MEX9804

September 17, 1998

PETITION

on

Labor Law Matters Arising in the United States

submitted to the

National Administrative Office (NAO) of Mexico

under the

North American Agreement on Labor Cooperation (NAALC)

Regarding the Failure to Enforce Existing Minimum Wage and Overtime Protections in Workplaces Employing Foreign Nationals Due to the Memorandum of Understanding between the U.S. Department of Labor and the U.S. Immigration and Naturalization Service on Shared Enforcement Responsibilities.

submitted by:

Yale Law School Workers' Rights Project; American Civil Liberties Union Foundation Immigrants' Rights Project ; Asian American Legal Defense and Education Fund (AALDEF); Asian Law Caucus; Asian Pacific American Legal Center of Southern California; Center for Immigrants Rights; Florida Immigrant Advocacy Center; International Labor Rights Fund; Korean Immigrant Workers Advocates (KIWA); Latino Workers Center; Legal Aid Society of San Francisco, Employment Law Center; Mexican American Legal Defense and Education Fund (MALDEF); National Employment Law Project (NELP); National Immigration Law Center; National Immigration Project of the National Lawyers Guild; National Korean American Service & Education Consortium, Inc. (NAKASEC); National Network for Immigrant and Refugee Rights; Service Employees International Union (SEIU); Union of Needtrade, Industrial and Textile Employees, AFL-CIO, CLC (UNITE!).

Table of Contents

I. Introduction and Summary of the Case

A. Introduction

In contravention of its domestic labor laws and international obligations, the United States government prevents immigrant workers from enforcing their statutory right to minimum wage and overtime pay. U.S. policy deters immigrant workers from reporting wage and hour law violations to the federal Department of Labor (DOL) by requiring the Department to play the role of agents for the U.S. Immigration and Naturalization Service (INS). This policy requires DOL investigators to examine the immigration status of workers and report suspected violations to the INS. Though the U.S. Department of Labor is supposed to protect workers, it functions in this capacity as protector of law-breaking employers. This policy sends a clear signal to exploitative employers that they need not pay their immigrant workers a legal wage, because such workers are aware that filing a wage and hour complaint can easily lead to deportation for themselves or their co-workers, friends, and family. The inevitable result is to depress the terms and conditions of employment for all workers in the United States.

The U.S. policy challenged in this Petition is codified in a Memorandum of Understanding (MOU) between the INS and the U.S. DOL dated June 11, 1992, which requires DOL officials investigating a wage and hour complaint to inspect employer records concerning the immigration status of employees and refer any evidence of undocumented status to the INS. The MOU thus compels the U.S. DOL's enforcement arm to do the work of INS agents, and sends a message with devastating effects for all immigrant workers in this country: "Seek Our Assistance at Your Peril." This MOU serves to undermine United States law which requires that the DOL guarantee full payment of wages to all workers, regardless of their citizenship or

immigration status.

Pursuant to the labor side agreement, negotiated by the Clinton Administration as a condition of supporting the North American Free Trade Agreement (NAFTA), persons in one signatory country may file a petition to protest another signatory nation's failure to enforce its own labor and employment laws. Because the MOU results in the systematic underenforcement of U.S. minimum wage and maximum hour laws, it is incompatible both with U.S. labor law and with the NAFTA side agreement on labor. The submitting organizations respectfully petition for the recission of the MOU.

B. Summary of the Case

Federal legal protections embodied in the United States' labor and employment laws provide that covered employees, regardless of their citizenship or immigration status, must receive a specified minimum hourly wage and a premium wage for hours worked beyond a specified weekly maximum (overtime wages). Federal law directs officials of the U.S. Department of Labor to enforce these minimum standards with a variety of investigative and prosecutorial powers. These basic protections serve as the cornerstone of an entire legal system intended to ensure decency and fairness in all employment relations. The North American Agreement on Labor Cooperation ("NAALC")[1] requires the signatory nations to comply with enumerated labor and employment objectives, including effective enforcement of existing labor laws, in particular minimum wage and overtime provisions.

Despite the existence of unambiguous wage and hour protections for all employees in the

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[1]North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

U.S. and the NAALC's insistence upon enforcement of these guarantees, some employers in the U.S. continue to set up sweatshops that exploit low-wage workers -- many of whom are immigrants from Mexico and other nations. Whether garment manufacturers, restaurant owners, or other sweatshop operators, these employers flagrantly violate existing minimum wage and overtime laws. The exploitation of foreign workers who lack work authorization papers is particularly acute. These workers comprise a significant segment of the U.S. work force, yet the federal government has taken action that effectively excludes them from the minimum wage and overtime protections of federal law, threatening to compromise the integrity of labor protections under United States law as well as under the NAALC.

Specifically, this submission challenges an official federal policy embodied in a Memorandum of Understanding[2] between the U.S. Department of Labor, the federal agency responsible for the enforcement of U.S. wage and hour laws, and the U.S. Immigration and Naturalization Service, the federal agency responsible for enforcement of U.S. immigration law. Under this Memorandum, the DOL must, during the course of investigating wage and hour violation complaints, "conduct thorough inspections of Forms I-9" to determine whether workers are authorized to work.[3] When DOL investigators suspect an employer has hired or employed an unauthorized worker, the DOL must "expeditiously communicate that information to the INS".[4]

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[2]Memorandum of Understanding Between INS and Labor Department on Shared Enforcement Responsibilities, Daily Labor Report, 113 DLR D-1, June 11, 1992 (copy attached as Exhibit 1).

[3]Id. at 5. Employers are required to complete and retain an INS Form I-9, "Employment Eligibility Verification," to demonstrate that each employee is a citizen or an immigrant authorized to work under the immigration laws. See 8 U.S.C. § 1324a (1998); 8 C.F.R. § 274a (1998).

[4]MOU, at 5.

In so doing, the DOL is reporting to the INS those workers who seek assistance from DOL offices to defend their rights as guaranteed by law, or the rights of their coworkers. By performing this required review of employer records and referring findings to the INS, the DOL officials, whose primary charge is to protect all workers through enforcement of wage and hour laws, are recruited into the service of the immigration agency. Instead of looking to DOL officials as friends and protectors, immigrant workers shun contact with the very officials charged with enforcing wage and hour laws. Not only does this practice subject employees without work authorization to potential deportation and the loss of their livelihoods, it also dilutes the protections of federal wage and hour law as applied to all workers, regardless of their citizenship or immigration status.

Because the MOU causes the systematic underenforcement of federal minimum wage and overtime laws, it is inconsistent with the NAALC. The NAALC mandates that each signatory government "effectively enforce its labor law" (Article 3) and provide access to tribunals for enforcement of labor law (Article 4). The MOU violates the United States' obligations under these Articles. More specifically, the MOU undermines the United States' promise under the NAALC to promote Labor Principle (6), which protects minimum employment standards, and (11) which protects immigrant workers.[5] The MOU affirmatively interferes with effective enforcement of labor law in the following ways:

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[5]In addition to these Principles, the MOU leads to the ineffective enforcement of all the other Labor Principles for the same reasons as those described in this Petition. These include the rights to organize and the prevention of health and safety injuries and illnesses. In the interests of not overburdening the National Administrative Office, however, this Petition will address only minimum wage and overtime pay.

(1) the MOU has a chilling effect on all workers employed in industries with immigrant worker populations, deterring them from reporting violations to or cooperating with U.S. DOL wage and hour investigators;

(2) without voluntary worker complaints, U.S. DOL officials lack the requisite information to enforce federal wage and hour laws; and

(3) the resulting underenforcement of wage and hours law by the United States government affects immigrant workers, their families, and their co-workers, and inevitably depresses the terms and conditions of employment for all workers throughout the nation, constituting a persistent pattern of practice in failing to enforce U.S. labor laws in violation of the NAALC.

Petitioners seek action from the National Administrative Office (NAO) of Mexico in an effort to bring the United States into compliance with its obligations under the NAALC. Petitioners aim to ensure full enforcement of United States wage and hour laws, and respectfully request expedited treatment of this matter before all appropriate mechanisms established by the NAALC.

