

UNOFFICIAL TRANSLATION

**REPORT ON THE REVIEW BY THE NATIONAL ADMINISTRATIVE
OFFICE OF MEXICO OF PUBLIC COMMUNICATIONS MEX 2003-1,
MEX 2005-1 AND MEX 2011-1 PURSUANT TO THE NAALC**

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Secretariat of Labor and Social Welfare

“Living Better”

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REPORT ON THE REVIEW BY THE NATIONAL ADMINISTRATIVE OFFICE OF MEXICO OF PUBLIC COMMUNICATIONS MEX 2003-1, MEX 2005-1 AND MEX 2011-1

I. *Executive Summary*

Under the terms of the North American Agreement on Labor Cooperation (NAALC), the governments of Mexico, the United States of America and Canada pledged, among other things, to improve working conditions and living standards in their respective territories; to promote, to the maximum extent possible, the labor principles set out therein¹; and to promote compliance with, and enforcement of their respective labor legislation.

The NAALC provides for public communications as a mechanism for any individual to bring to the governments' attention issues related to the enforcement of labor legislation that have arisen in the territory of any of the Parties. This review report covers three public communications received by the National Administrative Office (NAO) of Mexico, which is part of the International Affairs Unit of the Secretariat of Labor and Social Welfare. In accordance with its regulations, the NAO dealt with these communications together because they raise similar legal matters.²

In general, the three public communications allege that the U.S. Department of Labor and state labor officials in North Carolina, Arkansas, Idaho, Texas, Colorado, Florida, Oregon, Tennessee and Wyoming have not enforced labor laws governing foreign seasonal migrant workers who are employed with H-2A visas³ (agricultural) and H-2B visas⁴ (non-agricultural).

In particular, the petitioners claim that U.S. labor officials have failed to fulfill the obligations established in Article 2, which states that each Party shall ensure that its labor laws and regulations provide for high labor standards; Article 3, regarding the promotion of the

¹The labor principles set forth in NAALC Annex 1 are: 1) Freedom of association and protection of the right to organize; 2) The right to bargain collectively; 3) The right to strike; 4) Prohibition of forced labor; 5) Labor protections for children and young persons; 6) Minimum employment standards; 7) Elimination of employment discrimination; 8) Equal pay for women and men; 9) Prevention of occupational injuries and illnesses; 10) Compensation in cases of occupational injuries and illnesses; and 11) Protection of migrant workers.

²Article 10 of the "Regulations of the National Administrative Office (NAO) of Mexico states, with respect to the public communications referred to in NAALC Article 16(3): 'The NAO may conduct a single review of multiple public communications on issues related to labor legislation that have arisen in the territory of the same Party if they refer to related legal matters.'"

³The H-2A program for foreign seasonal migrant farmworkers allows agricultural employers to request permission to recruit and hire foreign workers to fill temporary or seasonal agricultural positions. Employers must offer and pay agricultural workers the highest of three wage rates: (1) the federal or state minimum wage, (2) the local prevailing wage for that job, or (3) a special "adverse effect wage rate" that varies from state to state and is usually higher than the local prevailing wage. Under the H-2A program, the employer must offer the workers free housing that meets federal and state safety standards. In addition, workers are guaranteed to be offered the opportunity to work at least three-fourths of the working days during the established employment period; if the employer offers less work, it must pay them an amount that makes up the deficit. Workers with an H-2A visa in the U.S. cannot change employers, since the visa is tied to a specific employer. NAALC, Comparative North American Labor Law Guides. Migrant Workers' Rights, pp. 71, 95 and 100.

⁴The H-2B program applies to non-agricultural jobs lasting 10 months or less, unless the employer's need is based on a one-time occurrence. For example, this program is used by seasonal businesses in the tourist industry, such as hotels and restaurants, as well as landscaping, fish processing and timber companies. Idem, p. 95

enforcement and effective application of labor laws through appropriate government measures; Articles 4, 5 and 7, which provide for workers' right to justice in exercising their rights and the right to information on labor legislation and public awareness of its provisions; and the labor principles set forth in numbers 1, 2, 4, 6, 7, 9, 10 and 11 of NAALC Annex 1, to wit: *freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.*

According to the NAALC, the U.S. Government is required to ensure that its labor laws and regulations uphold high labor standards; to enforce U.S. labor legislation; to guarantee private individuals' recourse to legal proceedings and to ensure that these proceedings are fair, equitable and transparent; to publish its laws, regulations and procedures; and to promote public information and awareness of labor legislation in order to protect the aforementioned labor principles.

The review by the NAO of Mexico was based on the arguments presented by the petitioners and by the NAO of the United States, and was guided by the NAALC and by Articles 9 and 10 of the Regulations of the NAO of Mexico regarding public communications. The review is not intended to create supranational mechanisms, because under the NAALC it is not up to the NAOs to judge or amend the legislation of the other Parties. The purpose of the review reports issued by the NAO of Mexico, according to the NAALC, is to bring to the attention of U.S. labor officials the allegations of labor law violations presented in the three public communications.

To comply with the provisions of NAALC Article 5.8, the NAO of Mexico sought to gather information about pending cases in such a way that any matter that is currently *sub judice* would be excluded from this report.

Public Communication MEX 2003-1 alleges "the absence of effective enforcement and application of labor legislation governing agricultural workers employed under the H-2A program in the State of North Carolina." This communication was submitted on February 11, 2003 by the Central Independiente de Obreros Agrícolas y Campesinos [Independent Federation of Agricultural Laborers and Farmworkers] and the U.S. non-governmental organization Farmworker Justice Fund, Inc. The petitioners allege omissions in the enforcement of labor legislation by U.S. authorities with respect to NAALC labor principles 1, 2, 6, 7, 9, 10 and 11.

Public Communication MEX 2005-1 alleges a "lack of efficacy by the United States in enforcing laws that protect migrant workers' rights." This public communication was submitted on April 13, 2005 by 13 non-governmental organizations from the U.S. and

Mexico⁵ and 16 H-2B migrant workers. The petitioners argue that companies in Idaho, Colorado, Arkansas, Texas, Florida, Oregon, Tennessee and Wyoming violated NAALC labor principles 4, 6, 9, 10 and 11.

Public Communication MEX 2011-1 involves the alleged “failure of the U.S. Government to enforce its domestic labor laws and its obligations under the NAALC with respect to minimum employment conditions and protection of migrants with H-2B visas” who work in traveling carnivals in the U.S. This communication was submitted on September 19, 2011 by the Center for Migrant Rights, 13 labor unions and non-governmental organizations⁶ from the United States and Mexico, and three workers of Mexican nationality.⁷

The main points made by the petitioners regarding alleged acts of omission by the U.S. Government concerning NAALC labor principles are detailed below:

With respect to NAALC principles 1 and 2, freedom of association and protection of the right to organize as well as the right to bargain collectively, the petitioners in **Public Communication MEX 2003-1** state that H-2A employees are expressly excluded from the enforcement of the National Labor Relations Act (NLRA) because they are agricultural workers. This prevents them from exercising the right to associate, to form unions and to bargain collectively. The petitioners contend that employers fire workers who seek to improve their working conditions. Moreover, they claim that the North Carolina Growers Association interferes with their efforts to organize.

The U.S. NAO confirmed that the NLRA excludes agricultural workers, and therefore they do not enjoy the right to form unions, bargain collectively and hold strikes under the protection of that law. However, they may be covered by state legislation. Nonetheless, the laws of North Carolina do not grant these rights to agricultural workers. In addition, the U.S. NAO indicated that the definition of agriculture is very broad when taking into consideration the definitions provided in the H-2A visa program, the Immigration Reform and Control Act (IRCA), the Internal Revenue Code and the Fair Labor Standards Act. The National Labor Relations Board is the authority responsible for determining whether a worker engages in agricultural activities or something else.

⁵Northwest Workers’ Justice Project, Brennan Center for Justice at New York University School of Law, Andrade Law Office (petition signatories); Idaho Migrant Council, National Immigration Law Center, Oregon Law Center, Northwest Treeplanters and Farmworkers United (U.S. NGOs); Centro de Investigación Laboral y Asesoría Sindical, A.C. [Center for Labor Research and Trade Union Consultation], Frente Auténtico de Trabajo [Authentic Labor Front], Red Mexicana de Acción frente al Libre Comercio [Mexican Action Network Against Free Trade], Sin Fronteras [Without Borders], and Unión Nacional de Trabajadores [National Workers Union] (Mexican NGOs and labor unions).

⁶ AFL-CIO, Proyecto de Derechos Económicos, Sociales y Culturales [Economic, Social and Cultural Rights Project] (ProDESC), North Carolina Justice Center, Friends of Farmworkers, Sin Fronteras, Interfaith Worker Justice, Comité de Defensa del Migrante [Migrant Defense Committee], Northwest Worker’s Justice Project, Centro de Apoyo al Trabajador A.C. [Center for the Support of the Worker] (CAT), Paso del Norte Civil Rights Project, Southern Poverty Law Center, Instituto de Estudios y Divulgación sobre la Migración, A.C. [Institute for Migration Studies and Information] (INEDIM) and Worker’s Center of Central New York.

⁷ Leonardo Cortez Vitela, Efraín Vásquez Flores and Julián Andrés García Zacarías.

According to a study published by the Secretariat of the Commission for Labor Cooperation in 2011, “The NLRA also excludes agricultural workers, the majority of whom are immigrants, from coverage. Workers on farms and ranches are thus excluded, although most workers in fruit, vegetable, poultry and meat packing and processing plants are covered. The exclusion of agricultural workers from the NLRA means that a union of agricultural workers cannot make use of federal law to require a company to participate in collective bargaining. In 1975, the state legislature of California, the most important farm state, passed a law similar to the NLRA for workers on farms and ranches. A few other states have laws affecting agricultural labor relations, but none is as extensive as the California law. In Florida, for example, the state constitution guarantees all workers, including agricultural employees, the right to collective bargaining, but the state legislature has not passed a law allowing workers to implement this right.”⁸

As for NAALC labor principle 4, the *Prohibition of forced labor*, the petitioners in **Public Communication MEX 2003-1** argue that some employers confiscate H-2B workers’ immigration documents to prevent them from quitting their jobs or complaining of rights violations.

The U.S. NAO reports that the 13th Amendment of the Constitution prohibits all forms of slavery or involuntary servitude, regardless of nationality, and therefore it protects H-2A and H-2B workers. The U.S. Code also prohibits forced labor, insofar as it provides that holding a person to work in “servitude” is prohibited throughout the territory of the United States. The NAO confirmed that no person, including someone with an H-2A or H-2B visa, can be required to work, nor can they be prohibited from quitting their job with a specific employer. The Wage and Hour Division is the authority responsible for conducting inspections and interviews to make sure workers are not intimidated, threatened or held against their will.

With respect to labor principle 6, *Minimum employment standards*, the petitioners in **Public Communication MEX 2003-1** point out that migrant workers with H-2A visas are expressly excluded from the Migrant and Seasonal Agricultural Workers Protection Act, and therefore have no right to free and safe housing and transportation. The petitioners add that H-2A workers do not know the terms of their employment because their employers do not have to register with the Department of Labor and are not required to inform workers of their conditions of employment. If workers ask for the contract to find out the terms, the employer fires or transfers them, leading to their deportation and preventing them from being hired in the future. They also mention that employers manipulate the extension of the contract to terminate it “prematurely,” thus avoiding payment of the compensation the workers are entitled to after completing three-fourths of the contract, including transportation back to their place of origin. The workers fear being blacklisted if they complain about the conditions under which they work.

⁸ Comparative North American Labor Law Guides. Migrant Workers’ Rights, pp. 102

The petitioners in **Public Communications MEX 2005-1** and **MEX 2011-1** allege violations of the general wage rights of H-2B migrant workers, and they document cases in Idaho, Arkansas, Colorado and Texas. They indicate that some workers receive lower pay than they were promised, sometimes even less than the minimum wage, in violation of the Fair Labor Standards Act. They work more than the limit of 40 hours a week established by that law without the corresponding overtime pay, and that brings their wages below the minimum. Moreover, the employer takes certain deductions for recruitment, transportation, visas and a “bonus” to ensure continued presence, which are not allowed by the H-2B visa program. There are also charges for tools, equipment, uniforms, breaks, and delays, and for complaints about conditions that violate the Migrant and Seasonal Agricultural Workers Protection Act. Employers commit acts of omission by failing to advise workers of these deductions and charges when they are hired, as required by the aforementioned law.

The petitioners in **Public Communication MEX 2005-1** allege that the housing conditions are substandard, in violation of the Migrant and Seasonal Agricultural Workers Protection Act. At times, companies charge rent for housing, which is a violation of state laws if workers do not authorize them in writing to do so.

The petitioners in **Public Communications MEX 2005-1** and **MEX 2011-1** agree that although there are mechanisms allowing for **H-2B** workers to exercise their rights by filing complaints with the Department of Labor or pursuing matters on their own with private attorneys, these are ineffective or excessively costly expedients. The workers therefore refrain from filing complaints, and they fear reprisals if they do so. The petitioners emphasize the lack of access to free legal counsel provided by organizations financed by the Legal Services Corporation,⁹ a service which is available to U.S. nationals.

According to information provided by the U.S. NAO, the Code of Federal Regulations stipulates that wages of H-2A workers must be the same as those of U.S. nationals. The Fair Labor Standards Act also establishes the minimum wage and overtime pay for workers with H-2A and H-2B visas, except that in the case of agricultural workers (H-2A), employers are exempt from overtime requirements. In addition, state legislation contains provisions governing wages paid to workers with H-2B visas. Idaho prohibits wage deductions if they have not previously been authorized by the worker. In Colorado, the state minimum wage is higher than the federal one, and the state wage must prevail. Furthermore, the H-2A visa program requires that workers be informed of the terms of employment, including the wage they will receive, which must be at least the minimum wage.

⁹This is a private non-profit entity created by a law enacted by Congress. The law specifies that it is not a federal agency, nor are its employees federal employees. The corporation is funded by a direct allocation made by Congress each year to finance about 134 different programs that offer free legal advice. It has more than 900 offices throughout the United States. These programs are intended to provide legal counsel to low-income U.S. citizens and to certain groups of migrants, including workers with H-2A visas.

Under this program, H-2A workers are to receive free and decent housing, as well as reimbursement for transportation expenses if they bring wages down to a level below the minimum wage, as required by the Fair Labor Standards Act. With regard to the housing of H-2B workers, employers are not required to provide it free of charge, but they do have to advise the worker at the time of hire and refrain from taking deductions that bring wages below the minimum wage, as provided in the Fair Labor Standards Act. Enforcement of these provisions is the responsibility of the U.S. Department of Labor through its Wage and Hour Division, the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC), or the respective state's department of labor.

The H-2A visa program requires employers to guarantee each worker employment for at least three-fourths of the length of the contract. The Employment and Training Administration of the Department of Labor is in charge of enforcing these provisions, as well as the payment of mandatory compensation such as transportation to the worker's place of origin if the employer terminates the contract early. This program requires that the employment contract stipulate the period it covers and that it be performed in its entirety.

The H-2B visa program was amended in February of 2012. The changes include requiring employers to reimburse workers for all of the visa, transportation, food and lodging expenses they incur while traveling to the place of work, as well as expenses for crossing the border, since these are all considered to be expenses "for the benefit of the employer." Thus, workers would be guaranteed to receive at least the minimum wage without deductions. However, employers have filed suit and the amendments are being held in abeyance until the lawsuit is resolved.

The U.S. NAO confirmed that workers with H-2B visas do not have access to free legal counsel provided by organizations financed by the Legal Services Corporation, although H-2A and H-2B workers can access other legal advice programs, and they can obtain support from the Wage and Hour Division of the U.S. Department of Labor.

Concerning NAALC labor principle 7, which prohibits employment discrimination, the petitioners in **Public Communication MEX 2003-1** state that workers with H-2A visas suffer employment discrimination in that employers do not hire single women or persons over the age of 40 unless they have been specifically requested by their employers.

On this issue, the U.S. NAO points out that both federal and state laws prohibit discrimination in the workplace on the grounds of race, color, religion, sex, nationality, age and disability. Federal legislation protects workers, including those in the H-2A visa program. The Civil Rights Act prohibits employment discrimination, and the Age Discrimination in Employment Act prohibits age discrimination in the hiring of persons aged 40 and over. Employers must publish information about their employees' rights and must take corrective or preventive measures to eliminate the source of discrimination and minimize recurrence thereof. Enforcement of this law is the responsibility of the Equal Employment Opportunity Commission of the U.S. Department of Labor.

Regarding NAALC labor principle 9, *Prevention of occupational injuries and illnesses*, the

petitioners in **Public Communication MEX 2003-1** allege that agricultural producers in North Carolina violate federal and state occupational safety and health standards in the fields and in housing. They further contend that state authorities do not conduct adequate inspections to penalize employers for non-compliance.

The U.S. NAO reports that applicable labor laws give seasonal agricultural workers with H-2A visas in North Carolina the right to protection against occupational injuries and illnesses. The statutes and standards governing occupational safety and health in that state are administered by the state Division of Occupational Safety and Health, sharing responsibility with the Occupational Safety and Health Administration and the Wage and Hour Division of the U.S. Department of Labor. The above notwithstanding, the state agency is responsible for enforcing standards related to occupational safety and health.

