000e-5(b), 29 U.S.C. 211, 29 U.S.C. 626, 42 U.S.C. 12117, 42 U.S.C. 2000ff-6.

**3. PRINCIPAL PURPOSES.** The purposes of a charge, taken on this form or otherwise reduced to writing (whether later recorded on this form or not) are, as applicable under the EEOC anti-discrimination statutes (EEOC statutes), to preserve private suit rights under the EEOC statutes, to invoke the EEOC's jurisdiction and, where dual-filing or referral arrangements exist, to begin state or local proceedings.

**4. ROUTINE USES.** This form is used to provide facts that may establish the existence of matters covered by the EEOC statutes (and as applicable, other federal, state or local laws). Information given will be used by staff to guide its mediation and investigation efforts and, as applicable, to determine, conciliate and litigate claims of unlawful discrimination. This form may be presented to or disclosed to other federal, state or local agencies as appropriate or necessary in carrying out EEOC's functions. A copy of this charge will ordinarily be sent to the respondent organization against which the charge is made.

**5. WHETHER DISCLOSURE IS MANDATORY; EFFECT OF NOT GIVING INFORMATION.** Charges must be reduced to writing and should identify the charging party and respondent and the actions or policies complained of. Without a written charge, EEOC will ordinarily not act on the complaint. Charges under Title VII, ADA or GINA must be sworn to or affirmed (either by using this form or by presenting a notarized statement or unsworn declaration under penalty of perjury); charges under the ADEA should ordinarily be signed. Charges may be clarified or amplified later by amendment. It is not mandatory that this form be used to make a charge.

#### **NOTICE OF RIGHT TO REQUEST SUBSTANTIAL WEIGHT REVIEW**

Charges filed at a state or local Fair Employment Practices Agency (FEPA) that dual-files charges with EEOC will ordinarily be handled first by the FEPA. Some charges filed at EEOC may also be first handled by a FEPA under worksharing agreements. You will be told which agency will handle your charge. When the FEPA is the first to handle the charge, it will notify you of its final resolution of the matter. Then, if you wish EEOC to give Substantial Weight Review to the FEPA's final findings, you must ask us in writing to do so within 15 days of your receipt of its findings. Otherwise, we will ordinarily adopt the FEPA's finding and close our file on the charge.

#### **NOTICE OF NON-RETALIATION REQUIREMENTS**

Please **notify** EEOC or the state or local agency where you filed your charge **if retaliation is taken against you or others** who oppose discrimination or cooperate in any investigation or lawsuit concerning this charge. Under Section 704(a) of Title VII, Section 4(d) of the ADEA, Section 503(a) of the ADA and Section 207(f) of GINA, it is unlawful for an *employer* to discriminate against present or former employees or job applicants, for an *employment agency* to discriminate against anyone, or for a *union* to discriminate against its members or membership applicants, because they have opposed any practice made unlawful by the statutes, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the laws. The Equal Pay Act has similar provisions and Section 503(b) of the ADA prohibits coercion, intimidation, threats or interference with anyone for exercising or enjoying, or aiding or encouraging others in their exercise or enjoyment of, rights under the Act.

# APPENDIX G

DISCRIMINATORY JOB ADVERTISEMENTS



## Job Ad Specifying Male Workers Ages 22 to 45



## CONVOCATORIA PARA TRABAJAR EN ESTADOS UNIDOS

### TRABAJADORES AGRÍCOLAS GENERALES

#### Requisitos

##### Características generales:

- Hombre entre 22 a 45 años de edad.
- Eficiencia y rapidez en el trabajo.
- Capaz de estar varias horas parado o agachado bajo el sol.
- Contar con buena salud y condición física.
- Buena actitud en el trabajo y con el personal.

##### Escolaridad:

Primaria o Secundaria  
(mínimo saber leer y escribir).

##### Experiencia Laboral:

Mínimo 3 años como trabajador agrícola en general.

Nivel de Inglés: Ninguno.

##### Estado civil:

Casado/Unión Libre, preferentemente con hijos en México.