II. The Petitioners

The Yale Law School Workers' Rights Project is a legal and educational organization committed to publicizing violations of workplace protections, improving working conditions, and promoting the fair and effective enforcement of United States labor and employment laws. The group provides legal analysis and litigation services to advance and protect workers' rights. The group works autonomously from the administration of Yale Law School and Yale University, which are not parties to this complaint.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of almost 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States, including basic labor and employment rights. Since its founding, the ACLU has sought to ensure that these rights are enjoyed equally by all persons, regardless of citizenship or immigration status. In particular, through its Immigrants' Rights Project, the ACLU has defended the right of immigrant workers to the full protection of the federal labor and employment statutes, including the Fair Labor Standards Act, National Labor Relations Act, and Title VII of the Civil Rights Act of 1964.

The Asian American Legal Defense and Education Fund (AALDEF) is a non-profit civil rights organization that fosters and defends the rights of Asian Americans. For twenty four years, AALDEF has represented and assisted thousands of immigrant workers in the garment, restaurant, and construction industries to organize immigrant led unions, community-based workers' centers, and mutual aid groups and to seek enforcement of federal and state labor law standards. The policy of the DOL to refer and report to the INS any undocumented workers who seek back wages and overtime pay undermines the enforcement of minimum wage laws and conflicts with the Fair Labor Standards Act that protects workers regardless of immigration status. The MOU discourages immigrant workers from asserting their rights and encourages unscrupulous employers to hire undocumented workers and indentured servants risking deportation if they seek to secure their rights through DOL. Such a MOU gives employers another tool to undercut wages and working conditions driving down labor standards and violating NAFTA's provisions protecting labor standards of all countries signing this treaty.

The Asian Law Caucus (ALC) is a non-profit civil rights and legal organization

established in 1972 in San Francisco to serve the Asian American community. Since its inception, the ALC has represented thousands of low-income, monolingual, immigrant workers in sweatshop industries such as garment, restaurant, and other service industries in their struggle for decent wages and working conditions. For undocumented workers who come to the ALC for assistance, the ALC must advise of the possible consequences of reporting their employer's violations to the U.S. DOL. These consequences include retaliation by their employers who may report them to the INS or the U.S. DOL itself reporting them to the INS. In just about every case involving undocumented workers, they decline to complain and just give up thousands of dollars in hard earned wages instead of risking deportation. At different times since 1992 when the MOU was adopted, the ALC's employment project attorney has spoken to the U.S. DOL about recission of the MOU, but to no avail.

The Asian Pacific American Legal Center of Southern California (APALC) is a non-profit civil rights organization located in Los Angeles that has provided legal services, advocacy, community education, outreach, and organizing to low income, primarily Asian Pacific American communities in Los Angeles. The Workers' Rights Organization at APALC seeks to ensure that all workers, regardless of their immigration status, language ability, or educational achievement, are afforded basic protections, such as minimum wage, overtime, and safe working conditions. A large number of the workers who seek APALC's assistance have not been paid by their employers and are exploited in a variety of ways. Because of the MOU at issue in this Petition, APALC will not bring claims before the U.S. DOL, nor will the Program Director of the Workers' Rights Organization advise any workers to trust the DOL without first informing them of the risk. Despite attempts during meetings with high-level DOL officials to have the MOU

rescinded, APALC has not been successful and urges its recission here.

The Center for Immigrants Rights (CIR) is a not-for-profit organization dedicated to defend the rights of all immigrants. Its program work consists of both community education and individual policy advocacy. From 1993 to 1996 the Workers' Rights Project at CIR held twenty workshops per year, distributed information, and advocated on behalf of individuals for, among other things, unpaid wages and overtime. Due to the Memorandum of Understanding between the INS and the DOL, CIR informed its clients that they should not file claims for unpaid wages or overtime with the federal Department of Labor. The inconsistent message this MOU sends to immigrants — that they have rights but must beware in vindicating them, has a great chilling effect, and CIR asks for its recission.

The Florida Immigrant Advocacy Center (FIAC) is a non-profit organization that protects and promotes the basic human rights of immigrants of all nationalities through direct legal services and impact advocacy efforts. The Workplace Justice Project at FIAC seeks to improve the working conditions of low-wage immigrants in South Florida through legal representation, advocacy, and education. The majority of the Project's clients have faced wage and hour violations, but are reluctant to report these to the U.S. Department of Labor, for fear of deportation. For instance, when one FIAC client reported violations to the Department of Labor, the employer, fearing INS sanctions, discharged undocumented workers on the day the Department of Labor agent was scheduled to visit the workplace. As a result, only documented workers benefitted from the settlement reached by the Department of Labor. Shortly after the Department of Labor's investigation, the employer rehired the undocumented workers and continued to pay them subminimum wages. Because the State of Florida does not have a

minimum wage law or a labor board, large numbers of immigrant workers in Florida have no other agency to turn to. The MOU at issue in this petition, therefore, facilitates their continued exploitation.

The International Labor Rights Fund (ILRF) is a non-profit organization representing human rights, labor, religious, consumer, academic, and business groups dedicated to assuring that all workers labor under reasonable conditions and are free to exercise their rights to associate, organize, and bargain collectively. ILRF works to advance trade, investment, and aid policies that promote worker rights around the world. ILRF carries on research, publishing, education, and advocacy projects to advance international fair labor relations.

The Korean Immigrant Workers Advocates (KIWA) is a community based non-profit organization that provides service and advocacy for low wage immigrant workers in the Los Angeles area. KIWA has assisted over 1500 workers reclaim lost wages through various procedures, including administrative filings at the federal and state labor agencies. The majority of KIWA's clients face wage and hour violations, non-payment of wages, or workplace injury issues. The Memorandum of Understanding at issue in this Petition prevents many KIWA clients from filing back wage claims with the U.S. DOL. The MOU further serves to create an air of distrust and fear between the low-wage employees and the agency charged with protecting their rights as workers.

The Latino Workers Center (LWC) is an independent, not-for-profit organization dedicated to defending the labor rights of low-wage Latino workers in the New York City area. The LWC provides support to workers in their efforts to organize in the workplace, helps coordinate public labor education efforts, and offers legal representation to workers in wage

disputes and other labor-related matters. Approximately 750 workers per year seek assistance with legal issues, commonly, with unpaid labor issues. The existence of the MOU has deterred the LWC from filing wage and hour complaints with the U.S. DOL.

The Legal Aid Society of San Francisco, Employment Law Center (ELC) focuses on the employment issues facing the indigent and working poor. The ELC's mission is to dismantle barriers to full and equal access to jobs and opportunities in the workplace, with a particular focus on traditionally under-represented groups such as immigrants, women, persons of color, disabled persons, and the working poor. The ELC also operates four Workers' Rights Clinics in the San Francisco Bay Area. In 1996, over 23% of their clients had cases involving wage and hour violations, and over 39% of clients referred to a state or federal governmental agency. Since the assertion of employment rights by undocumented workers can mean the loss of one's job if such reporting leads to INS deportation or "removal" actions against workers, enforcement of these rights is a struggle for the ELC. The Memorandum of Understanding challenged in this Petition forces the ELC not to refer clients to the U.S. DOL, the federal agency charged with protecting these workers' rights, due to fear of INS action.

The Mexican American Legal Defense and Educational Fund, Inc. (MALDEF) is a national non-profit organization that protects and promotes the civil rights of Latinos living in the United States through litigation and advocacy. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access, and public resource programs. Complaints about wage and hour violations are a significant part of those submitted by clients in employment related matters. These clients have expressed that fear of retaliation by their employers and governmental agencies makes them reluctant to protest such

violations. The MOU challenged in this Petition has very real deterrent and harmful effects. As described in the attached affidavit, this MOU forces advocates to warn clients about the very real possibility of INS involvement any time a wage or hour violation is reported, which effectively leads to underenforcement of wage and hour laws.

The National Employment Law Project (NELP) is a national advocacy organization that works with and on behalf of low-income immigrant workers to secure employment-based protection and economic justice. NELP has a network of over 350 legal services offices, low-wage worker community groups, unions, and grass-roots organizations which inform NELP's work and serve as conduits for information about the workplace realities of their constituents. Several of the groups in this network have reported that both their documented and undocumented immigrant worker clients fear that if they report minimum wage and hour violations to the U.S. Department of Labor that the Department will inform the INS which could move to deport them. The existence of the MOU at issue in this Petition serves to deter NELP from going to the U.S. DOL to assist their clients.