With respect to NAALC labor principle 10, *Compensation for occupational injuries or illnesses*, the petitioners in **Public Communication MEX 2003-1** claim that H-2A workers should have insurance that would cover them in case of industrial injuries. However, the employers of H-2A workers in North Carolina frequently discourage workers from signing claim forms for workers' compensation. They argue that in the majority of cases in which workers have filed a claim for an accident or injury, the process continues after they have left the United States. This complicates matters, and insurance carriers are not willing to cover medical expenses outside of U.S. territory. The petitioners contend that the U.S. Government has not made enough efforts to modify workers' compensation programs.

In **Public Communication MEX 2005-1**, the petitioners argue that workers with H-2B visas are not informed of the rights and benefits they have in terms of claiming compensation for accidents at work. In addition, they state that there are limitations on the ability to obtain free legal advice to exercise those rights, because the workers are erroneously classified as H-2B rather than H-2A. The petitioners also point out that if workers try to claim any compensation, they are blacklisted for future hiring.

The U.S. NAO reported that oversight of workers' compensation insurance is the responsibility of state government agencies. In North Carolina, compensation of H-2A and H-2B workers is administered and regulated by the North Carolina Industrial Commission; in Idaho it is the Idaho Industrial Commission; in Colorado it is the Division of Workers' Compensation of the Colorado Department of Labor and Employment. The Wage and Hour Division of the U.S. Department of Labor can cooperate with the states to ensure appropriate outcomes of workers' compensation claims when H-2A and H-2B workers have workplace accidents.

As for NAALC labor principle 11, *Protection of migrant workers*, the petitioners in **Public Communications MEX 2003-1**, **MEX 2005-1** and **MEX 2011-1** state that H-2A and H-2B workers do not enjoy the same legal protection as U.S. nationals because they are excluded from some federal laws. Additionally, their access to justice is limited, in that H-2A workers cannot file class action lawsuits and those with H-2B visas do not have access to free legal counsel. Other limitations that prevent migrant laborers from exercising their rights are the language barrier, seven-day work weeks, and constant changes in work sites in the case of employees of traveling carnivals. The petitioners allege that H-2A and H-2B workers are not

covered by public social security programs and lack the right to change employers or the freedom to terminate the employment relationship, because they risk being deported if they are discharged.

They point out that, even though in February of 2012 the H-2B visa program was modified in ways that improve workers' rights and employers' obligations, the changes have not taken effect because a lawsuit filed by employers is still pending.

The petitioners contend that sometimes workers receive a non-agricultural visa when they should receive an agricultural one, which employers do in order to avoid their responsibilities under various laws of the United States: the Immigration Reform and Control Act, the Fair Labor Standards Act and the Internal Revenue Code.

The information provided by the U.S. NAO confirmed that the regulations of the Legal Services Corporation stipulate that H-2A workers may receive free legal assistance, specifically in matters related to wages, housing, transportation and other rights included in the employment contract, but the regulations prohibit the use of funds to file or join in class action lawsuits. However, the NAO also pointed out that there are private and government programs, such as the Wage and Hour Division of the U.S. Department of Labor, that provide advice and representation for groups of H-2A migrant workers that are in similar circumstances, that is, collectively or by class. H-2B workers are prohibited from seeking the free legal counsel provided by organizations financed by the Legal Services Corporation. The U.S. Government pointed out that although there is that limitation, H-2B workers can receive advice and representation through programs such as the Immigrant Justice Project of the Southern Poverty Law center, as well as the services provided by the Wage and Hour Division of the U.S. Department of Labor.

In addition, the government states that Immigration and Citizenship Enforcement and the Citizenship and Immigration Service are responsible for ensuring that workers with H-2B visas engage in activities appropriate to their classification. Furthermore, the Wage and Hour Division can levy fines if it believes an employer has falsified information in order to be certified as an H-2B employer.

Recommendation

1. Based on the arguments made by the petitioners in the three public communications and by the U.S. Government through the NAO, and pursuant to the regulations of the NAO of Mexico governing the Public Communications referred to in Article 16(3) of the North American Agreement on Labor Cooperation (NAALC), the NAO of Mexico hereby brings to the attention of the U.S. Department of Labor this review report so that in accordance with its internal procedures, the Department of Labor can decide on the appropriate course of action, in terms of its laws and internal practices, to address the petitioners' arguments. Namely, to determine whether the rights of migrant workers with H-2A and H-2B visas have been violated by failing to guarantee full exercise thereof by the workers; failing to take measures to enforce labor legislation; not providing adequate access or the corresponding procedural guarantees in proceedings

to require enforcement of the law; and failing to inform workers of the laws, regulations and procedures available to them for exercising their rights in relation to:

- Freedom of association and protection of the right to organize;
 - Right to collective bargaining;
 - Prohibition of forced labor;
 - Minimum employment standards;
 - Elimination of employment discrimination;
 - Prevention of occupational injuries and illnesses;
 - Compensation in cases of occupational injuries or illnesses; and
 - Protection of migrant workers.
2. The NAO of Mexico emphasizes its respect for the NAALC and for the general commitment set forth in Article 2 thereof: recognizing the right of each Party “to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations,” and it refrains from making pronouncements about the provisions the petitioners allege impose limits on the rights of agricultural and migrant workers.
3. Within the framework of the NAALC, the NAO of Mexico has reviewed previous public communications regarding violations of migrant workers’ rights (MEX 9801, MEX 9802, MEX 9803, MEX 9804 and MEX 2001-1). In every case, it has recommended that the matters be examined in ministerial consultations between Mexico and the United States. As a result of such consultations, bilateral cooperation mechanisms have been developed to publicize workers’ rights, and some of them are still in effect.^[1] However, the recurrence of public communications such as those reviewed in this report could mean that acts of commission or omission are being committed with respect to the protection of migrant workers.

For this reason, this NAO recommends that the Secretary of Labor and Social Welfare of Mexico request ministerial consultations with the U.S. Secretary of Labor under the terms of NAALC Article 22. The ministerial consultations would be for the purpose of gathering more information so as to conduct an exhaustive examination of the actions taken by the U.S. Government to guarantee that migrant workers in its territory enjoy the freedom of association and protection of the right to organize; the right to bargain collectively; the prohibition of forced labor; minimum employment standards, particularly with respect to payment of the minimum wage; elimination of employment discrimination; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries or illnesses; equal protection to that afforded U.S. nationals; and access to proceedings that enable them to enforce these rights.

^[1]On April 15, 2002, the [Mexican] Secretariat of Labor and Social Welfare and the U.S. Department of Labor announced the Ministerial Consultations Joint Declaration confirming their commitment to vigorous enforcement of labor laws within the limits of their jurisdictions, with a view to protecting all workers regardless of their immigration status. The principle of protecting migrant workers was also addressed in the Ministerial Consultations Joint Declarations related to Public Communications MEX 9801, MEX 9802, MEX 9803 and MEX 9804. In addition, since 2004 the Mexican Secretariat of Foreign Relations and the U.S. Department of Labor have signed 49 agreements to publicize information about wages and hours, occupational safety and health and equal employment opportunities.

II. *Introduction*

The NAALC, signed by the governments of Mexico, the United States and Canada and in force since 1994, has the following objectives: improve working conditions and living standards in each Party's territory; promote, to the maximum extent possible, the labor principles set out in Annex 1; encourage cooperation to promote innovation and rising levels of productivity and quality; encourage publication and exchange of information; pursue cooperative labor-related activities on the basis of mutual benefit; promote compliance with, and effective enforcement by each Party of, its labor law; and foster transparency in the administration of labor law.

The NAALC does not establish new labor standards, nor is it intended to approve the labor legislation of the three countries or to create supranational bodies. Rather, it seeks to emphasize the Parties' interest in and commitment to the enforcement of their own labor laws by the competent national authorities. It provides for public communications as a mechanism for any individual to bring to the governments' attention issues related to the enforcement of labor legislation that have arisen in the territory of any of the Parties. This review report is a result of that mechanism.

The NAALC provides other mechanisms whereby the three governments can address matters related to the enforcement of labor legislation, such as ministerial consultations, committees of experts and arbitral panels. Only the arbitral panel is empowered, after extensive opportunities for dialog and cooperation, to determine whether a government engaged in a consistent pattern of omissions in the enforcement of labor legislation concerning safety and health, child labor and minimum wages, and to impose penalties on the government in question.

This report deals with matters related to the enforcement of labor legislation in the United States, based on **Public Communications MEX 2003-1, MEX 2005-1 and MEX 2011-1**, which were submitted to the NAO of Mexico. The petitioners argue that labor authorities in the United States have failed to provide enforcement of labor legislation in these areas:

- Freedom of association and protection of the right to organize;
- Right to collective bargaining;
- Prohibition of forced labor;
- Minimum employment standards;
- Elimination of employment discrimination;
- Prevention of industrial injuries and occupational illnesses;
- Compensation in cases of occupational injuries or illnesses; and
- Protection of migrant workers.

Pursuant to Articles 9 and 10 of the Regulations of the National Administrative Office (NAO) of Mexico regarding the public communications referred to in Article 16(3) of the North American Agreement on Labor Cooperation (NAALC), the NAO of Mexico is issuing this report, which combines the three public communications referred to above and addresses the arguments of the petitioners with respect to the aforementioned NAALC principles, the obligations of the U.S. Government to enforce its labor laws under NAALC and the relevant provisions of U.S. labor legislation.

To comply with the requirements set forth in NAALC Article 5.8, the NAO of Mexico has made no comment whatsoever about matters that may be pending and issues that are *sub judice*. Furthermore, in keeping with NAALC Article 2, the NAO of Mexico has made no pronouncements regarding current U.S. labor legislation, in view of the Parties' right to establish their own labor standards and therefore to adopt or amend their labor laws and regulations.

III. Legal Framework

Among the objectives of the NAALC are: "improve working conditions and living standards in each Party's territory"; "promote, to the maximum extent possible, the labor principles set out in Annex 1;"¹⁰ "promote compliance with, and effective enforcement by each Party of, its labor law" and "foster transparency in the administration of labor law."¹¹

To achieve these objectives, each Party has the obligation to:

- Comply with its labor legislation and enforce it effectively through appropriate government measures;
- Guarantee that private individuals have recourse to procedures;
- Guarantee that proceedings in its administrative, quasi-judicial and labor tribunal proceedings are fair, equitable and transparent;
- Publish its laws, regulations and procedures, and
- Promote public information and awareness of their labor legislation.¹²

In the review, the NAO of Mexico emphasizes that the NAALC requires that enforcement of labor legislation be carried out by the competent labor authorities of each countries, insofar as it does not create or recognize supranational mechanisms. The parties pledge to fully respect the Constitution of each country and to recognize each one's right to establish its own labor standards and therefore to modify its labor laws and regulations.¹³ In this regard, the NAO of Mexico also points out that the NAALC provides that "decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement."¹⁴

¹⁰ The labor principles that the Parties pledge to promote under the terms set forth in their domestic legislation are: 1) Freedom of association and protection of the right to organize; 2) The right to bargain collectively; 3) The right to strike; 4) Prohibition of forced labor; 5) Labor protections for children and young persons; 6) Minimum employment standards; 7) Elimination of employment discrimination; 8) Equal pay for women and men, in accordance with the principle of equal pay for equal work in the same establishment; 9) Prevention of occupational injuries and illnesses; 10) Compensation in cases of occupational injuries and illnesses; and 11) Protection of migrant workers.

¹¹ NAALC Article 1.

¹² NAALC Articles 3 and 7.

¹³ NAALC Articles 2 and 42.

¹⁴ NAALC Article 5.8.

The NAALC also calls for NAOs to establish the rules for submission and receipt of public

communications on labor law issues that arise within the territory¹⁵ of any of the Parties. In that regard, the review of these matters by each NAO shall be in accordance with the procedures of each country.¹⁶

On April 28, 1995, Mexico published the Regulations of the Administrative Office of Mexico Concerning Public Communications Submitted under NAALC Article 16.3 in the *Diario Oficial de la Federación* [the official gazette]. These regulations provide that public communications shall:

- Be sent to the address of the NAO and written in Spanish;
- Identify the petitioner;
- Indicate whether they contain confidential information, in which case the NAO shall protect the confidentiality of such information;
- Detail the labor law issues that have arisen in the territories of the other Parties (Canada and the United States).

After the public communication has been received, the NAO of Mexico must notify the petitioner either that the communication has been accepted or that certain data are missing. For purposes of review, the NAO of Mexico may request consultations and cooperation from the other two Parties' NAOs, pursuant to NAALC Article 21; it may obtain additional information from the petitioners and from experts and consultants; and it may also organize informational sessions.

The NAO of Mexico must issue a report within a reasonable period of time, depending on the complexity and nature of each public communication. The report must contain:

- The labor law issues that have arisen in the territories of the other Parties;
- A list of those issues and the obligations set forth in the NAALC;
- A recommendation of whether or not ministerial-level consultations should be sought under NAALC Article 22, as well as any other measure that might contribute to achieving the objectives of the NAALC.

Based on the NAO's recommendation, the Secretariat of Labor and Social Welfare may seek ministerial-level consultations with its counterpart in the United States or Canada regarding any matter that falls within the purview of the Agreement, for the purpose of conducting a thorough examination of the case, in particular by using publicly available information.¹⁷

If the matter presented by the petitioners has not been resolved through ministerial consultations, any of the consulting Parties may request in writing the establishment of an Evaluation Committee of Experts (ECE). Such committee will analyze, in light of the objectives of the NAALC and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labor standards as they apply to the particular matter considered by the Parties in the ministerial consultations.¹⁸

¹⁵ NAALC Annex 49.

¹⁶ NAALC Article 16.3.

¹⁷ NAALC Article 22.

¹⁸ NAALC Article 23.

If one of the consulting Parties, after considering the ECE's final report and carrying out the consultations described in NAALC Articles 27 and 28, believes there is a persistent pattern of failure in the other country's enforcement of technical labor standards covering occupational safety and health, child labor, or minimum wages, the Council of Ministers may, by a two-thirds vote of its members, decide to convene an arbitral panel. Such panel is authorized to determine whether a government engaged in a persistent pattern of failure to enforce labor laws governing occupational safety and health, child labor and minimum wages, provided that this persistent pattern of failure is related to trade or is covered by mutually recognized labor laws.¹⁹ The arbitral panel must issue a report that can be used by the Parties to agree upon an action plan. If the action plan is not put into practice, the arbitral panel may sanction the Parties.

IV. Synopses of the Three Public Communications

Public Communication MEX 2003-1

On February 11, 2003, the NAO of Mexico received **Public Communication MEX 2003-1** "related to the United States and the the absence of effective enforcement of labor legislation governing agricultural workers employed under the H-2A²⁰ program in the State of North Carolina," submitted by the *Central Independiente de Obreros Agrícolas y Campesinos* and the U.S. NGO Farmworker Justice Fund, Inc.

This public communication makes reference to alleged failures by U.S. authorities to enforce labor laws related to labor principles 1, 2, 6, 7, 9, 10 and 11, set forth in NAALC Annex 1: *freedom of association and protection of the right to organize; the right to bargain collectively; minimum employment standards; elimination of employment discrimination; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.*

¹⁹ NAALC Article 29.

²⁰The H-2A program for foreign seasonal migrant farm workers allows agricultural employers to request permission to recruit and hire foreign workers to cover temporary or seasonal agricultural positions. Employers must offer and pay agricultural workers the highest of three wage rates: (1) the federal or state minimum wage, (2) the local prevailing wage for that job, or (3) a special "adverse effect wage rate" that varies from state to state and is usually higher than the local prevailing wage. Under the H-2A program, the employer must offer the workers free housing that meets federal and state safety standards. In addition, workers are guaranteed to be offered the opportunity to work at least three-fourths of the working days during the established employment period; if the employer offers less work, it must pay them an amount that makes up the deficit. Workers with an H-2A visa in the U.S. cannot change employers, since the visa is tied to a specific employer. *Comparative North American Labor Law Guides. Migrant Workers' Rights*, pp. 71, 95, 100.

The petitioners allege in the public communication that the competent labor authorities violated NAALC labor principle 1, *Freedom of association and protection of the right to organize*. They state that H-2A migrant workers are excluded from the rights enshrined in the National Labor Relations Act and the Migrant Seasonal Agricultural Worker Protection Act, and are therefore denied the possibility of associating among themselves or joining an organization to demand higher wages or better working conditions, since employers have the power to reject such demands and hire new workers. The petitioners contend that agricultural employers in the H-2A program restrict communication between the workers and union representatives and/or attorneys, infringing upon their freedom of association and right to organize.

The petitioners claim that H-2A migrant workers, having been excluded from both statutes, are also denied the right to collective bargaining set forth in NAALC labor principle 2 and are thereby prevented from requesting changes in their contract, either to demand a higher wage or to improve their working conditions. The petitioners state that if workers request a revision in their contract, the employer simply transfers or fires them, which will result in their deportation and the certainty that they will not be rehired in the future.

They point out that excluding H-2A migrant workers from the application of the National Labor Relations Act and the Migrant Seasonal Agricultural Worker Protection Act prevents them from exercising the rights to safe housing and transportation, to receive information on the employment they are being offered, and to know the terms of this employment when they are hired. Agricultural employers can transfer workers from one workplace to another, whereas the workers cannot change employers or look for other work.

According to the petitioners, the U.S. Government allows H-2A employers to manipulate the extension of the contract to avoid their responsibility for paying the compensation the law requires for H-2A workers who work at least three-fourths of the period of the contract, and to avoid paying the cost of transporting them back to their places of origin. In addition, the petitioners state that H-2A employers do not comply with their obligation to reimburse workers for the expenses they incur in traveling to the workplace. According to the petitioners, this violates the provisions of NAALC labor principle 6, *Minimum employment standards*.

