¿QUO VADIS?
RECLUTAMIENTO
Y CONTRATACIÓN DE
TRABAJADORES MIGRANTES
Y SU ACCESO
A LA SEGURIDAD SOCIAL:
dinámicas de los sistemas
de trabajo temporal migratorio
en Norte y Centroamérica

Alejandra Constanza Ancheita Pagaza
Gisele Lisa Bonnici

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Authors:
Alejandra Constanza Ancheita Pagaza and Gisele Lisa Bonnici*
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Editorial coordination
Fabienne Venet Rebiffé

Diagramming
Gonzalo Pino Farias

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* The authors are independent consultants for Instituto de Estudios y Divulgación sobre Migración, A.C. INEDIM:
Alejandra Ancheita is a lawyer, a labor and human rights expert. She is the founder and Executive Director of Proyecto de Derechos Económicos, Sociales y Culturales; ProDESC.
Gisele Bonnici is a lawyer, a migrant and refugee human rights expert. She currently serves as the Regional Coordinator for the International Detention Coalition in the Americas, and has been a Board member of INEDIM since its inception.

INEDIM
Emilio Castelar 131
Col. Polanco Chapultepec
México, D.F.
Tel. (52) 55 5533 4988
contacto.inedim@gmail.com
www.estudiosdemigracion.org
Board of Directors

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Rodolfo García Zamora
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Gisele Lisa Bonnici
Vocal

Alejandro Carrillo Castro
Vocal

Manuel Ángel Castillo García
Vocal
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I. Introduction

Temporary migrant labor systems,¹ proposed as successful models to respond not only to lack of employment in developing countries, but also to the need that developed economies have for poorly paid unskilled labor, have proliferated throughout the world. Attempts have been made to use these temporary migrant labor systems to control and regularize migration flows in contexts in which for various geographic, historical, economic and social reasons migration flows have been facilitated and even normalized. In both cases, in spite of the diversity of international agreements and conventions regarding human rights, which establish protection standards, the protection of migrant workers has remained secondary. Although there have been efforts in some sending and receiving countries to include these standards, an effective implementation still remains a challenge that needs to be faced.

The increase in the number of reports filed by human rights organizations, migrant rights organizations, and unions regarding systematic abuse committed against temporary migrant workers, as well as the obvious failure to use temporary labor systems to curb migration flows and their adverse consequences, now more than ever calls attention to the need to analyze these systems from a perspective that protects, respects, ensures and advocates human rights. The purpose of this research report is to improve our understanding of the current temporary migrant labor visa systems and schemes in the region with a focus on the recruitment and contracting mechanisms, as well as access to social protection by migrant workers and their families. By making recommendations aimed at concretizing a human rights-based focus from which to approach and calls attention to labor migrations, we expect to contribute towards the dialogue among decision-makers involved in developing these systems.

This research report, upon which Working Document No. 4 is based, includes a diagnostic analysis of six different systems used to regulate temporary labor migration in the region comprising the Central–North American corridor.² Three of these systems involve migration flows between El Salvador, Guatemala and Mexico, on the one hand, and Canada, on the other. Another system involves the migration flows that have traditionally been aiming for the United States. Finally, another two systems are related to South–South migration associated to relations between neighboring countries and border populations: a) the bilateral program for temporary migrant workers between Canada and Mexico; b) the private system for temporary migrant workers from Guatemala going to Canada; c) the national program for temporary migrant workers from El Salvador going to Canada; d) the H-2A program for temporary agricultural workers, and the H-2B program for temporary non-agricultural workers in the United States, for Mexican workers; e) the bilateral temporary labor cooperation program for workers from Guatemala and Belize operating in the south of Mexico.

The study was developed along two lines: i) the recruitment and contracting processes, and ii) access to social protection for temporary migrant workers through the right to social security. These two research lines have been analyzed through the lens of the highest standards for migrant worker rights protection established by international human and labor rights’ conventions and agreements.³ This responds to the objective of identifying and making evident the structural deficiencies and voids in these systems, in order to be able to ensure labor and

¹ In this paper, we understand the word system, in the term temporary labor systems, as defined by the Royal Academy of the Spanish Language: (From the Latin word *systēma*, coming from the Greek word σύστημα). 1. m. Set of rules or principles regarding a subject that are rationally interwoven. See: http://lema.rae.es/drae/. This definition helps us understand that the so-called “temporary worker programs” are in fact a set of basic principles aimed at ordering the labor migration flows and are far from being actual programs designed under the principles of bilaterality and respect for the human rights of migrant workers.
² It should be noted that the research was completed in May 2012.
³ See: http://www.hchr.org.mx
social security for temporary migrant workers and their families. Conceptually speaking, “temporary migration,” “temporary labor,” and “temporary migrant workers” are understood within the context of the objectives of these systems and programs, i.e., increasing the number of workers in the workforce without increasing the number of residents. These concepts may also be understood in relation to the definite and limited period the permits cover, in which the legal situation is temporary, regardless of the real time of residence in the country providing employment.

Throughout the research, it was confirmed that from a rights perspective, the recruiting practices should be treated as the general theme of the contracting conditions. This depends on how the temporary labor systems are designed. Likewise, access to the right to social security for temporary migrant workers and their families must be based on the rights acquired due to their condition as temporary migrant workers. Based on these very same systems, aspects were studied that relate to labor and social security as defined and operated under the labor relationship agreed to by the States involved in the temporary work systems and the contracting process. In general terms, these aspects are underlying the deficiencies identified for the attainment of decent work and access to the right to social security for temporary workers and their families.

As for the phase corresponding to migrant worker recruitment and contracting, the study focused on the mechanisms and procedures operating in the systems and programs being studied. This is a significant initial phase that regulates and frames the labor relationship. An analysis was thus made of the abuses resulting from or associated with this phase. The role of the involved actors, such as migration authorities, labor ministries, international institutions, public and private recruitment agencies, private companies, independent recruiters and social networking, among others, were also considered.

From this perspective, the recruitment process must be free of deceit or threat, and must be institutionalized through the legal framework that regulates public or private recruitment agencies, the function of which is to facilitate workers’ mobility across borders and to find employment for them in other countries. In the case of private agencies, the States involved must define the conditions that rule them through a licensing or authorization system. This system must include clear rules and regulations regarding the free of charge services workers are entitled to. Migrant workers recruited by private employment agencies must also be ensured appropriate protection. At the same time, it is necessary to stipulate the corresponding penalties in order to prevent abuse. The contracting process must be institutionalized through signing a work agreement that clearly includes working conditions. The work agreement must be officially registered in the sending country. Finally, abuse such as: child labor, forced work, human trafficking and labor exploitation, etc., should be prevented in these processes.

Given that contracting migrant workers through such systems and programs leads to the implementation of a social protection system, this system was analyzed in relation to: the mechanisms and procedures for migrant workers and their family members to be entitled to social security. The existence or lack of regulation, both in the country of origin and destination, as well as the consequent human rights violations was taken into consideration. From this perspective, attention was paid to working conditions, health care access, unemployment insurance, maternity or paternity leave, and disablement pensions due to a work-related accident, illness or aging. The ways in which these rights are extended to the migrant workers’ family members were also analyzed.

The social protection principles stated below were also addressed, together with the States’ obligation to develop programs that not only meet their goals in a comprehensive way, but also, simultaneously, consider the socio-economic and development realities of the analyzed countries. Social protection is based on the principles of universality, comprehensiveness, immediacy and sufficiency. This implies that all people must be ensured social protection regardless of their economic, labor, social or fiscal condition. Social protection must aim at achieving total coverage vis-à-vis any contingency, and must also be implemented in a timely fashion. On the

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other hand, the principle of sufficiency implies that risk coverage should cover the totality of the produced damage. The unity principle establishes that social security systems must be coherent with the country’s socio-political conditions. The equal treatment principle establishes that the application of standards and requirements must be identical for all community members.5

In the analysis of the different systems, access to social protection refers to the real conditions of migrant workers’ access to social security systems, both in the country of origin and reception, using the highest standards established by the human right to social protection as a reference.

This document contains an introduction (chapter 1) and a chapter 2 devoted to methodological and conceptual notes. Chapter 3 characterizes the systems being analyzed. It considers many aspects, including both the background and the context in which each system was defined, the systems’ bilaterality or unilaterality, the level of participation and shared responsibility of the State in the counties sending and receiving temporary workforce, and the regulation or non-regulation of the private actors involved.

Each one of these sections represents a full and independent study, with information and analysis specificities, depending on the system at hand. Chapter 4 is devoted to conclusions, a general balance that forms the underpinnings of a series of conclusions that can be part of proposals for work guidelines on a national, bi-national and regional level.

Lastly, the work concludes with a series of recommendations aimed at various actors. The intention is to represent a baseline that permits academia, civil society, and government to evaluate the existing systems and guide the design of new systems and programs of temporary labor migration in the region. This does not imply that the authors recommend temporary work systems as an alternative for migrant workers in the Americas. Nonetheless, these systems actually exist and it is necessary to contribute to their improvement.

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5 Ibid. p. 47.
II. Methodological and Conceptual Notes

This piece of research explores how temporary labor systems have been designed focusing on the conditions imposed upon participants and their access to human and labor rights.

This exploratory, descriptive, analytic and proactive study is based on research conducted in 2011 and part of 2012. This piece of research is comprised of two different parts: i) a documentary part, which consists of an analysis of the applicable national and binational programs, laws and policies, and takes international labor law and human rights as a theoretical framework; and ii) fieldwork based on qualitative and semi-structured interviews with key individuals, such as government officials, academics, labor activists, civil society organizations and migrant workers. Throughout the duration of this research, there was also participation in seminars and work meetings with other organizations involved in similar projects, with the intention of sharing experiences, confirming findings, and fine-tuning recommendations. Thanks to participation as observers in some events with worker organizations, information was supplemented through informal conversations with temporary migrant workers, which provided a broader and more direct vision of their experience.

The research activities entailed different operational difficulties, including the scarcity of official updated statistical information and field studies dealing with the operational practices of the project's target systems.

Upon analyzing the information and developing the report, the main difficulty was to understand how each system operates in relation to workers’ rights, both under the law and in practice. There are basically two reasons for this: First, the administration of the systems can at times be complex and confusing, because some systems may be unique or have an unclear definition of its institutional framework. In Canada, for instance, migration is subject to a shared jurisdiction between the federal level (related to foreigners, employment insurance, criminal law, etc.), and the provincial level (related to labor rights, health care, education, housing, etc.). Although both Guatemalans and Salvadorans go to Canada under the same Canadian modality, in the former case, it is merely a private arrangement, whereas in the latter, it forms part of a governmental project. The second reason mainly has to do with the fact that designing an isolated or concrete system might seem well thought out in writing, but in practice it very seldom materializes well. Of course temporary migrant workers face more obstacles than do Canadian workers, because of what their status as foreigners implies and their vulnerability vis-à-vis employers and contractors. The interviews to a certain extent helped to clarify and confirm findings and call attention to the gap between what the law and systems claim, on the one hand, and what temporary migrant workers actually experience on a daily basis, on the other.

The contemporaneity of this topic also implies that policies and systems constantly undergo modifications, which is why it is very complex to access updated information. During the study, for example, the cooperation program in Costa Rica came to an end, whereas other programs were under development in El Salvador. This led to a temporary suspension in the process of sending workers to Canada. Towards the end of the study, however, the Salvadoran program was re-opened. In Guatemala, a change of officials in the recruiting agency led to modifications. As for the H2-B visas, the requirements stipulated by the U.S. Department of Labor (DOL) for employers to be able to contract workers under this visa were reformed. These reforms have been enforced as of February 2012.  

The concepts of: (i) recruitment and contracting processes; and (ii) the right to social protection through access to social security are part of the scaffolding of this research. They are derived from the highest protection

6 See: http://www.guestworkeralliance.org/h2b-new-rules/
standards for migrant worker rights established in international human and labor rights agreements and conventions:

(i) Recruitment and contracting processes

For the purpose of this analysis, the concepts of recruitment and contracting were addressed as the State's obligation to respect, protect, ensure and promote human rights, stipulated in the international human rights law. From this perspective, the recruitment process must be free of deceit or threat, and must be institutionalized through the legal framework that regulates public or private recruitment agencies, the function of which is to facilitate workers' mobility across borders and to find employment for them in other countries. In the case of private agencies, the conditions that rule their operation must be defined through a licensing or authorization system.

Migrant workers recruited by private employment agencies must also be ensured appropriate protection. At the same time, it is necessary to stipulate the corresponding penalties in order to prevent abuse.

The contracting process must be institutionalized through signing a work agreement that clearly includes working conditions. The work agreement must be officially registered in the sending country. Finally, abuse such as: child labor, forced work, human trafficking and labor exploitation, etc., should be prevented in these processes.

(ii) Migrant workers' right to social protection

The authors approached social protection from the perspective of the State's obligation to respect, protect, ensure and promote human rights, as stipulated in the international human rights law. The social protection principles stated below were also addressed together with the States’ obligation to develop programs that not only meet their goals in a comprehensive way, but also, simultaneously, consider the socioeconomic and development realities of the analyzed countries.

