Public Communication

Petition to the National Administrative Office of Mexico
Under the North American Agreement on Labor Cooperation

Regarding the failure by the United States to implement and effectively enforce the labor laws applicable to agricultural workers under the H-2A program in the State of North Carolina, United States of America

Submitted by:

Central Independiente de Obreros Agrícolas y Campesinos

and

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I. INTRODUCTION

The federal government of the United States of America is responsible for administering laws and regulations with respect to the recruitment, hiring, transportation, employment, housing and working conditions of the citizens of Mexico who are employed by North Carolina agricultural employers as temporary foreign agricultural workers under the H-2A visa program. The federal government has primary responsibility for implementing and enforcing this temporary-worker program. However, the law and regulations also place some responsibilities for implementation and enforcement on the state government, in this case the State of North Carolina.

The federal and state governments have failed to implement and effectively enforce the labor laws applicable to agricultural workers under the H-2A program. In this manner, the United States of America (hereinafter "U.S.") has failed to comply with Article 3 of the North American Agreement on Labor Cooperation (NAALC). The U.S. has also failed to ensure that the Mexican citizens working on H-2A visas have access to governmental tribunals and the procedures of those tribunals for the enforcement of American labor laws. In this manner, the U.S. has also failed to comply with Article 4.

The conduct of the United States of America, in whole or in part, deprives the workers employed by H-2A program's employers of:

- the freedom of association
- the right to organize
- the right to bargain collectively
- the right to strike
- the right to minimum employment standards
- freedom from employment discrimination on the basis of age, sex and other improper factors
- freedom from occupational injuries and illnesses that could be prevented, and
- compensation in case of occupational injuries and illnesses, and
- the protection of migrant workers required by law.

See NAALC Article 49.

Such conduct also includes the failure to provide the H-2A program migrant workers from Mexico with at least the same legal protection as provided to nationals in the U.S. in respect of working conditions. See NAALC Annex 1, Principle 11.

Further, the U.S. has failed and is failing to strive to improve its domestic labor standards and its labor laws and regulations with respect to the employment of agricultural workers under the H-2A program in North Carolina. See NAALC Articles 2 and 3.

Finally, there have been persistent patterns of failure by the United States of America to

effectively enforce occupational safety and health and minimum wage technical labor standards with respect to the migrant workers in North Carolina under the H-2A visa program. See NAALC Article 27.

As described further below, we request the National Administrative Office of Mexico to undertake:

- cooperative consultations with the National Administrative Office of the United States under NAALC Article 21,
- consultations at the ministerial level under Article 22, and, if resolution of the matters has not been resolved during such ministerial consultations, then the establishment of an Evaluation Committee of Experts, under Articles 23-26, to assist in the study and resolution of these matters,
- additional measures to address the issues raised in this document.

II. STATEMENT OF JURISDICTION

NAO Jurisdiction

Jurisdiction over this matter is based on Article 16(3) of the North American Agreement on Labor Cooperation (NAALC), which provides that the NAO shall review submissions of public communications on labor law matters arising in the territory of another Party. This submission by interested parties is brought to challenge labor law matters, defined in Article 49 of the NAALC, arising in the United States. In particular, the parties filing this submission challenge the failure of the United States to provide migrant workers in a Party's territory with the same legal protection as the Party's nationals in respect of working conditions. *See* NAALC Annex 1 (11). The NAO of Mexico has adopted procedures for such reviews under a Regulation published in the *Diario Oficial de la Federacion* of April 28, 1995.

Ministerial Review Jurisdiction

Jurisdiction lies with the Secretary of Labor and Social Welfare of Mexico under Article 22 of the NAALC to request consultations with the Secretary of Labor of the United States regarding any matter within the scope of this Agreement. The matters raised in this submission are within the scope of the Agreement.

Evaluation Committee of Experts Jurisdiction

Under Article 23 of the NAALC, jurisdiction lies with an Evaluation Committee of Experts (ECE), at the request of any consulting party, to analyze patterns of practice by the United States in the enforcement of its technical labor standards in matters that are trade-related and covered by mutually recognized labor laws. This submission includes technical labor standards as defined in Article 49 of the NAALC, and the matters are trade-related and covered by mutually recognized

labor laws.

Dispute Resolution Jurisdiction

Under Article 29 of the NAALC, jurisdiction lies with an Arbitral Panel, by a two-thirds vote of the Council, to consider the matter where the persistent failure by the United States to effectively enforce its occupational safety and health, child labor or minimum wage technical standards is trade-related and covered by mutually recognized labor laws. This submission includes such matters.

III. STATEMENT OF TRADE-RELATEDNESS AND MUTUALLY RECOGNIZED LABOR LAWS

1. Trade Relatedness

The matters addressed in this submission involves the failure in implementation and enforcement of labor laws in workplaces, firms, companies, and sectors that produce, provide and sell goods that are traded among the territories of the Parties and that compete with goods produced, provided and sold by persons and entities of another Party. Such goods include apples, strawberries and other fruits; cucumbers, sweet potatoes and other vegetables; tobacco; trees and other horticultural products; and other commodities, in both their fresh (or unprocessed) and processed states.

2. Mutually Recognized Labor Laws

The U.S. and Mexico both have laws that address the same general subject matters raised in this submission in a manner that provides enforceable rights, protections or standards. Among other things, the law and regulations of the H-2A visa program, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and 1188 and 20 C.F.R. Part 655 and 29 CFR Part 501, provide for the issuance of visas and establish the wages and working conditions of foreign and domestic workers at employers that utilize the H-2A program.