The National Immigration Law Center (NILC), a non-profit organization, is a national legal support center whose mission is to protect and promote the rights of low-income immigrants. NILC staff specializes in the immigration, public benefits, and employment rights of immigrants. NILC provides assistance to a broad constituency of legal aid programs, pro bono attorneys, immigrants' rights coalitions, community groups, and other non-profit agencies throughout the United States. Through its contacts with advocates nationwide, NILC is well aware that the MOU at issue in this petition undermines the enforcement of labor law protections. By entangling labor law enforcement by the U.S. Department of Labor with the

enforcement of immigration laws, the MOU has had a chilling effect on the ability of workers to file complaints with the Department of Labor. In order to avoid the risk of triggering a referral to the Immigration and Naturalization Service, immigrant workers avoid contact with the Department of Labor, thereby perpetuating labor law violations and emboldening abusive employers. NILC therefore urges the recission of the MOU as called for in this petition.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit organization dedicated to protecting the legal, civil, constitutional, and human rights of noncitizens in the United States, regardless of their immigration status. The NIPNLG monitors the availability of labor law remedies to immigrant workers and provides technical assistance and training to legal service providers that represent noncitizen workers and to the noncitizen workers themselves. In providing such training and assistance, the NIPNLG informs immigrant workers and their representatives that a worker who reports a wage and hour violation faces possible INS enforcement because of the Memorandum of Understanding between the DOL and the INS.

The National Korean American Service & Education Consortium (NAKASEC) is a national organization working to empower Korean Americans through education and advocacy. NAKASEC's advocacy program concentrates on immigrant rights and civil rights, focusing on serving those with fewer resources and less access, such as women, youth, seniors, low-income residents, and recent immigrants. Every year NAKASEC provides referral and advice to several hundred clients, most of whom inquire about immigration matters such as immigrant worker rights issues. Because of the Memorandum of Understanding between the INS and DOL, we cannot refer immigrants to DOL for labor law violations and other worker complaints.

The National Network for Immigrant and Refugee Rights (NNIRR) is a national

organization composed of local coalitions and immigrant, refugee, community, religious, civil rights, and labor organizations and activists. It serves as a forum to share information and analysis, to educate communities and the general public, and to develop and coordinate plans of action on immigration and refugee issues. NNIRR works to promote a just immigration and refugee policy in the United States and to defend and expand the rights of all immigrants and refugees, regardless of immigration status. Comprised of over 70 community-based, legal services, and labor organizations, NNIRR's National INS Raids Task Force documents and monitors INS enforcement activity in non-border areas of the U.S. These documentation efforts have shown that INS collaboration with local, federal, and state agencies, including the Department of Labor, generates a climate of fear that undermines worker organizing in diverse industries and geographic locations.

The Service Employees International Union (SEIU) is an international labor union with over 1.3 million members, many of whom are employed in law wage sectors of the economy. Throughout its history, SEIU has advocated for vigorous enforcement of our nation's wage and hour laws which is of particular concern to low wage workers. It is deeply concerned that its members and other workers not be deterred from enforcing their rights for fear of adverse consequences to themselves or their fellow workers on account of their immigration status.

The Union of Needletrade, Industrial and Textile Employees, AFL-CIO, CLC (UNITE!) Is an international labor union headquartered in New York City. UNITE! has been in existence for nearly one hundred years and represents workers in apparel and textile industries all across the United States, Canada and Puerto Rico. The union represents over 300,000 workers, a large number of whom are immigrants. Some of UNITE!'s major organizing campaigns are in low-

wage sectors with high concentrations of recent immigrants. UNITE! is the only national union in the country with a distinct department that provides legal representation in immigration matters to its members. The union has direct and ongoing experience with the adverse impact that the MOU at issue in this petition has on the workplace rights of immigrant workers.

III. Statement of Jurisdiction

A. National Administrative Office Jurisdiction

NAO jurisdiction to review this submission is provided by Article 16(3) of the NAALC authorizing each NAO to review public communications on labor law matters arising in the territory of another party, in accordance with domestic procedures. This submission involves labor law matters, as defined in Article 49 of the NAALC, arising in the territory of the United States. 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.

The Memorandum of Understanding at issue in this submission reflects an administrative policy which prevents the United States from effectively enforcing its minimum wage and overtime laws. Certain of Petitioners and other organizations have requested the amendment or recission of the MOU through appropriate administrative channels. These requests have not been successful.

Petitioners affirm that neither this matter nor any other matter which forms the subject of this complaint is pending before any international body.

Under Article I, the objectives of the NAALC include (1) promoting effective enforcement by each Party of its labor law; (2) promoting, to the maximum extent possible, the

labor principles set out in Annex 1, including the establishment and enforcement of minimum employment standards; and (3) improving working conditions and living standards in each Party's territory. Review of this submission by the Mexican NAO would further these objectives of the Agreement.

B. 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.

C. 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 or practices 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.

1. The submission includes technical labor standards.

Under Article 49, "technical labor standards" means "laws and regulations, or special provisions thereof, that are directly related to [minimum wage and overtime standards]." Plainly, this submission is "directly related" to the United States federal minimum wage and overtime standards set forth in the Fair Labor Standards Act of 1938, as amended.

2. The matters addressed in the submission are trade-related.

The harmful consequences of the MOU at issue in this Petition affect workers in many industries, but are particularly severe in restaurants, garment-producing sweatshops, and other

manufacturing workplaces.[6] The clothing made by some sweatshop workers, for example, is produced using materials imported from Canada or Mexico, and may then be exported to Canada or Mexico, and competes with Canadian and Mexican imports in the United States garment market. The MOU and its consequences are plainly trade-related according to Article 49 (1) of the NAALC: they involve workplaces "that produce goods . . . (a) traded between the territories of the parties; or (b) that compete, in the territory of the Party whose labor law was the subject of ministerial consultations under Article 22, with goods or services produced or provided by persons of another Party." .

3. The matters addressed in the submission are covered by mutually recognized labor laws.

The United States, Mexico and Canada each have minimum wage and hour laws. This submission concerns the underenforcement of the federal Fair Labor Standards Act, which sets a national minimum wage applicable to employees regardless of their immigration status or citizenship, subject to limited, enumerated exceptions not relevant here.

The Canada Labour Code likewise establishes a minimum hourly wage "regardless of occupation, status or work experience,"[7] with the specific wage rates fixed by provincial legislatures.[8]

Similarly, Mexican Federal Labor Law establishes a minimum wage requirement for all workers regardless of occupation.[9] Specifically, federal law requires that employers comply with

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[6]See infra Section V.C. & V.D.

[7]Canada Labour Code, Part III, Division II, Section 178.

[8]See, e.g., Ontario Employment Standards Act, § 23 (1998) (establishing the level of the minimum wage in the province of Ontario).

[9]See Ley Federal del Trabajo, Título III, Capítulo VI, Artículos 90-97.

all minimum standards,[10] extends a general minimum wage to all workers,[11] and requires that national commissions establish appropriate levels for this minimum wage.[12]

4. The submission analyzes a pattern of practice by the United States in the enforcement of its minimum wage technical labor standard.

The matter that forms the subject of this Petition is not a single instance or case, but is rather a sustained and recurring pattern of practice on the part of federal officials responsible for enforcement of minimum wage and overtime standards. The MOU commits DOL wage and hour investigators to review an employer's I-9 records and makes DOL, "responsible for the prompt referral to INS of all suspected...violations of the [immigration] provisions against knowingly hiring or continuing to employ unauthorized workers."[13] The practice documented in this submission is thus official policy of the U.S. DOL.

D. Dispute Resolution Jurisdiction

Under Article 29 of the NAALC, a two-thirds vote of the Council confers jurisdiction on an Arbitral Panel to consider a matter where a signatory nation has engaged in a persistent pattern of failure effectively to enforce its minimum wage laws, and where that failure is trade-related and the subject of mutually recognized laws. This Petition, and the MOU it criticizes, involves such matters.

IV. Relevant United States Law and Policy

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[10]See Ley Federal del Trabajo, Artículo 56 ("Las condiciones de trabajo en ningún caso podrán ser inferiores a las fijadas en esta ley . . . .").

[11]See Ley Federal del Trabajo, Artículo 92 ("Los salarios mínimos regirán para todos los trabajadores. . . .").