As for labor principle 7, *Elimination of employment discrimination*, the petitioners claim that H-2A employers do not hire single women or persons over the age of 40 unless they have previously worked in the program and they have specifically been asked back.

The petitioners further allege that labor principle 9, *Prevention of occupational injuries and illnesses*, is violated by North Carolina H-2A agricultural employers when they fail to meet federal and state safety and health standards, namely, the requirement to provide drinking water and portable sanitary facilities and sinks in the fields. According to the petitioners, H-2A workers in North Carolina inhabit dwellings that have no water or heat and are infested with rats. They assert that the North Carolina Department of Labor does not conduct adequate investigations into illnesses related to pesticide exposure.

Regarding labor principle 10, *Compensation for occupational injuries and illnesses*, the petitioners claim that H-2A workers should be covered by an insurance policy that entitles

them to compensation for injuries on the job. However, they contend that H-2A employers in North Carolina frequently discourage workers from signing the forms required to adjudicate claims for compensation due to injuries. According to the petitioners, some H-2A employers in North Carolina are known to have sent back to Mexico H-2A workers who suffered injuries on the job even before they have received any medical treatment. When workers have filed claims for occupational injuries or illnesses, H-2A employers generally contest the claims, and in the meantime the workers are sent back to their country of origin. As a result, it is difficult for them to remain in contact with their attorneys in the United States or to attend the hearings that are held in that country.

The exclusion of H-2A migrant workers from the rights granted under the National Labor Relations Act and the Migrant and Seasonal Agricultural Worker Protection Act, according to the petitioners, violates labor principle 11, *Protection of migrant workers*, by denying them the legal protection afforded to farmworkers who are U.S. nationals. Because they are not covered by these two laws, H-2A migrant workers cannot file suits in U.S. District Courts to have their rights recognized. Very few H-2A workers complain about the violation of their labor rights as they fear losing their jobs or not being rehired in the future. Because of the foregoing, the petitioners believe that H-2A workers do not have access to justice, in violation of the provisions of NAALC Articles 4 and 5.

The petitioners point out that the U.S. Congress prohibits free legal assistance programs funded by the Legal Services Corporation²¹ from filing class action litigation.

They say that H-2A workers are not covered by public social security programs in the United States because of their migrant status, and therefore they are ineligible for long-term disability benefits. Moreover, these workers do not qualify to receive public assistance from government programs in that country.

On September 5, 2003, the NAO of Mexico accepted the public communication for review because it met the requirements established in Article 1 of its regulations. On September 15 of that year, the NAO of Mexico requested consultations with the U.S. NAO, under the terms of NAALC Article 21, to cooperate on labor law matters referred to in the communication. On February 3, 2004, the NAO of Mexico received the response from the U.S. NAO. On June 18, 2004, the petitioners sent additional information.

The review took into consideration the labor law issues arising within U.S. territory presented by the petitioners as well as the responses and information provided by the U.S. NAO within the framework of the consultations for cooperation.

²¹This is a private non-profit entity created by a law enacted by Congress. The law specifies that it is not a federal agency, nor are its employees federal employees. The corporation is funded by a direct allocation made by Congress each year to finance about 134 different free legal advice programs. It has more than 900 offices throughout the United States. These programs are intended to provide legal counsel to low-income U.S. citizens and to certain groups of migrants, including workers with H-2A visas.

Public Communication MEX 2005-1

Public Communication MEX 2005-1, submitted to the NAO of Mexico on April 13, 2005, refers to “the failure of the United States to enforce laws protecting the rights of migrant workers with H-2B²² visas.” It was presented by 7 U.S. non-governmental organizations, 5 Mexican organizations,²³ and 16 H-2B migrant workers.

The petitioners argue that Universal Forestry²⁴ in Idaho and Mountain Fresh Com LLC²⁵ in Colorado violated NAALC labor principles 4, 6, 9, 10 and 11, as specified in Annex 1: *prohibition of forced labor; minimum employment standards; prevention of occupational injuries and illnesses; compensation for occupational injuries and illnesses; and protection of migrant workers.*

According to the petitioners, workers with H-2B visas (non-agricultural seasonal workers)²⁶ hired to work in states such as Idaho, Colorado, Arkansas and Texas were employed in agriculture and should have been admitted under the H-2A visa program. However, the employer stated that they would perform non-agricultural work, and therefore the workers were issued H-2B visas. As a result, they were denied benefits that H-2A workers are entitled to.

The petitioners contend that migrant workers in the United States suffer serious and frequent violations of their labor rights, such as receiving less than the minimum wage required by law, working in unsafe conditions, not receiving compensation for occupational injuries and illnesses, not being informed of the conditions of employment at the time of hiring, not being given the conditions offered by the employer, unsafe employer-provided transportation, and employer-provided housing that does not meet safety and health standards.

²²The H-2B program applies to non-agricultural jobs lasting 10 months or less, unless the employer’s need is based on a one-time occurrence. For example, this program is used by seasonal businesses in the tourist industry, such as hotels and restaurants, as well as landscaping, fish processing and timber companies. *Comparative North American Labor Law Guides. Migrant Workers’ Rights*, p. 95.

²³ Northwest Workers’ Justice Project, Brennan Center for Justice at New York University School of Law, Andrade Law Office (petition signatories); Idaho Migrant Council; National Immigration Law Center Oregon Law Center, Northwest Treeplanters and Farmworkers United (U.S. NGOs); Centro de Investigación Laboral y Asesoría Sindical, A.C., Frente Auténtico de Trabajo, Red Mexicana de Acción frente al Libre Comercio, Sin Fronteras, I.A.P. [Private Assistance Institution] , Unión Nacional de Trabajadores (Mexican NGOs and unions).

²⁴ A company that hires migrant workers to work in national forests cutting and burning vegetation, clearing trails and planting trees.

²⁵ A company engaged in packing corn in Olathe, Colorado.

²⁶ They may only be hired for: (i) a one-time occurrence, (ii) a season (needed during a specific season of the year); (iii) periods of high demand for labor (to supplement permanent staff); and (iv) occasional work (short periods of work). It is the employer, not the worker, who receives the certification, which is not transferable.

According to the petitioners, the U.S. Congress prohibits free legal assistance programs funded by the Legal Services Corporation from providing legal counsel to workers with H-2B visas, since they are not agricultural workers.

Regarding labor principle 4, *Prohibition of forced labor*, the petitioners argue that once the workers were settled in Idaho, the employer's representative withheld their passports and told them they would not be returned unless the workers paid \$150.00, which is a possible violation of the federal law prohibiting involuntary servitude. According to a representative of the employers who was cited by the petitioners, the reason for withholding the passports is to prevent workers from seeking work elsewhere.

The petitioners contend that in violation of labor principle 6, *Minimum employment standards*, H-2B workers are paid less than the wage promised by the recruiting agent. They say that the wage received by some H-2B workers is less than the minimum wage as a result of improper deductions made by the employer in violation of the Fair Labor Standards Act of the United States.

In some cases, the employer representative deducted charges for working tools from workers' wages. In addition, the housing provided by the employer does not meet minimum safety and health standards. In many cases this housing is not in compliance with the conditions required under the Migrant and Seasonal Agricultural Workers Protection Act.

In addition, the petitioners claim that employers use recruiters to hire workers and bring them into the United States legally. However, H-2B workers must cover some costs (recruitment fee, passport, visa and transportation), and often they go for several days or weeks without work without receiving any income, even though their expenses continue.

The petitioners allege that labor principle 9, *Prevention of occupational injuries and illnesses*, is violated when workers are transported to the workplace in vehicles that do not meet the safety requirements of the Migrant and Seasonal Agricultural Workers Protection Act.

With respect to labor principle 10, *Compensation for occupational injuries and illnesses*, the petitioners contend that because they cannot obtain legal representation, workers cannot exercise their right to receive compensation for injuries on the job.

Finally, concerning labor principle 11, *Protection of migrant workers*, the petitioners argue that the United States prevents migrant workers with H-2B visas from accessing free legal services financed by the federal government. In this manner, such workers are excluded from any opportunity for recognition of the rights they are theoretically guaranteed under U.S. law, which violates the country's obligations under the NAALC.

The petitioners conclude that the U.S. Government and the U.S. Department of Labor did not enforce the laws protecting the rights of migrant workers with H-2B visas. The majority of the cases cited in the public communication (15) took place in the states of Idaho, Arkansas and Texas. However, the petitioners point out that H-2B migrant workers have the same problems in other states, such as Colorado, Florida, Oregon, Tennessee and Wyoming.

On April 25, 2005, the NAO of Mexico accepted the public communication for review because it met the requirements established in Article 1 of its regulations. On March 19, 2006, the petitioners submitted an addendum to the public communication in which they alleged negligence by the United States in enforcing laws protecting the rights of migrant workers, especially in the state of Colorado. On October 12, 2007, the NAO of Mexico requested consultations with the U.S. NAO, under the terms of NAALC Article 21, to cooperate on labor law matters referred to in the communication. On October 15, 2010, the NAO of Mexico received the response from the U.S. NAO.

Public Communication MEX 2011-1

This public communication, submitted to the NAO of Mexico on September 19, 2011, refers to the alleged failure of the U.S. Government to enforce its domestic labor laws and fulfill its obligations under the NAALC with respect to minimum employment standards (NAALC labor principle 6) and protection of migrant workers (NAALC labor principle 11). The petitioners cite NAALC Articles 1, 2, 3 and 4 as being violated.

The communication was presented by the Centro de los Derechos del Migrante, the AFL-CIO and 12 other U.S. and Mexican NGOs,²⁷ and by three workers of Mexican nationality, Leonardo Cortez Vitela, Efraín Vásquez Flores and Julián Andrés García Zacarías, who worked with H-2B (non-agricultural) visas for J&J Amusements (J&J) in 2007 and Rithoffer Shows, Inc. (Reithoffer) in 2008 in the entertainment industry, principally carnivals.

The petitioners state that the workers did not receive the minimum wage, overtime pay, pay for full hours, or reimbursement for transportation expenses. They also allege that the workers had dangerous working conditions, had their wages unjustifiably withheld or reduced, were penalized for “bad behavior” for tardiness or for using the bathroom, were denied days off, and lived in degrading housing, all in violation of NAALC Articles 1 and 2.

They argue that the U.S. Government is negligent in the enforcement of its domestic labor laws because it has failed to inspect workplaces, investigate complaints or guarantee effective remedies for violations of minimum working standards for H-2B workers, nor has it provided migrant workers in its territory with the same legal protection as its nationals, in violation of NAALC Article 3.

²⁷ The Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), North Carolina Justice Center, Friends of Farmworkers, Sin Fronteras, Interfaith Worker Justice, Comité de Defensa del Migrante, Northwest Worker's Justice Project, Centro de Apoyo al Trabajador A.C. (CAT), Paso del Norte Civil Rights Project, Southern Poverty Law Center, Instituto de Estudios y Divulgación sobre la Migración, A.C. (INEDIM) and *Worker's Center of Central New York*.

Furthermore, they claim that the government does not allow H-2B workers access to legal representation by organizations financed by the federal government through the Legal Services Corporation, even though workers who are U.S. nationals are entitled to these services free of charge and Congress has declared that there is a need for equal access to justice for persons who cannot afford private legal counsel, and therefore NAALC Article 4 has been violated.

The petitioners point to regulations requiring minimum wages, at the federal level under the Fair Labor Standards Act and at the state level according to the minimum wage established by each state (when it is exempt from applying the federal minimum wage or when the state minimum wage is higher). Regulations that apply exclusively to H-2B workers require employers to pay wages that do not adversely affect the wages of U.S. nationals. The minimum wage for an H-2B worker must be equal to the federal, local or state minimum wage, or the prevailing wage (the average wage paid to similar workers), whichever is highest.

The petitioners say that under U.S. legislation, during the first week of work employers must reimburse workers for expenses incurred during the hiring process. However, the petitioners were not reimbursed for their travel expenses (between \$300 and \$950); a percentage of their wages was withheld as a guarantee of performance of the labor contract, an amount which was never repaid; and deductions were taken for the purchase of tools or uniforms, in violation of the Fair Labor Standards Act.

They contend that carnival workers suffer abuses associated with their work schedules, as they are forced to work an average of 70 hours a week without overtime pay. This is despite the fact that the employers are certified by the U.S. Department of Labor as companies offering work weeks of 40 hours and overtime pay for anything exceeding that. The petitioners claim that although the applicable wage for workers at J&J was \$6.61 per hour, they earned an average of just \$3.41 per hour because they worked 12 hours a day, in violation of the Fair Labor Standards Act.

They point out that the number of complaints filed with the U.S. Department of Labor for employer violations has declined. According to the U.S. General Accounting Office, the number of complaints fell between 1997 and 2007, added to the fact that the investigations conducted by the Wage and Hour Division are inadequate and slow.

The petitioners indicate that migrant workers frequently receive less rights protection than U.S. nationals, even though the law requires minimum labor standards for all workers. One limitation is the lack of language skills, because workers receive information about their employment in English.

Other obstacles faced by the worker petitioners in exercising their rights through administrative or judicial proceedings are that they work seven days a week and change locations frequently; they must work for a single employer; and if they are fired in reprisal for complaining about their working conditions, they are forced to return to their country of origin immediately (they cannot change employers), which is not the case for workers who are U.S. nationals.

The NAO of Mexico accepted this public communication for review on February 24, 2012, and so notified the petitioners. On August 16, 2012, the petitioners provided supplemental information to the public communication. To gather more information, on August 27, 2012 the NAO of Mexico requested that the U.S. NAO provide additional information to what was furnished in the consultations related to **Public Communications MEX 2003-1** and **MEX 2005-1**. As of the date of this review report, the U.S. NAO has not provided the additional information.

V. Matters Related to Labor Legislation and Obligations under the NAALC

The objective of this section is to present in a systematic manner the arguments put forward by the petitioners in **Public Communications MEX 2003-1**, **MEX 2005-1** and **MEX 2011-1**, as well as the applicable legislation and the articles and principles of the NAALC concerning the obligations of the U.S. Government to enforce its labor legislation .

First, each of the eight NAALC principles cited in the three public communications are listed: (i) principle 1, *freedom of association and protection of the right to organize*; (ii) principle 2, *the right to bargain collectively*; (iii) principle 4, *prohibition of forced labor*; (iv) principle 6, *minimum employment standards*; (v) principle 7, *elimination of employment discrimination*; (vi) principle 9, *prevention of occupational injuries and illnesses*; (vii) principle 10, *compensation in cases of occupational injuries and illnesses*; and (viii) principle 11, *protection of migrant workers*, including for each one, first, the issues raised by the petitioners; second, the obligations the United States must fulfill under the NAALC; and third, the applicable U.S. labor laws. The information provided by the petitioners and by the U.S. NAO was used as a basis for analysis.

5.1 Freedom of association and protection of the right to organize

5.1.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners state that migrant workers with H-2A visas in North Carolina are deprived of the freedom of association and the right to organize unions. They are thus denied rights that agricultural workers who are U.S. nationals do enjoy under the National Labor Relations Act, federal legislation that implements the freedom of association and the right to organize unions for most workers in the United States.

According to the petitioners, H-2A migrant workers are denied the possibility of associating among themselves or joining an organization to demand higher wages or better working conditions, since employers have the power to reject such demands and hire new workers. The petitioners also allege that the U.S. Government has not prevented employers from interfering with workers' efforts to organize and join unions.

The petitioners contend that agricultural employers in the H-2A program restrict communication between the workers and union representatives and/or attorneys, infringing upon their freedom of association and right to organize. Because they are seasonal, non-resident immigrants, H-2A workers often live in housing provided by employers and do not

have telephone service. Thus, H-2A employers can control workers' access to and communication with union representatives and/or attorneys.

The standard employment contract in North Carolina, drawn up by the employers, contains a restrictive clause that prevents legal advisers or union activists from entering workplaces or worker housing.²⁸ This clause states: "This housing does not generate rights of tenancy; the employer maintains possession and control of the housing at all times..."²⁹ Tenancy would give workers the right to receive visitors of their choice, including, among others, union representatives, legal advisers, medical personnel and religious advisers. The U.S. Labor Department approved the North Carolina Growers Association contract containing that clause.

Similarly, the work rules issued by the North Carolina Growers Association provide: "The employer reserves the right to exclude any person(s) from visiting the housing."³⁰ On August 13, 1998, the president of the Farm Labor Organizing Committee, AFL-CIO, along with three activists, visited a labor camp operated by a member of the North Carolina Growers Association. The police arrested them on charges of trespassing on private property. Although the case was later dismissed, the local sheriff informed the activists that he would continue arresting those accused by North Carolina growers of trespassing.

According to the petitioners, the North Carolina Growers Association organizes orientation sessions for new workers hired under the H-2A program, and certain agencies participate in these sessions. However, union representatives and/or attorneys are never invited. During the sessions, representatives of the North Carolina Growers Association claim that attorneys and representatives of the unions are enemies of the H-2A program and warn workers to avoid any contact with them. The North Carolina Growers Association posts signs with messages such as these: "Don't be a puppet of legal services" and "Don't believe what legal services tell you about the North Carolina Growers Association."