The law of Mexico provides comparable protections for migrant workers recruited for employment outside of Mexico. There are Mexican laws designed to ensure that Mexican workers receive reasonable pay for their work in the United States, are not charged for travel expenses, have decent housing and are otherwise treated fairly for their work in the United States. For example Article 28 of the Federal Labor Law requires that the work conditions will be recorded in writing and will include specified terms and conditions of employment. Article 28 also provides the cost of transportation, repatriation, transport to the place of origin and nourishment of the worker and his family, as applicable, and all costs which arise from crossing the border and fulfillment of the arrangements of migration, or for any similar concept, will be the exclusive responsibility of the employer. The laborer is to receive the whole salary that belongs to him or her, without any deduction for those concepts. Thus, Mexican law obligates U.S. employers recruiting in Mexico to bear the full costs of the worker's transportation, visas,

and similar costs. In addition, Article 28 specifically provides that the migrant worker will have the right to enjoy, at the work headquarters or close by, available rental or any other form of hygenic and dignified housing."

IV. The Petitioners

This public communication is submitted by the Central Independiente de Obreros Agrícolas y Campesinos (CIOAC) of Mexico on behalf of itself and on behalf of the former and current employees of the North Carolina Growers Association and the members of this Association that employ workers under the H-2A visa program. The contact persons are Federico Ovalle Vaquera and Jose Luis Hernandez. CIAOC's adddress is Anaxságoras No. 732, Colonia Narvarte, Deloegación Benito Juárez, Mexico, D.F., C.P. 03020. Telephone numbers are 52-55- 9116-7444 and 9116-7445.

This public communication is also submitted by the Farmworker Justice Fund, Inc., of the United States of America. Contact persons are Bruce Goldstein, Co-Executive Director, and Virginia Ruiz, staff attorney. Their address is 1010 Vermont Ave., N.W., Suite 915, Washington, D.C. 20005, USA. The telephone number is 202-783-2628. Fax is 202-783-2561. E-mail address is fjf@nclr.org.

V. Factual Background and Legal Framework

A. Agricultural Industry in North Carolina

North Carolina is a major producer of agricultural products. The state's farms had net income in 1998 of $ 2.36 billion, which was third highest of the states in the U.S. A significant portion of this agricultural production comprises labor-intensive crops for which harvest workers are hired. It is first in the nation in the production of tobacco, with 207,800 acres of tobacco land producing, 449 million pounds, worth $789 million in 1999. It also leads the nation in sweet potato production, which is grown on 37,000 acres of land. North Carolina growers and harvesters are second in the nation in the production of cucumbers that are used for pickles, 78,000 tons, and the harvesting of Christmas trees, earning over $92 million in 1999. Additionally, the state is ranked fourth in greenhouse and nursery production, and in production of blueberries and strawberries. Growers also produced 165 million pounds of apples in 1999. (Source: North Carolina Department of Agriculture and Consumer Services).

B. Background on Agricultural Workers

Farmworkers continue to be the lowest paid occupational group in the United States. The Department of Labor has found that three-fifths of farmworkers earn less than the poverty guidelines, and the median income of farmworkers has been stagnant at about $7,500 per year. In addition, farmworkers' average hourly wages have fallen in real terms during the decade ending in 1998. See U.S. Department of Labor, Office of the Assistant Secretary for Policy,

"Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers," Research Report Number 8, March 2000 (hereafter "NAWS 2000 Rept.") at 33-42.

For over the last one hundred fifty years, large agricultural businesses in America have relied heavily on international migrant workers. American agriculture has a long history of repeatedly recruiting new groups of foreign workers, whose economic, political and legal status often restricted the ability of this occupational group to improve its wages and working conditions or gain the labor law protections that other workers received. See Carey McWilliams, Factories in the Field 305-06 (Peregrine Smith 1971 ed.)(1939). See also, Cletus E. Daniel, Bitter Harvest: A History of California Farmworkers 1870-1941 (Univ. of Calif. Press 1981).

During the late 1950's, the *bracero* program annually admitted more than 400,000 Mexican citizens to work on temporary visas as agricultural workers in the United States. Ernesto Galarza, Merchants of Labor 79 (McNally & Loftin 1964). Simultaneously, there were undocumented workers from Mexico who performed farm work (p. 58, 70), and persons who received "green cards" who were admitted to the U.S. from Mexico as immigrants, many of whom were agricultural workers (p. 250).

Today, U.S. agricultural workers continue to be an international migrant labor force. Eighty-one percent of farmworkers in the United States are foreign-born, and almost all foreign-born farmworkers, 95 percent, are from Mexico. Three-fourths of U.S. farmworkers completed their education in Mexico. On average, U.S. farmworkers spent an average of 12 weeks -- almost one fourth of the year -- outside the United States. See NAWS 2000 Report at 5, 14, 24-25.

C. North Carolina Farmworkers

North Carolina is believed to rank fifth in the United States in its number of migrant farmworkers; however, reliable statistics on the actual number of farmworkers in the state are virtually non-existent. The North Carolina Employment Security Commission estimated in 1999 that there were 119,471 farmworkers in the state, of whom 47,860 were estimated to be migrant farmworkers -- those who had left their permanent residences to go to work in North Carolina.