[12]See Ley Federal del Trabajo, Artículo 94 ("Los salarios mínimos se fijarán por una comisión nacional. . . .").

[13]MOU, at 3.

A. The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes legal protections for workers at the level of federal law.[14] FLSA includes provisions for a minimum wage,[15] overtime pay,[16] employer record-keeping requirements,[17] as well as child labor restrictions.[18] These protections apply to many full and part time workers in the United States.[19] As of September 1, 1997, workers are guaranteed $5.15 per hour,[20] and overtime pay at a time-and-a-half rate for work over forty hours per week.[21] These standards are legally required whether wages are calculated on an hourly basis or piece rate.[22]

B. Federal wage and hour laws protect workers regardless of their immigration status.

The United States' FLSA mandates a minimum wage for employees located physically within the United States, regardless of whether an employee is a U.S. citizen, a foreigner with work authorization papers, or an undocumented immigrant. For the purposes of minimum wage and overtime law, U.S. law broadly defines the term employee to include "any individual employed by an employer,"[23] without explicit limitation to only those employees who are

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[14]Fair Labor Standards Act, 29 U.S.C. §§ 201-219. (1997).

[15]Id. at § 206.

[16]Id. at § 207.

[17]Id. at § 211.

[18]Id. at § 212.

[19]Exceptions include professional, administrative, and executive employees, and workers in some enterprises that do business within a single state. Id. at § 213.

[20]29 U.S.C. § 206.

[21]Id. at § 207.

[22]See United States v. Rosenwasser, 323 U.S. 360 (1945) (all citations to United States federal court decisions refer to the official publication series and are included in the appendix filed with this submission) (copy attached as Exhibit 2.).

[23]29 U.S.C. § 203(e)(1).

citizens or authorized immigrant workers.[24] The Supreme Court, in the leading case entitled Sure-Tan, Inc. v. National Labor Relations Board, held that the National Labor Relations Act (NLRA) protects undocumented workers.[25]

Following the reasoning of the Sure-Tan ruling, courts have determined that other labor and employment laws -- including minimum wage and overtime laws -- safeguard documented and undocumented immigrant workers. For instance, in Patel v. Quality Inn South, a federal appellate court applied the Sure-Tan rationale to conclude that FLSA applies to workers regardless of their immigration status. "Breadth of coverage was vital to [the FLSA's] mission . . . . [T]he Supreme Court's decision in Sure-Tan weighs heavily in favor of [the] contention that Congress did not intend to exclude undocumented aliens from FLSA's coverage."[26] Thus, all workers represented in this submission, regardless of their immigration status, are entitled by law to the minimum wage and maximum hour protections that have become the hallmark of just and effective United States labor law.

Finally, petitioners are aware of no United States law that requires officials charged with the enforcement of labor law to take on the role of identifying or pursuing undocumented

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[24]See, e.g., Patel v. Quality Inn South, 846 F.2d 700, 706 (11th Cir. 1988) ("[U]ndocumented workers are 'employees' within the meaning of the FLSA.") (copy attached as Exhibit 3); see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (undocumented workers are "employees" for purposes of National Labor Relations Act) (copy attached as Exhibit 4); NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997) (same) (copy attached as Exhibit 5).

[25]Sure-Tan, 467 U.S. at 892.

[26]Patel, 846 F.2d at 702-03; see also, Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro) Inc., 795 F.2d 705 (9th Cir. 1986) (copy attached as Exhibit 6); NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997). But see Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) (undocumented workers who were discharged in violation of the NLRA not entitled to back pay) (copy attached as Exhibit 7).

immigrants. The decision by the DOL to review employer I-9 records and report suspected immigration law violations to the INS is entirely administrative.

C. The Memorandum of Understanding

On June 11, 1992, the INS and the DOL executed a Memorandum of Understanding outlining their shared enforcement responsibilities and specifically requiring the DOL to review employer I-9 records and to report to the INS any suspected immigration law violations. The MOU was issued voluntarily by the agencies and was not compelled by any provision of law. It applies to the Wage and Hour Division of the U.S. DOL, which is responsible for the enforcement of minimum wage and hour standards, as well as to the INS investigation and border patrol divisions. The MOU holds the Wage and Hour Administration "responsible for the prompt referral to INS of all suspected...violations of the [immigration] provisions against knowingly hiring or continuing to employ unauthorized workers."[27] The MOU requires DOL agents investigating wage and hour violations to conduct "thorough inspections" of employer's I-9 records to determine whether any of the employees are suspected of lacking work authorization.[28] A DOL investigator who suspects a violation of immigration law is obligated to "expeditiously communicate that information to INS and . . . [to] clearly and specifically identify possible violations, along with any supporting documentation which may be available."[29]

The MOU includes no safeguards to guarantee that the DOL can fulfill its mission of enforcing minimum wage and hour standards. While it states that "the primary responsibility of

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[27]MOU, at 3.
[28]Id. at 5.
[29]Id.

[DOL] is the enforcement of labor standards statutes with the goal of ensuring that all covered workers are afforded the full benefits and protections of these laws," and even requires that the DOL "take no action which will compromise its ability to carry out its fundamental mission, regardless of the workers' immigration status," it contains no specific provisions granting DOL freedom to enforce the law without the interference of inquiring into and reporting on employees' immigration status.[30] DOL employees are mandated to report suspected immigration violations, and they have no discretion to act otherwise. As this Petition demonstrates, the U.S. DOL's policy of investigating and reporting employees' immigration status does in fact seriously undermine its fundamental mission, deters reporting of wage and hour violations, and erects a barrier to the effective enforcement of minimum wage and hour laws.

V. The MOU violates Article 3 (Government Enforcement Action) and Article 4 (Private Action) of the NAALC.

The Memorandum of Understanding between the U.S. DOL and the INS significantly undermines the effective enforcement of federal minimum wage and hour laws. Fear of INS raids deters undocumented workers -- as well as documented workers and worker advocates in industries with large immigrant workforces -- from reporting wage and hour violations to the DOL. As a result, the DOL, which relies primarily on voluntary employee complaints to enforce the FLSA, cannot fulfill its duty to enforce labor law. Reports by the U.S. Government Accounting Office on the exploitation of immigrant workers have repeatedly confirmed the importance of voluntary workers complaints to effective DOL enforcement.[31] Moreover, the

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[30] Id. at 2.

[31] See infra, Part V(B)(2).

MOU effectively eliminates the only available administrative remedy for many who suffer violation of basic labor standards.

The MOU is thus the source of ongoing violations of Article 3 and Article 4 of the NAALC. Article 3 establishes a government duty to "promote compliance with and effectively enforce its labor law through government action."[32] As a component of this enforcement, Article 4 of the NAALC guarantees that all "persons with a legally recognized interest under [national] law . . . have appropriate access to . . . tribunals for the enforcement of . . . [that] labor law."[33]

By creating a deterrent to reporting for a broad category of persons protected by FLSA, the MOU makes the ineffective enforcement of labor laws a matter of policy. The prevalence of sweatshop conditions in industries that rely heavily on immigrant workers indicates a "persistent pattern of failure to effectively enforce . . . minimum wage technical labor standards" under Article 29 (1) of the NAALC.[34]

A. The MOU chills citizens, documented workers, undocumented workers, and worker advocates from notifying the DOL of illegal employer practices.

Widespread fear of deportation deters undocumented workers from reporting wage and hour violations. In the summer and fall of 1995, the National Immigration Project of the National Lawyers Guild interviewed dozens of community leaders, immigration and labor lawyers, legal services providers, and union organizers in areas with large immigrant populations.[35] This study represents the single most exhaustive documentation of the problem.

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[32]Article 3(1), NAALC, 1993, 32 I.L.M. 1499, 1503.

[33]Id. at 1503.

[34]Id. at 1509.

[35]See Elizabeth Ruddick, Silencing Undocumented Workers: U.S. Agency Policies Undermine Labor Rights and Standards, Immigration Newsletter, June 1996, at 1.