Social protection is based on the principles of universality, comprehensiveness, immediacy and sufficiency. This implies that all people must be ensured social protection regardless of their economic, labor, social or fiscal condition. Social protection must aim at achieving total coverage vis-à-vis any contingency, and must also be implemented in a timely fashion.

On the other hand, the principle of sufficiency implies that risk coverage should cover the totality of the produced damage. The unity principle establishes that social security systems must be coherent with the country’s sociopolitical conditions. The equal treatment principle establishes that the application of standards and requirements must be identical for all community members. In the analysis of the different systems, access to social protection refers to the real conditions of migrant workers’ access to social security systems, both in the country of origin and reception, using the highest standards established by the human right to social protection as a reference.

A summary of the international agreements and conventions regarding the human rights of migrant workers has been provided in order to permit a better understanding of the framework within which this analysis was developed. These agreements and conventions have been issued by international bodies, such as the United

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7 See: http://www.hchr.org.mx
8 See: http://www.hchr.org.mx
10 Ibid. p. 47.
Nations Organization (UNO), the International Labour Organization (ILO), the Organization of American States (OAS), and the International Social Security Association (ISSA)\footnote{The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination; the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the American Convention on Human Rights; the Protocol of San Salvador were considered among other international conventions with a broad application.} (Annex 2).

A table with ratifications of UN, ILO, OAS and ISSA conventions by Canada, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua and the United States, has been annexed for an analysis of the temporary worker systems addressed in this work (Annex 3).
III. Temporary Migrant Labor Systems

3.1 The Mexico/Canada System: The Seasonal Agricultural Worker Program (SAWP)

Background

The Seasonal Agricultural Workers Program (SAWP) is a federal Canadian government program that facilitates the entry of temporary foreign workers in order to meet the country’s demand for agricultural workers. This program originally began as an agreement on seasonal agricultural workers between Canada and the Caribbean in 1966. Mexico joined the agreement in 1974 through a Memorandum of Understanding on seasonal migrant workers for the Canadian agricultural sector. It is worth noting that this memorandum became a part of the Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico, which stipulates the obligations and rights of workers and their employers. The Seasonal Agricultural Workers Program (SAWP) arose from this agreement. In Mexico this program is known as PTAT for its acronym in Spanish, while in Canada it is known as the Canadian Seasonal Agricultural Workers Program (CSAWP).

This program is established under a series of instruments operating under general labor legislation in Canada and its provinces. These instruments outline the duties and obligations of the different parties who participate in the program and provide a broad structure for the migration of workers. In its initial stages, the program could have been described as a “government to government” migration program that is periodically reviewed and renewed. The program defines and regulates private actors and their roles within the program. Nine of ten Canadian provinces participate in the program and, at the employers’ request, approximately 70 percent of participating workers return to the same farms, year after year.

Two departments of the Canadian federal government share responsibility for the entry of foreign workers: Human Resources and Skills Development Canada (HRSDC) and Citizenship and Immigration Canada (CIC). Their functions are divided: one ensures that the contracting of foreign workers will have a neutral or positive impact on the Canadian labor market, while the other is responsible for the entry of temporary workers in accordance with the Immigration and Refugee Protection Act (IRPA).

The Mexican government has determined its participation in the program through the Ministry of Labor and Social Welfare (STPS by its acronym in Spanish) that recruits and selects workers, the Ministry of Health (SSA) that carries out medical examinations before the workers leave Mexico, and the Ministry of Foreign Affairs (SRE) that provides consular assistance while workers remain in Canada. Although in practice, the STPS and the SRE are the ministries that actually manage the program.

The Canadian government delegated and privatized program management when it passed certain duties to the Foreign Agricultural Resources Management Services (F.A.R.M.S.) in Ontario, a non-profit organization responsible for notifying and processing employment requests accepted by the Human Resources Centres (HRC). The elected Board of Directors of farmer representatives that governs F.A.R.M.S. refers to it as an organization “run by employers for employers.” It is important to mention that a simile to F.A.R.M.S. has been

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14 Ibid.
15 Ibid. p. 20.
16 Ibid. p. 15.
17 Ibid. p. 20.
established in the province of Quebec, which is called Fondation des Entreprises en Recrutement de Main D’Œuvre Agricole Étrangère (FERME).18

According to official STPS data, the SAWP has grown continually, from 203 workers in its first year to more than 15,000 workers per year. By September 30, 2010, a total of 192,876 workers were calculated to have participated in this program.19 During the first stage of operations, this program grew significantly. However, growth declined a few years ago when the demand was diverted to other countries.

The admission process begins with the agricultural employers who register with the local Human Resources Centres in order to receive required certification that they need foreign workers. This process should be carried out at least eight weeks prior to the date the agricultural work will begin. Prior to this process, the farmers should hire any skilled Canadian workers who respond to the call for recruitment.

In order to contract seasonal Mexican workers, farmers need to offer at least 240 hours of work over a six-week period, free and suitable housing, food or cooking facilities and a minimum wage that is higher than the current wage or the rate per job paid to Canadians who would carry out the same work.20 Authorization to contract temporary foreign workers is sent to F.A.R.M.S.

Initially, only married men with experience as farm workers were allowed to participate. They were required to have at least three and no more than 12 years of education, between 22 and 45 years of age, and to be residents of Mexico City. In 1989, the program included women between 23 and 40 years of age with dependent children, who currently represent 5 percent of all workers participating in the program. Since 2003, unmarried men are also allowed to participate. During the first stage of the program, 70 percent of the workers came from the Mexico City area, but this proportion began to fall when recruitment was broadened to include workers from throughout Mexico.21

On the Mexican side, the mechanics of the program are as follows: the government announces the employment opportunity in Canada through its 148 State Employment Services offices. Workers, on average, should make six trips to Mexico City, covering their own expenses, to carry out the necessary procedures. Starting in May 2002, through the Economic Support System for Labor Mobility Abroad, the Mexican government has given workers a one-time payment of $3,000 pesos, so they can travel to Mexico City to receive information about the work they will carry out in Canada, as well as their rights and obligations.

These workers receive passports from the SRE (special passports that are valid for three years, at the cost of $165 pesos [around $12 USD]) together with forms for seasonal exit from the country issued by the Ministry of the Interior (SEGOB by its Spanish acronym). They also receive medical examinations at health centers in Mexico City that have been approved by the Canadian government. The Mexican Ministry of Labor and Social Welfare seeks to coordinate these activities through a network of information counters, where returning migrants should file their “return reports” corresponding to the year they worked in Canada before January 31st of the following year.22 This so-called “return report” is a sealed letter in which employers judge the workers’ manners, in addition to their personal and professional performance.23

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21 Ibid.
23 In Mexico’s first periodic report submitted to the International Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Executive Branch looked favorably on the return report—an employer evaluation of migrant workers, which mainly seeks to reduce employer reduction costs—without recognizing the discretionality it can entail. (No. 436, p. 90)
A travel agency affiliated with F.A.R.M.S. organizes worker transportation to Canada and to the employer’s farm. Employers cover the cost of worker transportation to Canada and then deduct 4 per cent from workers’ wages to recoup these costs. They also deduct payroll taxes and insurance costs from worker wages.24

In Canada, migrant workers formally have the same rights and obligations as Canadians who hold the same occupation. Migrant workers participate in the Canada Pension Plan (CPP) and employment insurance programs. According to the SAWP, migrant workers must have private health insurance as long as they do not have access to the provincial health plan and employers should register workers with provincial Workers’ Compensation Boards.25

According to the “Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico,” the worker, the employer and the government agency from the worker’s country sign a standard employment agreement. The agreement establishes that the ensuing labor relation will be regulated under the laws of Canada and the province where the migrant worker will carry out his/her activities.

Contracting

Contracting conditions for temporary workers under the SAWP are defined and administered by government agencies from both countries. Violations to workers’ rights are thus not as evident under SAWP as under other temporary work systems, such as the H2-A and H2-B work visas issued by the US government, as described later in this work.

Under the SAWP, the contracting process begins with the application for workers that employers must file with the Human Resources Department in Canada. This application must be presented at least two months prior to the agricultural season and the application must include information about the working conditions. One month prior to the beginning of the season, if Canadian citizens have not filed applications to work on these farms, the Department responds to the farmer’s request authorizing F.A.R.M.S. to proceed with the process. This organization seeks to respond to all applications and if an employer asks for specific workers (by name), F.A.R.M.S. is entrusted to request these workers. Later, the Human Resources Department makes the corresponding requests to the Mexican Ministry of Labor and Social Welfare.27

As previously mentioned, one of the parties responsible for program administration in Mexico is the Ministry of Labor and Social Welfare. This ministry selects 10 percent more workers than the number of workers who are formally requested, in order to be able to “respond to any unforeseen circumstances” in the demand expressed by Canadian employers. The STPS determines the following categories of workers:

1. Applicants or candidates
2. Selected workers
3. Workers sent to Canada, with a distinction between first-time SAWP participants, first-time workers with a determined employer and workers who have been requested by a specific employer.28

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26 Available at: http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpmc2013.shtml
The requirements established for workers under the SAWP framework have changed over time and the triannual renegotiation of SAWP between the Canadian and Mexican governments has allowed both parties to redefine more advantageous conditions for employers.29 The disparity of these requirements can be observed across the different employment opportunities that the STPS publishes at its 148 State Employment Services offices, as well as at the Mexican consulates in Canada. One example is the offices of the Consulate General of Mexico in Toronto, which establishes the following requirements:

“To be eligible to participate in the program, a person must have agricultural experience, be at least 22 years old, have a minimum third grade level education and a maximum of 10th grade, has to be married or have a common law partner, preferably with children, and live in a rural zone.”30

Whereas the STPS disseminates other requirements, such as:

“Be an agricultural worker, peasant or farmhand and have labor experience in these occupations. Have Mexican citizenship, preferably be 22 to 45 years old, be married or live in a common law marriage, have a minimum of a third grade elementary school education and a maximum high school education, know how to read and write, and live in a rural area.”31

It is important to mention that workers who are selected to go to work in Canada under the SAWP sign an employment agreement that stipulates the following:

1. The period of employment must be no less than a minimum of 240 hours or six weeks (whichever is completed first) but cannot exceed eight months.
2. The first two weeks of employment constitute a trial period during which the worker cannot be fired except for due cause for refusing to work. After the trial period, the worker can be terminated for “failing to fulfill his/her duties, refusing to work, or any other sufficient cause.” This results in the worker being repatriated and the worker can be held partially or fully responsible for the cost of repatriation.
3. The employer must provide the worker with adequate housing that should be inspected by a designated authority on a yearly basis.
4. The employer must provide periods for meals and rest.
5. The employer must pay the worker a weekly wage. This wage cannot be lower than the current wage for the kind of agricultural work that the worker will carry out, nor lower than the wage the employer pays to Canadian workers who carry out the same kind of work. The employer can deduct certain items from the employee's wages such as food, insurance, housing maintenance costs and operational expenses. In addition, the employer is required to make other deductions required by law (including deductions for employee insurance, the Canada Pension Plan and provincial taxes).32

At the end of the season, employers present a written evaluation on each worker.33 This written evaluation can be seen as a tool for building stable labor relations between workers and employers, nevertheless, in most cases, it is used as a tool to exercise control between the governmental institutions involved in the program and the Canadian employers.34

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29 Lutz, Vizcarra Bordi and Flores Castro argue that these requirements have been renewed based on three factors: demands made by Canadian employers; the Mexican government’s desire to reduce the yearly number of repatriations; and denouncements from academics and Canadian civil society organizations regarding human rights violations of foreign agricultural workers on Canadian farms.
31 See: http://www.stps.gob.mx/bp/secciones/conoce/areas_atencion/areas_atencion/servicio_empleo/trabajadores_agricolas.html
33 Ibid. p. 68.
Although Mexican workers under SAWP formally have the same rights as Canadian workers performing the same job,\textsuperscript{35} the differences in legislation between provinces hinder real access to equal labor rights for migrant agricultural workers, who are excluded from minimum wage regulations in most jurisdictions, as described below.\textsuperscript{36}

A labor rights comparison by province

<table>
<thead>
<tr>
<th>Province</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>Workers are excluded from the majority of labor standards including minimum wage, hours of work, overtime pay, paid statutory holidays, vacation pay and rest periods.</td>
</tr>
<tr>
<td>British Colombia</td>
<td>Workers have the right to minimum wage. Legislation also establishes a process for calculating wage rates on a job-by-job basis for workers involved in harvesting. Agricultural workers are excluded from receiving overtime pay and paid statutory holidays. They have the right to yearly vacation leave and vacation pay. Special standards are applied to agricultural workers hired by licensed contractors of agricultural workers. These contractors must pay wages directly to the worker’s bank account.</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Workers are excluded from the majority of minimum labor standards, including minimum wage, hours of work, overtime pay, paid statutory holidays, vacation pay and rest periods.</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Workers employed on a farm with three employees or less and who are not relatives are excluded from several provisions and benefits including minimum wage, hours of work, overtime pay, paid statutory holidays, vacation leave, vacation pay and rest periods.</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Agricultural workers have the right to all labor standards except payment for overtime. Overtime benefits do apply to workers in greenhouses or nurseries that produce fruits or vegetables.</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Most agricultural workers have the right to a minimum wage but are excluded from an hourly wage, i.e., they can only do shift work and receive overtime pay and paid statutory holidays. Workers employed in greenhouses are protected under labor law.</td>
</tr>
<tr>
<td>Ontario</td>
<td>Workers involved in primary production of the majority of agricultural goods are excluded from many employment standards, including minimum wage, hours of work, overtime pay, paid statutory holidays, vacation leave and vacation pay. However, workers who harvest fruits, vegetables and tobacco have the right to minimum wage (including harvesters who are paid on a job-by-job basis). These workers also have the right to statutory holidays and vacation pay after 13 weeks of employment.</td>
</tr>
</tbody>
</table>

\textsuperscript{35} See: \url{http://www.stps.gob.mx/saladeprensa/boletines_2008/abril_08/b050_abril.htm} [Translated from the original] “Mexican workers under the SAWP have the same rights and obligations as Canadian workers in the same occupation. Among other rights, this includes an eight-hour workday and conditions for the payment of overtime. Workers are registered with provincial social security, thus affording them health care, pensions and other social benefits such as paternity support (an amount is granted when a child is born) and worker compensation for injury or illness on the job.”