The U.S. Department of Labor authorized the hiring of 10,608 temporary foreign agricultural workers under the H-2A program for North Carolina during the 2000 season. Department of Labor, Report on H-2A Activity for Fiscal Year 2000. This is a marked increase in the use of H-2A labor in North Carolina. For example, the Department of Labor approved only 2,245 H-2A positions for North Carolina in 1991. Today, no other state has as many H-2A workers. These employers, who use the H-2A program, grow a variety of crops and commodities, including cucumbers, tobacco, hay, sweet potatoes, strawberries, tomatoes, grapes and Christmas trees.

A significant percentage of the H-2A workers in North Carolina harvest cucumbers and many of those cucumbers are processed by Mt. Olive Pickle Company in Mount Olive, North Carolina.

The nature of the work and the treatment of the H-2A guestworkers is powerfully affected by the relationship between the growers of the cucumbers and Mt. Olive Pickle. Like many agricultural product processors, Mt. Olive makes significant demands on the growers regarding quality, quantity and timing of the vegetable harvest. Many growers wish to market their produce to Mt. Olive, which is the fourth-largest pickle producer in the United States. Indeed, it is the largest independent pickle company (that is, not owned by a conglomerate) and markets the number one brand of pickles in the southeast and the second-ranking brand of non-refrigerated pickles in the country. Mt. Olive contracts with about 50 cucumber growers for delivery of a specified number of bushels, at a specified purchase price, grown in compliance with Mt. Olive's requirements and standards. These growers, in turn, employ thousands of cucumber pickers during the harvest. Human Rights Watch, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards 151-53 (2000). Substantial labor union organizing, led by the Farm Labor Organizing Committee, AFL-CIO, is occurring at growers that supply Mt. Olive Pickles with cucumbers. Some of the farmworkers' whose freedom of association has been denied or hindered are part of this union organizing campaign. The harvest workers have been demanding that Mt. Olive, as well as the growers, negotiate to reduce the interference with workers' right to organize and to improve wages and working conditions.

H-2A workers are also employed in the Christmas tree industry. North Carolina is the country's second largest producer of Christmas trees, behind Oregon, producing 34 million trees on over 23,000 acres. These workers are employed to cut, shear and bundle the millions of trees exported every year. During this short seven-week season, workers may expect to work 14 to 16 hours a day in bitter cold weather. Indeed, many workers complain of a lack of adequately heated shelter in which they may seek temporary refuge from the cold. Despite record profits for the industry, approximately $100 million in 2001, these workers are often paid less than they were 15 years ago.

In 2001, Christmas tree workers in North Carolina were entitled to receive $7.06 per hour, which was the adverse effect wage rate under the H-2A program for that year. Additionally, such workers are also entitled to overtime wages. However, H-2A workers are frequently denied their overtime pay. The U.S. Department of Labor filed a complaint against the growers in 1998 for their failure to pay overtime wages as required by the Fair Labor Standards Act. However, the case has not been resolved. When the costs to the workers' of traveling to North Carolina are considered, at the beginning of the season some workers effectively earn less than the minimum wage of $5.15 per hour. The Department of Labor has not complied with its own rules regarding payment of the federal minimum wage and workers have been forced to sue on that issue as well.

Additionally, the housing available for Christmas tree workers is often abysmal. Under the H-2A program, growers must provide housing that meets the Labor Department's standards. Although many do, several workers have been forced to occupy makeshift living quarters such as trailers, shacks and abandoned school busses. In one case, workers were housed in the basement of a motel, where they slept on thin mattresses on a concrete floor. The rooms had neither heat nor hot running water. In one case, a worker's room was flooded and his mattress soaked when the

bathroom toilet across the hall overflowed. In another case, workers were housed in an abandoned school building, where the winter wind leaked through the broken windows.

For additional information, see the award-winning, three-part series on the H-2A program, "Desperate Harvest," *Charlotte Observer*, October 30-Nov. 1, 1999.1

D. Recruitment and Hiring of H-2A Workers

Agricultural employers seeking H-2A workers actively recruit and hire such workers in Mexico. Employers typically do this by contracting with, and/or becoming members of, an organization that will act as a labor contractor for them. In exchange for a fee, the contractor will handle all or many of aspects of the recruitment and hiring of the foreign workers and of the process of applying to the United States government for permission to hire foreign workers. Such organizations often are involved, in addition, in the transportation, training, discipline, allocation of workers to jobsites, and other aspects of the workers' employment.

In North Carolina, the North Carolina Growers Association, Inc. (NCGA) is the organization that carries out these services for many of the agricultural employers that use the H-2A program. It is a business devoted primarily to recruiting, hiring and employing workers under the H-2A program. To attract and select Mexican job applicants, the NCGA relies on a recruitment firm based in the United States and that firm's network of Mexican labor recruiters located throughout Mexico. Prospective H-2A workers from Mexico often must pay the recruiter a fee in order to be considered and/or hired for an H-2A job. Workers are also required to pay other costs associated with the recruitment and hiring process, including obtaining a passport, the cost of the H-2A visa itself, and the traveling expenses incurred by having to travel to multiple cities in order to secure the job.

The NCGA also acts as an "employer" of each individual worker employed at H-2A program growers; that is, the NCGA and each farm are the "joint employers" of the workers. However, in an effort to escape legal responsibilities that are owed by employers, NCGA apparently is claiming that it is the "employer" of the H-2A workers only for certain purposes and not for others.