##### Requisitos adicionales:

No tener ningún antecedente migratorio negativo; por ejemplo haber vivido en el extranjero de manera ilegal, haber intentado ingresar a E.U.A. ilegalmente, o a algún otro país, etc.

Únicamente campesinos o jornaleros que vivan a 3 horas de la ciudad de Puebla, acostumbrados al trabajo pesado en el campo (no se aceptan choferes, comerciantes o personas con otro oficio o profesión).

Experiencia en cultivos pesados como caña, espárragos o cultivos que requieran mucho desgaste físico y resistencia.

Periodo del contrato: 10 meses

Salario: \$12.67 dólares norteamericanos por hora

Documentación obligatoria (original y copia):

- Acta de nacimiento
- CURP
- INE o IFE vigente
- Comprobante de Domicilio (vigencia máxima de 3 meses)
- Comprobante de estudios (primaria o secundaria)
- Pasaporte vigente (o por lo menos con cita para obtener pasaporte)

#### Informes y recepción:

Secretaría de Trabajo. Servicio Nacional de Empleo Puebla

- Unidad Central Puebla -

Callejón de la 10 Norte 806, Barrio de "El Alto",  
Puebla, Puebla. C. P. 72290.

Tel: (222) 232 5547, (222) 246 4457 Ext. 114, 226, 228 y 229.

Horario: lunes a viernes de 9 a 13 hrs.

- Unidad Regional Tehuacán -

CIS Tehuacán, Carretera Federal Puebla-Tehuacán km. 115.Col.  
San Lorenzo Teotipilco, Tehuacán, Pue. C. P. 75855

Tel: (238) 3803930 ext. 233 y 230.

Horario: lunes a viernes de 9 a 13 hrs.

- Unidad Regional Teziutlán -

Av. Hidalgo S/N, entre calle La Mesilla y Av. del Trueno, Estación  
de Ferrocarril Teziutlán, Teziutlán, Pue. C. P. 73800

Tel: 23 11 12 64 35. Horario: lunes a viernes de 9 a 13 hrs.



**TRABAJO**  
SECRETARÍA DEL TRABAJO  
Y PREVISIÓN SOCIAL



**SNE**  
SERVICIO NACIONAL  
DE EMPLEO

## Job Ad Specifying Male Workers

← → ↻ Secure | <https://www.facebook.com/azteclabor/>

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 AZTEC Foreign Labor

Me gusta

Seguir

Recomendar

...



**AZTEC Foreign Labor**

9 de febrero a las 12:45 · 

SE BUSCA GENTE con experiencia en la PIZCA DE FRESA - un empleador de Santa Maria, California va a llegar a Ciudad Guzman, Jalisco el 23-25 de febrero a buscar gente **CON EXPERIENCIA EN LA PIZCA DE FRESA**. Se requiere gente de estatura baja, masculina, con experiencia comprobable, y pasaporte.

Si va a estar en esta area o conoce de alguien ya trabajando en la area con experiencia en la pizca de fresa, se puede poner en contacto con Santiago Perez Duran Duran Santiago 241-132-7833 (Mex) o con el empleador, Freshway Farms: Jose Marquez - 805-714-9485 (EU).



Inicio

Información

Fotos

Opiniones

Squarespace Gallery

Videos

Squarespace Page

Publicaciones

Eventos

Comunidad

Crear una página





**¡Atención Álamo y zonas aledañas!** Estaremos buscando hombres de 18 a 39 años con experiencia en la cosecha de la Naranja para contratos de trabajo temporal con Visa H2A en Estados Unidos. Interesados deberán poder presentar los siguientes documentos:

- ✓ Pasaporte Mexicano (6 meses de vigencia)
- ✓ Carta de No Antecedentes Penales (si pudo obtenerla)
- ✓ Acta de Nacimiento
- ✓ Carta de Trabajo y Recibos de Pago para comprobar su experiencia en la Cosecha Naranja, Limón o Cítricos
- ✓ Credencial de Elector (IFE o INE)
- ✓ Visas Anteriores y SSN (sólo si han ido visados antes)
- ✓ Certificado Médico de Buena Salud.