Prince Edward Island  
Workers are excluded from the majority of minimum standards, including minimum wage, an hourly wage, overtime pay, paid statutory holidays, vacation days, vacation pay and rest periods.

Quebec  
Most agricultural workers have the right to minimum wage although they are excluded from established hours of work and overtime pay. Workers who are mainly involved in harvesting by hand or processing fruits and vegetables do not have the right to minimum wage.

Saskatchewan  
Workers employed on farms, ranches or commercial gardening are excluded from legislation on employment standards. However, workers at greenhouses, egg hatcheries and commercial pig farms are included under labor legislation and, thus, have the right to minimum wage.

Migrant workers under the SAWP have the protection of a minimum wage in accordance with the Employment Agreement in Canada, which stipulates that workers should be remunerated with at least a minimum wage. They also have the right to 30-minute mealtimes and a day of rest for every six consecutive days of work.37

General social security conditions

In Canada, there are generally three primary rights conferred to employees under health and safety legislation in accordance with the terms of the Canadian Labor Code.38 The first right is that workers can participate in decision-making regarding health and safety in the workplace and are allowed to organize joint health and safety committees with labor and management representatives. These committees are responsible for carrying out inspections, participating in investigations of workplace accidents, investigating employee complaints, making recommendations, reviewing education and training programs, and requesting the intervention of government inspectors when necessary.

The second right is the right to refuse to carry out a job if a worker considers it to be dangerous, without being penalized by the employer. It is important to note that this right is generally invoked at workplaces where workers are unionized.

The third right, related to health and safety in the workplace, is the right to access to information about health and safety risks while on the job. The Workplace Hazardous Materials Information System is a program designed under each jurisdiction that calls for appropriate cautionary labeling of hazardous materials, the provision of technical data sheets about safety features of certain materials and appropriate training for workers who may be exposed to hazardous materials.39

Although the right to a safe workplace in Canada is independent from a worker’s legal status, certain occupations can be excluded from occupational health and safety legislation (OH&S). Agricultural workers are generally covered but are excluded in Alberta, which means that they are also excluded from the Workplace Hazardous Materials Information System, making their right to satisfactory working conditions in the workplace even weaker.

37 Ibid. p. 43.
38 Ibid. p. 48.
39 Ibid.
Likewise, legislation regarding worker remuneration or pay applies to foreign workers regardless of their migratory status. However, they may be excluded for other reasons, for example, in Alberta, Manitoba, Nova Scotia, Prince Edward Island and Saskatchewan, employers are not required to compensate agricultural workers but they can choose to do so.\textsuperscript{40}

Compensation for occupational accidents

Workers in Canada may be compensated for injuries that are caused by or during a job according to the terms of federal and provincial labor legislation. Employers contribute to a collective fund, determined on an industry-to-industry basis, and injured workers receive compensation from this fund regardless of fault. The cost to the employer cannot be deducted from workers’ pay. Compensation benefits for injured workers include health care costs, payment for the loss of the worker’s wage and rehabilitation costs. There is a worker compensation board in each jurisdiction that is responsible for administering this program.\textsuperscript{41}

Unemployment insurance

The Federal Employment Insurance Act in Canada regulates the national employment insurance model. The federal government has exclusive faculties to legislate in this matter according to the terms of the Constitution Act, 1867. This law determines that both employers and employees must make contributions to the government through obligatory payroll deductions. Workers can request this insurance only if they have worked between 420 and 700 hours that can be documented during the previous 52 weeks, or since the person’s last previous request, whichever is shorter. Employees must also demonstrate that they are willing and available to work but that they have not been able to find an appropriate job.\textsuperscript{42} Nevertheless, for seasonal migrant workers, access to this unemployment insurance is hindered precisely by the seasonal nature of their work and, although $1.73 Canadian dollars are deducted from their pay for every $100 dollars earned, they do not have real access to unemployment insurance like other workers in Canada.

In addition to the aforementioned benefits, a male or female worker has the right to benefits for sick leave, parental leave (maternity or paternity), or compassionate care (the right to care for a sick relative). To have access to these benefits, an applicant must have worked 600 hours during the previous 52 weeks. It is not necessary for an applicant to be a resident and both maternity and sick leave can be granted for up to 15 weeks and paternity benefits can be requested for up to 35 weeks. Compassionate care benefits can be requested for up to six weeks.\textsuperscript{43}

Pensions

The Canada Pension Plan (CPP) is a self-financed contribution plan that ensures economic income for contributors and their families due to the loss of income caused by disability retirement or death. The plan is founded on income-based contributions. Retired workers are eligible to receive financial assistance from the Canada Pension Plan, the Old Age Security Pension, or both. According to the law, anyone who has made at least one valid CPP contribution is eligible to receive a monthly retirement pension. This pension can be received starting one month after the contributor turns 60 years old. Contributors who retire at the age of 65

\textsuperscript{40} Ibid. p. 49.
\textsuperscript{41} Ibid. p. 50.
\textsuperscript{42} Ibid. p. 53.
\textsuperscript{43} Ibid.
receive a monthly benefit equivalent to approximately 25 percent of their average monthly pension income during their period of contributions.\textsuperscript{44}

If a CPP contributor dies, it is possible for the worker’s spouse or common law partner or dependent children to receive the corresponding benefits.\textsuperscript{45} In the case in which a contributor under the age of 65 has a disability, he/she can receive CPP benefits as long as he/she has made sufficient contributions to the Plan and as long as the disability has been declared, under the terms of Canadian law, to be “severe and prolonged.” Some of the provisions of this measure are particularly important to migrant workers: agricultural workers are not subject to deductions when they earn less than $250 Canadian dollars or if they have worked less than 25 days in a single year.\textsuperscript{46}

Under Canadian law, a person who has made CPP contributions can request CPP benefits from any part of the world. Canada has signed reciprocal agreements with other countries that allow people who have not resided in Canada for a long enough period to qualify to receive CPP benefits. According to existing agreements, workers can request benefits from one or both countries by totaling the periods of agreement with the social security systems in the two countries.\textsuperscript{47} However, in practice, few workers have achieved this, either due to a lack of information or a lack of effective mechanisms in both countries to make this a reality, as we will see later on.

### Health care

In order for people in Canada to have access to health care, they must be residents. Residence is generally accredited through a minimum six-month period of residence in a province. For this reason, many temporary migrant workers are excluded from this coverage. However, there are some exceptions. In Manitoba, a temporary worker with authorization to work for at least 12 months can request these services. Workers who participate in the Live-in Caregiver Program (LCP) and the CSAWP can also receive health care in other provinces, even though they are not permanent residents.

As mentioned, each province has different modalities and in a case in which a worker does not have access to the provincial health care program, the employer can make special arrangements for him/her to have access. For CSAWP workers, their employment agreements establish that they have the right to social security. In this sense, if a worker works in a province that does not provide access to health care, the employer will have to acquire private health insurance.

### The right to unionize: An option to improve labor conditions

For temporary migrant workers, collective organizing to call for their labor and human rights continues to be an option for true empowerment to improve their working and living conditions. Several authors and activists have indicated that on farms where organizational processes exist and there is a labor agreement between worker representatives and the employer, it is easier to denounce violations to working conditions or even for workers to feel secure in demanding their rights to maternity or paternity leave, among others.\textsuperscript{48}

A union is generally defined under provincial law as a workers’ organization that aims to regulate employee-employer relations. It is prohibited for employers to make financial contributions to unions and for

\begin{itemize}
  \item \textsuperscript{44} Ibid. p. 56.
  \item \textsuperscript{45} For more information about the benefits for families of deceased contributors, see the “Benefits after death” section available at Service Canada:
    \url{http://www.servicecanada.gc.ca/eng/services/pensions/after-death.shtml}
  \item \textsuperscript{46} \textit{Op. cit.}
  \item \textsuperscript{47} Ibid. p. 57.
  \item \textsuperscript{48} UFCW Canada. “The Status of Migrant Farm Workers in Canada 2010-2011,” p. 20. Available at:
\end{itemize}
managers to become union members.\textsuperscript{49} It is important to note that Labor Relations Boards are the courts responsible for settling complaints regarding unfair labor practices.

The right to collective bargaining

A labor union represents workers during collective bargaining either because it has been voluntarily recognized by the employer or has been certified by a Labor Relations Board. In the case in which certification of a union is requested in order to engage in collective bargaining, the Board only requires the union to be recognized by the majority of workers of the negotiating unit, which, in practical terms, is equivalent to the majority of workers on a farm who wish to collectively bargain to improve their working conditions. Once the union obtains certification from the Board, it is also appointed to collectively bargain and no other union or individual representative can negotiate with the employer on behalf of the majority of the workers.\textsuperscript{50}

The current situation of seasonal migrant workers in Canada

The description thus far of the seasonal agricultural workers program between Canada and Mexico generally outlines the legal framework under which minimum conditions should be ensured to guarantee that workers have access to their labor rights, as well as accountability mechanisms in the case that their rights are violated. However, different authors, labor unionists and activists have documented a series of challenges and violations that seasonal migrant workers face in their daily work environment and in their efforts to exercise their rights.

Following, we describe some examples that, given their prevalence, are gaps that call for repair of the labor conditions that SAWP offers workers, conditions that both the Mexican and Canadian governments need to ensure in order to guarantee the full exercise of temporary migrant workers’ human and labor rights under SAWP.

From the time of pre-selection of SAWP applications, a series of violations to workers’ human rights are observed. The fact that there are no unified program requirements generates discretionary interpretation and action on behalf of public servants at the different agencies of the ministries involved in program administration in Mexico when they receive and serve program applicants. One example is the STPS’ office in the city of Toluca, where workers must respond to a thorough survey and their answers to the survey are filed electronically. Applications from people who have served in the police or the military or who have worked as security guards are not accepted under the argument that they know how to use firearms. Another example, from this same office, is the way in which the applicants’ teeth and hands are inspected (a task carried out by the psychologist who holds the interviews).\textsuperscript{51}

Once applicants have passed the interview and initial inspection, workers are subjected to a medical examination. During this second phase, applicants must cover transportation costs to undergo these medical exams, without any guarantee of eventually being contracted. In Mexico, the Ministry of Health has decentralized these medical exams, a measure that was justified in the strategic courses of action of the 2007-2012 Migrant Health Program. This program also establishes follow-up activities for temporary migrant workers’ health care both abroad and upon their return.\textsuperscript{52} However, it is important to note that every time that workers return to Mexico and seek to go back to Canada the following season, since there is no real follow-up to the status of their health, they are required to pay the cost of these medical examinations once again.\textsuperscript{53}

\textsuperscript{49} Ibid. p. 28.
\textsuperscript{50} Ibid. p. 29.
\textsuperscript{52} See: \url{http://www.salud.gob.mx/unidades/evaluacion/metas_pns/estrategia8.pdf}
Once they are in Canada, temporary migrant workers face conditions of discrimination that enable the violation of their human and labor rights. The most common example is the constant threat of repatriation as a measure of repression if they dare to denounce unsatisfactory working conditions on the farm or claim other rights, such as the right to decent housing. Another problem they must face is the many different mechanisms and procedures to be followed in the case of a contractual violation by an employer. These resources and procedures can turn out to be advantageous or disadvantageous to each worker, depending on his/her circumstances.  

SAWP participants do not reap unemployment insurance benefits, even though more than 2 percent of their wage is deducted for this purpose. They also cannot accept work from an employer different than the one they began to work for upon their arrival in Canada, unless they are transferred to another farm according to their own will upon completion of their contract under HRSDC consent and at the knowledge of the consular representative from their country of origin. The lack of job mobility makes it increasingly difficult for workers to denounce mistreatment or unsatisfactory working conditions since employers use dismissal as a measure of repression.