IV. Failure to Comply With the North American Agreement on Labor Cooperation

A. Introduction

As described further below, workers affected by the H-2A temporary foreign agricultural worker program in the United States have been harmed by the failure of the United States to promote compliance with and effectively enforce applicable labor laws, in violation of Article 3. The

1 The articles are available online at http://are.berkeley.edu/APMP/pubs/agworkvisa/charlotteseries.html.

failure to enforce labor laws is especially severe with respect to the freedom of association and the protection of the right to organize, minimum employment standards, and protection of migrant workers. See Article 49, "labor law" definition par. (a), (f) and (k). Such workers also have been denied appropriate access to administrative, quasi-judicial, judicial and labor tribunals, and recourse to appropriate procedures, for the enforcement of United States labor law, in violation of Articles 4 and 5.

In addition, these workers have been harmed by the failure of the United States to comply with its obligation under Article 1 to promote to the maximum extent possible the labor principles in NAALC Annex 1, including the freedom of association and protection of the right to organize (Principle 1); the right to bargain collectively (Principle 2); the right to strike (Principle 3); minimum employment standards (Principle 6), the elimination of employment discrimination on the grounds of age, sex, national origin, race, and disability (Principle 7), and providing migrant workers in the U.S. with the same legal protection as the U.S. nationals enjoy in respect of working conditions (Principle 11).

B. Denial of fundamental freedom of association

1. Right to join and organize labor unions and engage in collective bargaining

Agricultural workers in the United States are specifically excluded from the National Labor Relations Act, the federal law that implements, for almost all other employees, the right to join and organize labor unions, and the right to collectively bargain. 29 U.S.C. 152(3). Because the agricultural workforce for many years has included large numbers of migrant workers from other countries, especially Mexico, this exclusion operates to deprive many migrant workers from Mexico of the same rights that are accorded to non-migrant workers. In addition, the principal labor law for farmworkers, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1800, does not protect employees against discrimination or reprisals for efforts to organize or secure collective bargaining. Most states, including North Carolina, do not offer such protections. In the absence of legal protection for the exercise of the right to organize and collectively bargain, these workers are hindered from utilizing these rights. In practice, the government has failed to prevent employers from interfering with workers' efforts to join unions and organize.

2. Exclusion of H-2A Migrant Workers from the Migrant and Seasonal Agricultural Worker Protection Act Constitutes Denial of Access to Justice and Violation of Freedom of Association

Migrant workers who enter the United States under the H-2A program are excluded explicitly from the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). This is the principal federal employment law for agricultural workers. 29 U.S.C. § 1802(8)(B)(2) and (10)(B)(iii). The AWPA requires employers and their recruiters to disclose all material information about their jobs to workers in a timely manner and accurately. The employers must

comply with the terms of employment (the "working arrangements") that are disclosed and pay all wages when they are due. The Act also contains provisions to ensure safe housing and transportation, where housing and transportation are provided. In addition, AWPA establishes a system of registration or licensing of farm labor contractors and requires employers to use only licensed labor contractors.

This law allows both the workers themselves and the Secretary of Labor to bring cases in the federal district courts of the United States (and not merely the local courts of the states) to enforce workers' rights and seek remedies for violations. For example, a worker who has not been paid the correct wage rate or received other benefits required by the employment contract may file a lawsuit to enforce the contract in federal court. However, AWPA's exclusion of H-2A workers deprives them of the law's substantive protections described above.

This exclusion has many serious effects. H-2A migrant workers, unlike other farmworkers, are not entitled to disclosures about the job terms at the time they are recruited. See 29 U.S.C. § 1821. Indeed, the recruiter need not even inform the worker of which company will be his employer in the United States. The labor contractors that are used by the employers to recruit and hire H-2A workers need not be registered and monitored by the U.S. Department of Labor. An employer of H-2A workers need not ensure that the labor contractor is registered and meets the standards of the law. Such a farm labor contractor may even avoid the sanctions imposed for mistreatment of other farmworkers even though the AWPA was created in response to the widespread abuses associated with the use of labor contractors. See 29 U.S.C. §§ 1811-1814, 1842. The transportation safety standards and vehicle insurance requirements for migrant workers are also inapplicable to H-2A workers. § 1841.

The right under AWPA to sue for an employer's failure to comply with "working arrangements" under section 1822(c) is a much broader concept than the usual right under the laws of the states to challenge a violation of a "contract."[2] In addition, state laws of contract often contain technical defenses that employers may use to defeat the workers' claim, while the right under AWPA generally is not subject to the same technical defenses. H-2A guestworkers are denied the right to bring claims under AWPA and are subjected to the problems associated with state laws. Additionally, AWPA specifically authorizes courts to award workers monetary awards or "statutory damages" for violations of AWPA, even where it is difficult to determine the value of the harm of a particular violation. § 1854. In this way, AWPA creates penalties for employers who would violate the law in ways that harm workers but have little economic cost to the employer. Under the contract law of states, such statutory damages generally are not available and some employers have an incentive to violate the law because there is no meaningful penalty.

This discrimination against H-2A workers deprives migrant workers of the labor law protections other workers enjoy, and therefore violates the United States obligation under Article 1 to promote Principle 11 in the NAALC. This exclusion also denies such workers effective

[2] AWPA specifically states that it is intended to "supplement State law." § 1871.

enforcement procedures and remedies in violation of Articles 3, 4 and 5.