**IMPORTANTE: No haber cruzado ilegalmente a E.U.A. o haberlo intentado.**

**EMPEZANDO EL MES DE OCTUBRE EN EL CLUB DE LEONES DE ÁLAMO**

Av. Independencia SN, Col. Centro, Álamo, Temapache Ver. México CP 92730

**PRE-REGISTRO**  
11am a 8pm  
**¡AHORRA TIEMPO!**

SÁBADO	DOMINGO	LUNES
1	2	3

Pre-Regístrate presentando todos los papeles que tengas para **ahorrar tiempo usando la línea preferencial** en la siguiente etapa.

**FERIA DE EMPLEO**  
11am a 8pm

MARTES	MIÉRCOLES	JUEVES
4	5	6

Evento de reclutamiento principal. Trae tus documentos para iniciar el registro, **o ven a terminar** el proceso si ya te has Pre-Registrado.

**Pre-Registro también disponible en línea, Informes en nuestros sitios y al Tel.**

[@FreshHarvestUSA](#)

[www.trabajoh2a.com](http://www.trabajoh2a.com)

01 800 824-4474



**MUCHO OJO: EL REGISTRO ES GRATUITO.** Es un fraude que si le cobran por el registro o por informes del programa H2A. **Repórtelo inmediatamente a quien le cobre, es un delito.**

## Job Ad Specifying Male Workers for Construction and Female Workers for Cleaning

facebook.com/268810030692222/posts/269970833909475/

Apps

Ofertas de trabajo usa,visa h2a y h2b reclutamiento

Julia

Me gusta Seguir Compartir

**Ofertas de trabajo usa,visa h2a y h2b reclutamiento**  
11 de abril de 2019 ·

Buenas noches, tenemos 40 vacantes para hombres para el área de contruccion 🏗️ en Carolina del Norte & 20 mujeres para limpieza, pasaporte mexicano vigente , manden inbox interesados

21 31 comentarios

Me gusta Comentar Compartir

Más relevantes

Escribe un comentario...

**Gualberto Jaime Ramos** Saludos estaremos contratando personal para una compania en dallas tx  
Me gusta · Responder · 1 sem  
4 respuestas

**Jorge Garcia** Información gracias  
Me gusta · Responder · 2 sem

**Francisco Gonzalez** Me interesa y gustaría ir...





Wood River

17/Febrero/2020

Participa en el reclutamiento de aspirantes a Visas H2B durante el segundo periodo fiscal de los Estados Unidos de Norte América. El aspirante debe cumplir con los requisitos del perfil solicitado, además de los documentos que avalen la identidad del ciudadano. Se rechaza en todo momento a ciudadanos con antecedentes migratorios, los cuales no pueden ser tomados en cuenta. Se recibirán un total de 60 aspirantes para su evaluación e investigación del perfil.

Se seleccionarán un total de 24 aspirantes que cumplan con las mejores características deseadas para el perfil solicitado.

El reclutamiento inicia el día lunes 17 de febrero del 2020 con fecha de termino indefinida hasta completar los 60 lugares. El reclutamiento es totalmente gratuito.

El día 18 de marzo Wood River notificará a las 24 personas seleccionadas para iniciar sus trámites migratorios y pedimento.

Wood River no solicita pagos por participar en el reclutamiento, todos los gastos corren a cuenta de la empresa. Al obtener tu pedimento debes presentarte en el Consulado Americano en el lugar que se te indique.

Contrato: Julio - Diciembre 2020 Lugar: Columbus NE. Visa: H2B. Sueldo: 19,80 USD Hr Sexo: Masculino Empresa Ofrece servicio de comedor, hospedaje y transporte gratuito.

Wood River

Empleo #69644

MAYORDOMO HUGO  
GONZALEZ

REQUISITOS Y DIFUSIÓN  
APP TELEGRAM

INFORMACIÓN APP  
TELEGRAM +14023962042