The study concluded that "almost unanimously, respondents reported that the convergence of immigration and labor law was deterring immigrant workers from asserting their rights to the minimum wage, overtime pay, safe working conditions, or union representation to which they are legally entitled."[36] Numerous scholars also have noted that the vulnerability of undocumented workers deters voluntary worker complaints and hinders the effective enforcement of labor laws.[37]

As long as the U.S. DOL is required to review employer I-9 records and report suspected immigration law violations to the INS, immigrant workers will fear and mistrust DOL agents rather than look to them for assistance in redressing wage and hour violations. In Los Angeles, Julie Su of the Asian Pacific American Legal Center described accompanying DOL agents on sewing factory inspections at which half of the workers fled as soon as the agents arrived.[38] The causal link between complaints to the DOL and dreaded INS raids is firmly established in the minds of many workers. Media and publications disseminated to immigrant communities have carried numerous stories confirming the correlation. The INS Raids Bulletin, published by the National Network for Immigrant and Refugee Rights, reported an Ohio case in which workers

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[36]Id.

[37]See, e.g., Lora Jo Foo, The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protection Legislation, 103 Yale L.J. 2179, 2183 (1994) (immigrant workers' vulnerability "keeps them silent about the abuses they endure in sweatshops") (copy attached as Exhibit 8); Jennifer Gordon, We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 Harv. C.R.-C.L. L. Rev. 407, 417 (1995) (discussing how fear of deportation makes undocumented workers easily exploitable) (copy attached as Exhibit 9); Dennis Hayashi, Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the FLSA, 17 Yale J. Int'l L. 195, 201 (1992) (noting that undocumented workers are "unwilling to assert their rights for fear of deportation") (copy attached as Exhibit 10).

[38]Ruddick, supra note 35, at 5.

who filed for wages owed through the DOL were tracked down by INS and deported.[39] Spanish language newspapers, television, and radio reported that a large INS raid in Houston began with a tip from the Department of Labor.[40] Similarly, in Southern Florida, the DOL and the local police joined forces in a raid on agricultural workers in 1995, resulting in the deportation of two hundred workers. According to Laura Gemino of Florida Rural Legal Assistance, the incident was extensively reported in the local media and had a chilling effect on workers' willingness to complain.[41] These various statements and newspaper stories demonstrate the widespread perception that reporting violations of labor law to the DOL is tantamount to inviting the INS into one's workplace.

Undocumented workers are not alone in being deterred by the MOU from reporting wage and hour violations. Documented workers and US citizens with undocumented relatives or friends in the same workplace fear the consequences of contacting the DOL. Employees in this situation are unable to make an official complaint about their own exploitative work conditions without risking their families' or friends' deportation. The National Immigration Project Study recounted a typical case: When a lawful resident farmworker in California complained to her employer about unsafe drinking water at the farm where she and six relatives were working, the entire family was fired on the spot. The employee did not report the incident to the DOL from fear that bringing a retaliation charge would lead to her family being investigated and deported.[42]

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[39]See National Network for Immigrant and Refugee Rights, Raids Bulletin, (October, 1997) <http://www.nnirr.org/nnirr/campaigns/raids/1.2-english.html>.

[40]Telephone Interview with Benito Juarez, Houston Immigration and Refugee Coalition (July 7, 1998).

[41]Ruddick, supra note 35, at 5.

[42]Id., at 13 n.12.

The MOU prevents many worker advocates and legal service centers from bringing complaints to the U.S. Department of Labor as well. Jennifer Gordon, the Director of The Workplace Project in Long Island, New York, stated, "Reports to the DOL about non-payment of wages could trigger a raid in addition to a wage inspection at a particular workplace, resulting in the deportation of the workers who stood up for their rights. Because of the risks that attend involving DOL inspectors, the Workplace Project usually does not work with the U.S. DOL."[43] Of the more than 750 wage and hour cases brought by members of the Workplace Project from 1994-1996, not one was referred to the federal DOL.[44]

Similarly, Peter Rukin, formerly of the Latino Workers Center (LWC) in New York, reported that "the existence of the MOU, and the policy decision it represents has deterred me from filing wage and hour complaints with the DOL. I simply cannot justify exposing my clients to the risk of detention and deportation as the price for vindicating their labor rights."[45] Although approximately 750 workers contact the Latino Workers Center each year for assistance with labor law violations, the LWC has filed fewer than five wage and hour complaints to the DOL in the past five years.[46]

The Comite Latino, the Centro Romero, and the American Friends Service Committee in New Jersey all avoid the federal DOL completely because of immigration concerns.[47] The Illinois Coalition for Immigrant and Refugee Protection took the U.S. Department of Labor off a

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[43]Gordon, supra note 37, at 419-20.
[44]Ruddick, supra note 35, at 5.
[45]See Affidavit of Peter Rukin.
[46]See id.
[47]See Ruddick, supra note 35, at 5.

Know Your Rights leaflet distributed throughout the Latino community, partly in response to concerns that DOL complaints might lead to immigration investigations.[48] Finally, a staff member at the Los Angeles-based Korean Immigrant Workers Association, which handles approximately 250 wage and hour cases a year, reports that the MOU policy discourages many employees from bringing claims.[49] This sentiment is common to numerous organizations that represent immigrant workers.[50]

B. The Department of Labor cannot effectively enforce labor law without employee complaints.

Responsibility for the enforcement of the FLSA is vested in the Administrator of the Wage and Hour Division ("WHD"), a subdivision of the U.S. Department of Labor. The WHD employs 1462 full time employees[51] in its 264 offices,[52] nationwide. In 1997, it had a budgetary allocation of $117, 904 million dollars.[53] The vast majority of WHD's work arises from FLSA violations -- in 1991, of its 69,000 cases, 61,000 were FLSA-related.[54] WHD is the sole agency charged with the enforcement of FLSA wage and hour provisions. Although some states have established a state minimum wage and a state agency to enforce it, many have not, and of those

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[48]See id.

[49]See id.

[50]See attached affidavits.

[51]Telephone Interview with Bob Devore, Program Analyst, Wage and Hour Division, U.S. Department of Labor (July 20, 1998) (citing APCS 1998 Report).

[52]Id.

[53]Id.

[54]See Problems in the Labor Department's Enforcement of Wage and Hour Laws: Hearings Before the Subcommittee on Employment and Housing of the House Comm. on Government Operations, 102nd Cong., 2nd Sess. 67 (1992) (statement of Cari M. Dominguez, Assistant Secretary for Employment Standards, Wage and Hour Division, Department of Labor).

that have, many state standards are lower than those of FLSA.[55] Moreover, worker advocates report that the effectiveness of state enforcement cannot match that of the federal agency.[56]

The federal WHD is equipped with an array of unique, statutorily created powers for investigation and enforcement. In nearly all cases, however, this formidable enforcement mechanism does not begin until an employee notifies the DOL of illegal employer activity.

1. **DOL has unique investigative and enforcement capacities.**

With its unique investigative and prosecutorial capacities, the DOL can enforce minimum wage and overtime laws in ways that are legally and logistically impossible for individual employees and their non-governmental advocates.

First, DOL alone has the resources to undertake the tens of thousands of investigations needed annually. Low-wage immigrant workers lack the resources to do so privately.[57]

Second, FLSA arms representatives of the WHD with the explicit authority to investigate and gather information regarding wages and other conditions of employment.[58] Investigators may enter the premises of a workplace and demand production of relevant records. A typical

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[55]Seven states do not have, and therefore do not enforce, a state minimum wage at all, and twelve states have a minimum wage lower than the federally guaranteed $5.15 / hour. See Department of Labor, Minimum Wage Laws in the States (visited July 1,1998) <http://www.dol.gov/dol/esa/public/minwage/america.htm>. (Of states with large numbers of immigrant workers, for example, Florida has no state minimum wage, and New York's minimum wage is nearly $1 less than the federal standard.)

[56]See Affidavit of Peter Rukin.

[57]Although FLSA also permits individual workers to sue in federal court to remedy some FLSA violations, see 29 U.S.C. § 216(b), low wage immigrant workers invariably lack the resources to do so.

[58]29 U.S.C. § 209.

investigation involves employer and employee interviews, a review of records, and sometimes contact with previous employees.[59] If employers are uncooperative, the Administrator has the power to subpoena documents and witnesses necessary to determine the employer's compliance with labor standards.[60] An employer who fails to comply with WHD subpoenas may be held in contempt of court and fined.[61] Taken together, these resources and investigative powers give WHD access to the information necessary to prove violations of FLSA.