The petitioners allege that the North Carolina Growers Association orders H-2A workers to get rid of the "Know Your Rights" pamphlet that is prepared and distributed by non-governmental organizations that provide legal advice to H-2A workers prior to their arrival in North Carolina. The North Carolina Growers Association substitutes another pamphlet for it, called "Understanding the Work Contract." The replacement pamphlet warns that legal services' hidden agenda is to destroy the H-2A program, discouraging agricultural producers from hiring more workers by filing an excessive number of lawsuits, most of them groundless.³¹ The petitioners say these statements and actions on the part of the North Carolina Growers Association are intimidating to any worker who is considering the possibility of exercising his or her rights.³²

²⁸ As part of the supplemental information submitted on June 18, 2004, the petitioners sent a letter from the NCGA attorney confirming that Legal Services representatives must have the employer's permission to speak to the workers in the fields.

²⁹ NCGA Agricultural Work Agreement.

³⁰ NCGA Work Rules, paragraph 12 (Vass, North Carolina, rev. 1/27/97).

³¹ NCGA Understanding the Work Contract, pp. 12-13.

³² As part of the supplemental information submitted on June 18, 2004, the petitioners included three workers' affidavits describing the orders they were given by the NCGA to get rid of the pamphlets issued by Legal Services of North Carolina and the mistreatment suffered by workers who contact Legal Services.

The study “Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards,” published in August of 2000 by Human Rights Watch, states:

Human Rights Watch also found evidence of a campaign of intimidation from the time they first enter the United States to discourage any exercise of freedom of association by H-2A workers. Growers’ employees are told that the attorneys from Legal Services and union organizers are “the enemy.” Most pointedly, growers’ officials lead workers through a ritual akin to book-burning by making them collectively trash “Know Your Rights” manuals from Legal Services attorneys and take instead employee handbooks issued by growers. On paper, H-2A workers can seek help from Legal Services and file claims for redress for violations of H-2A program requirements (but not for violation of the right to form and join trade unions, since they are excluded from NLRA protection).

However, in this atmosphere of grower hostility to Legal Services, farmworkers are reluctant to pursue legal claims that they may have against growers. “They don’t let us talk to Legal Services or the union,” one worker told Human Rights Watch. “They would fire us if we called or talked to them.”³³

5.1.2 Obligations of the United States under the NAALC

In the NAALC, the governments pledged to guarantee “The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests” in labor principle 1, *Freedom of association and protection of the right to organize*.

With regard to the petitioners’ assertions that H-2A migrant workers in North Carolina are precluded from associating among themselves or joining a union, that the U.S. Government has not prevented employers from interfering with workers’ efforts to organize and join unions, that H-2A agricultural employers restrict communication between workers and union representatives and/or attorneys, that the statements and actions of the North Carolina Growers Association deter workers from exercising their rights, the U.S. Government’s obligations under NAALC are as follows:

- *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*

³³ “Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards,” Human Rights Watch, August 2000.

- *Article 3. Government Enforcement Action:*

“Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

- b) monitoring compliance and investigating suspected violations, including through on-site inspections;*
- d) requiring record keeping and reporting;*
- e) encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
- g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

- *Article 5. Procedural Guarantees:*

6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

- a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*
- b) promoting public education regarding its labor law.”*

5.1.3 Applicable Labor Legislation

According to the U.S. NAO, U.S. policy on freedom of association is established in the National Labor Relations Act, 29 U.S.C. 151-187, which guarantees the right to form unions, collectively bargain for labor contracts and carry out strikes. The National Labor Relations Board, an independent federal agency, is responsible for monitoring compliance with that law.

The National Labor Relations Act covers employees included in the definition provided in Section 2, 29 U.S.C. 152(2)(3)(5). Section 2(3) of this law explicitly excludes agricultural workers, employees in domestic service, independent contractors, supervisors, and employees covered by the Railway Labor Act (RLA) 29 U.S.C. 152(3). According to the U.S.

Department of Labor regulations applicable to the H-2A program, an H-2A worker is defined as any non-immigrant foreign employee who was admitted to the United States to engage in agricultural labor or provide seasonal services pursuant to Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act of 1986 (8 U.S.C. 1101(a)(15)(H)(ii)(a)). 20 CFR 655.100. The phrase “agricultural work or services” means “agricultural labor,” as defined in Title 26, Section 3121(g) of the Federal Insurance Contributions Act (FICA), and “agriculture” as defined in Title 29, Section 203(f) of the Fair Labor Standards Act. Therefore, the agricultural work in question should be included either in the Federal Insurance Contributions Act or the Fair Labor Standards Act in order to be considered agricultural labor in the H-2A program. If the description of the work is covered by the definition contained in one or both of these laws, it may also be covered by the H-2A program.

In addition, Title III, Part A of the Immigration Reform and Control Act of 1986 establishes the H-2A denomination for “non-immigrant” foreign agricultural laborers and defines them as workers who are temporarily in the United States to perform “agricultural labor,” as defined in the Fair Labor Standards Act and the Internal Revenue Code.

The Internal Revenue Code defines agricultural labor as “on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; and in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.”

In contrast, the National Labor Relations Act does not define the term “agricultural laborer,” but as the Supreme Court has pointed out, since 1946 Congress has issued instructions to the National Labor Relations Board in funding legislation to use the definition of “agriculture” contained in Section 3(f) of the Fair Labor Standards Act to determine the meaning of “agricultural laborer.” See *Holly Farms vs. NLRB*, 517 U. S. 392, 397 (1996). Section 3(f) of the Fair Labor Standards Act provides: “Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. 29 U.S.C. 203(f). Therefore, the U.S. NAO confirmed that H-2A workers in North Carolina, like other workers in the United States, would be excluded from the protections of the National Labor Relations Act if the National Labor Relations Board or the competent courts determine that they are engaged in “agriculture,” according to the definition of this term in the Fair Labor Standards Act. If the National Labor Relations Board or the competent courts determine that H-2A workers are not involved in agricultural activities within the meaning of the Fair Labor Standards Act, the workers would enjoy the rights enshrined in

the National Labor Relations Act. For cases in which this law is not applicable, the relationship between agricultural workers and their employers would be subject to the local laws of North Carolina.

With respect to the alleged restriction of communication between H-2A workers and union representatives and/or attorneys, the U.S. NAO states that employers of H-2A workers must provide free housing, among other benefits. In general, this housing is located on the employer's property, and the employer may impose reasonable restrictions on access to the property. Often such restrictions are included in the work rules, which are part of the employment contract. In April of 2000, as a result of a complaint filed by Legal Services of North Carolina, the Division of Foreign Labor Certification of the U.S. Department of Labor modified some of the rules contained in the National Labor Relations Act regarding visitor access to allow union representatives and attorneys to make visits. As amended, this law now includes a paragraph on access to housing in its work rules governing visiting rights. Specifically, the provisions of this law state:

“Access to housing by social work officials of Labor Services and other personnel authorized by the government, during the course of their official duties, is permitted. Non-government social service workers, providers of social services and other visitors may have access to the common areas of housing facilities, provided that their presence does not interfere with the other residents' right to peaceful enjoyment. If it does, they will be asked to leave the premises. If there is no common area, the employer must ensure that there is an appropriate place at the job site for such visits. Visitors engaged in commercial activities are not allowed. Visitors who cause or are involved in illegal activities will be reported to law enforcement authorities and will be required to leave the premises.”

The matter of the right to tenancy of farmworker housing falls within state jurisdiction, and the Division of Foreign Labor Certification of the U.S. Department of Labor has no authority to interpret such laws.

5.2 Right to Collective Bargaining

5.2.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners allege that H-2A migrant workers are deprived of the right to collective bargaining that agricultural workers who are U.S. nationals enjoy, since they are excluded from the rights enshrined in the National Labor Relations Act.

According to the petitioners, because they do not have access to the terms and conditions of employment when they are first hired, have no information about the company that is hiring them, are not allowed to associate among themselves or join a union, and have their contact with union representatives and/or attorneys restricted, H-2A migrant workers are not in a position to exercise their right to collective bargaining.

The petitioners state that if workers request a revision in their contract, either to demand a

higher wage or to improve their working conditions, the employer simply transfers or fires them, which will result in their deportation and the certainty that they will not be rehired in the future.³⁴

5.2.2 Obligations of the United States under the NAALC

According to the NAALC, the governments pledged to guarantee “The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment” in labor principle 2, *Right to collective bargaining*.

With respect to the petitioners’ allegations about H-2A migrant workers being denied the right to engage in the collective bargaining that U.S. nationals enjoy, the U.S. Government is required under the NAALC to:

- *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*
- *Article 3. Government Enforcement Action:*
 - “2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party’s labor law.*”
- *Article 4. Access by Private Individuals to Proceedings:*
 - “2. *Each Party’s law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
 - *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*
 - *collective agreements, can be enforced.*

³⁴ As part of the supplemental information submitted on June 18, 2004, the petitioners sent three lists compiled by the North Carolina Growers Association of the workers “ineligible for rehiring” because they tried to exercise their labor rights.

- *Article 5. Procedural Guarantees:*

“6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.”

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

- a) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*
- b) promoting public education regarding its labor law.”*

5.2.3 Applicable Labor Legislation

According to the U.S. NAO, H-2A workers have the same right to collective bargaining that U.S. citizens enjoy. The National Labor Relations Act, 29 U.S.C. 151-187, guarantees the right to negotiate collective labor contracts, and the National Labor Relations Board is the federal agency responsible for monitoring compliance.

As indicated in section 5.1.3 (addressing labor legislation applicable to the freedom of association and the protection of the right to organize), H-2A workers in North Carolina, like other workers in the United States, would be excluded from the protections of the National Labor Relations Act if the National Labor Relations Board or the competent courts determine that they are engaged in “agriculture,” according to the definition of this term in the Fair Labor Standards Act. For cases in which the National Labor Relations Act is not applicable, the relationship between agricultural workers and their employers are subject to the local laws of North Carolina. The U.S. NAO pointed out that North Carolina laws do not protect the collective bargaining rights of agricultural workers.

According to a study published by the Secretariat of the Commission for Labor Cooperation in 2011, “The NLRA also excludes agricultural workers, the majority of whom are immigrants, from coverage. Workers on farms and ranches are thus excluded, although most workers in fruit, vegetable, poultry and meat packing and processing plants are covered. The exclusion of agricultural workers from the NLRA means that a union of agricultural workers cannot make use of federal law to require a company to participate in collective bargaining. In 1975, the state legislature of California, the most important farm state, passed a law similar to the NLRA for workers on farms and ranches. A few other states have laws affecting agricultural labor relations, but none is as extensive as the California law. In Florida, for example, the state constitution guarantees all workers, including agricultural employees, the right to collective bargaining, but the state legislature has not passed a law allowing workers to implement this right.”³⁵

³⁵ *Comparative North American Labor Law Guides*. Migrant Workers’ Rights, Secretariat of the Commission for Labor Cooperation, pp. 102.

5.3 Prohibition of Forced Labor

5.3.1 Arguments of Petitioners in Public Communication MEX 2005-1

The petitioners contend that some employers confiscate their employees' work permits and other immigration documents to prevent them from leaving or reporting labor violations to the authorities. They say that some employers even require workers to sign contracts requiring them to turn over their immigration documents.

5.3.1.1 Obligations of the United States under the NAALC

Under the NAALC, the governments agreed to "The prohibition and suppression of all forms of forced or compulsory labor, except for types of compulsory work generally considered acceptable by the Parties, such as: compulsory military service, certain civic obligations, prison labor not for private purposes and work exacted in cases of emergency" in labor principle 4, *Prohibition of forced labor*.

In connection with the petitioners' allegations that some employers confiscate work permits and other immigration documents to prevent their workers from leaving, the U.S. Government has an obligation under the NAALC to:

- *Article 2. "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."*
- *Article 3. Government Enforcement Action:*
 1. *"Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - f) *Providing or encouraging mediation, conciliation and arbitration services; or*
 - g) *Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."*
 2. *Each Party shall ensure that its competent authorities give due consideration in*

accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

- *Article 6. Publication:*

1. *“Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.*

2. *When so established by its law, each Party shall:*

- a) *publish in advance any such measure that it proposes to adopt; and*

- b) *provide interested persons a reasonable opportunity to comment on such proposed measures.”*

- *Article 7. Public Information and Awareness:*

“Each Party shall promote public awareness of its labor law, including by:

- a) *ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

- b) *promoting public education regarding its labor law.”*

5.3.1.2 Applicable Labor Legislation

The U.S. NAO reports that the 13th Amendment of the Constitution prohibits all forms of slavery or involuntary servitude, regardless of nationality, and therefore it protects H-2A and H-2B workers. The U.S. Supreme Court defines “involuntary servitude” as controlling a person’s work or services for the benefit of another without a legitimate right to do so. This includes forced labor as payment of a debt.

Involuntary servitude is also prohibited by federal law under Title 18, Section 1584 of the U.S. Code. Title 18, Section 241 of that law provides for sanctions ranging from fines to 10 years in prison for anyone who keeps another person in involuntary servitude. Therefore, no person, even H-2A and H-2B workers, can be forced to work for anyone.

The Wage and Hour Division is responsible for enforcing the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act. For this purpose, it conducts inspections and interviews with workers. Its inspectors are trained to detect situations in which workers may have been threatened, intimidated or held against their will. When a case of involuntary servitude is discovered, inspectors report it to the competent authorities, and where appropriate, to an NGO. The Wage and Hour Division establishes alliances with

NGOs and with other government agencies and collaborates with them on inter-institutional task forces on human trafficking. It also trains citizens and organization members to detect possible violations of labor laws, among other things.

5.4 Miminum Employment Standards

5.4.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners claim that H-2A migrant workers do not have the right to safe housing and transportation, insofar as they are excluded from the rights enshrined in the National Labor Relations Act and the Migrant Seasonal Agricultural Worker Protection Act.

According to the petitioners, the Migrant Seasonal Agricultural Worker Protection Act requires employers and/or recruiters to give workers complete information about jobs that they offer, and such information must be provided at the specified time and in the specified form. The petitioners state that H-2A migrant workers do not know the terms and conditions of employment when they are hired, nor do they know what company is hiring them. Labor contractors used by H-2A agricultural producers do not have to register with the U.S. Department of Labor, so it exercises no oversight of them.

According to the petitioners, the U.S. Government allows H-2A employers to manipulate the extension of the contract to avoid their responsibility for paying the compensation the law requires for H-2A workers who work at least three-fourths of the season. Under the H-2A program, employers have to give workers an opportunity to work at least three-fourths of the period for which they were hired. This minimum guarantees workers information about their potential earnings. If the employer should be unable to offer this amount of work and the worker is able and available to work, the employer must pay compensation.

According to the petitioners, H-2A agricultural producers have violated their obligation to pay workers the cost of transportation back to their places of origin. The H-2A program requires employers to pay for workers' transportation to their places of origin after they have completed the seasonal contract. In addition, employers must reimburse workers for the expenses they incurred for transportation to the job site, after the worker has worked half the season.

The petitioners claim that employers who no longer have work for these laborers tell them they must terminate the contract "early" and return to their place of origin, only to then tell the competent authorities that the workers quit prematurely. That way, they do not have to meet their obligation to pay compensation to H-2A migrant workers for working three-fourths of the contract or pay them for transportation back to their places of origin.³⁶ The petitioners further contend that the U.S. Department of Labor has not pursued actions to enforce these legal obligations.

³⁶ As part of the supplemental information submitted on June 18, 2004, the petitioners sent 14 "voluntary quit" forms signed by workers in which they state that they are quitting and that they decline to exercise any right contained in their labor contract.

On March 31, 2004, the Office of the Inspector General of the Department of Labor issued the report "Evaluation of the North Carolina Growers Association," in which it was demonstrated that this association uses the same ending date (early November) for nearly all of its labor force, "exaggerating the length of time when they need the majority of the workers... Many of these workers do not receive payment for their transportation back home, even though they worked the majority of the labor contract." Agricultural statistics indicate that the tobacco harvest generally ends in the middle of October, and the majority of the workers included in the sample used by the Office of the Inspector General completed their work by October 15. In 2001, 93% of work orders issued by the North Carolina Growers Association had an ending date of November 5. The Office of the Inspector General concluded that this practice "allows the Association not to pay for return transportation and/or contractual guarantees." It recommended that the Employment and Training Administration of the U.S. Department of Labor "review the manpower requirement dates included in the applications and insist that they reflect more accurately the date when workers will be needed for the harvest."³⁷

The conclusions reached by the Office of the Inspector General of the U.S. Department of Labor concurred with those reached in in the 1997 report by the General Accounting Office of the U.S. Congress, which stated that "in 1996, about one-third of all H-2A workers employed in North Carolina had finished their work early. Consequently, the employers did not pay these workers' transportation costs to return to their places of origin, nor did they pay the compensation required under the guarantee of work for at least three-fourths [of the season]."³⁸

The General Accounting Office also reported that "workers in the H-2A program ... are unlikely to complain about violations of their rights, since they fear losing their jobs or not being hired again in the future."³⁹ The fear of being blacklisted is warranted, according to a study by the Carnegie Endowment, which based its conclusions on interviews with Mexican H-2A workers. The study concluded that "the blacklists of the H-2A program appear to be widespread. They are very well organized and are produced during all phases of the recruitment and hiring process. The workers report that they now remain on the blacklist for three years, whereas in the early 1990s they were blacklisted for one year."⁴⁰

In the specific case of the Christmas tree industry in North Carolina, which has a season of seven weeks, the petitioners allege that H-2A migrant workers toil for 14 to 16 hours a

³⁷ Office of the Inspector General of the U.S. Department of Labor, "Evaluation of the North Carolina Growers Association," Report #04-04-008-03-325 of March 31, 2004.

³⁸ U.S. General Accounting Office, "H-2A Agricultural Guestworker Program," December 1997.

³⁹ Ward, "Growers Trade," p. 30.

