

April 13, 2005

PETITION

on

LABOR LAW MATTERS ARISING IN THE UNITED STATES

submitted to the

NATIONAL ADMINISTRATIVE OFFICE OF MEXICO

under the

NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

REGARDING THE FAILURE OF THE UNITED STATES TO EFFECTIVELY ENFORCE
LAWS PROTECTING THE RIGHTS OF IMMIGRANT WORKERS

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I. Statement of the violation: Through its restrictions on legal services to certain immigrants, the United States violates NAALC Articles 4 and 5, and is failing effectively to enforce its laws in connection with Labor Principles 6, 9, 10 and 11.

The petitioners submit this communication to bring to the attention of the National Administrative Office the facts that, in violation of the obligations of the United States under the North American Agreement on Labor Cooperation (“NAALC”), immigrant workers in the United States suffer serious and frequent violations of their labor rights, and that the United States is failing to take appropriate steps to enforce its laws or remedy those violations. In fact, the individual petitioners have suffered numerous violations of labor law rights afforded them under the laws of the United States, including the rights to earn the statutorily mandated minimum wage, to safe working conditions, to compensation for occupational injuries, to disclosure of the conditions of their employment at the time of hiring, to adherence by the employer to the promised conditions of employment, to safe transportation when the transportation was provided by the employer, and to safe and sanitary housing when the housing was provided by the employer.¹

As a practical matter, the individual petitioners--and many other foreign workers authorized to work in the United States--must secure the assistance of counsel to vindicate most labor rights under United States law. Although similarly situated domestic workers are eligible to receive legal assistance at no cost from legal services programs funded by the federal Legal Services Corporation (“LSC”), the United States forbids legal services lawyers that receive any funding from LSC from representing petitioners,² thus denying international migratory workers an opportunity effectively to enforce their labor law rights in violation of the NAALC. Because

¹ The particulars of the labor violations suffered by the petitioners are described in the Supporting Memorandum at section I. In section II of the Supporting Memorandum, petitioners explain that the labor violations they suffered are typical of conditions encountered by alien workers in the United States.

² See Consolidated Appropriations Act, 2005, Pub. L. 108-447 (2004) (“None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . .”); 45 C.F.R. § 1626.

the individual petitioners were ineligible for assistance from all legal services programs receiving any LSC funding, they all had extreme difficulty obtaining legal representation. As a result, some have lost the opportunity to enforce certain labor rights, and others have gone for years without necessary medical treatment for occupational injuries and without being able to recover wages and other money that their employers owe them.³

The United States' denial of access for many different categories of work-authorized immigrants to legal services lawyers receiving some LSC funding violates Articles 4 and 5, and Labor Principles 6, 9, 10 and 11, of the NAALC. First, the United States violates the basic obligation to ensure that workers are able to enforce their rights. This obligation is set out in Article 4, which requires the United States to "ensure that [persons with a legally recognized interest under its law] 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 . . . can be enforced."⁴

Second, the United States violates its obligation to provide access to the administrative or judicial bodies with power to enforce those rights. This obligation is set out in Article 4, which requires the United States to "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 [United States] labor law."⁵

Third, the United States violates its obligation to ensure that the administrative or judicial proceedings to enforce those rights are fair, not unnecessarily complicated, and not unreasonably expensive. This obligation is set out in Article 5, which requires the United States to:

ensure that its administrative, quasi-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: . . .

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

³ See Supporting Memorandum at § I.

⁴ NAALC, Art. 4, § 2.a. The relevant legal services restrictions are described more fully in the Supporting Memorandum at § III.A.

⁵ NAALC, Art. 4, § 1.

- (d) such proceedings *are not unnecessarily complicated and do not entail unreasonable charges* or time limits or unwarranted delays.⁶

Finally, the United States fails effectively to enforce its laws in connection with the Labor Principles requiring: a) “[t]he establishment of minimum employment standards, such as minimum wages . . . for wage earners,”⁷ b) “[p]rescribing and implementing standards to minimize the causes of occupational injuries and illnesses,”⁸ c) “[t]he 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 the course of employment,”⁹ and d) “[p]roviding migrant workers in [the United States’] territory with the same legal protection as [United States] nationals in respect of working conditions.”¹⁰

United States nationals can and do obtain freely provided legal representation from attorneys supported by public funding from LSC. LSC-funded lawyers represent U.S. nationals when employers fail to pay agreed wages, fail to respect contract terms, provide sub-standard housing, and retaliate against workers trying to enforce their rights. The duty under the NAALC to provide equal treatment to immigrant workers requires that those workers be provided access to the same free representation to enforce their rights in court.