3. Denial of Access to Justice Due to Limitations on Access to Legal Services

As a practical matter, H-2A workers who seek legal counsel to protect their rights must ordinarily seek legal assistance from a law firm that receives at least some of its funding from the federal agency called the Legal Services Corporation (LSC), an entity established by the U.S. Congress to provide funding to local, not-for-profit law firms to serve poor people. Migrant workers under the H-2A program are virtually always poor because the jobs they hold pay wage rates that produce earnings below the poverty level. They cannot afford to pay for legal counsel. In many cases, the H-2A workers are dependent on finding a lawyer who works at one of the offices that receives funds from the LSC.

Congress, in recent years, has severely restricted the kinds of legal representation that may be provided by organizations that receive funding from the LSC. These restrictions generally prevent certain types of activities by the legal assistance organization even if the organization obtains funds from outside sources that would have allowed it to perform such activities. Most importantly, for example, Congress prohibits the legal assistance programs funded by the Legal Services Corporation from filing class action litigation. As a consequence, many H-2A workers cannot file a class action lawsuit merely because they are workers who migrated to the United States to perform work under the H-2A program.

Class actions have been a useful, cost-effective, efficient method of bringing cases on behalf of large groups of individuals that have been mistreated in a similar fashion. Under rules adopted by Congress and the courts, class actions allow representatives to bring claims on behalf of a group. See Federal Rules of Civil Procedure, Rule 23. This avoids the need for every individual affected by a practice to participate actively as a party in the case in every stage of the litigation. Class actions are particularly useful to farmworkers. For many migrant farmworkers, their poverty and their need to travel extensively for work precludes them from actively participating in every stage of litigation. In addition, some farmworkers correctly fear that they will be fired or not hired in a later season under the H-2A program if they file a lawsuit; in a class action the worker can be included without taking an active role. The prohibition on class actions and other restrictions on lawyers working for federally funded programs substantially interfere with the ability of H-2A workers to enforce their rights and obtain access to justice.

4. Denial of freedom to associate or not to associate in violation of Articles 3, 4 & 5

The H-2A law ties workers to the employer that secured their visas. Further, they may only work at that employer for the period of time stated in the visa, which is the period of time requested by the employer. Under some circumstances, businesses that constitute "joint employers" may transfer workers among different businesses, however the workers themselves lack the right to change employers. See 8 U.S.C. § 1184(c)(1), 8 C.F.R. 214.2(h)(5); 20 C.F.R. 655.106(a)-(b); 655.106(c)(2). In addition, if an H-2A worker demands wage rates higher than those offered by

the employer and approved by the Department of Labor, the employer may simply dismiss the worker, which will result in his deportation, and obtain another guest worker. Technically, a worker who demands a wage higher than the minimum set by the government can be considered by the employer to be "unavailable" for employment. Further, once their job ends, or if they quit because the wages are too low, the H-2A workers must depart the U.S. or be deemed "unauthorized" and subject to deportation.

H-2A workers, therefore, lack the freedom to dissociate themselves from their employers and seek other employment in the United States. As a practical matter, they are denied the ability to effectively associate themselves into an organization to demand higher wage rates or better working conditions, because the employers are permitted to reject such demands and immediately secure additional guest workers at the minimum wages and benefits approved under the H-2A program.

In addition, workers who hope to secure work in a following season are dependent on an employer to secure the visa for them for that following season. They have no right to be recalled the following season for satisfactory performance of their jobs. In this status, the workers are reluctant to jeopardize their jobs and the opportunity for work in future seasons by demanding better wages or working conditions.

Additionally, H-2A workers, who frequently live in housing controlled by their employers, often lack the freedom to associate with whom they choose and in confidence, as described further below. If the workers' status were not so limited, they would have a greater ability to ignore the employers' efforts to restrict access to and communication among the workers.

5. Restrictions on communication and association with union representatives and legal services attorneys

H-2A workers are particularly vulnerable to their employers' efforts to restrict their right of freedom to associate and communicate with whom they choose. This is due to their non-immigrant temporary status, the fact that they frequently live in employer-provided housing without access to telephones, and because they generally rely on their employers for transportation and therefore access to virtually all human services. Thus, H-2A employers possess the ability to control workers' access to information and communication with others and exercise that ability in several ways.

In North Carolina, H-2A employers place particular emphasis on restricting worker communication and association with representatives of trade unions and attorneys from legal services organizations. The agricultural employers and the North Carolina Growers Association begin these restrictions as soon as H-2A workers arrive in the state. The NCGA conducts orientation sessions for newly arriving workers at its offices. The NCGA invites selected agencies to participate in the sessions. Union representatives and legal services attorneys are not among those invited to participate. In the area where the orientation sessions take place, the

NCGA prominently posts signs which contain strongly worded admonitions against legal services and which urge workers to avoid any contact with legal services attorneys. Such messages include: "Don't be a puppet of Legal Services", and "Don't believe what Legal Services tells you about the NCGA." During the orientation sessions, NCGA officials state that union representatives and legal services attorneys are, among other things, the enemies of the H-2A program and warn workers to avoid any contact with such individuals. Virtually no other source for legal representation exists for these workers.