⁴⁰ Demetrios G. Papademetriou y Mónica S. Heppel, *Balancing Acts: Toward a fair bargain on seasonal agricultural workers*, International Migration Policy Program of the Carnegie Endowment for International Peace (1999), p. 13.

day in freezing temperatures, without sheltered areas with adequate heating where they can get out of the cold temporarily. According to the petitioners, H-2A migrant workers are frequently denied the minimum wage and overtime pay they are entitled to. In addition, the housing provided by the employer sometimes does not meet Department of Labor Standards.

5.4.1.1 Obligations of the United States under the NAALC

In the NAALC, the governments pledged to guarantee “The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements” in labor principle 6, *Minimum employment standards*.

With respect to the petitioners’ allegations that H-2A migrant workers do not enjoy minimum employment standards, the U.S. Government is required under the NAALC to:

- *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*

- *Article 3. Government Enforcement Action:*

“Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

- a) Appointing and training inspectors;*
- b) Monitoring compliance and investigating suspected violations, including through on-site inspections;*
- c) Seeking assurances of voluntary compliance;*
- d) Requiring record keeping and reporting;*
- e) Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
- g) Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*

2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*

- *Article 4. Access by private individuals to proceedings:*

1. *“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*

2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*

- a) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*

- b) *collective agreements, can be enforced.”*

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

- a) *ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

- b) *promoting public education regarding its labor law.”*

5.4.1.2 Applicable Labor Legislation

According to the standards of the H-2A program, an employer who applies for certification in order to hire foreign labor must meet the following specific requirements:

- According to Title 20, § 655.120 of the Code of Federal Regulations, the wage for H-2A workers must be the same as that paid to U.S. nationals. The hourly rate must be at least the Adverse Effect Wage Rate,⁴¹ the state minimum wage, the federal minimum wage, the prevailing hourly wage, or the piece rate, whichever is highest.

⁴¹ The Adverse Effect Wage Rate (AEWR) is established by state for all H-2A agricultural workers. It is equal to the annual average hourly rate annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the United States Department of Agriculture.

- In addition, if a worker is to be paid on a piece-rate basis, the piece rate must be that which is established by the State Workforce Agency.⁴² If the piece rate is less than the hourly rate, the worker must receive a supplement to equal the hourly rate. The piece rate must not be less than the prevailing rate in the area for the same agricultural products and/or activities.
- The employer must provide free housing for all workers who are not able to return to their homes on the same day. Such housing must be inspected and approved in accordance with the standards of the Occupational Safety and Health Administration of the U.S. Department of Labor, CFR 1910.142 or 20 CFR 654.404-417.⁴³ Rental housing that meets local and state safety and health standards may also be provided without cost to the worker.
- The employer must provide three meals a day for each worker, or it must set up free kitchen facilities for workers to prepare their own meals. If the employer does provide meals for workers, it may charge a reasonable fee for them.

The employer is responsible for the following types of transportation for the workers:

- Once the worker has fulfilled fifty percent of the contract, the employer must reimburse him or her for the cost of transportation and travel expenses from the place of recruitment to the place of employment, if the worker incurred such expenses.
- For workers who have been provided housing, the employer must provide free transportation from the housing to the job site.
- After the labor contract is concluded, the employer must pay the worker's transportation and travel expenses for the trip back to the place of recruitment.

The Fair Labor Standards Act, which is enforced by the Wage and Hour Division of the U.S. Department of Labor, requires that the majority of employers pay their workers wages that are no less than the legal minimum wage for all the hours they work, unless such workers are exempt.

Although Sections 206 and 207 of the Fair Labor Standards Act provide that employers must pay workers at least one and one-half times the hourly rate for working more than 40 hours a week ("overtime"), many employers are exempt from this requirement under Section 213 of the aforementioned law. The exemption includes agricultural workers, harvesters working at a piece rate, workers who can come and go from their permanent residence to the job site, and others, regardless of whether they have seasonal H-2A visas.

⁴² The state employment office.

⁴³ The standards of the Occupational Safety and Health Administration refer to housing, water supply, waste disposal, heating, electricity and lighting, bathrooms, washing facilities, kitchen areas, garbage, insect and rodent control, sleeping facilities, safety and first aid.

Employers who participate in the H-2A program must fill out Employment and Training Administration (ETA) form 750, Part A, Offer of Employment, and post an ETA 790 job order in the inter-/intra-state authorization system.

For purposes of the H-2A program, these documents, which establish the terms of employment and are signed by the employer, are considered to be the labor contract. The contract stipulates that H-2A workers must receive the Adverse Effect Wage Rate, the prevailing wage, or the state/federal minimum wage, whichever is highest; free housing; a specific number of hours per day, to be averaged weekly; and reimbursement for transportation expenses after 50% of the contractual term has been completed.

Enforcement of the labor contract (ETA 750), which is binding and may be enforced through the state court system, is the responsibility of the Wage and Hour Division. One of its priorities is to provide speedy responses to complaints about violations of the H-2A labor contract. The complaints received by the Wage and Hour Division normally refer to: failure to pay the total number of hours worked (forcing workers to sign out but to continue working, requiring work without pay during meal times, requiring work after quitting time), failure to pay overtime, and illegal withholding.

If the Wage and Hour Division does not have jurisdiction because it is a matter of state jurisdiction or the complainant wishes to resort to another agency, the complaint is turned over to the appropriate office (the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, or the North Carolina Department of Labor); or the complainant is informed of his or her right to file suit in court.

After analysis, receipt of accepted complaints is acknowledged in writing. Complaints regarding violations that are potentially harmful to worker safety are given first priority. The statute of limitations for collecting back wages (generally two years) is also taken into consideration. The names of the complainants are kept confidential unless the complainant authorizes disclosure. Most employers pay compensation to complainants after the Wage and Hour Division's investigation is concluded.

The Wage and Hour Division has been delegated some investigation, inspection and information gathering functions for determining whether employers' contractual obligations to H-2A workers are met. The State Workforce Agency is responsible for inspecting housing prior to occupancy for the purpose of ensuring compliance with standards set by the Occupational Safety and Health Administration or the Employment and Training Administration, as well as the Department of Labor's safety standards. Employer-provided housing must be inspected prior to the issuance of H-2A certification. The Wage and Hour Division oversees compliance with applicable regulations once the housing has been occupied.

Another priority of the Wage and Hour Division is to protect workers in the lowest-paying sectors. Between 2003 and 2005, the Wage and Hour Division focused primarily on enforcement of labor legislation in the agriculture sector.

Inspection records maintained by the State of North Carolina do not identify the legal status

of complainants, so it is impossible to determine whether inspections were the result of complaints by H-2A workers. Complainants are guaranteed confidentiality under the regulations of both the U.S. Department of Labor and its North Carolina counterpart.

The H-2A visa program requires employers to guarantee each worker employment for at least three-fourths of the length of the contract. If the employer decides to shorten the contract to less than three-fourths of the term, it must pay the worker the amount he or she would have earned for the full guaranteed period of work, that is, for three-fourths of the term.

If an H-2A worker who has accepted the terms of the labor contract decides to terminate the employment before having completed three-fourths of the period, the employer is not bound by the three-fourths guarantee.

If the worker decides to end the job before the conclusion of the contract, the employer is not obligated to pay for return transportation.

The Wage and Hour Division is the authority that enforces the three-fourths payment guarantee and the payment of transportation costs for workers' return trip after the conclusion of the contract. However, the Employment and Training Administration is in charge of resolving matters related to employers' obligations to H-2A workers with respect to labor certification processes, including the duration of the labor contract.

The North Carolina Growers Association must make sure that the three-fourths guarantee is honored and that workers are informed of the duration of the contract as soon as they are recruited. Regardless of the duration, the employer is bound by the three-fourths guarantee. During the period of employment, the Wage and Hour Division makes random visits to workplaces to review the information provided by the employer when applying for certification, and it investigates more thoroughly in the case of complaints.

5.4.2 Arguments of Petitioners in Public Communication MEX 2005-1

The petitioners contend that abuses and violations of H-2B migrant workers' labor rights have been committed in the United States. Among these, they state that some H-2B workers are paid less than what was promised and less than the minimum wage. The reason is that sometimes employers take some inappropriate deductions, in violation of the Migrant and Seasonal Agricultural Workers Protection Act, the Fair Labor Standards Act and local legislation in Idaho.

The failure to pay the promised wage constitutes a rescission of the labor contract under the Migrant and Seasonal Agricultural Workers Protection Act. Furthermore, when the Department of Labor certifies companies to hire foreign seasonal workers, it must confirm the wage the employer intends to pay. Also, even though one of the conditions for hiring migrant workers is that work be available for them for the entire term of their H-2B visa, many times the workers go without work for several days, and therefore they have no income despite their continuing expenses.

The petitioners argue that U.S. agricultural producers hire Mexican laborers under the H-2B visa program through recruiters who are responsible for delivering the workers and following the application procedure with the Department of Labor. The recruiters are also in charge of carrying out the procedures for obtaining visas, hiring, transporting, training and placing the workers. Workers selected for the H-2B program are required to pay them for these procedures. The payment of these fees is in violation of the Migrant and Seasonal Agricultural Workers Protection Act, the petitioners allege, since the employer has not informed the workers of these expenses.

The petitioners state that very few workers file complaints for violations of their rights out of fear of losing their jobs, not being rehired in the future, or being blacklisted.

Petitioner Candelario Pérez and five other workers were hired in 2000 by Universal Forestry in Idaho as seasonal non-agricultural workers with H-2B visas. The company promised to pay them \$10.50 per hour. However, they received around \$7.40 per hour, in violation of the Fair Labor Standards Act. The company housed six workers in a camp without bathrooms, beds or purified water.

On September 26, 2000, Candelario Pérez and another worker filed individual complaints with the U.S. Department of Labor regarding these violations. That office concluded an investigation of Universal Forestry on July 13, 2002, determining that the company owed Candelario Pérez \$631.25 for lost wages, but it did not issue a decision on the other complaints. Nor did it resolve the complaints filed by the other workers, because they did not have a fixed address and it could not contact them to confirm their accusations.

Moreover, in November 2000, petitioners Manuel Camero Torres, José Antonio Vargas Cisneros, Juan Carlos Lira and Alfredo Borjas González were hired by a representative of Universal Forestry as H-2B workers. They complained of inappropriate fees, unsafe transportation to the work site, and poor housing conditions (lack of space, absence of basic services).

In June 2002, petitioners Basilio Ceja Carballo, Moisés Escamilla Pérez, Bernabé Feria, Práxedes Guevara Hernández, Edgar Lozano Guevara, Salvador López García, Emilio Morales Donís, Domingo Morales Gómez, Alfredo Pérez Ramírez, Jaime Salas Juárez and other workers from Veracruz with H-2B visas were hired by Universal Forestry in Idaho. They allege that they were not informed of the terms of their contracts; they were transported in unsafe conditions; they were charged inappropriate fees; and their housing was in poor condition. The company did not provide work for them during the first days of their contract, and it confiscated their passports. The workers had no income, but they had to pay for their basic needs. By August of 2002, most of the workers had left the company because of lack of work, low wages and unjustified fees.

In another case, petitioner Dan Morales was hired to pack fruit in Arkansas and Texas with an H-2B visa. He received less than \$5.15 an hour (minimum wage), in violation of the Fair Labor Standards Act. After a few weeks, Morales was assigned to operate machinery even though he stated he was not qualified for the work. Within a short time he had an accident

which resulted in the amputation of a leg. Because of his migrant status, the worker could not find an attorney to advise him.

Petitioners Edgar Peña, Guillermo Orozco, Anastacio Valdéz and Rosa Hernández included their complaints in the addendum presented to the NAO of Mexico on March 30, 2006. Together with more than 25 workers from Nayarit, the petitioners were hired as H-2B workers by Mountain Fresh of Colorado. They contend that the company did not provide them with work for the full period of their contract, because in the first few weeks it had nothing for them to do and they worked sporadically in agricultural labor for other companies (even though when their visa was processed the company stated they would not be performing agricultural labor). Some of the workers sought legal counsel to resolve the problem. However, they did not receive any support because the office they went to was funded by the Legal Services Corporation. After two and one-half weeks without assigning them formal work, Mountain Fresh fired only the workers who had sought legal counsel.

The petitioners were promised a wage of \$6.26 per hour. However, in the first days they were paid only about \$2.12 per hour for performing work other than that stipulated in their contract. Moreover, Mountain Fresh took deductions for rent and recruitment, which brought their pay below the minimum wage, thus violating the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act.

They further contend that the housing conditions were inadequate (without enough bathrooms or bedrooms, no drinking water, heating, telephone or cooking facilities), in violation of the standards established in the Migrant and Seasonal Agricultural Workers Protection Act. On occasion, the employers charged rent for the housing. These deductions are in violation of local laws in Idaho, because the employer did not have written authorization from the workers to take them.

All of the petitioners argue that workers who are U.S. nationals have access to free legal advice from offices funded by the legal Services Corporation. However, the law prohibits offices financed by this organization to offer their services to H-2B migrant workers, so all of them were practically precluded from obtaining legal assistance, as they could not afford it, they were deported, or they did not have the money to pay for the trip from Mexico to the United States to continue the legal process. Consequently, many workers were not able to enforce their labor rights by collecting the wages or benefits owed to them or receiving the medical treatment they needed as a result of accidents on the job.

The petitioners argue that the United States does not provide adequate access to administrative or judicial bodies that can enforce migrant workers' labor rights. Judicial proceedings are too complicated to pursue without counsel, and retaining private counsel is too expensive. Therefore, the United States has violated its commitments under the NAALC.

5.4.2.1 Obligations of the United States under the NAALC

In the NAALC, the governments pledged to guarantee "The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners,

including those not covered by collective agreements” in labor principle 6, *Minimum employment standards*.

With respect to the petitioners’ allegations that H-2B migrant workers do not enjoy minimum employment standards, the U.S. Government is required under the NAALC to:

- *Article 2. “Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*
- *Article 3. Government Enforcement Action:*
 - “1. *Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - g) *Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*
 2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*
- *Article 4. Access by Private Individuals to Proceedings:*
 1. *“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*
 2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
 - c) *its labor law, including in respect of occupational safety and health, employment*

standards, industrial relations and migrant workers, and

d) collective agreements, can be enforced.”

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

c) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

d) promoting public education regarding its labor law.”

5.4.2.2 Applicable Labor Legislation

The requirements to apply for H-2B visas and the protections that migrant workers with these visas should be afforded are provisions of the Immigration and Nationality Act. Under this law, the H-2B program for non-agricultural labor (construction, forestry, hospitality, landscaping, meat packing, and traveling carnivals and circuses) allows U.S. employers to hire foreign labor on a temporary basis if they have not been able to find U.S. nationals to do the work.

In addition, the Fair Labor Standards Act covers workers with H-2B visas, among others. According to this law, any employer seeking to hire a migrant worker with this type of visa must agree to pay a wage equal to or exceeding the minimum wage. As of July 2009, the federal minimum wage was \$7.25 per hour. Compliance with this law is monitored by the Wage and Hour Division of the Department of Labor.

Title 44, Chapter 15 of the Idaho Code establishes the minimum wage to which all workers in that state are entitled. Given that the state minimum wage is lower than the federal rate of \$7.25, this state applies the federal minimum wage. In addition, Title 45, Chapter 6 of the same code prohibits employers from withholding or diverting any part of their employees' wages without written authorization from the employees.

In the state of Colorado, on the other hand, the minimum wage is a little higher than the federal rate. Therefore, the state minimum wage, currently \$7.64 per hour, applies there. The minimum wage is increased or decreased annually in Colorado, based on a formula used to calculate the cost of living.

With regard to transportation, it is a violation of the Fair Labor Standards Act for workers to be required to pay for their own transportation if this brings their wages down to below the minimum during the first week of work. Once H-2B workers' contract ends, the employer is required to cover their transportation costs only if paying such costs themselves would push their wages below the minimum during the final week of work.

Workers with H-2B visas are not entitled to free housing. Wage deductions by the employer for housing are allowed, as long as the worker is informed at the time of hiring and the deductions do not push his or her wages below the minimum, as set forth in the Fair Labor Standards Act. The H-2B visa program does not require the employer to provide housing for workers, but if housing is promised at the time of hiring, it must be provided.

There is no provision in the U.S. H-2B regulations governing the employer's failure to honor the period of work stated in the original job offer. However, the H-2B program regulations do require that the employment contract stipulate the period it covers and that it be performed in its entirety. If an employer fires a worker before the contract has ended, he must cover transportation costs back to the place of origin.

The petitioners cite the Migrant and Seasonal Agricultural Workers Protection Act numerous times, but this law does not cover H-2B workers, since they are not considered "migrant agricultural workers" or "seasonal agricultural workers." For this reason, the petitioners are not protected by this law.

The petitioners argue that workers with H-2B visas hired to work in states such as Idaho, Colorado, Arkansas and Texas should have been given H-2A visas, since they performed agricultural work and H-2B visas are for non-agricultural workers, and therefore they did not receive the treatment and the protections that are afforded to H-2A workers. In this regard, several different U.S. laws define agricultural work.

Title III, Part A of the Immigration Reform and Control Act of 1986 establishes the H-2A denomination for "non-immigrant" foreign agricultural laborers and defines them as workers who are temporarily in the United States to perform "agricultural labor," as defined in the Fair Labor Standards Act and the Internal Revenue Code.

The Fair Labor Standards Act defines agricultural work as "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

The Internal Revenue Code defines agricultural work as "Services performed on a farm by any person in connection with the cultivation of the soil, or the raising or harvesting of any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, or wildlife. And any service performed for the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm."