The Agriculture Workers Alliance, a member organization of the United Food and Commercial Workers of Canada (UFCW Canada) has documented the use of repatriation as a measure of repression. Their report “The Status of Migrant Farm Workers in Canada 2010-2011” states:

“Migrant farm workers in Essex County and across Canada face fear and oppression as daily realities in Canada’s food production system. Many are forced to do life-threatening work without proper protective gear or training. They are crammed by the dozens into makeshift shanties and unsafe transport vans. They are told not to report their injuries. If they do raise concerns, migrant workers are typically shipped out that day and banished from ever working in Canada again.”

SAWP is the main provider of migrant agriculture workers in Canada. In 2009, over 26,000 workers traveled to Canada under SAWP and most provinces participated in the program, with the exception of Newfoundland and Labrador. In this same year, the majority of these workers were registered as being employed in Ontario due to the large concentration of industrial-scale agriculture operations and greenhouses. However, various organizations and unions have corroborated that independently of where they work, the SAWP workers that do not have collective bargaining agreements are denied most of their labor rights. They do not exercise a voice in their labor or housing conditions or their wages.

With regard to access to health care, each jurisdiction has its own health insurance plan, but in Manitoba foreigners with permission to work for less than a year do not have the right to coverage, and in Ontario most new residents and returning workers have to wait three months before having a right to coverage. Due to residence requirements, many international immigrants do not have the right to medical insurance.

Due to the way in which pension benefits are calculated, workers who work sporadically in Canada have few possibilities to receive a significant pension. The plans also exclude agricultural work in which a person receives wages of less than $250 dollars in cash a year. However, since many workers in the SAWP program

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56 Ibid.

57 Interview with Andrea Gálvez, UFCW liaison to Mexico. June 16, 2011.


60 Ibid.
return to Canada every year, they have the right to a pension under the CPP. Retired workers can receive these benefits although they live outside of Canada.\(^{61}\)

In this regard, Mexico and Canada signed an agreement on social security regulated under the Old Age Security Act and the Canada Pension Plan. According to its terms, the authorities involved in administering this agreement are the Mexican Social Security Institute (IMSS by its acronym in Spanish) on behalf of Mexico and the HRSDC on behalf of Canada. This agreement aims to avoid double taxation and to ensure the right to a retirement pension.\(^{62}\) Nevertheless, Mexican farm workers under SAWP who pay social security contributions are excluded from the binational agreement on social security since they are exclusively insured through the contract signed with their employer.\(^{63}\) However, a large number of workers lack appropriate information in order to exercise these rights.\(^{64}\)

In the case of accidents on the job and health care, workers face another series of obstacles and violations to their rights. Article V.I of the bilateral agreement, updated in 2006, establishes that “the employer will recoup the total sum of the insurance premium through deductions to the worker’s wages.” In practical terms, this means that $0.50 cents of a Canadian dollar are deducted from each worker’s wage each day despite the fact that health care is free in certain provinces, such as Quebec and Ontario, which means that workers who work on farms in these provinces should not be subjected to this deduction.\(^{65}\)

The conditions under which SAWP workers labor demonstrate that although laws and committees have been established to supervise health and safety standards, they are not put into practice. In 2009, the Joint Centre of Excellence for Research on Immigration and Settlement carried out an investigation on health status, risks and needs of migrant agricultural workers in Ontario. This research was based on 600 interviews conducted with agricultural workers that participated in this project through the Agriculture Workers Alliance (AWA). The results indicated the following: \(^{66}\)

- Half of the workers responded that they worked while sick or injured in fear of employer reprisals or repatriation.
- Half of the workers responded that they were ordered to work with chemicals and pesticides and were not supplied the necessary protection.
- Many had not received any health and safety training.
- 24 percent of workers who were injured on the job filed worker compensation claims for risks on the job. Workers who did not make claims declared being fearful of being docked pay, repatriated or blacklisted from returning the next season.

Other authors have pointed out that Canadian employers grouped under F.A.R.M.S. use measures of intimidation so that workers do not denounce poor working conditions on the farms or seek medical care and that they are sent back to Mexico with diseases caused by overwork or exposure to pesticides.\(^{67}\) The following testimony exemplifies the pattern of labor rights violations under SAWP:

“Inocencio was an agricultural worker from the state of Tlaxcala who worked in a greenhouse in Ontario and who was seriously poisoned by a very dangerous pesticide. So he decided to suspend his contract and return to Mexico, since he was denied care by the farm owner and by the consulate representative who, rather than helping him, threatened that he would be banned from the program. Inocencio had bad

\(^{61}\) Ibid.
\(^{62}\) See: www.amepdf.org.mx/semana/conveniosdeimss.pps
\(^{64}\) Interview with Andrea Gálvez, UFCW liaison in Mexico. June 16, 2011.
\(^{67}\) Lutz et al. Op cit. p. 129.
headaches and was losing his sight so he bought a ticket back to Mexico, where he went to the doctor. Officials from the Ministry of Labor visited him at home and although he explained his case and showed them the medicine prescribed by his doctor, he was expelled from the SAWP.\(^{68}\)

Another barrier and problem faced by SAWP workers are the huge distances between their dormitories and the fields, as well as the distances between the farms and the nearest town. On many occasions, workers travel by bicycle to buy groceries in town and are hit by cars or injured en route; these situations are not reported as workplace injuries. Linguistic segregation is another condition of inequality and vulnerability for these workers.\(^{69}\) In the cases in which workers decide to go to the doctor for an occupational disease, it is very difficult for them to tell the physician what the problem is in English or in French.\(^{70}\) The agreement between Mexico and Canada does not mention the possibility of benefitting from the services of an interpreter when a worker requires medical assistance.

Along similar lines, a study carried out on the labor conditions of agricultural workers under the SAWP in the province of British Columbia shows a long list of obstacles to the actual exercise of their labor rights and points to the unattended structural causes that are largely responsible for the violations to these workers' labor and human rights.\(^{71}\) Mexican workers in the study were concerned because they did not know the terms of their contract or Canadian laws, nor did they possess information about their rights as workers. In an interview, one worker said that she had read the contract five times and was just starting to understand it.\(^{72}\)

Mexican migrant workers do not share the same labor culture as their Canadian employers, placing them at a disadvantage. In the same way, they are unfamiliar with Canadian laws or labor relations procedures that could provide them with support or affect their conditions as workers. This situation is also reflected in the inadequate orientation they receive about their contract or the deductions on their paystubs, which are generally written in English or French. The implications of the unemployment fund are an example of this: although seasonal agriculture workers contribute to the employment insurance fund (EI), just like any other worker in Canada, the CSAWP contract does not allow them to become unemployed or actively seek employment. Thus, CSAWP workers cannot file an EI claim while in Canada, unless they qualify for sick leave.\(^{73}\)

Despite this, some men workers have discovered an interesting opportunity for exercising their paternity rights while they are in Mexico. If the worker's wife is pregnant and the child is less than a year old, upon his return to Mexico, the worker can file an EI claim for so-called paternity benefits. Women, however, have found it much harder to exercise these rights and feel incapable of claiming the corresponding benefits. Some women point out that the problem is that they are not allowed to become pregnant while they are in Canada.\(^{74}\)

Other authors have mentioned that the classification of workers under CSAWP also reveals the way in which this program selects workers based on their family ties, at the same time that it demands that workers suspend their personal lives and obligations while they are in Canada, reflecting the Mexican government’s lack of a comprehensive policy for male and female migrant agriculture workers through its consulates.

In light of these omissions, different workers’ rights defense groups, including faith-based groups, community organizations and labor unions are working to fill the void left by the Mexican consulates and by

\(^{68}\) Ibid.

\(^{69}\) For additional information, see: [http://www.justicia4migrantworkers.org/justiciaespa_new.htm](http://www.justicia4migrantworkers.org/justiciaespa_new.htm)

\(^{70}\) Interview with Evelyn Escalada. June 13, 2011.


\(^{72}\) Interview with Evelyn Escalada. June 13, 2011.

\(^{73}\) Ibid.

\(^{74}\) Ibid. p. 54.
Canadian provincial and federal government agencies. These groups provide essential services and do not receive funding from the Canadian government or those parties who have a vested interest in the success of the CSAWP.75

One study on workers in the province of British Colombia reveals that the majority of workers face huge obstacles to effectively claim their rights:

- Workers were not able to complain about their wage, hours, health and safety conditions or even injuries because they were afraid of losing their jobs;
- The agricultural employment agreement system imposes an unfair power imbalance on immigrant agricultural workers that forces them into silence;
- Restrictions on worker mobility allow employers to have excessive control over the employment contract; the CSAWP structure undermines migrant workers’ right to denounce violations;
- Federal Canadian agencies have left a gap in CSAWP coordination with other government agencies and for the protection of worker rights.76

It is quite clear that the CSAWP structure is designed in such a way that temporary migrant workers, over time, weaken their family and community ties. This “temporality” is a permanent condition in these workers’ lives since the majority end up returning to this employment program for the rest of their lives due to the increasingly weak labor market in Mexico.

It is also evident that the CSAWP structure also effectively establishes a series of barriers that impede these workers from fulfilling the necessary requirements to request Canadian citizenship, forcing them to make Canada their “country of employment.”

Unionizing and collective bargaining

As previously mentioned, unionizing is a right that does not exist in all Canadian provinces. However, there is an important effort to spread this right throughout the country.77

The Agriculture Workers Alliance (AWA) and the UFCW Canada have presented eleven petitions for certification before the provincial labor relations boards. The resulting collective bargaining agreements demonstrate better treatment of migrant workers and a reduction in the fear of reprisals when workers denounce a violation to their labor rights.78

Some examples of achieved improvements are:

- A procedure for filing claims.
- The right to be requested by the same employer each season based on seniority.
- Training of the health and safety committees in the workplace.
- Provision of collective bargaining agreements and other documents in the worker’s language.
- A place at the negotiation table to address issues about working and living regulations and conditions.

75 Ibid. p. 56.
76 Ibid. p. 57.
77 Interview with Andrea Gálvez, UFCW liaison in Mexico. June 16, 2011.
Nevertheless, as was mentioned in the case of Alberta and Ontario, the right to unionize has yet to become a reality and in Quebec the provincial labor laws contain sections that also obstruct migrant workers from exercising their right to unionize.\(^{79}\)

Despite the fact that the Temporary Foreign Workers Program (TFWP) and the Mexico-Canada Pilot Work Agreement are not the main focus of this chapter, it is important to mention and characterize them in general terms, since the TFWP is considered to be a less regulated version of the CSAWP, which implies an increased number of workers contracted under the former program, as well as greater labor exploitation.

The Temporary Foreign Workers Program for Occupations Requiring Lower Levels of Formal Training (TFWP)

The Temporary Foreign Worker Program for Occupations Requiring Lower Levels of Formal Training (TFWP) was established in 1977. This program is now able to supply workers to Canadian industrial agriculture on a large scale. The main sources for these migrant workers are South Asia, Central America, Mexico and Jamaica.

Some of the conditions established under this program are that temporary foreign workers must pay for their housing and half of their return ticket. The TFWP provides less protection and supervision than CSAWP. Thus, the agricultural industry has turned to the TFWP as its preferred supplier. The federal government has expanded the TFWP program by over 500 percent since 2006 and currently 50 percent of all seasonal migrant agriculture workers are calculated to be traveling under CSAWP and the other 50 percent under TFWP.\(^{80}\)

Moreover, this program functions similar to temporary H2-A and H2-B visas from the United States, that is to say there is no bilateral agreement between the two governments and the employer only has to provide a labor contract. Employers use existing channels to contract workers, such as FERMES in Quebec, where the number of TFWP workers grew from 300 to 3,000 in seven years.\(^{81}\) In Ontario, workers are being contracted through F.A.R.M.S. and in Alberta, there is no employer association carrying out worker contracting. However, and even though there is no legislation to regulate recruiters, the Canadian government has the obligation to ensure that worker rights are respected.

The Mexico/Canada Labor Mobility Pilot Project

The Mexico/Canada Labor Mobility Pilot Project also exists. Through this pilot project, these two countries commit to promote the organized, legal and safe flow of temporary Mexican workers to Canada, with full respect for their labor rights and under equal conditions to Canadian workers. This pilot project began in 2008 under a similar agreement to the Seasonal Agricultural Workers Program, promoted through the signing of a memorandum of understanding between Mexico and Canada in 1974. Over this past year, this project has brought 18,000 Mexicans to work in the fields of Ontario, Quebec, Manitoba, Alberta and British Columbia.\(^{82}\)

In the announcement of this pilot project, it was established that this project would be regulated and coordinated by the federal governments from these two countries under supervision of the Ministries of Foreign Affairs and Labor and Social Welfare, through the National Employment Service, in the case of Mexico. The

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79 Ibid. In 2008, the Ontario Court of Appeals ruled in favor of the UFCW’s claim that the prohibition regarding the creation of a union on farms, under the law of Ontario, was a violation of worker rights under Canada’s Charter of Rights and Freedoms. In a precedent-setting decision, the Supreme Court of Canada reinforced this ruling by determining "...the Section 2(d) guarantee of Freedom of Association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues." (B.C. Health Services). pp. 21-22.

