March 30, 2006

ADDENDUM TO 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

Submitted by:

D. Michael Dale
Northwest Workers' Justice Project
P.O. Box 1032
Cornelius, OR 97113

Maria Andrade
Andrade Law Office
623 W. Hayes
Boise, Idaho 83702

Laura K. Abel
David S. Udell
Brennan Center for Justice at New York University School of Law
161 Avenue of the Americas, 12th floor
New York, NY 10013

William Beardall
Fabiola Flores (law clerk)
Texas Equal Justice Center
510 South Congress Ave., Suite 206
Austin, Texas 78704

Attorneys for:

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, Pedro Ruiz Valdes, Jaime Salas Juarez, Jose Antonio Vargas Cisneros, Edgar Peña, Guillermo Orozco, Anastacio Valdez, Rosa Hernandez

Centro Pro Derechos Humanos, Centro de Investigación Laboral y Asesoría Sindical, A.C., Frente Auténtico del Trabajo, National Union of Workers (UNT), ProDH, Red Mexicana de Acción frente al Libre Comercio, Sin Fronteras, I.A.P., El Centro de Derechos Humanos de la Montaña "Tlachinollan" A.C.

Idaho Migrant Council, International Labor Rights Fund, National Immigration Law Center, Oregon Law Center, Pineros y Campesinos del Noroeste

Introduction

In April of 2005, workers and United States and Mexican organizations filed a petition with the Mexican National Administrative Office under the North American Agreement on Labor Cooperation concerning the denial of effective means, including access to legal services lawyers working for programs funded by the Legal Services Corporation, for H-2B temporary workers in the United States, to enforce labor standards as required by the Agreement.[1] The petition is still under study by the National Administrative Office. The problems raised by this petition are continuing, so new petitioners join the original parties in filing this Addendum to the above-referenced petition.

Facts in Support of Petition

I. Petitioners Edgar Peña, Guillermo Orozco, Anastacio Valdez, Rosa Hernandez

A. Labor Violations

In the summer of 2005, Mountain Fresh Corn, LLC, employed petitioners Edgar Peña, Guillermo Orozco, Anastacio Valdez, Rosa Hernandez and between 25 and 40 other workers from Santiago Ixcuintla, Nayarit, all of whom the company brought into the United States as temporary non-agricultural workers on H-2B visas, ostensibly to work in its corn packing operations in the Olathe, Colorado. Mountain Fresh ("The Employer") recruited them through a farm labor contractor named Francisco Saenz. The Employer violated the workers' rights to be provided with work for the full duration of

[1] *See* Mexico NAO Submission 2005-1 (H-2B Visa Workers), http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01petitition.htm, http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01memo.htm.

their visas, to be paid the wage they were promised, to be paid minimum wage, not to have illegal deductions made from their pay, and to have decent housing as promised.

1. Recruitment Violations Suffered by the workers.

Mountain Fresh Corn used recruiters to recruit the workers who were not properly registered under the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[2] Petitioners were not provided with a written disclosure detailing the terms of employment as required by the AWPA.[3]

2. Contract Violations Suffered by the Workers

Mountain Fresh Corn promised petitioners work at least five days a week with the opportunity also to work weekends. However, there was no work available for the entire first week after the workers' arrival in Colorado. Petitioners worked a couple of days at Hulteen Orchards, Inc., a cherry farm, but the rest of the week they and their fellow workers sat around waiting for word that they could work at Mountain Fresh. Seven of the workers, including petitioners, consulted with a legal assistant at an office of Colorado Legal Services, in order to find redress for their situation. However, because Colorado Legal Services receives federal funding, the workers could not be represented by the program.

The Employer had promised the workers employment for the entire duration of their five month visas. After two and a half weeks of sporadic employment petitioners and the other workers who had sought legal assistance were told there was no more work for them at Mountain Fresh and they were free to leave. They were the only workers from among the 25-40 workers that Mr. Saenz brought from Santiago Ixcuintla that were

[2] See 29 U.S.C. § 1811.
[3] 29 U.S.C. § 1821.

dismissed. Because they had only worked a short time, they had no money to return home.