Although to petitioners’ knowledge the NAALC signatories have never before considered whether the NAALC is violated by the denial to immigrant workers of legal representation that is provided to U.S. nationals, the Inter-American Court of Human Rights (IACHR) has determined that a number of other international obligations binding on the U.S. and other Organization of American States members are violated by such a denial of legal representation. In Opinion OC-18/03, the IACHR ruled that the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the Organization of American States Charter, the American Declaration on the Rights and Duties of Man, and the Universal Declaration on

⁶ NAALC, Art. 5, § 1 (emphasis supplied).

⁷ NAALC, Annex 1, Labor Principle 6.

⁸ *Id.*, Labor Principle 9.

⁹ *Id.*, Labor Principle 10.

¹⁰ *Id.*, Labor Principle 11.

Human Rights impose an obligation on the U.S. of equality and non-discrimination in the enforcement of human rights.¹¹ The IACHR ruled that the right to obtain fair hearings before courts and administrative bodies in labor matters is one of the human rights to which principles of equality and non-discrimination apply.¹² Applying these principles, the IACHR ruled that “[w]hen fear of deportation or denial of free public legal services to immigrants prevents immigrants from asserting their rights, the right to judicial protection is violated.”¹³ The petitioners respectfully submit that the NAALC similarly bars the denial of free legal services to immigrant workers in labor matters when such services are provided to U.S. nationals.

II. The petitioners

A. Individual petitioners

The individual petitioners are Alfredo Borjas Gonzalez, Manuel Camero Torres, Basilio Ceja Carballo, Moises Escamilla Perez, Bernabe Feria M., Praxedis Guevara Hernandez, Juan Carlos Lira, Salvador Lopez Garcia, Edgar Lozano Guevara, Dan Morales, Emilio Morales Donis, Domingo Morales Gomez, Alfredo Perez Ramirez, Candelario Perez, Jaime Salas Juarez, and Jose Antonio Vargas Cisneros. All of them have worked in the United States on temporary H-2B visas obtained by their employers. As explained below, and in greater detail in the Supporting Memorandum at I, all of them have suffered extensive violations of their labor rights, and all of them have had extreme difficulty obtaining legal representation to seek redress for these labor law violations, with the result that they have been unable to enforce some of those rights.

¹¹ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), ¶¶ 70 to 110.

¹² *Id.*, ¶¶ 121 to 125.

¹³ *Id.*, ¶ 126.

1. Petitioner Candelario Perez and other men with H-2B visas who worked together for Universal Forestry in Idaho

During the late summer of August 2000, Universal Forestry employed petitioner Candelario Perez (a Panamanian) and five other men, all of whom the company had brought into the United States as temporary non-agricultural workers on H-2B visas, to work in the mountains outside McCall, Idaho, slashing and burning vegetation, clearing trails, and planting trees. In the course of that employment, the company violated the men's rights to be paid the wage they were promised, to pay the legally mandated minimum wage, and to be provided with decent housing.

Universal Forestry had promised to pay the men \$10.50 per hour. However, petitioner Perez was paid approximately \$7.41 per hour for some of his employment and as little as \$1.00 an hour during other portions of his employment, in violation of the federal Fair Labor Standards Act ("FLSA"). The other men had likewise been paid less than they had been promised. In late August, 2000, Universal Forestry housed the six H-2B employees, including petitioner Perez, at a primitive campsite in the mountains outside of McCall. There were no restroom facilities or developed campground facilities nearby. The men slept in a lightweight four-person tent, in a makeshift shelter made out of a lightweight plastic, and in another shelter made out of a tarp. There were no sleeping pads, mattresses or sleeping bags. The only drinking water was untreated and came from a creek, even though local residents understand that any untreated water from creeks or streams can expose them to giardia and e-coli bacteria. In early September, as night time temperatures approached freezing, the crew leader slept in a pickup truck; two men slept in an equipment trailer lacking vents, windows, or an emergency escape; and three men slept in a tent.