80 Interview with Andrea Gálvez, UFCW liaison in Mexico. June 16, 2011.

81 Ibid.

82 For additional information, see: [http://www.dgec.df.gob.mx/programas/mexcana.html](http://www.dgec.df.gob.mx/programas/mexcana.html)
worker profile for applicants to this new system is described as a “Food Counter Attendant,” who will carry out activities like:

- Serve customers;
- Package take-out food;
- Follow the monitor for customer orders;
- Follow cash management procedures;
- Support product sales;
- Suggest appropriate products, combos or sizes.

The requirements for applying to this pilot project are:

- One-year minimum previous work experience.
- Elementary to high school education or equivalent.
- Be a Mexican citizen and reside in national territory.
- Be over 18 years of age.
- Hold valid official identification (Federal Electoral Institute ID card, military service record or passport).
- Have a Unique Population Registry Code (CURP by its Spanish acronym).
- Provide proof of the last year of formal schooling (maximum high school or vocational degree).
- Have proven experience in the available job.
- Demonstrate advanced English (at least a 70 percent level).

Conclusions and recommendations

The Seasonal Agricultural Workers Program (SAWP) between Mexico and Canada is one of the few temporary work systems that from inception has sought to develop and achieve a principle of bilaterality. Both governments are involved in program design and implementation and the existing agreement between the two countries establishes rights as well as obligations.

Under the premise that sustained bilaterality demonstrates the intention to address the interests of both the sending and receiving countries, the SAWP has been proposed as a model program for other parts of the world. However, in practice, a series of challenges to program administration have been observed that are detrimental to the rights of temporary migrant workers.

Existing differences between provincial legislation and national legislation hinder the full exercise of some labor rights, such as the right to unionize and to contest wrongful termination. The rights to housing and to health are also affected. Likewise, since the payment of taxes is imposed upon workers, wage deductions are made without the worker being able to reap the supposed benefits. Worker wages are different in each province and are based on minimum wage; furthermore, working conditions are more difficult in some provinces than others.

The role of the Mexican consulate in Canada is another consistent factor for consternation. Several reports on human rights violations of temporary workers under the SAWP program bear testimony to patterns demonstrating a lack of appropriate information, attention and assistance from consulate personnel.

The following list of general recommendations is a compilation of what other organizations dedicated to the defense of temporary migrant workers’ rights, authors and labor unions have identified as necessary actions to ensure respect and protection of workers’ labor and human rights under the SAWP.

1. Provide a transparent, impartial process of appeal available to all workers prior to any repatriation process.
2. Make it a condition of the CSAWP and the TFWP that provinces bringing migrant workers to Canada provide legislation that allow these workers to form and join unions to bargain collectively as provided under the Charter of Rights and Freedoms.
3. Immediately make public the statistics used by HRSDC to determine the yearly wage rates to be paid to seasonal migrant workers.
4. Enforce the provisions of the CSAWP and the TFWP that workers under the programs get paid as least as much as the provincial seasonal average wage rate.
5. Create national standards that require provinces to fully protect foreign workers.
6. Create national standards for provinces to accredit, monitor and sanction both domestic and offshore recruiters of foreign workers.
7. Give workers a place at the bargaining table to determine the yearly wage rate and provincial levels of pay.
8. Inspect all workers’ housing prior to and following their occupancy.
9. Make it mandatory that all written materials, instructions and signage be provided to workers in the necessary languages.
10. Eliminate the practice of withholding 25 percent of wages for Caribbean workers.
11. Immediately terminate any employer from the CSAWP and the TFWP who is found to be holding the personal documents of temporary migrant workers.
12. If an employer is removed from the CSAWP for violating the agreement, the employer should be banned from participating in any other federal or provincial foreign temporary worker programs.
13. Ensure workers are given a free medical examination before they return to their home country.
14. Provide a path to permanent residence for seasonal agricultural workers and other temporary foreign workers.
15. Ensure that employers remit a credible Labour Market Opinion based on much more substantial evidence than currently required.
16. Canada must not wait any longer to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which has been adopted by the United Nations General Assembly.

Regarding the Mexican government, we recommend:

1. Improve the information provided to workers.
2. Build capacity for coordination with provincial government agencies and strengthen the consulate’s role as a mediator for the protection of Mexican citizens.\(^{83}\)
3. In addition, we recommend that Mexico establish contact with the authorities in other sending countries that provide migratory labor to Canada in order to attempt to establish a platform of minimum conditions for the contracting country. This would preempt competitors from continuing to downscale the conditions under which migrant workers are contracted. This is a difficult strategy, which will take time, but that should be developed with technical support from international organizations such as the ILO.

\(^{83}\) Ibid. p. 65.
Bibliographic references


6. Interview with Evelyn Escalada, Professor at the University of York, Canada, and member of Justice for Migrant Workers. June 13, 2011.


17. www.amcpdf.org.mx/semana/conveniosdeimss.pps
3.2 The Guatemala/Canada System: The Canadian Seasonal Agricultural Workers Program (CSAWP)

Background

Guatemala’s migration processes can be explained within a social and political context aggravated by a 36-year long Civil War, concluded in 1996. This situation left Guatemala under conditions that hinder its social and economic recovery. The lack of opportunities Guatemalan women and men have to access decent employment and development, together with the burden of violence and the weakening of Guatemalan institutions have turned migration into a life option for many workers and their families. Within this context, it is important to note that remittances -which have grown considerably over the years- have become the main source of income for thousands of Guatemalan families.84

The Seasonal Agricultural Workers Program Guatemala - Canada, known as CSAWP, was established in 2003 with the goal of systematizing and formalizing the continuous displacement of migrant workers with experience in agriculture.85 The program was formalized with the signature of a Memorandum of Understanding between the Fondation Des Entreprises Pour Le Recrutement de la Main-D’Œuvre Étrangère: (FERME) in Canada and the International Organization for Migration (IOM). Contrary to the Seasonal Agricultural Workers Program between Mexico and Canada, known as the SAWP, the CSAWP was not formally signed by the governments of the countries involved, but by a specific organization that represents farmers or employers in Canada -FERME- and an intergovernmental organization, the IOM.86

According to the Memorandum, the IOM in coordination with the Guatemalan Ministry of Labor and Social Welfare (Ministerio del Trabajo y Previsión Social / M TyPS by its acronym in Spanish) and the Canadian Department of Foreign Affairs, Trade and Development (DFATD) will help potential workers to obtain migration documents. FERME and the M TyPS will select the workers, and personnel from the Guatemalan Consulate in Canada will be in charge of providing assistance at the airport upon arrival of workers from Guatemala. The Memorandum also establishes that the CSAWP will be implemented under the framework of the labor and migration laws of both countries.87 However, because the Memorandum of Understanding was not signed by both governments, the claim and fairness of the rights of Guatemalan workers, both under the Canadian legal framework and that of Guatemala, has been observed to be vague.

Although the Memorandum establishes that the Guatemalan Ministries of Labor and Foreign Affairs play a definite role in the CSAWP’s administration, in actual fact, the IOM is the only institution that has a direct relationship with FERME, which is in charge of the applications sent by Canadian farmers. The IOM also receives the applications that stipulate how many workers will be needed, their work and physical characteristics, as well as the names of the places where they will be working, the names of the contracting companies, and contract duration.88

According to the Canadian Department of Foreign Affairs, the Guatemalan Ministry of Labor and the IOM identified that the workers who have traveled to work in the Canadian agricultural fields, mainly come from 18 departments and 105 municipalities in the Republic of Guatemala, representing 32 percent of the total number of municipalities.89 6.6 percent of the workers come from 18 municipalities with poverty levels under 30 percent; 22.7 percent from 23 municipalities with poverty levels between 31 and 50 percent; and another 43.1 percent from 28 municipalities with poverty indicators above 71 percent.

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84 See: http://www.mappingmigration.com/migrationdevelopmentenglish.html
86 Additional information at: http://www.iom.int/cms/en/sites/iom/home.html
88 Ibid.
From this perspective, the institutions of the Guatemalan government, as well as the IOM have evaluated that the CSAWP helps to improve the living conditions of temporary migrant workers and to reduce their poverty levels, as it represents a job opportunity unavailable in their own country.

Another piece of information to consider is that out of the total number of workers traveling as part of the temporary work program, 93.7 percent are men and 6.3 percent are women. The IOM and institutions of the Guatemalan government have claimed that the number of women is lower due to the fact that there is a higher demand for male workers. Some researchers have set forth in various studies that the working conditions on Canadian farms, together with the social and cultural construction of the feminine and masculine roles in the Guatemalan society produce more difficult conditions for female agricultural workers, thus inhibiting their participation in the recruitment and contracting program and processes.

As for the civil status of the workers temporarily traveling to Canada, the Canadian Department of Foreign Affairs and the Guatemalan Ministry of Labor have established the following statistics: 91.9 percent of the program participants are married or with a common-law partner, 6.7 percent are single men, and the rest are widowers, separated and/or divorced. As for the women migrant workers, the highest percentage corresponds to single women. These statistics reveal that temporary migrant workers from Guatemala belong to a young population with a concrete need for employment and a need to eventually return to Guatemala to restore family bonds.

It is the IOM that defines the procedure to select migrant workers. The IOM defines the places to be visited in order to select workers. In a prior visit, IOM personnel make the first selection of workers. Later on, representatives from the Guatemalan Ministries of Foreign Affairs and Labor arrive to carry out interviews and initial testing in order to be able to grant a definite approval. Since early 2003, the program has been growing yearly, from 215 migrants and 10 employers in 2003 to over 14,000 migrants and 500 employers.

**Contracting**

The visa application form and all the corresponding documents are sent to the Canadian Embassy, so that the medical examination forms can be issued. If the worker’s medical examinations are approved, he/she is appointed to a request for seasonal agricultural workers. At the same time, an HRSDC work permit must be requested through FERME.

Once the Canadian Embassy has received the HRSDC work permit, then the visa is issued. The workers who are traveling are asked to visit the IOM office a few days before departure in order to receive instructions about the trip, “appropriate behavior,” and the discipline standards they must follow during work on the farms. Each worker receives a folder with all the travel documents on the day of departure. The

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90 Ibid.
93 Jacobo Vargas Foronda. *Op cit.*
96 See: [http://www.ufcw.ca/index.php?option=com_content&view=article&id=2161%3Aguatemalan-migrants.&catid=17%3Acanadian](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2161%3Aguatemalan-migrants.&catid=17%3Acanadian): The “instructions” the workers receive are a sort of list of warnings to remind them, among other things, that, "You cannot compare yourself to the Mexican workers, they have a different kind of deductions." (The form given to each worker at the IOM is annexed and can be consulted at the aforementioned web site).
documents are classified in order to facilitate emigration from Guatemala and immigration to Canada. The folder includes the documents the worker will need to give the employer.97  

The selected workers have to pay for the medical examinations carried out in Guatemala at health clinics approved by the Canadian Embassy. The selected workers make a 4,000 quetzal deposit (slightly over $500 US dollars), which functions as a penalty if the worker returns before the termination date stipulated in the contract. If the worker respects the dates stipulated in the contract, the deposit is reimbursed upon contract completion.98  

The selected workers are also required to purchase private medical insurance with Empresa Promotora de Servicios de Salud (EPSS), a health care promotion company designated by the IOM, that is also in charge of booking and purchasing flights which are paid directly by FERME. Although the letter of recommendation the employers give migrant workers is sent directly to the IOM headquarters, when the migrant workers return, they must hand it in to the IOM. It is important to note that the workers must nonetheless personally take the letter to the IOM offices since whether they get contracted the following season or not is contingent on this letter.99  

According to the Guatemalan Ministries of Foreign Affairs and Labor, and the IOM, migrant workers enjoy fair conditions under the CSAWP framework.100 However, as will be seen below, the conditions are far from satisfactory.  

In general terms, upon arriving in Canada, Guatemalan workers are placed at work in vegetable fields (lettuce, celery, tomatoes, cabbage, broccoli, etc.), and to a lesser extent, in tree nurseries and agricultural farms. They are required to work a minimum of eight hours per day and in accordance with the law are entitled to days off and breaks within the working day.101 Workers, however, have reported that they work between 9 and 12 hours per day,102 and, although they do have 10 to 15 minute breaks, the physical labor demanded in some farms is highly strenuous.  

According to the Guatemalan consul, wages were $11.75 Canadian dollars per hour, as opposed to the minimum wage established in Quebec, which is $9.50.103 It is important to note that the wages Guatemalan workers receive in Canada by law must be the same as the wages received by Canadian agricultural workers. It must, however, be taken into account that each province has its own labor codes and that there are differences between them.  

Employment contract duration varies between three and eight months.104 The second evaluation of the CSAWP, conducted by the Guatemalan Ministries of Foreign Affairs and Labor, and the IOM in 2008, established “contract compliance” percentages. It should be noted that when non-compliance was described, only workers were held responsible and no responsibility was attributed to the lack of satisfactory working conditions in the workplace, which is the employers’ responsibility.  