The failure to employ the workers for the term of the contract constituted a breach of their employment contract, in violation of both traditional contract law principles and the AWPA.[4]

3. Wage Violations Suffered by the Workers

The Employer promised to pay the men $6.26 an hour. However, the first couple of days in Colorado, petitioner Peña earned an average of $2.12 an hour picking cherries at a farm because Mountain Fresh Corn did not have work for them yet. The other workers were likewise paid less than they were promised. The failure to pay the promised pay rate constituted a breach of their employment contract, in violation of both traditional contract law principles and the AWPA.[5] The failure to pay the promised rate also likely breached Mountain Fresh's assurances to the U.S. Department of Labor ("U.S. DOL"), which had certified Mountain Fresh to employ foreign temporary workers based upon those assurances.[6] Finally, the payment of wages below $5.15 per hour violated the Fair Labor Standards Act ("FLSA"), which establishes the minimum wage that a covered employer can pay any worker.[7]

Mountain Fresh deducted money from the men's paychecks for rent and recruitment fees. For some of the men the deductions caused their pay to fall below $5.15 per hour. This violated the FLSA, which prohibits deductions made for the

[4] 29 U.S.C. § 1822(c) (prohibiting violation of a working arrangement).

[5] 29 U.S.C. § 1822(c) (prohibiting violation of a working arrangement).

[6] Employers seeking to participate in the H-2B program must certify to the Department of Labor that they will pay workers the prevailing wage. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iv); 20 C.F.R. § 655 *et seq*.

[7] 29 U.S.C. § 206(a)(1).

primary benefit of the employer – such as deductions for equipment enabling a worker to do his or her job – whenever the deductions cause the worker's pay to fall below $5.15 per hour.[8]

4. Housing Violations suffered by the Workers

Mountain Fresh promised, via its recruiters, the workers they could stay at the company's onsite dorms without cost. Upon arrival, though, the workers learned that the dorms belonged to the federal government and they would be charged rent for their stay. The petitioners stayed in the dorms, but the rest of the workers from Nayarit were taken to small unfurnished apartments where ten workers shared two bedrooms. Failure to provide minimum quality housing at no cost to the workers constituted a breach of their employment contract, in violation of both traditional contract law principles and the AWPA.[9] Providing housing that was substandard and overcrowded violated the AWPA, as well as Colorado state law.[10]

5. Unlawful Retaliation.

AWPA prohibits the retaliatory firing of workers "because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter."[11] At the time that petitioners were released from employment, the rest of the H-2B workers continued to work. Only the seven workers who had sought help from legal services were let go. This constituted unlawful retaliation under AWPA.

[8] *Arriaga v. Florida-Pacific Farms, LLC*, 305 F.3d 1228, 1235-36 (11th Cir. 2002); *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1513 (11th Cir. 1993).

[9] 29 U.S.C. § 1822(c) (prohibiting violation of a working arrangement).

[10] 29 U.S.C § 1823.

[11] 29 U.S.C § 1855(a).

6. Unlawful Deprivation of Rights Suffered due to Abuse of the H-2B Program.

Temporary workers who are brought to the United States to work in agriculture must be brought under the provisions of the H-2A program.[12] The individual petitioners were employed in agriculture, and should have been admitted under the H-2A program. Instead, because the employer represented that they would be doing non-agricultural work, they were given H-2B visas. H-2A visa holders are entitled under law to free housing, [13] to reimbursement for their costs of transportation to and from the work site, [14] to be paid the higher of the prevailing wage rate or a special rate that in Colorado in 2005 was $ 8.93 per hour,[15] and to a guarantee that at least ¾ of the promised work be available or for compensation for that work.[16] Most significantly, H-2A workers are entitled to be represented by lawyers working for legal services programs that are funded by the Legal Services Corporation. [17] H-2B visa holders are accorded none of these rights. By misrepresenting that the workers would be doing non-agricultural work, their employer deprived the individual petitioners of each of these rights. [18]

7. Inability of Petitioners effectively to enforce their labor rights because they had extreme difficulty obtaining legal representation

a. Inability of petitioners to obtain relief from the state and federal departments of labor, in the absence of legal representation

The petitioners have been unsuccessful in persuading the Colorado Department of Labor and the U.S. Department of Labor to resolve the labor law violations they suffered.