Furthermore, NCGA officials have ordered H-2A workers to discard their "Know Your Rights" handbooks into trashcans provided at the orientation site. These handbooks are produced by legal services organizations and are distributed to the workers prior to their arrival in the state. Workers have discarded the booklets, fearing dismissal or retaliation if they do not do so. The handbook that NCGA gives to workers after they discard their "Know Your Rights" booklets is titled "Understanding the Work Contract" and warns:

> FLS [Farmworker Legal Services] has a hidden motive when they approach you. They say that they are your friends and they are concerned about your rights and well being, but in reality their motive is to destroy the program which brings you to North Carolina legally . . . FLS discourage the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. Don't be fooled and allow them to take away your jobs.[3]

"Understanding the Work Contract" accuses Farmworker Legal Services of eliminating the H-2A programs in Idaho, West Virginia, Maryland, and Florida. It states that the 10,000 H-2A workers in Florida were "left with no hope of working again in the United States" and calls the Florida H-2A workers "witnesses of the danger of speaking to FLS."[4] The NCGA comments are intimidation against any worker who thinks about attempting to enforce their legal rights.

6. Restricting Workers' Ability to Receive Visitors in Employer-Provided Housing and on Employer Property

The NCGA and its member growers undercut workers' associational activity with union and other workers' rights advocates, such as attorneys from the farmworker unit of Legal Services. The standard employment contract for H-2A workers in North Carolina – which is written by the

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[3] North Carolina Growers' Association, Inc., "Understanding the Work Contract," pp. 12-13.

[4] Ibid. Florida H-2A workers employed in the sugar cane industry were replaced by mechanized harvesting equipment. Here and in other states cited, growers argued that aggressive legal advocacy forced them to leave the H-2A program and move to mechanical harvesting. More often, growers moved to employ undocumented workers who have no access to legal services. Farmworker advocates respond that growers abandoned H-2A workers rather than comply with the law. For more on the Florida events, see Robert McCabe, "Firms Cutting Cutters," *Fort Lauderdale Sun-Sentinel*, April 28, 1993, p.1D; for Idaho, see Warren Cornwall, "Businesses seek help in immigration roulette," *Idaho Falls Post Register*, May 19, 1997, p. A1.

employers -- contains a clause restricting workers' access to legal advisors or union organizers. The clause reads, "No tenancy in such housing is created; employer retains possession and control of the housing premises at all times . . ."[5] Tenancy would give workers the right, which most tenants of housing have, to receive visitors of their own choosing, including union representatives, legal advisors, medical outreach personnel, religious counselors, and others. Despite this clear breach of the principle of freedom of association, the state law regarding housing for such workers, and the U.S. Department of Labor's obligation to require compliance with state and federal laws, the U.S. Department of Labor has approved the NCGA's contract containing this clause.[6] Similarly, the "Work Rules" issued by the NCGA states that "[T]he employer reserves the right to exclude any person(s) from visiting housing premises."[7]

The employers have inserted additional language saying that "Any eligible individual wishing to exempt themselves from this tenancy condition can exempt themselves from this requirement by filing a request of waiver in writing with the North Carolina Growers Association prior to inhabiting the housing facility and beginning work." A farmworker in Mexico would have to be able to read and understand a dense legal contract and then muster the courage to write a "request of waiver" to avoid its restrictions, something that in practice is simply not going to happen.

On August 13, 1998, Baldemar Velásquez, the president of the Farm Labor Organizing Committee, AFL-CIO and three other FLOC organizers visited a labor camp operated by another member of the NCGA. FLOC is a labor union and has collective bargaining agreements with cucumber, tomato and other growers in several states. Police officers arrested them on charges of trespass, based on the tenancy clause in paragraph 6 of NCGA's standard agricultural work agreement. Although the case was later dismissed, the local sheriff told FLOC organizers that he would continue to arrest anyone accused by North Carolina growers of trespassing. These and other incidents intimidate workers from exercising their freedom of association and violate laws that regulate their employment.

The denial of freedom of association to H-2A workers is further discussed in Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards" (2000), available online at www.hrw.org, at pp. 38-39, 146-160, 173-174, see also 135-145.

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[5]NCGA Agricultural Work Agreement..

[6]Under H2-A regulations, all work contracts must be approved by the Department of Labor.

[7]NCGA "Work Rules," paragraph 12 (Vass, North Carolina, rev. 1/27/97).

7. Blacklisting

In December 1997, the U.S. General Accounting Office (GAO) reported that "'H-2A workers . . . are unlikely to complain about worker protection violations fearing they will lose their jobs or will not be hired in the future.'"[8] The workers' fear of blacklisting -- being denied employment by the H-2A employers as a group -- is well-founded, according to a 1999 Carnegie Endowment for International peace study, which based its findings on interviews conducted in Mexico with current Mexican H-2A workers. The Carnegie Endowment study found that "[b]lacklisting of H-2A workers appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment process. Workers report that the period of blacklisting now lasts three years, up from one year earlier in the decade."[9] Thus, workers are denied their freedom to associate with individual employers based on industry-wide communications among employers participating in the H-2A program.

Mary Lee Hall of Legal Services confirms that the existence of a blacklisting system against workers who complain "is known to every H-2A worker, and I have yet to meet one who did not take this threat seriously."[10] The National Farm Worker Ministry delegation also reports being told by farmworkers that "[a]nyone who had dared to speak up in the past had been blacklisted . . Word is spread of any H-2A workers who have spoken up about their working or living conditions, and those workers are sent back to Mexico and do not get rehired."[11]

Legal Services attorneys and others involved with H-2A workers and the H-2A recruiting process have reported concrete instances of blacklisting. Ventura Gutierrez, a labor organizer in California, told Human Rights Watch that he went to an H-2A recruiting office in Tlaxcala, Michoacan, Mexico and saw a list of names posted on the wall, entitled "*lista negra*" (Spanish for "black list"), indicating which workers were not to be recruited as H-2A farmworkers. Gutierrez reported that a women named Juana writes on a blackboard the names of people who are "blacklisted and therefore shouldn't get visas. Workers have to pay to get off the blacklist."[12]

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[8]Ward, "Growers' Trade," p. 30.