In 2007, 93 percent of the 2,255 workers traveling to Canada completed the contract; 76 percent were workers that had traveled to Canada before, and 16 percent were first time participants. 6.8 percent were workers who did not fulfill the contract for any of the following reasons:105  

- 2.8 percent were contracts that were interrupted by the employers due to the workers’ lack of discipline (alcoholism, conflicts with workmates, etc.) and/or low productivity.

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99 Ibid.  
101 Ibid. p. 16.  
103 For additional information, see: http://www.focal.ca/publications/focalpoint/409-march-2011-federico-urruela  
104 See: http://www.justicia4migrantworkers.org/sw_new.htm  
105 See: Cuadernos de Trabajo sobre Migración No. 25. p. 17.
• 0.8 percent were workers who took the decision to terminate the contract because they were unable to adapt to living and working in Canada.
• 1.7 percent were sent back for health reasons.
• 1.3 percent were sent back for family reasons.
• 2 percent abandoned their job in order to travel to the United States.

**General social security conditions**

In accordance with Canadian law, all workers are entitled to social protection and to access the same social rights and benefits as Canadian workers, without discrimination. In addition, as was explained in the chapter on the SAWP, all the provinces of Canada have their own legislation on health and safety conditions in the workplace.

Social security is indispensable for workers to be able to begin work in Canada. Upon a worker's arrival in Canada, the Guatemalan Consulate almost immediately carries out the corresponding formalities together with the worker.

The compensation laws applicable in Canada establish a system through which workers can request compensation for work-related injuries or diseases. The following deductions are made for this kind of compensation:

- Employment insurance: a 1.53 percent deduction from gross wages.
- Health care insurance: a $3.92 Canadian dollar deduction per week.
- Parental insurance: a monthly 4 percent deduction from gross wages offering the benefit of economic assistance from the Canadian government to the worker who has a baby at the beginning of his/her work in Canada or within a year after returning to Guatemala, provided that he/she accumulated more than 600 working hours towards the end of the season.
- Vacations: vacation pay is made at the end of the contract.
- Housing and accommodation: a weekly deduction of $35 Canadian dollars.
- Quebec Certificate of Acceptance: $175 Canadian dollars. Payment for this certificate is made from 4.0 percent of the vacation pay at the end of the contract.
- Quebec taxes: a 4.95 percent monthly deduction from gross wages through which the worker is entitled to receive a pension after ten seasonal work visits in Canada.
- Income tax: 16 percent of the wages are deducted. This tax is only applicable to married workers or workers with a common-law partner who earn more than $16,510 Canadian dollars in one season.
- Income tax declaration: At the end of the contract, 4.0 percent of the vacation pay is deducted, around $40 Canadian dollars, for a specialized private company to prepare the documentation regarding the income tax, facilitating the formalities for the workers, and filling-in the TD1 form. It is important to note that in 2009, the Quebec Labor Standards Board informed the Guatemalan Consulate and FERME that the weekly deductions made to nearly 4,000 temporary agricultural workers from Guatemala had been a violation, since the maximum deduction allowed by the Provincial Government Labor Standards is 20 dollars per week.

It is important to note that the role played by the Guatemalan Consulate’s staff could be of greater assistance to the Guatemalan workers from the moment they arrive in Canada. However, it has been documented that the Canadian government has refused to give consulate staff a safe-conduct to enter the airport and support workers with the first formalities.

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108 Ibid. p. 28.
The medical services plan

The medical services plan in the CSAWP undoubtedly illustrates one of the challenges faced by temporary workers and their families in accessing social security in its broadest sense. The medical services plan they are offered is presented as an “opportunity” to access health care, thus avoiding the possibility that the workers demand compliance of a right to social security that they are entitled to as workers and that also covers the family members that depend on them.

The medical services plan is offered by the IOM of Guatemala and is mainly addressed to the migrants’ family members since the work-related accidents and illnesses of workers on Canadian farms are taken care of under the framework of the Canadian health care system. Because health care services in Guatemala are in general precarious, the medical services plan is actually offered as an opportunity.\(^{109}\) Guatemala spends only 1 percent of its Gross Domestic Product on public health care and it is estimated that up to 20 percent of the population does not have access to medical services.\(^{110}\)

Three different medical services plans exist and each plan has a price paid in US dollars because it is provided by an inter-institutional agreement with a remittances company (an international micro finance company), which forms part of the IOM network in the United States and a medical services company in Guatemala (Empresa Promotora de Servicios de Salud, S.A. or EPSS by its acronym in Spanish).

It should be noted that migrant worker participation is obligatory and that several of the available medical services plan packages are paid with the workers’ remittances. In 2008, EPSS facilities in Guatemala consisted of 251 general practice centers, 252 specialization centers, 69 laboratories, 24 X-ray sites, and 19 hospitals. The families are covered for a whole year starting at the beginning date of the employment contract. Although the medical insurance does not cover the workers during their stay in Canada, they are covered by the plan after their return to Guatemala. The EPSS has a call center that beneficiaries use in order to receive information about where to seek treatment, and to coordinate appointments with the medical professionals.\(^{111}\)

The plan functions as follows:

- It is obligatory for all CSAWP workers to fill-in a form with the information required to issue the card that entitles them to receive medical services. The following information is required:\(^{112}\)
  - first name and surnames of the person sending the remittance.
  - first name and surnames of the beneficiary or beneficiaries in Guatemala.
  - beneficiaries’ ages.
  - beneficiaries’ sex.
  - number of the main beneficiary’s identification card (non-essential).
  - beneficiaries’ civil status.
  - beneficiaries’ kinship.
  - beneficiaries’ home address.
  - beneficiaries’ telephone number.

The medical services plan has coverage in all regions, departments and municipalities of Guatemala and there exist different user plans, described as follows:\(^{113}\)

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\(^{110}\) Ibid.

\(^{111}\) Ibid.


Medical Services Plans

<table>
<thead>
<tr>
<th>Type of Plan</th>
<th>Fee</th>
<th>Migrant’s total expense in US dollars</th>
<th>Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>A) Basic Plan</td>
<td>Individual Annual</td>
<td>$18.00</td>
<td>Clinical physician, gynecologist, pediatrician.</td>
</tr>
<tr>
<td>Family Annual</td>
<td>$36.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B) Silver Plan</td>
<td>Individual Annual</td>
<td>$100.00</td>
<td>Clinical physician, gynecologist, pediatrician, orthopedist, urine and blood lab tests. Diagnostic imaging, X-rays, medical services, and scheduled transportation. Dentist, dental evaluation, cleanings, fluors, fillings, and basic tooth extractions.</td>
</tr>
<tr>
<td>Family Annual</td>
<td>$260.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c) Gold Plan</td>
<td>Individual Annual</td>
<td>$185.00</td>
<td>Clinical physician, gynecologist, pediatrician, specialized physicians (endocrinologists, neurologists, cardiologists, gynecologists). Urine and blood lab tests. Diagnostic imaging, X-rays, medical services, and scheduled transportation. Dentist, dental evaluation, cleanings, fluors, fillings, and basic tooth extractions. Maternity.</td>
</tr>
<tr>
<td>Family Annual</td>
<td>$450.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Workers’ current situation under the CSAWP

The working conditions of temporary workers from Guatemala under the CSAWP are far different from the working conditions of Mexican workers under SAWP. The first difference is that the workers under CSAWP are recruited by the IOM directly and are offered employment as a great opportunity where, if they “work” hard enough, they will be entitled to a series of privileges rather than rights. From the moment they are hired, a kind of behavior code is imposed on them, which must be followed once they are on the farms in Canada.114

The recruitment and contracting conditions of these workers have been identified to be unclear and unverifiable. A researcher, Jacobo Foronda, explained that the workers he tried to interview on various occasions for his research on the CSAWP, expressed their fear that if the IOM found out that they were talking about their work on farms in Canada, they would be sanctioned and might even run the risk of not having their contract renewed in the following agricultural seasons.115

A birth certificate and a police clearance certificate are among the documents that Guatemalan workers are required to submit. The workers must immediately present their passport and they are required to pay a 4,000 quetzal guarantee (slightly over $500 USD) plus another 2,600 quetzal payment ($330 USD) for medical examinations.

Other expenses they must face are the fees for the Mexican transit visa and the Canadian work visa, as well as transportation expenses to travel from their place of origin to the capital city in order to conduct the necessary formalities.116 As for the guarantee deposited by the workers, although they are informed that it will be reimbursed when they return to Guatemala once their contract has been completed, when a worker returns

116 Ibid. p. 13.
because he/she was dismissed by the employer, the guarantee is not returned to them and they have to pay for their flight back home.

As for the working conditions on the Canadian farms, the workers have informed that their working days range from 13 to 19 hours, and that they sometimes lose track of the days they have worked since they also work Saturdays and Sundays. They hardly complain about this situation since they feel privileged just to have a job. They do not know their contract terms either. Many are not familiar with the legal language and others have reported that it is written in French, which they do not understand. They do not receive a copy of the contract either.\textsuperscript{117} This scenario evidences that the Guatemalan Ministry of Labor has delegated its work of supervising labor law compliance to both the IOM and FERME, leaving workers in a state of vulnerability even before leaving their country.

The Guatemalan Consulate in Canada is entitled to supervise the workers’ conditions under the CSAWP. However, they have informed that this task demands too much dedication from the staff to be able to conduct it periodically and limitlessly.\textsuperscript{118}

Another aspect in which the Guatemalan Consulate in Canada participates is conflict resolution between workers and employers.\textsuperscript{119} The workers have evaluated this participation as deficient. Many of the visits that the consulate makes take place at the workers’ lunch time and do not take into account that many of them go home to eat. Throughout the day, there are two 15-minute breaks in the morning and another two in the afternoon.\textsuperscript{120}

It should also be highlighted that although, in accordance with federal and provincial labor law in Canada,\textsuperscript{121} the same working conditions should be applied to Canadian workers and to temporary migrant workers from Guatemala, the actual possibility to access justice in case of a violation of rights is far from effective. This is mainly due to the fact that the Guatemalan workers participating in the CSAWP are committed to remain in a labor relationship until the end of the term of the contract, even if their labor rights are violated. Should the employer decide to terminate the labor relationship, the workers are required to return to Guatemala without the possibility of being hired by another employer. This lack of freedom is an element that, like in the SAWP, becomes an instrument of pressure on workers who carry out temporary jobs.

According to testimonies by the workers themselves, they face confinement while working on farms in Canada, and this leaves them more vulnerable to their human and labor rights being violated.\textsuperscript{122} Confinement imposes limitations on collective organization. Workers are therefore unable to negotiate improvements in their working conditions, or to affiliate to a union. It should be noted, however, that in some provinces of Canada workers do have the right to affiliate to a union and to collective bargaining.\textsuperscript{123}

Many workers have reported that there is a scarce possibility of receiving advice from Canadian unions regarding their rights as workers, as well as their social security rights.\textsuperscript{124} There exist, however, social organizations, like Justice for Migrant Farm Workers, or the Agricultural Workers Alliance (AWA), that are part of the UFCW and are constantly approaching and advising temporary migrant workers. The AWA, for instance, is already operating 10 support centers for workers throughout Canada.\textsuperscript{125} These centers have done very important work in training temporary workers working in Canada under SAWP and CSAWP.

\textsuperscript{117} Ibid.
\textsuperscript{118} See: Cuadernos de Trabajo sobre Migración No. 25. Op. cit. p. 28
\textsuperscript{119} Ibid. p. 29.
\textsuperscript{120} Ibid. p. 26.
\textsuperscript{121} See: \url{http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml}
\textsuperscript{122} See worker testimonies in: Jacobo Vargas Foronda. Op. cit. p. 27
\textsuperscript{123} See the chapter on SAWS.
\textsuperscript{124} See worker testimonies in: Jacobo Vargas Foronda. Op. cit. p. 27
\textsuperscript{125} See: \url{http://www.ufcw.ca/index.php?option=com_content&view=article&id=2009&Itemid=198&lang=en}
Moreover, the CSAWP establishes a series of deductions on the temporary workers’ paychecks in order to ensure that they receive social security, which nonetheless temporary migrant workers rarely get to see. Some Guatemalan workers expressed that the unemployment insurance only benefits Canadian workers, since by the time the insurance is paid, they have already returned to Guatemala.126

The Medical Services Plan has given rise to several concerns. In Guatemala, the Plan, apart from being contingent on migrant worker remittances, migrant workers and their family members face complications to access medical services. To gain access to these services, workers are required to maintain their worker status, which in some cases leads workers to remain in dangerous jobs or under exploitative conditions in order to be able to pay insurance coverage for their families. If a worker is not hired or is not selected for a season, his/her protection will come to an end.