According to the U.S. Department of Labor, workers with H-2B visas who are involved primarily in the planting of trees may be protected by the Migrant and Seasonal Agricultural

Workers Protection Act, provided that they meet the terms of the definition of migrant or seasonal agricultural worker.⁴⁴

Immigration and Citizenship [sic] Enforcement (ICE) is the federal agency responsible for ensuring that workers with H-2B visas perform the work specified in their classification, i.e., non-agricultural work. The United States Citizenship and Immigration Services (USCIS) can conduct investigations if it believes immigration laws have been violated, for example, when an employer knowingly employs a migrant for activities other than those stipulated in the contract.

In the case of H-2B workers, the Wage and Hour Division has the authority to conduct investigations and impose fines if it believes an employer has intentionally provided false information on its Application for Temporary Labor Certification with respect to the labor to be performed by migrant workers, their schedules, job requirements, workplace, wages, and other aspects. In addition, the Employment and Training Administration of the U.S. Department of Labor can exclude employers from the H-2B program for up to three years if they assign workers to activities not permitted by the program and by their certification.

In February 2012, amendments to the H-2B visa program regulations were published. However, these regulations, which would improve conditions for migrant workers with H-2B visas, may not become effective because they are the subject of a suit filed by dissatisfied employers that is pending judgment. With these amendments, employers would be required to reimburse workers for all expenses incurred during the hiring process (visas, transportation, food and lodging on the way to the workplace, and fees for crossing the border), given that these expenses are considered to be “for the benefit of the employer.” The changes would thus guarantee that workers receive at least the minimum wage without deductions.

Finally, the Legal Services Corporation Act, the law that founded the Legal Services Corporation, and the Legal Services Corporation Appropriations Act exclude H-2B workers from receiving legal advice from any organization receiving funds from the Legal Services Corporation. These laws allow only workers with H-2A visas to receive the benefits of legal counsel.

The U.S. Government claims that mechanisms do exist for migrant workers with H-2B visas to gain access to administrative and judicial proceedings even though they cannot turn to organizations financed by the Legal Services Corporation. For example, programs such as the Immigrant Justice Project of the Southern Poverty Law Center can legally represent low-income migrant workers, including those with H-2B visas, free of charge. In addition, the Wage and Hour Division has implemented certain mechanisms to enable H-2B migrant workers to receive information about their rights, such as a toll-free telephone service with translators in more than 176 languages, and pamphlets in English and Spanish that provide this information for all workers with H-2B visas.

⁴⁴ The term “migrant agricultural worker” refers to an individual who is employed seasonally in agricultural work and cannot return to his or her residence at night. It does not include: “... any seasonal non-immigrant foreigner who is authorized to perform agricultural labor in the United States under the Immigration and Nationality Act in the H-2A visa program.”

5.4.3 Arguments of Petitioners in Public Communication MEX 2011-1

The petitioners allege that although there are regulations governing minimum employment standards by establishing the minimum wage, this provision is often ignored. At the federal level, the Fair Labor Standards Act currently provides that the minimum wage is \$7.25 per hour for the first 40 hours of the week, plus one and one-half times that rate for each hour over 40 in a work week. At the state level, most states have their own minimum wages. When a job is exempt from the Fair Labor Standards Act, or when the state minimum wage is higher than the federal rate, the state rate must be paid.

There are regulations that apply exclusively to H-2B workers. They provide that employers pay wages that the U.S. Department of Labor identifies as wages that will not reduce those of U.S. nationals. The minimum wage for an H-2B worker must be equal to the federal, local or state minimum wage, or the prevailing wage (the average wage paid to similar workers), whichever is highest. Prevailing wages are normally higher than federal wages, and the objective is to protect the wage levels of workers who are U.S. nationals vis-à-vis those who are foreign nationals, who might perform the same work for lower pay.

The petitioners argue that under the amended regulations for the H-2B visa program, issued in February 2012,⁴⁵ employers are now required to reimburse workers for all the expenses involved in the hiring process (visas, passports, meals, lodging, transportation, fees for crossing the border), since these expenses are considered to be “for the benefit of the employer.” The Fair Labor Standards Act, on the other hand, guarantees that these expenses (transportation and recruitment costs) will be reimbursed during the first week of work, such that the worker will actually receive the minimum wage without discounts. The petitioners point out, however, that they were not reimbursed for their travel expenses. Mr. Cortez and Mr. Vázquez, who worked for the J&J Company, spent an average of \$330. Mr. García, who was recruited by JKJ to work for the Reithoffer Company, spent nearly \$950.

They state that the employers withheld a percentage of their wages as a guarantee of performance of the labor contract, arguing that it was a “bonus” to be paid at the end of the contract if the worker remained until the end. In that regard, Mr. García, who had to leave his job because of unsafe and unfair working conditions at Reithoffer, never received that amount (\$50 per week). The petitioners also state that deductions are frequently taken for tools and equipment to be used on the job, in violation of the Fair Labor Standards Act. Workers at Reithoffer were required to purchase company uniforms for \$100, paid with wage deductions that brought their pay below the minimum, another violation of the Fair Labor Standards Act.

The petitioners allege that migrant carnival workers suffer abuses in the form of schedules that require them to work an average of 70 hours or more per week, for which they receive a fixed weekly salary. That ends up being well below the minimum they should receive. This is despite the fact that the employers are certified by the U.S. Department of Labor as

⁴⁵ The petitioners state that although these amended regulations are supposed to enter into force in April of 2012, the amendments will not be enforced until a lawsuit filed by some employers and by the U.S. Chamber of Commerce is decided. If the court finds in favor of the plaintiffs, the amendments to the regulations will be invalid and will not enter into force.

companies offering hourly pay and work weeks of 40 hours. The petitioners claim that although the applicable wage for workers at J&J was \$6.61 per hour, they earned an average of just \$3.41 per hour because they worked 12 hours a day. Additionally, taking into account unreimbursed expenses incurred before starting the job, workers at J&J earned a net pay of \$1.61 per hour. Mr. García, who worked for Reithoffer, earned approximately \$1.98 per hour, due to the number of hours he worked beyond the statutory 40 hours. This is a violation of the Fair Labor Standards Act.

Moreover, the petitioners also claim that deductions are taken for rest and meal periods that they do not use, and fines are levied for tardiness, “misbehavior,” using the bathroom outside of authorized breaks, and complaining about violations of their rights.

They argue that complaints of employer violations filed with the Wage and Hour Division of the Department of Labor, which is in charge of enforcing the Fair Labor Standards Act, have declined. According to the General Accounting Office of the U.S. Congress, this reduction in the number of complaints took place between 1997 and 2007.

They also point out that workers have three mutually-exclusive mechanisms for enforcing their rights:

- 1) Investigation and conciliation by the Wage and Hour Division of the Department of Labor.
- 2) Legal action against the employer through the Office of the Solicitor of the Department of Labor.
- 3) Private legal action against the employer by the worker.

The petitioners contend that although the Wage and Hour Division does respond to the complaints it receives, its efforts to conciliate or investigate are inadequate, ineffective and quite slow, which makes workers vulnerable.

According to a 2009 report issued by the General Accounting Office of the U.S. Congress, the process for admitting complaints at the Wage and Hour Division “had major deficiencies,”⁴⁶ and the U.S. Department of Labor depends on complaints from workers to enforce the law. However, workers do not file complaints for fear of reprisals.

The petitioners acknowledge that although the current administration of the U.S. Department of Labor implemented measures to improve oversight to enforce the legislation (300 inspectors were hired to look into minimum standards and the technology was updated), its law enforcement efforts are far from effective. Therefore, the United States is not fulfilling its obligations under the NAALC.

Legal action is taken against the employer by having the Office of the Solicitor of the Department of Labor order the employer to pay lost wages and an equal amount in damages to the worker.

As for private legal action, the petitioners state that private attorneys do not take cases of low-income workers because they are not financially attractive. For migrant carnival workers, the situation is even more complicated, since they are isolated in towns throughout the United States and are constantly moving from one place to another. They never spend more than two weeks in one location, which complicates meeting with attorneys and preparing cases.

⁴⁶ It states that the Wage and Hour Division discourages the filing of complaints by providing contradictory information, by failing to investigate complaints in a timely manner, to enforce the law, or to follow up with employers to make them pay back wages to workers, and by selecting only the most salient and lucrative cases to investigate and litigate.

Migrant workers with H-2B visas cannot receive legal advice from non-governmental organizations that support low-income people and are financed by the federal government through the Legal Services Corporation,⁴⁷ because U.S. law restricts access for these workers.

Nevertheless, even if migrant workers do manage to find legal representation while they are in the United States, it is unlikely the case will be resolved before they have to leave the country at the end of their contract. Therefore, they must pursue matters from their country of origin (transnational litigation), which is very costly and complex. Furthermore, there are a number of different barriers to overcome, including language, access to communication (telephone, Internet), the need to notarize documents requested by embassies and consulates, obstacles to obtaining a visa to return to the United States, transportation costs and the cost of having statements taken in Mexico for submission to U.S. courts (U.S. Consulates charge very high fees for taking statements).

The infrequency of lawsuits filed by migrant workers, combined with the failure of the U.S. Department of Labor to fulfill its obligations, discourages employers from complying with the law, since they will not be penalized.

Thus, according to the petitioners, the systematic violations of U.S. law persist despite the regulations of the Fair Labor Standards Act.

5.4.3.1 Obligations of the United States under the NAALC

In the NAALC, the governments pledged to guarantee “The establishment of minimum employment standards, such as minimum wages and overtime pay, for wage earners, including those not covered by collective agreements” in labor principle 6, *Minimum employment standards*.

With respect to the petitioners’ allegations that H-2A migrant workers do not enjoy minimum employment standards, the U.S. Government is required under the NAALC to:

- *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*

⁴⁷This is a private non-profit entity created by a law enacted by Congress. The law specifies that it is not a federal agency, nor are its employees federal employees. The corporation is funded by a direct allocation made by Congress each year to finance about 134 different free legal advice programs. It has more than 900 offices throughout the United States. These programs are intended to provide legal counsel to low-income U.S. citizens and to certain groups of migrants, including workers with H-2A visas.

- *Article 3. Government Enforcement Action:*

“1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

- a) Appointing and training inspectors;*
 - b) Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) Seeking assurances of voluntary compliance;*
 - d) Requiring record keeping and reporting;*
 - e) Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - g) Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*
- 2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*

- *Article 4. Access by Private Individuals to Proceedings:*

- 1. “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*
- 2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
 - e) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*
 - f) collective agreements, can be enforced.”*

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

- e) ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

f) *promoting public education regarding its labor law.*”

5.4.3.2 Applicable Labor Legislation

Under the Immigration and Nationality Act of the United States, the H-2B program for non-agricultural labor (construction, forestry, hospitality, landscaping, meat packing, and traveling carnivals and circuses) allows U.S. employers to hire foreign labor on a temporary basis if they have not been able to find U.S. nationals to do the work.

As stated above in section 5.4.2.2, the Fair Labor Standards Act covers all workers in the United States, including migrant workers with H-2B visas. According to this law, any employer seeking to hire a migrant worker, in this case one with an H-2B visa, must agree to pay a wage equal to or exceeding the minimum wage. As of July 2009, the federal minimum wage was \$7.25 per hour. Compliance with the Fair Labor Standards Act is monitored by the Wage and Hour Division of the U.S. Department of Labor.

It is a violation of the Fair Labor Standards Act when a worker with an H-2B visa is required to pay for transportation and as a result his or her pay falls below the minimum wage during the first week of work. Once an H-2B worker's contract ends, the employer is required to cover transportation costs only if such costs would bring his or her wages below the minimum during the final week of work.

As mentioned above in section 5.4.2.2, in February 2012, amendments to the H-2B visa program regulations were published. However, these regulations, which would improve conditions for migrant workers with H-2B visas, may not become effective because they are the subject of a suit filed by dissatisfied employers that is pending judgment. With these amendments, employers would be required to reimburse workers for all expenses incurred during the hiring process (visas, transportation, food and lodging on the way to the workplace, and fees for crossing the border), given that these expenses are considered to be “for the benefit of the employer.” The changes would thus guarantee that workers receive at least the minimum wage without deductions.

Regarding inappropriate withholding as a “guarantee of completing the contract,” deductions for tardiness, going to the bathroom, “misbehavior” or complaining of violations of labor rights, applied by employers against workers with H-2B visas, the Fair Labor Standards Act considers such deductions a violation, since they push the worker's pay below the minimum wage that is required. The law also states that it is illegal to take deductions from wages due to the employer's lack of funds or goods, to pay for uniforms required by the employer, or to pay for tools required for the job, if such deductions reduce the wages received.

With respect to working more than 40 hours per week without overtime, the Fair Labor Standards Act also provides that non-exempt workers must be paid the wage corresponding to the time worked in the regular workday as well as overtime, at at least one and one-half times the regular rate of pay for more than 40 hours worked in a week.

The Fair Labor Standards Act calls for the Wage and Hour Division of the U.S. Department of Labor to intervene to enforce the payment of back wages, in a timely manner. The

Department of Labor may also take legal action against an employer to recover back pay for a worker with an H-2B visa, plus a similar amount in damages. Finally, a worker may file a private legal action to recover back wages, damages, attorneys' fees and court costs.

5.5 Elimination of Job Discrimination

5.5.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners state that approximately 20 percent of agricultural workers in the United States are women, and their average age is 40 years. However, H-2A agricultural products do not hire single women or persons older than 40 years of age unless they have worked in the program before and they have specifically been asked back.

According to the petitioners, this violates the Equal Employment Opportunity Act, the Age Discrimination in Employment Act, and principle 7 of NAALC Annex 1, *Elimination of employment discrimination*.

5.5.1.1 Obligations of the United States under the NAALC

In the NAALC, the governments pledged to guarantee the "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" in labor principle 7, *Elimination of employment discrimination*.

With respect to the petitioners' allegations that H-2A migrant workers do not enjoy the right against employment discrimination, the U.S. Government is required under the NAALC to:

- *Article 2. "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."*
- *Article 3. Government Enforcement Action:*
 - "1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:*
 - a) Appointing and training inspectors;*
 - b) Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) Seeking assurances of voluntary compliance;*

- d) *Requiring record keeping and reporting;*
- e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
- g) *Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*

2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*

- *Article 4. Access by Private Individuals to Proceedings:*

- 1. *“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*

- 2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*

- a) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*

- b) *collective agreements, can be enforced.”*

- *Article 7. Public Information and Awareness:*

“Each Party shall promote public awareness of its labor law, including by:

- a) *Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

- b) *Promoting public education regarding its labor law.”*

5.5.1.2 Applicable Labor Legislation

Both federal and state laws in the United States prohibit discrimination in the workplace on the grounds of race, color, religion, sex, nationality, age and disability. Federal legislation protects workers, including those hired under the H-2A program to work for a certified employer.

At the federal level, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the grounds of race, color, religion, sex or nationality. Title VII of 42 U.S.C. 2000e covers employers, state and local governments and educational institutions that employ 15 or more persons. The Age Discrimination in Employment Act prohibits age

discrimination against persons 40 years and older in hiring, promoting, firing, layoff or compensation.

The Age Discrimination in Employment Act covers employers with 20 or more employees, state and local governments (including school districts), placement agencies and labor organizations. In addition, Titles I and V of the Americans with Disabilities Act of 1990 prohibit discrimination in employment against disabled persons. The Americans with Disabilities Act covers all employers, state and local governments, and educational institutions with 15 or more employees. The Equal Employment Opportunity Commission (EEOC) is responsible for monitoring compliance with Title II, the Americans with Disabilities Act and the Age Discrimination in Employment Act.⁴⁸

Any individual who believes his or her labor rights have been violated may file a discrimination suit with the EEOC or with a state agency for fair labor practices. In addition, an individual, organization or agency may file charges on behalf of the person suffering from discrimination in order to protect the identity of such person. The charges may be filed with the EEOC within 180 days of the date of the alleged violation. This time period may be extended to 300 days if the charge is covered by a local or state anti-discrimination law.

Workers may file charges of employment discrimination, caused either by intentional acts or by practices that have a discriminatory effect, to recover lost wages, hiring, promotion, reinstatement, initial pay, reasonable housing, or other remedies that would put the individual in the position he or she would have been in if not for the discrimination. Awards may also include attorneys' fees, expert witness fees and court costs. The majority of the laws enforced by the EEOC also provide for damages (compensatory and punitive) if it is found that there was intentional discrimination. Compensatory damages may be for financial losses or other suffering caused by the discrimination. Punitive damages may be awarded when the employer has acted in bad faith. The EEOC requires employers to publish information for their employees about their rights. Employers must also take corrective or preventive measures to eliminate the source of the discrimination and minimize its recurrence.

In North Carolina, workers are protected against reprisals by their employers under the Retaliatory Employment Discrimination Act of the North Carolina General Statutes.

The North Carolina Department of Labor, through its Employment Discrimination Bureau, is responsible for monitoring compliance with the provisions of the Retaliatory Employment Discrimination Act. The Employment Discrimination Bureau has accepted complaints from H-2A workers in North Carolina regarding violations of the Retaliatory Employment Discrimination Act.

5.6 Prevention of Industrial Injuries and Occupational Illnesses

5.6.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners allege that North Carolina agricultural employers violate federal and state safety and health standards, which require them to provide drinking water and disposable

⁴⁸ A bipartisan federal commission, independent of the U.S. Department of Labor, that is responsible for enforcing federal laws related to employment discrimination on the grounds of race, color, religion, sex (including

pregnancy), origin, age (40 years or more), disability or genetic information.

cups in the fields. In many cases, supervisors charge workers for the water or beverages they drink.⁴⁹

The petitioners contend that many fields in North Carolina lack portable sanitary facilities and sinks, which are supposed to be provided for workers in fields where they work for more than three hours continuously.