The Universal Forestry employees have mostly been unsuccessful in persuading the Idaho Department of Labor and the U.S Department of Labor to resolve labor law violations they suffered at the hands of Universal Forestry. Petitioner Perez and the other Universal Forestry employees, all of whom were H-2B workers, were ineligible to receive assistance from legal services offices that receive any funding from the federal LSC. Consequently, it took petitioner

Perez a considerable amount of time to find legal representation. By the time he found counsel, he had lost contact with the other H-2B workers, so those men are not aware that there is an attorney willing to represent them. As time passes, those men are losing the right to bring some of their claims in court.

2. Petitioners Camero Torres, Vargas Cisneros, Lira, and Borjas Gonzalez

In November of 2000, petitioners Jose Alfredo Borjas Gonzalez, Manuel Camero Torres, Juan Carlos Lira, and Jose Antonio Vargas Cisneros replied to an advertisement Universal Forestry had placed in a local newspaper in Tamaulipas, Mexico, soliciting applicants for forestry jobs in the United States. Universal's agent in Mexico misrepresented terms of employment, did not disclose terms in writing, and charged the men for services that he had said would be free. The workers were transported to the United States in a van that was old, in poor mechanical condition, and too small for its many passengers. The men, who describe the conditions of the 60-hour trip to Idaho as "inhumane," felt they were being treated like animals due to the discomfort and overcrowding. They were provided with a house that had only one bathroom and two bedrooms, no telephone, no heat, and was already occupied by about 13 men. The petitioners and other men slept wherever they could find space on the floor. Universal did not provide the men with the amount of work promised and did not pay them the minimum wage for the time they did have work.

The men had considerable difficulty finding a lawyer to represent them to pursue their labor law claims against Universal Forestry.

3. Petitioners Ceja Carballo, Escamilla Perez, Feria M., Guevara Hernandez, Lozano Guevara, Lopez Garcia, Morales Donis, Morales Gomez, Perez Ramirez, Salas Juarez and other workers from Veracruz, Mexico with H-2B visas employed by Universal Forestry in Idaho

Just as the men from Tamaulipas were leaving their employment with Universal Forestry, approximately thirty men from Veracruz were traveling to Idaho to work for Universal Forestry

as H-2B workers. Among the group were petitioners Basilio Ceja Carballo, Moises Escamilla Perez, Bernabe Feria M., Praxedis Guevara Hernandez, Edgar Lozano Guevara, Salvador Lopez Garcia, Emilio Morales Donis, Domingo Morales Gomez, Alfredo Perez Ramirez, and Jaime Salas Juarez. They also received misleading promises, and were transported in unsafe and overcrowded vehicles, charged undisclosed fees and housed in poor housing. This group of petitioners left Mexico for Idaho in late June, 2002. Before the men left for Idaho, Universal Forestry collected their passports and refused to return them until the end of July, 2002, to prevent the men from leaving to work for somebody else. As of July 9, 2002, Universal Forestry had not provided the men with any work, and the men's funds were dwindling as they continued to buy food and pay other basic living expenses. Although all of the men eventually did some work for Universal Forestry, by August of 2002, all but six had left their employment with Universal Forestry because there was so little work, the pay was so low, Universal Forestry was charging them for so many things it had not previously disclosed, and they no longer trusted Universal Forestry.

Many of the men in this group have not secured counsel to pursue their claims against Universal Forestry. As time passes, they are losing the right to pursue some of their claims in court.

4. Petitioner Dan Morales

Petitioner Dan Morales was recruited from his home in southern Mexico by Hector Martinez to pack watermelons in watermelon fields in Arkansas and Texas. Martinez, who arranged for an H-2B guest worker visa for Morales, provided him with squalid, overcrowded housing. Martinez paid Morales less than \$5.15, in violation of FLSA. After a few weeks, Morales got sick. Martinez told Morales to work in the grower's shed, driving a forklift, although Morales told him that he had no experience driving a forklift. In September 2001,

Morales had an accident with the forklift. He woke up in a hospital in Memphis, Tennessee, where his leg had been amputated at the knee.