[9]See Demetrios G. Papademetriou and Monica S. Heppel, *Balancing Acts: Toward a fair bargain on seasonal agricultural workers*, International Migration Policy Program, Carnegie Endowment for International Peace (1999), p. 13. Unfortunately, many farm worker advocates believe that this report does not propose effective remedies for the abuses associated with guestworker programs.

[10]Letter from Mary Lee Hall, managing attorney, Legal Services, to Stan Eury, president of the NCGA, July 2, 1999, p. 3.

[11]See "National Farm Workers Ministry Report," pp. 4-5.

[12] HRW telephone interview, Ventura Gutierrez of the Farmworker Network, California, July 19, 1999.

C. Failure of Government to Remedy and Prevent Discrimination and Violations of Labor Laws by H-2A Employers Against Employees and Job Applicants

Workers under the H-2A program are intimidated by the employers from pursuing their rights, but the U.S. Government, especially the Department of Labor, has an independent obligation to ensure that the H-2A employers comply with the legal obligations owed to their employees. See 8 U.S.C. § 1188; 20 C.F.R. Part 655. The U.S. Government has failed to enforce workers' rights under the H-2A program. This failure also discourages workers from making futile and risky efforts to persuade the government to enforce their rights.

1. Government Allows H-2A Employers' Manipulation of the Length of Season to Avoid Obligations to Employees

North Carolina employers that use the H-2A program have violated two basic legal obligations under the H-2A program, according to an agency of the United States Government, but the United States Government has failed seek remedies for, or an end to, these violations. These legal obligations relate to the length of the contract season and the failure of the employers to pay compensation owed upon the workers' completion of work.

Under the H-2A program, employers must provide workers with the opportunity to work for at least three-fourths of the stated period of employment. 20 C.F.R. 655.102(b)(6). This three-fourths minimum-work guarantee offers workers information about their potential earnings for traveling to a distant location and discourages employers from over-recruiting. For example, if the season is an 8-week apple harvest, then the employer must offer the opportunity to work at least 6 weeks. If the employer fails to offer that much work and the worker was available and willing to work, the employer owes the worker compensation for any shortfall in the number of days of work.

In addition, the H-2A program requires employers to pay for the transportation costs of H-2A workers to return to their homes in Mexico (or another country) if they complete the stated contract season. (The employers also must reimburse workers for their costs of transportation to the place of employment after they have worked one-half the season.) 20 C.F.R. § 655.102(b)(5).

The United States General Accounting Office, an agency of the United States Congress, found that over 1,700 H-2A workers of the approximately 5,000 employed in North Carolina in 1996 were considered by the employers to have ceased work or terminated their own jobs prematurely. Consequently, the employers did not pay such workers the transportation costs to return home and did not compensate them under the "three-fourths" minimum-work guarantee. The GAO questioned the legality of this massive failure to pay the three-fourths guarantee compensation and transportation costs. However, the U.S. Department of Labor, which is responsible for enforcing the H-2A law's requirements, has taken no action to enforce these legal obligations. Apparently, employers who have no additional work available, tell some workers that they may

"leave early" and return to Mexico and then report the workers as having left prematurely and refuse to comply with the requirements for workers who complete the season.

2. Denial of Access to Workers' Compensation for Work-Related Injuries and Illnesses:

H-2A workers are covered by workers' compensation insurance that can provide financial benefits in the event of a work-related injury. However, in North Carolina H-2A employers frequently discourage the filing of workers' compensation claims by their H-2A workers and also prevent the workers from consulting with attorneys who could assist them with the claims. North Carolina employers have also been known to send injured H-2A workers back to Mexico even before the workers have received medical attention for the injury. In these and other ways, the H-2A migrant workers' rights under labor law are not enforced, in violation of NAALC.

When claims actually do get filed in North Carolina, growers and their insurers often contest the claims. Meanwhile, the H-2A workers are sent back to Mexico at the season's end while the claim is still pending. These H-2A workers are thus forced into the extremely difficult and costly position of pursuing hearings and appeals from Mexico. Workers who have been returned to Mexico have difficulty consulting with U.S. attorneys handling their claims, attending hearings held in the U.S. and engaging in other activities that would help them pursue their claims.

The workers also frequently experience an interruption in, or complete cessation of, the medical treatment for the injury that is the basis of their claim. Such medical care may be unavailable in Mexico or the insurance company may be unwilling to pay for care received abroad. Unable to work because of their injury, H-2A workers become totally reliant on any potential financial benefits that may result from their workers' compensation claim -- H-2A workers are not covered by Social Security (to obtain long-term disability benefits) and are ineligible for other U.S. governmental public assistance programs because legally they are in "non-immigrant" status. H-2A workers have no governmentally sponsored "safety net" of financial support to help them while their contested claim is being decided. The resulting financial pressures may force the worker to settle his claim for workers' compensation at far below its value. Even if the worker and his attorney are successful in the workers' compensation case, any resulting penalties for the company's denial of the claim are very limited.

The fee system for pursuing workers' compensation claims in North Carolina is a further deterrent to H-2A workers asserting their rights under this law. This fee system is such that the claimant must bear his own attorney's fee except for very limited circumstances, thereby making it virtually impossible for workers with relatively small claims who are sent back to Mexico to pursue their claims, since the costs of pursuing the claim may exceed any potential recovery.