According to the petitioners, H-2A workers in North Carolina inhabit dwellings that have no water or heat and are infested with rats. The petitioners complain that the North Carolina Department of Labor intervenes belatedly and imposes very few penalties on H-2A employers, even though they have a history of violating safety and health standards.⁵⁰

They assert that the North Carolina Department of Labor does not conduct adequate investigations into illnesses related to pesticide exposure. The petitioners claim that investigations have been tardy, that no samples were taken, and that sick workers were not interviewed.⁵¹

5.6.1.1 Obligations of the United States under the NAALC

In the NAALC, the governments committed to “Prescribing and implementing standards to minimize the causes of occupational injuries and illnesses” in labor principle 9, *Prevention of occupational Injuries and Illnesses*.

In connection with the petitioners’ allegations that workers do not have the right to the prevention of occupational injuries and illnesses, the U.S. Government has the following obligation under the NAALC:

- *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*
- *Article 3. Government Enforcement Action:*
 - “1. *Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, ... such as:*

⁴⁹ As part of the supplemental information submitted on June 18, 2004, the petitioners sent documents related to H-2A workers’ complaints about the lack of water in the fields and the fact that they were charged a dollar for the water or beverages they drank. The petitioners complain that in these cases the North Carolina Department of Labor acted negligently by imposing penalties that were later reduced, or by refusing to investigate.

⁵⁰ As part of the supplemental information submitted on June 18, 2004, the petitioners sent documents related to three complaints by H-2A workers about housing that did not meet Department of Labor standards.

⁵¹ As part of the supplemental information submitted on June 18, 2004, the petitioners sent documents related to two cases of H-2A workers becoming ill due to exposure to pesticides. They allege that these investigations were deficient.

- a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - g) *Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.*
2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*
- *Article 4. Access by Private Individuals to Proceedings:*
 1. *“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*
 2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
 - a) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*
 - b) *collective agreements, can be enforced.”*
 - *Article 5. Procedural Guarantees:*

“1. Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

 - a) *such proceedings comply with due process of law;*
 - d) *such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.”*

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public.”

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

a) Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

b) Promoting public education regarding its labor law.”

5.6.1.2 Applicable Labor Legislation

Seasonal agricultural workers with H-2A visas in North Carolina have the right to the prevention of occupational injuries and illnesses under the statutes and standards governing occupational safety and health of the North Carolina Department of Labor, which are administered by the Division of Occupational Safety and Health of that state. The Occupational Safety and Health Act of 1970 guarantees healthy and safe working conditions for all workers. The Occupational Safety and Health Administration of the U.S. Department of Labor and its local offices in 22 states, including North Carolina, which enforce state plans approved by the federal Occupational Safety and Health Administration, share this responsibility.

According to Section 18 of the Occupational Safety and Health Act of 1970, the states administering an occupational safety and health program approved by the Occupational Safety and Health Administration, or a state plan, must adopt compliance standards and requirements that are at least as effective as those established at the federal level. North Carolina administers a program that is approved, monitored and partly financed by the U.S. Department of Labor. The state is responsible for investigating accidents, responding to complaints about safety and health, investigating complaints of discrimination, and guaranteeing access to information on safety and health, exposure to hazardous or toxic agents, and workers’ legal rights and obligations.

The federal Occupational Safety and Health Administration standard that applies to the arguments presented in the public communication is the Temporary Labor Camp Standard (29 CFR 1910.142), which regulates lodging, lighting, the water supply, sanitary facilities, sinks, showers, laundry, garbage disposal and insect and rodent control. Although the monitoring of compliance with responsibilities related to seasonal agricultural labor was transferred to the Wage and Hour Division of the U.S. Department of Labor, North Carolina opted to maintain its authority over such compliance within the state through its state occupational safety and health program.

The Agricultural Safety and Health Bureau of the North Carolina Division of Occupational Safety and Health is responsible for compliance with agricultural standards, including the Temporary Labor Camp Standard. The state standard is stricter than the federal one. The Agricultural Safety and Health Bureau of North Carolina is in charge of inspecting housing before occupancy. Any problem related to housing that is identified during the inspection

may result in citations and penalties by the North Carolina Occupational Safety and Health Administration.

The latter agency conducts inspections all over the state to make sure that employers meet occupational safety and health requirements. For migrant workers and temporary labor camps, the Agricultural Safety and Health Bureau conducts both pre-occupancy inspections of housing and compliance inspections.

Migrant worker housing must be registered, and employers must notify the Agricultural Safety and Health Bureau of their intention to house these workers.

Workers, including H-2A migrant workers, who file complaints about their workplaces or who exercise their occupational safety and health rights under state or federal legislation are protected against discrimination and may file their complaints with either the state or the federal Occupational Safety and Health Administration.

5.7 Compensation for Industrial Injuries or Occupational Illnesses

5.7.1 Arguments of Petitioners in Public Communication MEX 2003-1

According to the petitioners, H-2A workers should be covered by an insurance policy that entitles them to compensation if they are injured on the job. However, they claim that H-2A employers in North Carolina frequently discourage workers from signing the forms required to adjudicate claims for compensation. The petitioners allege that employers in North Carolina have been known to send H-2A employees with work injuries back to Mexico, even before they have received any medical treatment.⁵² In other cases, H-2A workers have their treatment for on-the-job injuries partially or totally interrupted. According to the petitioners, the insurance carriers are probably not willing to cover medical expenses outside of U.S. territory.

They state that when workers file claims for occupational injuries or illnesses, H-2A employers generally contest the claims, and in the meantime the workers are sent back to their country of origin. As a result, the case remains unresolved. These workers have difficulty consulting their U.S. attorneys or attending hearings held in the United States.

The petitioners contend that the U.S. Department of labor and the North Carolina Industrial Commission⁵³ have failed to make the necessary efforts to adjust or modify workers' compensation programs to meet the needs of H-2A workers.

5.7.1.1 Obligations of the United States under the NAALC

According to the NAALC, the governments committed to "The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment" in labor principle 10, *Compensation in cases of occupational injuries and illnesses*.

⁵² As part of the supplemental information submitted on June 18, 2004, the petitioners sent documents related to the cases of two H-2A workers who allegedly suffered retaliation by their employers and the North Carolina

Growers Association for consulting Legal Services about a work injury and filing a workers' compensation claim.
⁵³ State agency responsible for administering workers' compensation insurance.

In connection with the petitioners' allegations that workers do not have the right to compensation for occupational injuries and illnesses, the U.S. Government is obligated under the NAALC to:

- *Article 2. "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."*
- *Article 3. Government Enforcement Action:*
 1. *"Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - g) *Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."*
 2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*
- *Article 4. Access by Private Individuals to Proceedings:*
 1. *"Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*

2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*

- a) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and*
- b) *collective agreements, can be enforced.”*

- *Article 5. Procedural Guarantees:*

1. *“Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:*

- d) *such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.*

2. *Each Party shall provide that final decisions on the merits of the case in such proceedings are:*

- b) *made available without undue delay to the parties to the proceedings and, consistent with its law, to the public.*

3. *Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.*

5. *Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.*

6. *Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.”*

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

- a) *Ensuring that public information is available related to its labor law and enforcement and compliance procedures”;*

5.7.1.2 Applicable Labor Legislation

Oversight of workers' compensation is the responsibility of state government agencies. Neither the federal Occupational Safety and Health Administration nor state offices of

occupational safety and health have any authority or responsibility with respect to workers' compensation. Prior to the issuance of the H-2A certification, the Employment and Training Administration of the U.S. Department of Labor must be satisfied that the workers have workers' compensation insurance. In North Carolina, compensation of H-2A workers is administered and regulated by the North Carolina Industrial Commission.

The petitioners state that H-2A workers who have filed a legal case in the United States and are represented by counsel must remain represented even if they return to their country of origin. Because of the kind of visa they have, these workers are prevented from participating effectively at each stage of the litigation. However, in the majority of the cases in which the Department of Labor or attorneys represent the worker, the worker does not need to be present for litigation to continue.

In some cases involving foreign workers, the Wage and Hour Division has worked with embassies and consulates to locate workers and pay them compensation and back wages, because many of them are no longer in the United States. For example, in the case of *Reich vs. Monfort, Inc.*, 144.3d 1329 (10th Circ. 1998), the District Court ordered the employer to hire an independent supervisor to work closely with Mexican authorities to locate thousands of workers who could not be paid their back wages because the employer could not find them after they returned to Mexico. The Court ordered Monfort to keep the supervisor on staff for at least five years. In another example, after an enforcement initiative involving daycare centers, the consulate supported the Wage and Hour Division in locating many of the H-2A workers who were entitled to a share of more than \$200,000 in back pay.

5.7.2 Arguments of Petitioners in Public Communication MEX 2005-1

The petitioners argue that one of them, Dan Morales, was hired with an H-2B visa to pack watermelon in the states of Arkansas and Texas. Because he became ill and could no longer perform that work, he was assigned to operate a forklift, even though he stated he did not know how to do it. Later, the worker suffered an accident with the forklift, leading to the amputation of his leg.

Mr. Morales did not know he had the right to receive workers' compensation benefits or to file a complaint against his employer. Several private attorneys refused to represent him in his compensation case, claiming he was not entitled to it. At the local legal services office, when it was discovered that he had an H-2B visa, he was told he did not qualify to receive assistance from that office. He asked for help from the Department of Labor and received no response. Finally, Morales filed a compensation claim against the employer, but he entered into a settlement in which he received only \$15,000 and waived all his rights to take any further action against the employer.

The petitioners point out that H-2B workers are entitled to mechanisms for the prevention of injuries and illnesses under the Occupational Safety and Health Act. However, state authorities conduct limited inspections to verify employer compliance with safety and health legislation.

Furthermore, often H-2B workers do not file claims with the Occupational Safety and Health

Administration for violations of occupational safety and health regulations for fear of being blacklisted and never hired again. H-2B workers are unaware of the procedures to follow in order to exercise their rights.

The petitioners allege that it is difficult to pursue claims for work injuries after leaving the United States, and as H-2B workers, they are not eligible for the free advice and representation offered by the Legal Services Corporation.

In addition, the petitioners state that because they were employed in agricultural activities, they should have received H-2A visas. In this way, they would have the right to be represented by attorneys in legal aid programs financed by the Legal Services Corporation. However, they were given H-2B visas, putting them at a disadvantage vis-à-vis H-2A workers.

5.7.2.1 Obligations of the United States under the NAALC

According to the NAALC, the governments committed to “The establishment of a system providing benefits and compensation to workers or their dependents in cases of occupational injuries, accidents or fatalities arising out of, linked with or occurring in the course of employment” in labor principle 10, *Compensation in cases of occupational injuries and illnesses*.

In connection with the petitioners’ allegations that workers do not have the right to compensation for occupational injuries and illnesses, the U.S. Government is obligated under the NAALC to:

. *Article 2. “Affirming full respect for each Party’s constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt ... its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”Article 3. Government Enforcement Action:*

1. “Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:

- a) Appointing and training inspectors;*
- b) Monitoring compliance and investigating suspected violations, including through on-site inspections;*
- c) Seeking assurances of voluntary compliance;*
- d) Requiring record keeping and reporting;*
- e) Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*

g) Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.”

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

- *Article 4. Access by Private Individuals to Proceedings:*

2. “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.

3. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:

c) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and

d) collective agreements, can be enforced.”

- *Article 5. Procedural Guarantees:*

1. “Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

4. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. *Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.*

- *Article 7. Public Information and Awareness*

“Each Party shall promote public awareness of its labor law, including by:

a) Ensuring that public information is available related to its labor law and enforcement and compliance procedures”;

5.7.2.2 Applicable Labor Legislation

The states operate with safety and health plans and programs derived from the Occupational Safety and Health Act, which requires employers to provide information and training on risks, injury prevention methods, and relevant standards that apply to their workplace, in a work that the workers understand. They must also: a) maintain or adopt optimal conditions for protecting workers; b) learn and apply the applicable standards; and c) provide safety equipment and make sure workers use it whenever necessary.

Workers who have suffered violations of their occupational safety and health rights may file a complaint with Occupational Safety and Health Administration. Employers may not discriminate or take action against workers who exercise their right to ask for an inspection at their workplace.

At the state level, they can also file complaints about unsafe working conditions with the competent state entities.

Monitoring compliance with workers' compensation benefits for H-2B workers is the responsibility of state governments in certain states of the United States. Neither the federal Occupational Safety and Health Administration nor the state agencies have any authority or responsibility for paying benefits; they merely enforce compliance.

In the case of Idaho, workers' compensation is covered in Title 72 of the Idaho Statutes, which requires all employers to guarantee compensation for their workers in the case of injuries, either through insurance carriers or by covering the expenses themselves. The Idaho Industrial Commission is a government agency that is responsible for regulating workers' compensation, resolving disputes between injured workers and insurance carriers, and guaranteeing that employers have private insurance coverage for their employees.

In the state of Colorado, it is private insurers, not the government, that pay compensation to workers. The Colorado Department of Labor and Employment has a Division of Workers' Compensation that is charged with providing information about benefits for workers, resolving disputes between injured workers and employers or insurance carriers, and following up on complaints about compensation payment.

In the state of Arkansas, the Constitution (Section 11-9-4) requires employers to guarantee compensation for workers who suffer accidents or illnesses on the job, either through private insurance coverage or by demonstrating to the Arkansas Workers' Compensation Commission that they have sufficient funds to meet that responsibility. This commission is responsible for monitoring compliance with the employers' obligation. In any case, the employer must post information about this right and contact information for the insurance carrier in the workplace.

5.8 Protection of Migrant Workers

5.8.1 Arguments of Petitioners in Public Communication MEX 2003-1

The petitioners contend that the exclusion of H-2A migrant workers from the rights granted under the *National Labor Relations Act* and the Migrant and Seasonal Agricultural Worker Protection Act denies them the legal protection that farm workers who are U.S. nationals enjoy. Because they are not covered by these two laws, H-2A migrant workers are not authorized to file suits in U.S. District Courts to have their rights recognized.

Because of the foregoing, H-2A workers do not have access to justice, in violation of the provisions of NAALC Articles 3, 4 and 5. The National Labor Relations Act and the Migrant and Seasonal Agricultural Worker Protection Act enable seasonal migrant workers who are U.S. nationals to file suit in U.S. District Courts, and they authorize the courts to order the payment of pay monetary compensation or statutory damages by employers who violate or fail to honor workers' labor rights.

According to the petitioners, H-2A migrant workers must turn to law firms financed by the Legal Services Corporation because they cannot afford to hire private counsel. However, the U.S. Congress prohibits free legal aid programs funded by the Legal Services Corporation from filing class action litigation. This prohibition is a substantial impediment to H-2A migrant workers, who normally file class action suits, in the exercise of their rights and gaining access to justice.

The petitioners say that H-2A workers are not covered by public social security programs in the United States because of their migrant status, and therefore they are ineligible for long-term disability benefits. Moreover, these workers do not qualify to receive public assistance from government programs in that country.

The petitioners point out that agricultural producers can transfer workers from one workplace to another, while H-2A workers, unlike other farmworkers, have no right to change employers. H-2A workers are not free to sever the employment relationship and seek other jobs in the United States. If the worker quits, he or she must leave the United States or remain as an "unauthorized" worker subject to deportation. Workers who would like to be hired for the next season depend on the employer to guarantee them a visa for that season.

5.8.1.1 Obligations of the United States under the NAALC

In the NAALC, the governments committed to "Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions."

With respect to the petitioners' allegations that they have no access to justice or to the protection of laws that cover U.S. nationals, the U.S. Government has the following obligations under the NAALC:

- *Article 2. "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light."*
- *Article 3. Government Enforcement Action:*
 1. *"Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - f) *providing or encouraging mediation, conciliation and arbitration services; or*
 - g) *initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."*
 2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*
- *Article 4. Access by Private Individuals to Proceedings:*
 1. *"Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*
 2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*
 - a) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers; and*

b) collective agreements, can be enforced.”

- *Article 5. Procedural Guarantees:*

1. “Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

a) such proceedings comply with due process of law;

b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;

c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and

d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

a) in writing and preferably state the reasons on which the decisions are based;

b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and

c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

7. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law

distinct from its system for the enforcement of laws in general.

8. For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement."

- *Article 6. Publication:*

1. *"Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.*

2. *When so established by its law, each Party shall:*

- a) *publish in advance any such measure that it proposes to adopt; and*

- b) *provide interested persons a reasonable opportunity to comment on such proposed measures."*

- *Article 7. Public Information and Awareness:*

"Each Party shall promote public awareness of its labor law, including by:

- c) *Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

- d) *Promoting public education regarding its labor law."*

5.8.1.2 Applicable Labor Legislation

According to the U.S. NAO, H-2A workers may receive free legal services in the United States and may file class action suits. For example, that country's congress established the Legal Services Corporation, a non-governmental, non-profit organization that is not a federal agency and whose employees are not federal employees. This organization's purpose is to provide low-income U.S. citizens with access to legal assistance. To meet this responsibility, the Legal Services Corporation funds approximately 134 local legal aid programs, with more than 900 offices throughout the country serving every county in the United States. The regulations of the Legal Services Corporation specifically provide that H-2A workers may receive their legal assistance on matters related to wages, housing, transportation and other labor rights included in the employment contract under which the non-immigrant worker was admitted to the country.