Because Morales did not know how to find a lawyer, and because his immigrant status caused him to be ineligible for assistance from the local legal services office, he has been unable to enforce his legal rights, and has entered into an ill-advised settlement with Martinez. Additionally, because of his new disability and the delay in enforcing his rights, he has been left without a source of income.

B. Organizations representing the interests of immigrant workers in the United States

Petitioner Idaho Migrant Council is a non-profit corporation that provides employment training and support services to migrant workers in the state of Idaho. It provided assistance to many of the individual petitioners. Petitioner National Immigration Law Center is a national law center that advocates on behalf of immigrant workers in the United States. Petitioner Oregon Law Center is a non-profit organization that provides free legal services to low income persons in the state of Oregon. Because it does not receive any federal LSC funding, it was not legally prevented from representing the individual petitioners who worked in Idaho, but it lacked sufficient funds to do so, especially since neither the work nor the workers was connected in any way to the state of Oregon. Petitioner Pineros y Campesinos Unidos del Noroeste is a union of farm and forestry workers in the northwestern region of the United States. Many of its members are adversely affected by the failure of the United States to comply with its obligations under NAALC to enforce its labor laws.

C. Organizations representing the interests of immigrant workers in Mexico

The Centro de Investigación Laboral y Asesoría Sindical, A.C., is a law center that provides legal assistance to workers and unions in Mexico. Frente Autentico del Trabajo is an organization of independent labor unions in Mexico. Its members are potentially affected by the

failure of the United States to meet its obligations effectively to enforce its labor laws. The National Union of Workers (UNT) is an organization made up of more than two hundred unions that represent more than a million and a half workers located in economic sectors and social and cultural institutions of vital importance. Its members have an interest in the treatment of migratory workers in the United States. ProDH is a legal center sponsored by the Jesuit Order to advocate for basic human rights. Red Mexicana de Acción frente al Libre Comercio is a coalition of organizations concerned with the adverse effects of free trade. Sin Fronteras, I.A.P., provides legal support, social services and advocacy on behalf of immigrant workers in Mexico and outside of the country.

III. Statement of jurisdiction

A. National Administrative Office Jurisdiction

Article 16(3) of the NAALC conveys NAO jurisdiction to review “public communications on labor law matters arising in the territory of another Party,” in accordance with domestic procedures. Both the United States and Mexico are parties to the NAALC. This submission involves labor law matters, as defined in Article 49 of the NAALC, arising in the territory of the United States, because without access to legal services lawyers receiving funding from LSC, immigrant workers are unable to enforce their labor rights as contemplated in the NAALC. The National Administrative Office of Mexico has adopted domestic procedures for review of submissions on labor law matters by regulation published in the Diario Oficial de la Federación of April 28, 1995.

B. Ministerial Review Jurisdiction

Under Article 22 of the NAALC, the Secretary of Labor and Social Welfare of Mexico has jurisdiction to request consultations with the Secretary of Labor of the United States regarding any matter within the scope of the NAALC. This submission raises labor law matters as defined in Article 49 of the NAALC, because without access to legal services lawyers

receiving funding from LSC immigrant workers are unable to enforce their labor rights as contemplated in the NAALC.

C. Evaluation Committee of Experts Jurisdiction

Article 23 of the NAALC provides that any Party may request an Evaluation Committee of Experts if a matter within the scope of the NAALC has not been resolved after ministerial consultations pursuant to Article 22. The Evaluation Committee of Experts is authorized under Article 23 to analyze “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 under Article 22.” This submission includes technical labor standards as defined in Article 49 of the NAALC, because without access to legal services lawyers receiving funding from LSC immigrant workers are unable to enforce their rights under the prohibition of forced labor, minimum employment standards, elimination of employment discrimination, equal pay for men and women, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers, as contemplated in the NAALC.