Third, once WHD has conducted an investigation, it can utilize an array of enforcement mechanisms explicitly assigned to it by Congress. The most powerful tool at its disposal, and the one most frequently used against uncooperative employers, is the suit for injunctive relief and seizure of manufactured goods.[62] The statute provides that the Secretary of Labor may file suits against violators or downstream users of their products to impound goods produced in violation of wage and hour requirements.[63] This "hot goods" provision, and the threat of its invocation, gives WHD substantial clout in its dealings with FLSA violators; for when DOL has seized goods pending payment of wages, the sweatshop operator or the company for whom goods were produced will invariably find the money to pay workers their due wages. Thus, the threat of goods seizure is a significant source of the Division's effectiveness in enforcing federal labor laws. Indeed, former WHD Administrator Maria Echeveste concluded that recent increases in

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[59]See Dominguez testimony, supra. note 54.
[60]29 U.S.C. § 209.
[61]See Louis Weiner, Federal Wage and Hour Law 46 (1977).
[62]Id. at 50.
[63]29 U.S.C. § 215(a).

employer cooperation are "a direct consequence of using the hot goods provision."[64]

Finally, DOL alone is empowered to bring criminal proceedings against egregious, repeat violators of FLSA.[65] The threat of imprisonment supplies a powerful incentive for the worst employers to cooperate with a DOL investigation. But without a voluntary worker complaint, this threat is ineffective.

The WHD, granted these investigatory and enforcement mechanisms by Congress, is able to settle the majority of claims without litigation.[66] Employers, aware of the pressure which WHD could bring to bear, enter into voluntary repayment agreements or accept legally binding consent decrees. Only about five percent of DOL cases actually reach administrative or judicial adjudication.[67] WHD can often achieve compliance with the threat of an injunction alone, which has been cited as the source of a recent 30% increase in employer compliance.[68]

Even if individual suits for payment of wages could be an effective mechanism, most low-wage workers are hampered by a paucity of financial resources — the retention of an attorney and the pursuit of a protracted court case is beyond the means of those workers most in need of FLSA protection. Unions are barred from initiating legal action on their behalf.[69] And as described, private enforcement does not carry with it the possibility of criminal sanctions, nor does the statute grant employees an express cause of action to invoke the "hot goods" provision.

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[64]Garment Industry: Labor Department Wage and Hour Division Discusses Joint Enforcement with INS, Daily Labor Report, 1995 DLR 60 d24 (Mar. 29, 1995).

[65]29 U.S.C. § 216(a).

[66]Weiner, supra note 61.

[67]Dominguez testimony, supra note 54, at 68.

[68]See Garment Industry: Labor Department, supra note 64.

[69]See Alvin L. Goldman, Labor and Employment Law in the United States 407 (1996).

In sum, the structure of U.S. law and the economic reality of sweatshop labor dictates that the only viable means of enforcement of minimum wage and overtime laws rests with the federal Department of Labor.

2. Enforcement depends on employee reporting.

Complaints by individuals serve as the linchpin of FLSA enforcement.[70] Employee reports of FLSA violations constitute the single most important trigger for WHD actions, and a significant majority of cases handled by the WHD each year result from complaints filed by workers.[71] One scholar characterizes enforcement as "the joint responsibility of the Department of Labor and the individual worker."[72] WHD relies on employee reporting for 75% of its FLSA enforcement caseload.[73]

The central role of the individual complaint in the enforcement process is enshrined in FLSA itself. The US Supreme Court has noted:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and

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[70]U.S. Government Accounting Office, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops (Nov. 1994) [hereinafter GAO 1994) at 3 (the DOL "typically targets workplaces for inspection based on complaints received from workers and other sources"); id.at 10 (in the garment industry, "OSHA has chosen to rely on an employee complaint or a reported injury"); U.S. Government Accounting Office, "Sweatshops" in New York City: A Local Example of a Nationwide Problem, 38-39, 52 (June 8, 1989) [hereinafter GAO 1989]; U.S. Government Accounting Office, "Sweatshops" in the U.S.: Opinions on Their Extent and Possible Enforcement Options, 44 (August 30, 1988). See also GAO 1989 at 52 (New York State Apparel Industry Task Force hesitant to refer cases to INS, as workers' "cooperation is often needed to investigate employers' practices").

[71]General Accounting Office, Minimum Wages and Overtime Pay quoted in Dominguez testimony, supra note 54, at 69.

[72]Goldman, supra note 69.

[73]Dominguez testimony, supra note 54, at 69.

> complaints from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. (Emphasis added.)[74]

FLSA reflects this reliance on employee complaints in its criminal sanctions for employers convicted of retaliation against workers who have complained or testified.[75]

WHD's activities outside the realm of enforcement confirm employee reporting's central role in the effective enforcement of federal law. WHD commits significant resources to the cultivation of informed workers who will know when and how to file complaints. Each year it distributes millions of pamphlets and sponsors television and radio announcements explaining FLSA rights to workers.[76] It also requires that employers prominently post signs explaining wage and hour laws.[77]

In short, the powerful legal tools and enforcement capacity of the WHD can be brought to bear on an exploitative workplace in most cases only when triggered by a voluntary employee complaint.

C. Statement of Violations of the NAALC.

The MOU silences immigrant workers and prevents them from reporting wage and hour law violations to federal officials resulting in the pervasive non-enforcement of federal minimum

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[74]Mitchell v. DeMario Jewelry, 361 U.S. 288, 292 (1959); See also NLRB v. Scrivener, 405 U.S. 117, 122 (1972) (National Labor Relations Board "does not initiate its own proceedings; implementation is dependent upon the inititive of individual persons") (internal quotation omitted) (copy attached as Exhibit 11); Nash v. Florida Industrial Comm., 389 U.S. 235, 239 (1967) (invalidating denial of state unemployment benefits to worker who files charge with NLRB, because "this financial burden...will impede resort to the Act and thwart congressional reliance on individual action") (emphasis added) (copy attached as Exhibit 12).

[75]29 U.S.C. § 215(a)(3).

[76]Goldman, supra note 69.

[77]Dominguez testimony, supra note 54, at 101.

wage and overtime protections in immigrant workplaces. This systematic failure to enforce labor law constitutes a violation of Article 3 and Article 4 of the NAALC.

The MOU denies to thousands of employees their right to U.S. DOL enforcement of wage and hour laws. It also cripples the agency charged with enforcing U.S. law by depriving it of a key source of information, thus violating the U.S. obligation to enforce minimum wage and hour laws as required by its own law.

1. By silencing workers, the United States violates Article 4 (Private Action) of the NAALC.

The policy by which the DOL reviews employer I-9 records and refers suspected immigration violations to the INS leaves numerous workers without procedures to vindicate their rights under U.S. law. Workers do not file wage and hour complaints so long as they believe that this will result in their own deportation, or that of their undocumented coworkers, friends, or family. Given the importance of the DOL's enforcement mechanism, such workers cannot assert their rights to mandated wages in the face of severe exploitation. Article 4 of the NAALC guarantees that Party governments shall "ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to . . . [a] tribunal for the enforcement of the Party's labor law," and that they have recourse to the procedures whereby the rights arising under labor law may be enforced.[78] Undocumented workers have a "legally recognized interest under [the] law" of the United States[79] but do not currently have access to secure their rights under these laws. The MOU's deterrence of employee actions violates this guarantee. When

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[78]NAALC, supra note 1, at 1503.

[79]Patel, 846 F.2d at 706 (FLSA covers workers regardless of immigration status).

filing a complaint creates a serious threat of deportation, access to an enforcement agency is effectively foreclosed; without an avenue to report wage and hour violations to the DOL, all parties in affected industries -- U.S. citizens, documented workers, and undocumented workers -- are effectively denied recourse to precisely those procedures necessary for the enforcement of their rights under the FLSA. And this circumstance inevitably depresses the terms and conditions of employment for all workers in the U.S.