There currently exists a tendency to increase the participation of temporary workers under CSAWP, which will imply an increase in the demand for medical services in the next few years. Growth of this demand will also generate an increase in infrastructure in Guatemala to be able to provide the required health care. It is not clear, however, who will be responsible for the expansion of the EPSS health care networks since it is a private service, rather than a right provided by the Guatemalan government. The pressure of demand could translate into a price increase for users, who are basically migrant workers and their families. Given that that it is compulsory to join the Medical Services Plan when selected for the CSAWP, it has become a business for the IOM and the EPSS, and a contradiction to the workers’ legal right to access health protection.

As for the Guatemalan workers in Canada, when they refer to the medical insurance, they state that although they pay for it, it does not turn out to be very helpful. On occasions they have expressed that:

“Yes, we do pay for it. It is four dollars a week. In Guatemala, we buy family insurance, but it is no good. We are forced to buy it. There are no clinics here, although they say that there are doctors. If you need a clinic, you have to go all the way to the capital city.”

Besides, they note that having the medical services insurance does not ensure access to medical care when they feel sick on the farm:

“Yes, we do have insurance, but when a worker gets sick, he needs dollars to pay with. The boss does not take us to the hospital and if he does, we have to pay for it and also for the medicine.”127

It has been noted that the privatization of medical services in Guatemala as of the agreement between the IOM and the EPSS has caused greater inequality between Guatemalans who have enough economic resources to access these services and those who do not. In many cases, the latter are being neglected by the public health care service.128 As for other social security rights, there is also a parental insurance, the Canada Pension Plan, and employment insurance benefits. Staff from the Guatemalan Consulate in Canada should be in charge of explaining these rights to the migrant workers upon arriving in Canada. Although the deductions are applied to the migrant workers’ paychecks, they are rarely recovered by the beneficiaries.129

The workers, for their part, have reported that they have received no explanation regarding parental insurance:

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127 Ibid.
129 Ibid.
“I had a child while I was in Canada. We filled in the form with the Consulate, and so far nothing has been resolved yet. My son is already 3 years old! Another workmate was paid parental insurance, but I wasn’t.”

It has been confirmed that the requirements requested in order to be able to access social benefits become barriers due to the arbitrary deadlines imposed on the workers to be able to claim these benefits. Most workers cannot access these benefits not only because of the difficulties in the application procedure in Canada, but also because of the nature of the program that has a limited contract duration.

Conclusions and Recommendations

Various human rights organizations in Canada consider that CSAWP violates the labor and human rights of Guatemalan workers. The conditions under which they are recruited and contracted are evidently discriminatory and the fact that the Program has been designed and managed by FERME and the IOM, instead of the governments of Guatemala and Canada, leaves an enormous void that not only makes it possible for temporary worker rights to be violated, but also hinders the identification of those who are responsible for those violations in order to hold them accountable.

Evelyn Escalada, member of Justice for Migrant Farm Workers, has publicly denounced that the Canadian government goes against its own human rights laws and policies by evading its responsibility to administer the CSAWP in a co-responsible way together with the Guatemalan government.

The UFCW has made a specific recommendation to enable foreign workers to ensure that their human rights are enforced. The recommendation consists of permitting foreign workers to have access to apply for permanent resident status. This would enable temporary workers to access all social benefits, as well as to enjoy the protection of all laws, including the labor law, like any Canadian citizen, except for political rights.

On the Guatemalan side, it is recommended that the Guatemalan State take on the full administration of the CSAWP. The Guatemalan Ministries of Labor and Social Welfare and Foreign Affairs should promote that the CSAWP take worker rights into account, as well as the actual benefits derived from their working abroad. The government of Guatemala should thus promote the signature of a Memorandum of Understanding that establishes mechanisms to ensure and protect the human and labor rights of temporary migrant workers. Another recommendation is the implementation of a mechanism to audit the CSAWP from its very beginning.

With regard to access to medical services, sustainability and accessibility should be top priority in any reform to the Medical Services Plan for temporary workers. A possible reform would be to expand the role played by employers and/or FERME, the association that represents them, and make them assume some of the expense of the insurance packages. Another area of improvement for the program is to ensure more support from the Guatemalan consular staff to get medical treatment and facilitate benefit claims for the workers during their stay in Canada.

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131 Telephone interview with Evelyn Escalada, June 13, 2011.
133 Ibid. p. 42-43.
Bibliographic references


7. www.rwmc.uoguelph.ca


3.3. The El Salvador/Canada System: The Temporary Foreign Worker Program  

(Canada) and the Salvadoran System of Temporary Workers Abroad (El Salvador)\(^ {135} \)

Background and characteristics

El Salvador has a long tradition of labor migration in part due to its history and the high unemployment rates in recent decades. It is estimated that close to 25 percent of its population emigrated during the civil war from 1979 to 1992. Today, it is clear that the migration dynamics has had an impact on the country's development. A large segment of its 5.7 million inhabitants depend on the remittances of around 3 million Salvadorans who live abroad. In 2009, in spite of global recession, the value of remittances was $3 billion 465 million US dollars, representing more than 16 percent of the Gross Domestic Product (GDP) in El Salvador and more than 10 percent of household incomes. In the last 20 years, remittances have grown at an annual rate of nearly 8 percent, which is very similar to the annual average growth of Salvadoran exports.\(^ {136} \)

Since 2002, the Salvadoran government started to promote a better organized labor migration system for its workers. Canada is one of the countries to which workers travel under this modality. In order to be able to compare the case of the temporary labor system operating between El Salvador and Canada with the aforementioned systems, it should be noted that the El Salvador/Canada system is not based on a bilateral agreement. Each country operates unilaterally with its own structure and procedures. It is thus important to understand not only how each program Works, but also the role played by the contracting company and the intermediary function carried out by the IOM.

Canada: The Temporary Foreign Worker Program - TFWP

Under the Canadian framework, the admission of temporary migrant workers into the country takes place through the Temporary Foreign Worker Program (TFWP). The TFWP was initiated in 1973 so that Canadian companies could be able to contract a skilled workforce from other countries in a temporary and on an immediate basis, in case no Canadian workers were available for specific jobs. As opposed to the Mexico–Canada Seasonal Agricultural Worker Program (SAWP), which has remained relatively stable throughout the years, the TFWP has been expanding and adapting its purpose, size and target population in order to favor the needs of the business sector. It has nonetheless essentially remained out of the public debate. Given that the TFWP is an internal Canadian program, it responds to a commitment of the Canadian State with the contracted workers, but not with the government of the workers' country of origin.

By 2002, it was clear that employers were under pressure to fill the shortage of workers, apart from skilled worker category. The framework of the recently passed Canadian Immigration and Refugee Protection Act (IRPA) was unable to respond to the real needs of the Canadian labor market. For this reason and aiming at filling in the voids, the Canadian government introduced a pilot project based on occupations requiring lower levels of formal training. Named the Pilot Project for Occupations Requiring Lower Levels of Formal Training, it referred to National Occupation Classification Levels C & D (NOC C & D).

In order for a worker to gain admission to this Pilot Project, it is necessary that he/she have a high school diploma or two years of specific labor training. Many workers, however, are simply given a brief demonstration and on-the-job training. Besides, it allows Canadian employers to import seasonal workers other than agricultural workers from various countries (such as workforce for services, the hotel trade, equipment operation, transportation and construction). It also serves agricultural industries that are not under the SAWP.

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\(^ {135} \) The information in this chapter was updated to June 15, 2012.

\(^ {136} \) Informe sobre Desarrollo Humano El Salvador 2010; Programa de Naciones Unidas para el Desarrollo. Available at: http://hdr.undp.org/sites/default/files/reports/246/indh_el_salvador_2010.pdf
In the beginning, the Pilot Project was minimally publicized, but today it has grown into an important modality within the TFWP for contracting workers, which has benefitted the business sector. It represents an efficient modality that gives employers greater flexibility to recruit and contract temporary foreign workers, without having to follow the procedures and safeguards of a model like SAWP. For these reasons, agroindustrial businesses that do not depend on seasonal work because they work the whole year, mainly contract workers under this modality.

This form of recruitment and contracting has been criticized by the unions that safeguard migrant worker rights because it provides less protection and supervision than SAWP, and leaves the workers under the employers’ absolute and arbitrary control. Given the popularity the TFWP has gained among the business sector, it is also important to take into account the consideration that different sectors have made about this issue: Canada needs to formulate a long-term commitment for the contracting of foreign workers, given the difficulty of recruiting Canadian workers for these kinds of jobs.\(^{137}\)

The Pilot Project is regulated by the federal government, and temporary migrant workers enjoy the same rights as their Canadian counterparts enjoy under the Constitution and the federal law. However, as tends to occur in others areas of the Canadian migration policy, the TFWP’s policies and regulations vary from province to province, and shared jurisdiction can complicate implementation.

The TFWP is jointly managed between three different federal bodies: Citizen and Immigration Canada (CIC), Human Resources and Skills Development Canada (HRSDC) and Canada Border Services Agency (CBSA). The CIC deals with access to Canada when applications are made inside Canada, and visa officials in the consulates are in charge of assessing the admissibility of a foreigner in order to assure that there are no security, criminality and contagious disease issues. They also analyzes the legitimacy of the employers’ demand for labor, the credibility of the applicant’s intentions, and the applicant's qualifications for the job. The HRSDC analyzes the risks and benefits for the Canadian labor market, defining whether it is suitable for a temporary worker to be hired, and at the same time checks that no negative impact is forthcoming. The CBSA is responsible for migrant worker admissibility upon arriving in Canada, and is in charge of implementing IRPA, 2002.\(^{138}\)

At present, under the TFWP, visas can be given for a maximum of 24 months, with a possible extension if the need for the worker to continue is justified. For an extension, the CIC must be convinced that the worker's stay is still temporary and that he/she has no criminal record. It is the employer's choice to apply for such authorization for a current or new worker.

With the recent exponential increase in the number of applications under this modality,\(^{139}\) the challenges faced by the TFWP include: time lags and increases in the time it takes to process a work permit; the employers' lack of knowledge and understanding of requirements; and their limited capacity to monitor compliance with the Labour Market Opinion (LMO).

After the initial period stipulated by the TFWP, the company can select the workers who express their intention to stay in Canada for the Foreign Worker Provincial Nominee Program (PNP). This provincial program eases restrictions so that employers can give long-term incentives to the migrant workers they hire. Therefore, these workers --after a certain time lapses-- can move toward applying for permanent residence. It should be noted that only under the PNP can workers in the TFWP/Pilot Project have a path to permanent residence. Access is usually only open to skilled workers. The provincial programs in Alberta and Manitoba are of interest because they are based on the province’s needs (mainly promoted by the business sector), and allow

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\(^{139}\) For instance, an annual 100 percent increase has been reported in the number of applications in the provinces of Alberta and British Columbia.
the province itself (rather than the federal government) to select which workers may remain in Canada after their temporary visit.

The PNP in itself is aimed at establishing annual migration goals. In Manitoba, an area with low population density, the program has had great success. Moreover, it has been a positive experience for migrant workers since as far as the timing is concerned they enjoy a certain priority in the process. Besides, with support from a union, United Food and Commercial Workers Canada (UFCW Canada), many temporary workers in both provinces have gained permanent residence. When an application is approved, the migrant worker receives permanent residence and is allowed to bring his/her family to Canada. Another benefit is that they stop depending on the initial contracting company and may search for another employer if they so desire.

In April, 2011, in an attempt to strengthen the TFWP, important modifications were introduced at a federal level that not only affected the contracting process but also migrant worker rights. Far from reducing the vulnerability of workers under their employers, different critics claim that these modifications were not useful in solving the program’s weaknesses regarding the protection of workers’ rights.140

These modifications served to establish a stricter evaluation of the companies’ demand for workers. It also established a two-year prohibition for employers who do not comply with commitments to the workers in accordance with the legislation on recruitment, wages, working conditions and occupation. The requirement to publish a list of non-eligible employers on the CIC’s website was also established, although a visit to that site shows no names so far.141 Another modification is the penalization of workers for failure to comply with the work agreement, as well as for signing contracts with ineligible employers. The sanctions may imply dismissal, loss of the right to work in Canada or even deportation. Besides, according to a CIC bulletin of March 2011, workers making payments to an unauthorized contracting agency or migration agent will be considered at fault, even if they are victims of fraud.

The new cumulative duration regulation establishes a maximum four-year period for a migrant worker to be able to remain working in Canada.142 This rule, which applies to all temporary migrant workers as of April 1, 2011, regardless of their date of arrival,143 reaffirms job temporality and establishes a restriction on the possibility of remaining in and integrating into Canada.

Considering that the work permit is linked to the employer, these modifications undoubtedly discourage reporting offenses committed by employers or recruiters. This makes it impossible to gain effective access to justice where workers’ rights are violated while in Canada. It is important to note that at a provincial level, the employer needs to be presented with a formal complaint in order for a worker to be able to report an abuse, since the protection of migrant worker rights is under the jurisdiction of the province.

Besides, contrary to the House of Commons Committee’s recommendation of May 2009, the federal laws have not been modified for temporary workers in lower-skilled occupations to be able to apply for permanent residence, although most of the jobs they hold are not actually temporary. As long as this situation persists, the regulatory system for the admission of temporary workers, and the workers themselves will continue to be abused by Canadian employers, as a result of their need for a non-temporary workforce.