The Evaluation Committee of Experts can be convened only if the matter is trade-related and is covered by mutually recognized labor laws. This matter is trade-related, because many of the work-authorized immigrant workers who are ineligible for assistance from legal services offices that receive any LSC funding work for firms, companies or sectors that produce goods traded between the territories of the Parties or that compete with goods produced or provided by persons of another Party. This matter is covered by mutually recognized labor laws, because both the United States and Mexico have labor laws covering the same basic labor rights that the work-authorized immigrant workers seek to enforce with the assistance of legal services offices that receive LSC funding.

D. Dispute Resolution Jurisdiction

Under Article 29 of the NAALC, jurisdiction lies with an Arbitration Panel, by two-thirds vote of the Council established in Articles 8 and 10 of the NAALC, to consider the matter

“where the persistent pattern of failure by a Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards is: a) trade-related; and b) covered by mutually recognized labor laws.” This matter involves the failure of the United States effectively to enforce its occupational safety and health, and minimum wage technical labor standards, and this matter is trade-related and is covered by mutually recognized labor laws.

IV. Relief requested

Compliance with the United States’ responsibilities under the NAALC requires the United States effectively to enforce its labor law and to afford immigrants authorized to work in the United States a means to seek a remedy for violation of labor rights it recognized under its law by ceasing to deny work-authorized immigrants in the United States the opportunity to receive legal assistance from LSC grantees. Additionally, the United States must ensure that whenever it creates new categories of immigrant workers – for example through legalization programs or new guest worker programs – those workers are eligible for assistance from LSC grantees.

To this end, petitioners respectfully request the following:

A. Petitioners respectfully request that the National Administrative Office of Mexico take the following steps to bring the United States into compliance with these obligations:

1. Undertake cooperative consultations with the National Administrative Office of the United States as stipulated under Article 21 of the NAALC;
2. Pursue investigative measures, in accord with Section 6 of the Regulation published in the Diario Oficial de la Federación of April 28, 1995, by:
 - a. Accepting additional information from other interested parties;
 - b. Engaging an independent Mexican expert in the matters of United States legal services and access to the justice system to assist the National Administrative Office with the review;
 - c. Arranging for on-site investigations, by the expert, of the inability of immigrants in the United States to obtain access to legal representation necessary to enforce labor rights;

- d. Arranging for detailed study, by the expert, of the inability of immigrants in the United States to obtain access to legal representation necessary to enforce labor rights;
3. Hold public information sessions with workers, worker advocates and judicial and other government officials affected by the United States' denial of access to LSC grantees for all work-authorized immigrant workers in the United States, in locations that would allow the maximum number of workers, other participants and expert witnesses involved to provide testimony and additional information to the National Administrative Office without incurring undue personal expenses or hardship, having first made adequate arrangements for translation and having provided adequate notice to petitioners, including, at a minimum, hearings in New York City; Boise, Idaho; Nashville, Tennessee; Fresno, California; Washington, D.C.; and Mexico City.

B. Petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico begin consultations at the ministerial level with the Secretary of Labor of the United States on the matters raised in this submission in accord with Article 22 of the NAALC, and formally include the organizations and individuals who filed this submission in those consultations;

C. If ministerial consultations do not resolve these issues, petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico require the establishment of an Evaluation Committee of Experts (ECE) under Article 23 of the NAALC regarding all matters that may be properly considered, and that such proceedings be transparent and involve public participation of employees, employers, worker advocates, and government officials;

D. If, after a final ECE report, the matter remains unresolved, petitioners respectfully request that the Secretary of Labor and Social Welfare of Mexico request consultations under Article 27 of the NAALC, and utilize the mechanisms specified in Article 28 of the NAALC to reach a satisfactory resolution, and that such a Dispute Resolution Action include the participation of those organizations which participated in earlier public communications;

E. In the event that the matter remains unresolved after these consultations, petitioners respectfully request that the Secretary seek the support of the Minister of Labor of Canada to request an arbitral panel under the Article 29 of the NAALC to consider the United States' failure to permit all work-authorized immigrant workers in the United States to obtain

access to legal services lawyers who receive some of their funding from the federal Legal Services Corporation.

Respectfully submitted,

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