2. By crippling DOL enforcement, the MOU violates Article 3 (Government Enforcement) of the NAALC.

By deterring workers from reporting wage and hour violations, the MOU also makes it impossible for the United States to enforce these federal standards. Article 3 of the NAALC establishes a governmental duty to enforce its labor law, stating that "each Party shall promote compliance with and effectively enforce its labor law through appropriate government action."[80] With many of the nation's most exploited workers intimidated by the threat of INS scrutiny, the DOL is denied information on countless labor law violations. The threat to these workers also silences other potential reporters; U.S. citizens, documented workers, unions, and worker advocates are all deterred from approaching the DOL where undocumented workers in their workplace would suffer possible deportation. In an enforcement structure largely reliant on individual employee reporting, the systematic discouragement of employee complaints seriously hinders effective enforcement. By crippling DOL enforcement with regard to these workers and industries, the MOU thus violates Article 3's duty of Governmental Enforcement.

In the absence of enforcement, FLSA violations become the norm. In the garment

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[80]NAALC, supra note 1, at 1503.

industry, for example, violations in cutting and sewing shops are inordinately high. The DOL itself admits that violations of minimum wage and hour laws by employers of immigrant workers are widespread -- and that they persist unreported and unremedied because fear of the INS prevents workers from bringing claims to the Department of Labor.

Even senior U.S. government officials concede that fear of the INS has deterred immigrant workers from coming forward to the DOL. Indeed, in announcing a new federal task force to combat modern-day slave labor cases, Steve Mandel, Associate Solicitor, Division of Fair Labor Standards, stated that the exploitation of immigrant workers in these illegal employment situations is "getting worse," and "particularly in the population of garment workers" where there is a "higher degree of abusive practices."[81] Mr. Mandel further noted that the industry is "very difficult to monitor" in part because "the population tends to be very vulnerable [and] often unwilling to come to us with complaints."[82] In explaining at the same press conference that the task force hoped to "remove disincentives" for undocumented workers to file complaints, Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, stated that assurances that INS deportation actions would not begin against them has been "very important" in helping workers to come forward.[83]

Maria Echeveste, former administrator of the Wage and Hour Division, has acknowledged that "fear of deportation and a concomitant reluctance to complain about sweatshop conditions have contributed to a spread of substandard working conditions and to

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[81] Janet Reno, U.S. Department of Justice, Press Conference (April 23, 1998) (visited July 26, 1998) <http://www.usdoj.gov/ag/speeches/arr2398.htm>.

[82] Id.

[83] Id.

exploitation of illegal workers."[84] Discussing the joint enforcement efforts between the DOL and the INS, Echeveste stated, "there is something very wrong with the current effort."[85] Robert Reich, the former Secretary of Labor, noted in 1995 that employers are willing to risk hiring undocumented workers, since they know that they can hire "at less than the minimum wage, put them in squalid working conditions," and rest assured that those illegal immigrants are unlikely to complain.[86] As these U.S. officials concede, the DOL enforcement system has permitted two classes of workers to coexist in the United States -- those that are able to vindicate their federal labor rights and those that are not.

D. The chilling effect of the MOU demonstrates a persistent failure by the U.S. to enforce its labor standards effectively.

The MOU deters entire communities from reporting wage and hour violations, including large segments of certain industries, thus constituting a persistent U.S. DOL failure to enforce the FLSA effectively.[87] Even the Department of Labor has recognized the dramatic growth of sweatshops in the U.S. in recent years, with up to 80% of cutting and sewing shops violating federal law. A recent California survey of licensed garment contractors concluded that 51% paid

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[84]Garment Industry: Reich Enlists Religious Leaders to Aid in Anti-Sweatshop Campaign, Daily Labor Report, 1996 DLR 205 d4 (Oct. 23, 1996).

[85]Id.

[86]Immigration: Clinton Tells Agencies to Cooperate in Enforcing Workplace Immigration Laws, BNA Employment Policy and Law Daily, Feb. 9, 1995, at d3. Gary Delgado, Executive Director of the Applied Research Institute in Oakland, California notes that "companies think they can violate the law because they hire people who aren't in a position to raise hell about it." G. Pascal Zachary, While Congress Jousts Over Minimum Wage, Some People Ignore It, Wall Street Journal, May 20, 1996, at A1.

[87]Article 23(2) of the NAALC states that "[t]he ECE shall analyze, in light of the objectives of this Agreement 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 . . . ." NAALC, Article 27(1), 32 I.L.M. 1499, 1509.

less than minimum wage, 68% paid no overtime, and 73% did not keep adequate employee records.[88] Violations of wage and hour laws in the numerous unlicensed shops are likely to be even more common. Routine inspections in Los Angeles in 1995 exposed wage and hour violations at forty-six out of fifty shops inspected.[89] In recent years, however, sweatshops have proliferated throughout the US.[90] The inability of the DOL to control the growth of U.S. sweatshops has prompted former Secretary of Labor Robert Reich to declare, "[w]e are witnessing the development of a Third World economy—both workers and employers—in the midst of the First World".[91] Because the MOU's effect lies precisely in silencing the victims of labor law violations, it is difficult to quantify its impact. A substantial and growing body of evidence, however, clearly demonstrates that the U.S. garment industry is rife with wage and hour abuses.

In 1995, state labor officials discovered a scene reminiscent of a "POW camp from World War II" when they raided a sweatshop in El Monte, California. For five years, over 70 Thai workers, mostly women, had been imprisoned by sweatshop operators within a gated compound surrounded by barbed wire and spike fences.[92] The workers were forced to work as much as

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[88]Ruddick, supra note 35.

[89]See id.

[90]Peter Ephross, They're Back: Sweatshops Testing New UNITE, Forward, Mar. 29, 1996, at 1. (quoting Vincent Maltese, whose grandmother and two aunts died in the Triangle fire, "The languages they speak now are Chinese and Spanish. But the doors are still locked, and the stairs are still blocked.").

[91]See Ruddick, supra note 35, at 4.

[92]See Fang-Lian Liao, Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, 3 Southwestern Journal of Law and Trade in the Americas 487, 497 (1996) (copy attached as Exhibit 13).

seventeen hours a day, but earned as little as 60 cents an hour sewing garments destined for some of the nation's major retailers.[93] In recounting the conditions in which one of the Thai women had lived in the El Monte complex, a reporter wrote: "[The worker] worked every day until she dropped . . . . The faster her hands, the earlier she could finally limp to her spot in the cramped bedroom and pass out. If she was caught trying to escape, she would be beaten and photographed—[the employer] liked to throw such photos into the laps of workers who got out of line. All mail was censored, all phone calls monitored."[94] Workers were allowed to leave the compound only once a year.[95]

Gruesome as the details of the El Monte sweatshop are, this is not an isolated occurrence. After its discovery, the former Secretary of Labor, Robert Reich, observed, "there are many other El Montes waiting to happen".[96] His concern proved justifiable when a second round of raids shortly after the El Monte raid uncovered three illegal factories in the Los Angeles area where 56

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[93]See Frank Swoboda, Anti-Sweatshop Program Tailored for the Times, The Washington Post, May 30, 1996, at A29.

[94]Liao, supra note 92, at 497.

[95]See Christina Nifong, U.S. Garment Industry Faces Crossroads Under Competitive Pressures, Christian Science Monitor, Nov. 13, 1995, at 1.

[96]Swoboda, supra note 93, at A29.

workers were held in primitive conditions and worked for less than one dollar an hour.[97]

In fact, the horror stories abound. In an article published prior to the discovery of the El Monte compound, Lora Jo Foo recounts episode after episode of wage and hour violations within the garment industry and beyond. A Mexican immigrant dairyman charged in a lawsuit that he was living in unsanitary housing and working thirteen-and-a-half-hour shifts, with no overtime pay and few breaks.[98] In 1993, eighty Chinese immigrant workers at the Mirawa Restaurant in San Francisco's Chinatown worked for nine months with no pay, living on tips alone, until the owner closed the restaurant and disappeared.[99] In Marin county, Latino workers at a dairy ranch charged that they were paid two dollars and seventeen cents per hour and housed in unsanitary conditions.[100] Workers at a winery reported they were forced to live in storage sheds, physically threatened, and denied overtime pay.[101]

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[97]See Nifong, supra note 95, at 1. One reporter captured the following account of the El Monte sweatshop:

> Bo, a Chinese immigrant who did not want to give her full name for fear of being blacklisted from the garment industry, was hardly surprised, though, in light of her experiences working in a Bay Area sweatshop. "We worked in small room with 10 to 12 sewing machines in it. All the windows were sealed by pieces of wood; there was no air conditioning. We were not allowed to talk when at work, not allowed to stand up nor go to the bathroom that often. We worked six or seven days a week, nine-to-ten-hour days on average, but up to fourteen hours sometimes. There was no vacation or insurance." Fuyuki Kurasawa, Toppling the Pyramid: Organizing Against Subcontracting, Third Force, Feb. 28, 1996, at 20.