[12] 8 U.S.C. § 1188 .
[13] 8 U.S.C. § 1188 (c)(4) 20 CFR 655.102(b)(1)
[14] 20 C.F.R. 655.102(b)(5)
[15] 20 C.F.R. 655.107
[16] 20 C.F.R. 655.102(b)(6)
[17] 45 C.F.R. 1626.11
[18] Compare, 29 C.F.R 655.1, *et seq.*, with authorities cited in notes 12 to 17.

The State Monitor Advocate for the Colorado Department of Labor traveled to Olathe to interview the workers, and promised to turn over this information to the U. S. Department of Labor, but unfortunately the Monitor Advocate has as of February 28, 2006, had still not reported the violations he uncovered to the U.S. Department of Labor. No one in the regional office for the U.S. Department of Labor speaks Spanish and therefore no one was ever sent to interview the workers when the violations were happening.

b. Inability of petitioners effectively to enforce their labor rights because they had extreme difficulty obtaining legal representation

Although petitioners sought assistance from Colorado Legal Services, the lawyers in that program were unable to assist them, because the program receives funding from the Legal Services Corporation. There is no general legal services program in Colorado that does not received federal funding. For several months, petitioners searched for private *pro bono* counsel to represent them in their claims against Mountain Fresh Corn without success. Finally, after most of the workers have left the worksite in Olathe, Colorado, petitioners have found a private attorney from the Denver area who may be willing to represent the workers. However, the attorney is now at a significant disadvantage in representing these clients as he is not as familiar with the facts, the witnesses have left the country, and he is not a specialist in agricultural labor law.

II. Organizational Petitioners.

In addition to the original organizational petitioners, the following organizations join in this Adendum:

El Centro Pro Derechos Humanos is a Catholic organization that promotes the human rights of all workers around the world. Centro ProDH believes that migratory

workers under H-2B visas who find themselves exploited in the United States should have a just, transparent and effective process to enforce their labor rights.

El Centro de Derechos Humanos de la Montaña "Tlachinollan" A.C., based in Tlapa de Comonfort, state of Guerrero, Mexico, carries out a program in defense of human rights in five major areas: leadership/direction and administration; legal aid; education; communication; and international relations. Tlachinollan works with indigenous and other grass-roots communities that send migratory workers to the United States, it is interested in assuring that those workers have the full benefits contemplated by the NAALC.

The International Labor Rights Fund is an advocacy organization dedicated to achieving just and humane treatment for workers worldwide. ILRF believes that all workers have the right to a safe working environment where they are treated with dignity and respect, and where they can organize freely to defend and promote their rights and interests. ILRF is committed to overcoming the problems of child labor, forced labor, and other abusive labor practices. The organization promotes enforcement of labor rights internationally through public education and mobilization, research, litigation, legislation, and collaboration with labor, government and business groups. ILRF has an abiding interest in ensuring that Mexican workers in the United States have fair and adequate access to legal services when their rights are violated. ILRF believes that employers in the U.S. should not benefit from a system in which some of the poorest workers in the country are unable effectively to enforce their rights.

All of the petitioning organizations are deeply concerned with the continuing inability of temporary migratory workers authorized to work in the United States to

enforce their rights under United States labor laws or to receive remedies to which they are entitled under U.S. law. Although insufficient legal resources are available to investigate fully, these organizations have received concrete reports of abuses similar to those detailed here and in the original petition arising in the states of Delaware, Idaho, New Mexico, North Carolina, and Texas. These abuses continue because of the failure of the United States to meet its obligations under the NAALC to enforce its labor laws and provide effective remedial procedures.

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 same relief they requested in their initial petition:

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,

D. Michael Dale
Northwest Workers' Justice Project
P.O. Box 1032
Cornelius, OR 97113

Maria Andrade
Andrade Law Office
623 W. Hayes
Boise, Idaho 83702

Laura K. Abel
David S. Udell
Brennan Center for Justice
at New York University School of Law
161 Avenue of the Americas, 12th floor
New York, NY 10013

William Beardall
Fabiola Flores (law clerk)
Texas Equal Justice Center
510 South Congress Ave., Suite 206
Austin, Texas 78704