The Legal Services Corporation's regulations prohibit the use of its funds for filing or participating in class action suits. Law school programs and pro bono activities of law firms make legal services available to H-2A workers who have complaints about similar services, meaning that they are represented collectively. In addition, the Department of Labor can file actions on behalf of and in representation of workers, either as individuals or as groups, for

violations of the Fair Labor Standards Act, the H-2A program, the Migrant Seasonal Agricultural Worker Protection Act and other laws, regardless of their immigration status. Therefore, H-2A workers in the United States have the right to an immigration status [sic]. Therefore, H-2A workers in that country have the right to be represented by counsel, including government and social services legal advisers, and to act on their own behalf or on behalf of other H-2A workers who are in a similar situation.

The Wage and Hour Division has a toll-free long-distance phone line for workers who wish to report an alleged violation of their rights. The calls are forwarded to the corresponding agencies or to the closest Wage and Hour Division office. The center receiving these calls can communicate with persons who do not speak English. In addition, an investigator in the office in Raleigh, North Carolina, speaks Spanish, as do 300 others throughout the United States. Moreover, the Wage and Hour Division has a number of different support materials, information brochures and cards in Spanish and other languages explaining workers' rights. These materials are distributed among foreign countries' consulates and by community and church organizations that serve these workers. Because of the alliances between the Wage and Hour Division and many of these consulates and organizations, some of them have been trained in basic aspects of the laws enforced by the Wage and Hour Division.

5.8.2 Arguments of Petitioners in Public Communication MEX 2005-1

The petitioners state that the U.S. Government prevents certain migrant workers (those with H-2B visas) from accessing not only legal services financed by the federal government, but also those financed by state and municipal governments, charitable organizations and other private donors.

Migrant workers who are not able to receive assistance include many who are legally in the United States with work authorization, as well as the majority of undocumented migrants, including: "workers who have been recruited and brought to the United States by their employers under the H-2B visa program for non-agricultural employees."

Prohibiting lawyers that receive any government funds from advising legal foreign workers excludes such workers from any opportunity to enforce the rights they theoretically enjoy under U.S. law, and therefore violates the country's NAALC obligations.

5.8.2.1 Obligations of the United States under the NAALC

In the NAALC, the governments committed to "Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions" in labor principle 11, *Protection of migrant workers*.

In connection with the petitioners' assertions that some employers take steps to prevent their workers from reporting violations to the authorities, and that the workers do not have access to mechanisms for enforcing their rights, the United States has the following obligations under the NAALC:

- *Article 2. “Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*

- *Article 3. Government Enforcement Action:*

1. “Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:

- a) Appointing and training inspectors;*
- b) Monitoring compliance and investigating suspected violations, including through on-site inspections;*
- c) Seeking assurances of voluntary compliance;*
- d) Requiring record keeping and reporting;*
- e) Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
- f) Providing or encouraging mediation, conciliation and arbitration services; or*
- g) Initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.”*

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

- *Article 4. Access by Private Individuals to Proceedings:*

1. “Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.

2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:

- c) its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers; and*
- d) collective agreements, can be enforced.”*

- *Article 5. Procedural Guarantees*

1. *“Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:*

- a) such proceedings comply with due process of law;*
- b) any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;*
- c) the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and*
- d) such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.*

2. *Each Party shall provide that final decisions on the merits of the case in such proceedings are:*

- a) in writing and preferably state the reasons on which the decisions are based;*
- b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and*
- c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.*

3. *Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.*

4. *Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.*

5. *Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.*

6. *Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.*

7. *Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general.*

8. *For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement.*"

- *Article 6. Publication:*

1. *"Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.*

2. *When so established by its law, each Party shall:*

a) *publish in advance any such measure that it proposes to adopt; and*

b) *provide interested persons a reasonable opportunity to comment on such proposed measures."*

- *Article 7. Public Information and Awareness:*

"Each Party shall promote public awareness of its labor law, including by:

e) *Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and*

f) *Promoting public education regarding its labor law."*

5.8.2.2 Applicable Labor Legislation

According to the Fair Labor Standards Act, the labor protections afforded to U.S. nationals also cover H-2B migrant workers. The workers can file complaints with the Wage and Hour Division of the Department of Labor to seek enforcement of these general labor protection laws.

The Wage and Hour Division has a form in different languages that enables employers to meet the requirement of notifying their workers of the terms and conditions of employment. The Migrant and Seasonal Agricultural Worker Protection Act requires employers to disclose the terms and conditions of employment to migrant workers and day laborers at the time of recruitment and to seasonal workers when employment is offered, in writing if requested.

In addition, as indicated in section 5.8.1.2, according to the law passed by the U.S. Congress⁵⁴ to create the Legal Services Corporation, a non-profit, non-governmental organization, it is not a federal agency and its employees are not federal employees. The Legal Services Corporation is funded by a direct annual allocation from the U.S. Congress, and it finances about 134 non-profit legal aid programs with more than 900 offices throughout the United

⁵⁴ Legal Services Corporation Act of 1974, last amended in 2000.

States. These programs are intended to provide legal counsel to low-income U.S. citizens and to certain groups of migrants, including workers with H-2A visas. However, the Legal Services Corporation Act and the Legal Services Corporation Appropriations Act prohibit any legal aid program receiving funds from the Legal Services Corporation from offering their services to migrant workers with H-2B visas.

5.8.3 Arguments of Petitioners in Public Communication MEX 2011-1

The petitioners indicate that migrant workers frequently receive less rights protection of their rights than U.S. nationals, even though the law requires minimum labor standards for all workers alike in that country. One limitation is the lack of language skills, because workers receive information about their employment in English.

Another obstacle faced by the petitioner workers in using administrative or judicial proceedings to enforce their rights is the fact that they work seven days a week and frequently change job sites. Not only that, but unlike U.S. nationals, they must work for a single employer and, if they are fired in retaliation for complaining about conditions, they are required to return immediately to their country of origin (they cannot change employers).

Moreover, the petitioners argue that in February 2012, the U.S. Department of Labor issued amendments to the regulations governing the H-2B visa program that have two consequences:

1. The procedure employers must follow to participate in the program now requires them to show proof, not just state, that they were unable to find U.S. nationals who could perform certain jobs.
2. With respect to seasonal workers' rights, now employers must: disclose the job order, which contains the general terms of employment, to workers in a language they understand; issue a check stub every payday; display posters with information on workers' rights at the workplace; provide the Department of Labor with data on the recruiters they use to hire migrant workers and the agreements they have with such recruiters; issue the tools and equipment needed to perform the job to workers at no cost; refrain from intimidating, forcing, blacklisting, firing or discriminating against any worker who has exercised his rights under the H-2B visa program; and reimburse workers who complete 50% of their contract for the total cost of their travel to the United States and back to their country of origin.

However, according to the petitioners, even after these amendments enter into force, the Department of Labor will still lack the capacity to enforce them. Furthermore, although these amended regulations were supposed to enter into force in April of 2012, this did not happen and will not happen until a lawsuit filed by some employers' associations and by the U.S. Chamber of Commerce is decided. If the lawsuit is decided in favor of the plaintiffs, the amendments to the regulations will be invalidated.

Because the petitioners work seven days a week and carnivals frequently change locations, they cannot enforce their rights through administrative or judicial proceedings. The workers'

mobility hampers investigation and law enforcement. For example, petitioner Garcia, who worked for Reithoffer, was in Florida, North Carolina, New York and Maine over a short period of time, which made it difficult for him to gain access to social services agencies to exercise his rights.

The petitioners argue that they must work for a single employer (they cannot change employers), which makes it easy for employers to retaliate against workers and fire them for complaining about conditions. If workers file complaints, employers can not only fire them but also force them to return immediately to their country of origin, since the employers are required by law to report them to Immigration and Customs Enforcement (ICE). This becomes a constant threat to workers, because ICE can deport them merely because an employer has requested it.

In addition, the petitioners state that migrant workers who complain are included on blacklists, which prevents them from obtaining work with another employer.

Legislation governing migrant workers in the United States does not include any regulations allowing a worker with an H-2B visa to remain in the country or work for another employer if he or she is legally discharged. These situations do not occur with workers who are U.S. nationals.

The petitioners also point out that although the Fair Labor Standards Act regulates matters related to wages and overtime, certain businesses such as fairs and carnivals may be exempt from its provisions if they show convincing evidence that they meet certain requirements.⁵⁵

However, when an employer claims an exemption from the Fair Labor Standards Act, there is very little government oversight to ensure that these requirements are met. The lack of government oversight means that H-2B migrant workers in the fair and carnival industry are more vulnerable and receive wages less than those required under the Fair Labor Standards Act.

Moreover, the petitioners state that U.S. legislation denies H-2B workers the opportunity to receive free legal counsel from organizations set up for that purpose if they are financed by the federal Legal Services Corporation. Such services are the only recourse for H-2B migrant workers to obtain representation, yet they are not entitled to them.

Therefore, the petitioners argue, the Department of Labor does not enforce labor laws or minimum employment standards as effectively for migrant workers as it does for U.S. nationals. Under the NAALC, the United States pledged to enforce its laws effectively, without discriminating against migrant workers. Therefore, the petitioners believe the United States is not fulfilling its commitments.

⁵⁵ According to Section 213(a)(3) of the U.S. Code, concerning exceptions to the Fair Labor Standards Act, "any employee employed by an establishment which is an amusement or recreational establishment ... shall be exempt if (A) it does not operate for more than seven months in any calendar year, or B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year ..."

5.8.3.1 Obligations of the United States under the NAALC

In the NAALC, the governments committed to “Providing migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions” in labor principle 11, *Protection of migrant workers*.

The petitioners indicate that migrant workers frequently receive less rights protection than U.S. nationals, even though the law requires minimum labor standards for all workers alike. In this connection, the United States has the following obligations under the NAALC:

- *Article 2. “Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”*
- *Article 3. Government Enforcement Action:*
 1. *“Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, such as:*
 - a) *Appointing and training inspectors;*
 - b) *Monitoring compliance and investigating suspected violations, including through on-site inspections;*
 - c) *Seeking assurances of voluntary compliance;*
 - d) *Requiring record keeping and reporting;*
 - e) *Encouraging the establishment of worker-management committees to address labor regulation of the workplace;*
 - f) *providing or encouraging mediation, conciliation and arbitration services; or*
 - g) *initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.”*
 2. *Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.*

- *Article 4. Access by Private Individuals to Proceedings:*

1. *“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.*

2. *Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:*

- e) *its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers; and*

- f) *collective agreements, can be enforced.”*

- *Article 5. Procedural Guarantees:*

1. *“Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:*

- a) *such proceedings comply with due process of law;*

- b) *any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;*

- c) *the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and*

- d) *such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.*

2. *Each Party shall provide that final decisions on the merits of the case in such proceedings are:*

- a) *in writing and preferably state the reasons on which the decisions are based;*

- b) *made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and*

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3. *Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.*

4. *Each Party shall ensure that tribunals that conduct or review such proceedings are*

impartial and independent and do not have any substantial interest in the outcome of the matter.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

7. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general.

8. For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement.”

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1. “Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

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a) publish in advance any such measure that it proposes to adopt; and

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“Each Party shall promote public awareness of its labor law, including by:

g) Ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

h) Promoting public education regarding its labor law.”

5.8.3.2 Applicable Labor Legislation

According to the *Fair Labor Standards Act*, the labor protections afforded to U.S. nationals also cover H-2B migrant workers. The workers can file complaints with the local office of the Wage and Hour Division of the Department of Labor.

The Wage and Hour Division has a form in different languages that enables employers to meet the requirement of notifying their workers of the terms and conditions of employment. The Migrant and Seasonal Agricultural Worker Protection Act requires employers to disclose the terms and conditions of employment to migrant workers and day laborers at the time of recruitment and to seasonal workers when employment is offered, in writing if requested;

Furthermore, as indicated in sections 5.8.1.2 and 5.8.2.2, according to the law passed by the U.S. Congress⁵⁶ to create the Legal Services Corporation, a non-profit, non-governmental organization, it is not a federal agency and its employees are not federal employees. The Legal Services Corporation is funded by a direct annual allocation from the U.S. Congress, and it finances about 134 non-profit legal aid programs with more than 900 offices throughout the United States. These programs are intended to provide legal counsel to low-income U.S. citizens and to certain groups of migrants, including workers with H-2A visas. However, the Legal Services Corporation Act and the Legal Services Corporation Appropriations Act prohibit any legal aid program receiving funds from the Legal Services Corporation from offering their services to migrant workers with H-2B visas.

The U.S. Government claims that mechanisms do exist for migrant workers with H-2B visas to enforce their rights through administrative and judicial proceedings, even though they cannot turn to organizations financed by the Legal Services Corporation. For example, programs such as the Immigrant Justice Project of the Southern Poverty Law Center can legally represent low-income migrant workers, including those with H-2B visas, free of charge. In addition, the Wage and Hour Division has implemented certain mechanisms to enable H-2B migrant workers to receive information about their rights, such as a toll-free telephone service with translators in more than 176 languages, and pamphlets in English and Spanish that provide this information for all workers with H-2B visas.

⁵⁶ *Legal Services Corporation Act of 1974, last amended in 2000.*

VI. Recommendation

Under the NAALC, the governments of Mexico, the United States and Canada agreed to objectives such as improving working conditions and standards of living in their territories, promoting the agreed-upon labor principles⁵⁷ to the maximum extent possible, and promoting compliance with and effective enforcement of their respective labor laws.

The agreement provides for public communications as a mechanism for any individual to bring to the governments' attention issues related to the effective enforcement of labor legislation that have arisen in the territory of any of the Parties. This revision report covers three public communications received by the National Administrative Office (NAO) of Mexico, which is part of the International Affairs Unit of the Secretariat of Labor and Social Welfare. In accordance with its regulations, the NAO dealt with these communications together because they raise similar legal matters.⁵⁸

1. Based on the arguments made by the petitioners in the three public communications and by the U.S. Government through the NAO, and pursuant to the regulations of the NAO of Mexico governing the Public Communications referred to in Article 16(3) of the North American Agreement on Labor Cooperation (NAALC), the NAO of Mexico hereby brings to the attention of the U.S. Department of Labor this review report so that in accordance with its internal procedures, the Department of Labor can decide on the appropriate course of action, in terms of its laws and internal practices, to address the petitioners' arguments. Namely, to determine whether the rights of migrant workers with H-2A and H-2B visas have been violated by failing to guarantee full exercise thereof by the workers; failing to take measures to enforce labor legislation; failing to provide adequate access or the corresponding procedural guarantees in proceedings to require enforcement of the law; and failing to inform workers of the laws, regulations and procedures available to them for exercising their rights in relation to:

- Freedom of association and protection of the right to organize;
- Right to collective bargaining;
- Prohibition of forced labor;
- Minimum working conditions;
- Elimination of employment discrimination;
- Prevention of industrial injuries and occupational illnesses;
- Compensation in cases of occupational injuries or illnesses; and
- Protection of migrant workers.

⁵⁷ The labor principles set forth in NAALC Annex 57 are: 1) Freedom of association and protection of the right to organize; 2) The right to bargain collectively; 3) The right to strike; 4) Prohibition of forced labor; 5) Labor protections for children and young persons; 6) Minimum employment standards; 7) Elimination of employment discrimination; 8) Equal pay for women and men, in accordance with the principle of equal pay for equal work in the same establishment; 9) Prevention of occupational injuries and illnesses; 10) Compensation in cases of occupational injuries and illnesses; and 11) Protection of migrant workers.

⁵⁸ Article 10 of the "Regulations of the National Administrative Office (NAO) of Mexico states, with respect to the public communications referred to in NAALC Article 16(3): "The NAO may conduct a single review of multiple public communications on issues related to labor legislation that have arisen in the territory of the same Party if they refer to related legal matters."

2. The NAO of Mexico emphasizes its respect for the NAALC and the general commitment set forth in Article 2 thereof: recognizing the right of each Party “to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations,” and it refrains from making pronouncements about the provisions the petitioners allege impose limits on the rights of agricultural and migrant workers.

3. Within the framework of the NAALC, the NAO of Mexico has reviewed previous public communications regarding violations of migrant workers’ rights (MEX 9801, MEX 9802, MEX 9803, MEX 9804 and MEX 2001-1). In every case, it has recommended that the matters be examined in ministerial consultations between Mexico and the United States. As a result of these consultations, mechanisms have been devised for bilateral collaboration to publicize workers’ rights, some of which are now in force.^[1] However, the recurrence of public communications such as those reviewed in this report could point to a pattern of practice or failure contrary to the protection of migrant workers.

For this reason, this NAO recommends that the Secretary of Labor and Social Welfare of Mexico request ministerial consultations with the U.S. Secretary of Labor under the terms of NAALC Article 22. The ministerial consultations would be for the purpose of gathering more information so as to conduct an exhaustive examination of the actions taken by the U.S. Government to guarantee that migrant workers in its territory enjoy the freedom of association and protection of the right to organize; the right to bargain collectively; the prohibition of forced labor; minimum working conditions, particularly with respect to payment of the minimum wage; elimination of employment discrimination; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries or illnesses; equal protection to that afforded U.S. national; and access to proceedings that enable them to enforce these rights.

^[1]On April 15, 2002, the [Mexican] Secretariat of Labor and Social Welfare and the U.S. Department of Labor announced the Ministerial Consultations Joint Declaration confirming their commitment to vigorous enforcement of labor laws within the limits of their jurisdictions, with a view to protecting all workers regardless of their immigration status. The principle of protecting migrant workers was also addressed in the Ministerial Consultations Joint Declarations related to Public Communications.