[98]Foo, supra note 37, at 2182.

[99]Id. at 2183.

[100]See id. at 2183.

[101]See id.; see also Leo L. Lam, Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops, 141 U. Penn. L. Rev. 623 (1992) (asserting that shop owners frequently violate child labor laws) (copy attached as Exhibit 14).

The population for whom the MOU renders labor law unenforceable is substantial.[102] The undocumented immigrant presence in the U.S. is estimated at 5 million,[103] and untold numbers of U.S. citizens and legal immigrants share work spaces with undocumented workers. Consequently, with every worker who chooses not to enforce the federally guaranteed minimum wage for fear of being deported or causing the deportation of friends and coworkers, the pattern of underenforcement and non-enforcement of U.S. minimum wage and hours laws becomes more persistent. Absent greater removal by the U.S. DOL of barriers to workers who seek to contact the agency about the operation of illegal and unsafe garment shops, the sweatshops eventually discovered by federal labor officials are likely to continue to elicit responses of "shock and horror"[104] from U.S. citizens and labor officials alike.

E. The violation of Article 3 and Article 4 by the United States harms workers and law abiding employers.

The MOU has had pervasive effects on all workers in the U.S., especially those in industries with large immigrant work forces. In this section, petitioners focus on the U.S. garment industry, an industry which is both particularly relevant and representative given its large immigrant worker population.

1. The inadequate enforcement of federal wage and hour laws, precipitated by the MOU's chilling effect on employee complaints, harms workers in the garment industry.

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[102]See Labor Department: Close to Half of Garment Contractors Violating FLSA, Daily Labor Report, 1996 DLR 87 d11 (May 6, 1996).

[103]See United States Immigration and Naturalization Service, Illegal Alien Resident Population (visited Apr. 24, 1998) <http://www.ins.usdoj.gov/stats/illegalalien/index.html>.

[104]DOL Secretary Herman on El Monte Settlement, U.S. Newswire, Oct. 24, 1997 (quoting the statement of Secretary of Labor Alexis M. Herman).

The garment industry is rife with wage and hour violations.[105] Approximately half of the garment contractors in the U.S. violate federal minimum wage or overtime laws.[106] Two-thirds of New York's 7,000 garment shops are reported to be sweatshops, and labor officials estimate that one-fifth of Los Angeles apparel factories are underground.[107] Typically employing less than 50 workers, sweatshops locate in rundown buildings to minimize overhead expenditures, require workers to sew on the most basic equipment, and can close down at a moment's notice if their debts pile up or if they are in danger of an investigation by labor authorities.[108] There are a growing number of sweatshops in the U.S. that pay wages well below the minimum wage standard, fail to pay taxes, and ignore health and safety codes.

The competition between legal garment shops and illegal sweatshops has an industry-wide effect of driving down the wages, not only of undocumented immigrant workers, but of all garment workers. Legal immigrants and U.S. citizens with limited English-speaking skills are vulnerable to threats and intimidation by their employers.[109] In 1991, for instance, five hundred employees of Raymond and Yee Nor Kong were owed $1.8 million in loans and unpaid wages when the Kongs fled for Hong Kong and closed their eight garment factories.[110] All of the workers involved were U.S. citizens or documented immigrants.[111] In the New York garment industry, workers routinely must accept two to three dollars per hour -- well below the federal

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[105]See D.O.J. Press Conference, supra note 81.
[106]See Labor Department Report, supra note 102.
[107]Nifong, supra note 95, at 1.
[108]See id.
[109]Jo Foo, supra note 37, at 2209.
[110]Id. at 2183.
[111]Id. at 2183.

minimum wage -- as a consequence of employers' claims that they can immediately hire undocumented workers who will work for even less.[112] More broadly, wages in the garment industry have not only stagnated, they have actually dropped during the last fifteen years.[113] Standards for all employees are undermined when any reports of wage and hour violations are stifled.

Numerous U.S. courts and the U.S. Congress have recognized the negative impact that underenforcement of labor laws has on entire industries. The Supreme Court obseved, "[a]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens."[114] The DOL also recognizes the impact that competition between legal and illegal sweatshops has on employee wages. "At a time when the country is crying for an increase in the minimum wage, we are witnessing the erosion of minimum wage rights for the nation's garment workers," acknowledges the former Secretary of Labor, Robert Reich.[115]

2. The inadequate enforcement of federal wage and hour laws harms law-abiding employers in the garment industry.

The underenforcement of wage and hour laws also penalizes legitimate businesses who play by the rules. The unchecked growth of sweatshops in the U.S. forces employers who maintain safe workplaces and comply with federal wage and hour laws to compete, often

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[112]Ruddick, supra note 35, at 4.

[113]Labor Department Report, supra note 102.

[114]Sure-Tan, 467 U.S. at 892.

[115]Labor Department Report, supra note 102. In the same article, Maria Echeveste, former administrator of DOL Wage and Hour Division, also acknowledges that sweatshops "undermine [the] wages of legal workers." Id.

unsuccessfully, with illegally operated sweatshops that routinely violate federal wage and hour laws. "The price for goods made by legitimate contractors are within pennies or nickels of each other, but the underground rate is 30% to 40% lower," explains Robert Walters, a sportswear contractor, "[t]he underground economy is our competition, not each other."[116]

The losses suffered by legitimate employers because of unfair competition has an additional negative effect - it prevents them from accumulating enough capital to take advantage of modern time- and cost-effective technology.[117] Sweatshops promote exploitation over innovation and productivity, and their presence makes it increasingly difficult for legitimate employers to survive long enough to improve their facilities and increase their productivity through capital improvements.[118]

VI. Action Requested.

Compliance with the U.S. responsibilities under the NAALC requires (i) recission of the existing Memorandum of Understanding between the DOL and the INS, (ii) a guarantee that DOL inspectors will not enquire into the immigration status of workers when conducting investigations of wage and hour violations, (iii) a guarantee that DOL will not refer cases or information arising from investigations of voluntary worker complaints to the INS, and (iv) pursuant to Articles 6 & 7, a widespread education campaign by the DOL to notify workers that

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[116]Vicki Torres & Donna K.H. Walters, It's Blood, Sweatshops and Tears: Legitimate Garment Makers Are Being Squeezed From Both Sides, Los Angeles Times, Aug. 23, 1995, at A1.

[117]Foo, supra note 37, at 2179.

[118]Nifong, supra note 95, at 1 (quoting Alexis M. Herman, Secretary of Labor, as saying, "If you don't have exploitation as an option, it means you have to be more productive. There is an alternative to the low road, but it's particularly difficult if the erosion of standards is allowed to continue.").

the DOL will no longer communicate with the INS as a result of employee complaints.

For the foregoing reasons, petitioners respectfully request:

A. The NAO of Mexico:

1. Undertake cooperative consultations with the NAO 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 U.S. minimum wage and hour law enforcement to assist the NAO with the review,

   c. Arranging for on-site investigations by the expert, of labor rights violations and working conditions in U.S. immigrant communities, and

   d. Arranging for detailed study by the expert, of the investigatory and enforcement procedures of the DOL and the level of cooperation between the DOL and INS; and

3. Hold public information sessions with workers, worker advocates and government officials effected by the MOU, in locations that would allow the maximum number of workers, other participants and expert witnesses involved to provide testimony and additional information to the NAO

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 and Los Angeles;

B. 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 who filed this submission in those consultations;

C. If ministerial consultations do not resolve these issues, 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, 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, the Secretary seek the support of the Minister of Labor of Canada to request an

arbitral panel under Article 29 of the NAALC to consider the DOL's persistent failure to enforce minimum wage and hour standards, as a result of the policy enshrined in the Memorandum of Understanding, and that the proceedings be conducted in an open and transparent manner, complete with public participation; and

F. The Mexican NAO grant such other and further relief as it may deem just and proper.

Respectfully submitted,

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September 17, 1998

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