Despite these problems, in North Carolina there has been no systemic effort on the part of the state government, including the North Carolina Industrial Commission - the state agency which administers workers' compensation insurance -- to adjust or modify the workers' compensation

program to accommodate the needs of H-2A workers. Nor has the federal government, which creates the obligation to provide H-2A workers with benefits under the state workers' compensation program (or equivalent benefits) sought to remedy these obstacles. In these ways, the U.S. has failed to comply with labor laws, which include laws providing for compensation in case of occupational injuries and illnesses. NAALC Article 3 and Article 49, labor laws definition, subsection (j). The U.S. also has failed to promote labor principles number 10 and 11 in the NAALC Annex 1, in violation of Article 3.

3. Discrimination on the Basis of Age and Sex by Employers and Their Recruiters

The Department of Labor, under its own H-2A program regulations and under the Equal Employment Opportunity Act, is obligated to ensure that H-2A employers do not discriminate in recruitment and hiring on the basis of age, sex and other inappropriate factors. The Department's failure to implement its own regulations also constitutes a failure to comply with NAALC Article 2 and 3. In the United States, approximately twenty percent of farmworkers, or about 350,000, are women. Approximately a similar proportion of farmworkers are forty years old or older. NAWS 2000 Report at 9. Yet the H-2A employers in North Carolina do not hire a single woman under the program's 10,000 foreign workers. In addition, there is evidence that the NCGA employers discriminate on the basis of age and refuse to hire any person over age forty unless that person has worked in the program before and has been specifically requested to return. In a lawsuit brought by a Mexican worker against the NCGA for refusing to hire him based on his age, the NCGA said that the Age Discrimination in Employment Act does not prevent NCGA from engaging in age discrimination in a foreign country even though the NCGA and the job are located in the United States. In that case, the U.S. Court of Appeals for the Fourth Circuit, which covers North Carolina, agreed with the NCGA. The Department of Labor has taken no action to prohibit H-2A employers from discrimination on the basis of age, race, sex or disability when H-2A employers are hiring in Mexico.

4. Failure to Require Employers and Recruiters to Pay H-2A Workers' Costs of Travel and Visa Fees, As Required By Law

The U.S. Department of Labor is obligated by its own regulations to require H-2A employers to comply with all applicable employment-related laws. 20 C.F.R. § 655.103(b). The labor and immigration law of Mexico requires recruiters of Mexican citizens for jobs abroad to pay the workers' costs of transportation to the jobsite in the foreign country and the costs of visa processing. See La Ley General de Poblacion, Articulos 79 y 80; Reglamento de la Ley General de Poblacion, Articulos 134-136; La Ley Federal del Trabajo, Articulos 28-29, and, by incorporation, Articulo 25.

The Department of Labor fails to enforce these obligations, resulting in the payment of significant fees and other costs by workers to obtain H-2A jobs, in violation of the law. The North Carolina employers retain recruitment firms and seek to claim that the recruitment firms

bear all responsibility for compliance with any laws regarding recruitment, but this arrangement contravenes established law that the Department of Labor is failing to enforce.

V. REQUESTED REMEDIES

We request the National Administrative Office of Mexico to undertake cooperative consultations with the National Administrative Office of the United States under Article 21, and conduct an investigation into the matters discussed in this submission.

More specifically, the investigation should include an analysis of applicable labor laws; a study of the practices under the H-2A temporary foreign agricultural worker program by the North Carolina Growers Association and its members and recruiters; and interviews with workers, government officials, labor union officials, religious organizations, organizations that provide services to farmworkers, and other witnesses in the United States and in Mexico in an atmosphere free from possible employer intimidation or retaliation.

We also request consultations at the ministerial level under Article 22, and that those consultations include communications with the organizations that filed this submission, and labor unions and employers in the North Carolina H-2A program.

We ask that the ministerial consultation develop a comprehensive plan for halting the violations of workers' rights and implementing effective educational and enforcement mechanisms to protect Mexican and U.S. workers' rights under the H-2A guestworker program in North Carolina. The plan should also establish a schedule for revising the laws and regulations that discriminate against migrant workers and deprive them of the rights and freedoms to which they are entitled.

We also request that the ministers insist that the employers negotiate with the workers' labor unions and take specific steps to engage the produce processors through communications with the workers and the growers to ameliorate workers' conditions on an industry-wide basis and remedy violations of the NAALC.

If resolution of the matters has not been resolved during such ministerial consultations, then we request the establishment of an Evaluation Committee of Experts under Articles 23-26 to assist in the study and resolution of these matters.

If the final ECE report does not resolve the issues raised by this submission, we ask the Secretary of Labor and Social Welfare of Mexico to request consultations under Article 27 of NAALC and to utilize the mechanisms specified in Article 28 to reach a satisfactory conclusion. If such consultations do not succeed in resolving the issues, we ask the Secretary to seek the support of the minister of Labor of Canada to request an arbitral panel under Article 29 of the NAALC to consider the persistent pattern of failure of the United States to effectively enforce its occupational safety and health and minimum wage technical labor standards with respect to the

H-2A program in North Carolina.

We request that, during all of the above-mentioned proceedings, the parties that filed this submission and employers and labor unions, be permitted to actively participate and that all procedures be transparent and open to public participation.

Respectfully submitted,

Central Independiente de Obreros Agrícolas y Campesinos

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Dated: February 11, 2003

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