El Salvador: The Salvadoran Program for Temporary Workers Abroad and its Management Model

Given the impact of migration on national development, the Salvadoran government has responded to the nearly three million Salvadorans living abroad by establishing support programs coordinated by the Vice-Ministry of

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143 Not applicable to workers contracted under a bilateral or international agreement, such as SAWP.
Foreign Affairs for Salvadorans Living Abroad.\textsuperscript{144} Considering the impact of remittances on the Salvadoran financial sector, the government is increasingly searching for new ways of encouraging and managing human flows and remittances, involving and dialoging with people in the Salvadoran diaspora. In the last decade, migration was such an important public policy theme that it came to influence the design of governmental institutions, and the political rhetoric. It also became an important media topic.

As of June 2009, the Vice-Ministry initiated an internal reorganization process, redefining both strategic roles and action guidelines. There are currently three general directorates: Migration and Development, Foreign Service, and Human Rights. The services of the network of consular representations are also under the Vice-Ministry.\textsuperscript{145} The General Directorate of Migration and Development is in charge of the Salvadoran Program of Temporary Workers Abroad (Programa de Trabajadores Temporales Salvadoreños en el Exterior / PROSALTEX by its acronym in Spanish), which was put into effect in the year 2002 out of the need to create labor alternatives in other countries, given the high unemployment rate existing in El Salvador.

PROSALTEX is a national program that allows the Salvadoran government to sign bilateral agreements with other countries or foreign companies in order to enable Salvadorans workers to temporarily migrate in an orderly manner. It has been presented as a comprehensive management model that allows a worker to leave El Salvador with the minimum skills for the designated work; to meet the migration requirements of the receiving country, and to have their basic rights ensured and respected, including equal conditions in relation to the workers in the receiving country.\textsuperscript{146} PROSALTEX has placed emphasis on the need for coordination between the Ministry of Labor and Social Welfare (Ministerio de Trabajo y Previsión Social / MTPS), the Ministry of Foreign Affairs (Ministerio de Relaciones Exteriores / MRR EE) and the IOM headquarters in El Salvador in order to provide technical support throughout the different phases of worker selection, training and migration facilitation.

In its initial years, PROSALTEX carried out negotiations through the Salvadoran Embassy in Canada with a Canadian company called Maple Leaf Foods,\textsuperscript{147} interested in contracting between 150 and 200 Salvadoran workers under the Canadian TFWP modality and its Pilot Project in the province of Alberta. It was later extended to another company belonging to the same industry, Olymel, operating in Alberta and Manitoba.

By the year 2006, with the purpose of reaching a more effective and efficient management, and in the context of how the program had grown, it was considered important to sign a cooperation framework agreement geared to coordinate actions between the different institutions involved in labor migration processes. The IOM’s cooperation was sought as a strategic partner in order to strengthen the program’s administration. That same year, a Cooperation Convention was signed between the Ministry of Labor (MTPS), the Ministry of Foreign Affairs for Salvadorans Living Abroad.\textsuperscript{144}

\textsuperscript{144} The objectives of this Vice-Ministry are: a) to facilitate citizen inclusion and participation of Salvadoran people living abroad and their family members in national and territorial development processes; and b) to help comply with the State’s international obligations in human rights with an emphasis on consular and diplomatic protection of Salvadoran women and men living abroad. Its specific goals include the commitment: i) to provide efficient and comprehensive consular services that give dignified and quality treatment to all Salvadorians living abroad and their families; ii) to encourage Salvadorans living abroad and their families to own their rights and participate actively in national and territorial development processes; iii) for Salvadorans living abroad to strengthen their bonds with El Salvador and their municipality of origin; iv) to promote respect for and assurance of the human rights of all Salvadorans living abroad in accordance with the national and international standards in force, regardless of their migratory status; v) to facilitate the recognition and application by the State of El Salvador of the International Standards on Human Rights and Humanitarian Law in harmony with the Salvadoran Constitution.

\textsuperscript{145} Flowchart can be consulted at: www.ree.gob.sv


\textsuperscript{147} Maple Leaf Foods is a food processing company which owing to the lack of workforce, particularly in agricultural areas with low population density in Manitoba, employs more than 1,100 temporary migrant workers from China, Colomba, Honduras, Mauritius, Mexico, the Philippines and Ukraine, as well as El Salvador. In order to support this process, a special International Recruitment Office was set up in 2007. It should be noted that the kind of work in question is highly strenuous and dirty, thus implying health risks and the risk of physical injuries.
Affairs (MRREE) and the IOM.\textsuperscript{148} The Second Cooperation Convention was held in 2009 between the same institutions. This Convention was meant to last five years. This agreement has made it possible to make progress in the development of a Management Model for the Temporary Labor Migration Program, as part of a process coordinated by the IOM. This model was designed to define the competence of each of the actors involved in the management of temporary labor migration, and optimizing the experience of the workers contracted under this program.

Under this modality, more than 900 Salvadoran workers were contracted by Canadian companies between 2002 and 2009. The temporary work agreements lasted between six months and two years, depending on the company doing the contracting. The workers were stationed in six Canadian provinces, and more than 90 percent were working in meat processing plants, most of which belong to Maple Leaf Foods. In Alberta, there were 352 workers; in Manitoba, 461 and in Saskatchewan, 41. The rest worked in the agricultural sector or in hotel services in British Columbia, Ontario or Nova Scotia. In general, because of the kind of work carried out in processing plants, more men than women get selected.\textsuperscript{149}

No new work agreements were signed during 2010 and 2011, neither were workers sent to Canada because the management model in force was being refined and formalized. In January 2012, before the management model was formalized, the IOM received an application by Maple Leaf Foods to reactivate the program. The company requested that a recruitment and selection process of 135 Salvadoran workers be organized in coordination with government institutions. These workers were to be incorporated into their plants in Brandon (Manitoba) and Lethbridge (Alberta) for a two-year period.\textsuperscript{150} After early meetings with the counterparts, workers were called on a national level through a press conference held by the Ministry of Labor (MTPS), the IOM, the Vice-Ministry for Salvadorans Living Abroad and the Canadian Embassy in El Salvador.

According to the call for applications, the candidate profile the company was requiring was: workers aged between 20 and 35, with completed high school studies, no height preference, capacity to successfully complete the physical demands analysis by lifting 22 kilos and 700 grams, in the case of men, and 18 kilos and 200 grams, in the case of women, and the capacity to work in meat processing facilities, i.e., the capacity to tolerate temperatures ranging from -30°C to +30°C.

From February 28 to March 15, 2012, approximately 4,900 curricula vitae were received from applicants. They were revised in order to select the candidates meeting the requirements before the pre-interviews. In June that same year, 135 Salvadoran workers signed their work contracts with the company in order to work in Canada under this program.\textsuperscript{151}

In order to reaffirm its commitment with the continuity and strengthening of PROSALTEX in consideration of the workers’ interests, on June 15, 2012, the Ministry of Labor, the Vice-Ministry for Salvadorans Living Abroad and the IOM jointly signed a Memorandum of Understanding on the Management Model for the Temporary Workers Living Abroad Program in order to make the model operational.\textsuperscript{152}

\textsuperscript{148} Ibid.
\textsuperscript{150} It is important to note that Maple Leaf Foods also requested 130 workers from Honduras for an IOM–managed program under the command of Norberto Giron, IOM Mission Chief for El Salvador and Honduras. See: \url{http://www.ioim.int/jahia/Jahia/media/press-briefing-notes/phnAM/cache/offonc/lang/en?entryId=31384}
\textsuperscript{151} See: \url{http://www.mtps.gob.sv/index.php?option=com_content&view=article&id=1070%realizan-encuentro-familiar-con-personas-contratadas-para-trabajar-en-canada&catid=1%noticias-ciudadano&Itemid=77}
\textsuperscript{152} See: \url{http://www.ree.gob.sv/index.php?option=com_k2&view=item&id=2209:135salvadore%C3%B1os-partir%C3%A1n-a-canad%C3%A1-en-el-marco-del-programa-de-trabajadores-temporales-en-el-exterior}
Contracting temporary migrant workers

Regulation and procedures in El Salvador

In its legislation, El Salvador recognizes the need to extend labor protection to Salvadoran workers living abroad. The Organization and Functions of the Labor Sector and Social Welfare Act (Ley de Organización y Funciones del Sector Trabajo y Previsión Social), for example, in its Article 74 (on the contracting process for the provision of services abroad) stipulates that employment contracts may be signed with Salvadoran workers for the provision of services outside the national territory, provided that the Ministry of Labor grants a permit. The Ministry of Labor is obliged to grant this kind of permit as long as the workers' interests are ensured, or when it is not seriously detrimental to the national economy.

Once the permit has been granted, the contracts must be subjected to the approval of the Salvadoran Ministry of Labor and Social Welfare (MTPS). Contracts will be accepted if they meet the following requirements: a) that the workers be over 18; b) that the employer cover the workers’ transportation expenses to the place where they are to work and back to El Salvador; and c) that the employer provide a sufficient deposit, in the Ministry of Labor’s opinion, to ensure the workers’ repatriation expenses. The migration authorities will not allow contracted workers to leave the country without the prior approval of the corresponding contracts by the Ministry of Labor.

According to information gathered through documentation and interviews, PROSALTEX defines the objectives, scope, processes and responsibilities of the program’s implementation entities, in order to carry out the pre-selection, selection, documentation and orientation processes in an efficient and transparent manner. The idea is to clearly establish the relations and communications between the parties involved, as well as a concrete operational agreement with clearly identified administrative regulations.

The model’s main objectives are:

(i) To manage temporary and circular labor migration that is safe and positive for Salvadoran workers in order to thus contribute to improve both their own living conditions and their families’ living conditions in El Salvador.

(ii) To ensure that the workers who get selected to work abroad be temporarily contracted under decent work conditions in accordance with international standards.

(iii) To contribute toward increasing the labor profile of Salvadoran workers through acquiring new knowledge and techniques in the country of destination.

(iv) To link together Program and other strategic actors in order to set up development initiatives in El Salvador within the communities of origin where the contracted workers come from.

The management model proposes a series of strategic lines that give way to the implementation of a comprehensive and coordinated program. In the first place, as far as contracting is concerned, the program urges the parties involved to arrange new employment proposals and to broaden the work classifications with companies abroad interested in contracting Salvadoran workers. In practice, three different entities are in charge of receiving the request for workers: the consular representations abroad, the Salvadoran Ministry of Labor and

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153 During the research, the authors were able to confirm that there is no publicly available study, analysis, or revision of the temporary worker programs between El Salvador and other countries. Even in the interviews held with organizations and experts, there was not much baseline information about these programs. Given that the program is just being reestablished and that most of the workers who went to Canada with the program stayed there, it has not been possible to interview Salvadoran workers. The collected information comes from official sources, the IOM, studies on the Canadian TFWP, unions and other organizations that defend temporary migrant workers in Canada, newspaper notes and interviews with consultants and scholars from both countries.


the IOM. In the case of the consular representations and the IOM headquarters, it can be foreseen that contact with potential contracting companies will be carried out proactively, providing information about the existing workers’ profile in both countries and proposing a complete service that includes recruitment, preparing, and assisting workers with transportation. On occasion, the Ministry of Labor (MTPS) may receive offers directly from contracting companies.

The selection process in El Salvador is both rigorous and transparent. Workers have to go through a series of steps before being accepted to work in Canada under the TFWP/Pilot Project. To start with, the companies offering employment must demonstrate to the Canadian government that they need labor and that Canada does not have the indicated workforce. The companies approach the different Salvadoran consulates in the provinces of Manitoba and Alberta and inform them of their need for Salvadoran workforce. The Vice-Ministry for Salvadorans Living Abroad informs the Ministry of Labor (MTPS) about the number of workers that the companies need and their corresponding profiles.

The pre-selection process is carried out through the MTPS’s labor intermediation (via its Unit of Temporary Workers Living Abroad - Unidad de Trabajadores Temporales en el Exterior / UTTE by its acronym in Spanish) for information exchange, as well through the IOM’s technical assistance during the selection and contracting phases. The profile that the company requires is published in different written and audiovisual media in both counties. At the same time, the MTPS’s databases are searched for candidates that meet the requirements. In order to be pre-selected for contracting, certain profile requirements must be met (age, sex, work experience, schooling and other skills). Candidates must go through a personal interview with officials on the Steering Committee representing the MTPS and the IOM. They must also pass an English test at the required level, pass the criminal record check as well as be free of any migration restriction that would hinder them from leaving the country. If all these requirements are met, the candidates are summoned to another interview for the pre-selection and must take a psychological test, a general medical checkup, and a test of their knowledge of English. If necessary, the information provided by the applicant is checked through home visits.

The eligible workers are interviewed by company representatives in order to then step into the contracting phase, which is under the company’s responsibility. The contracting company must present the MTPS with the corresponding temporary work permit issued by the Canadian government (under the TFWP). The MTPS is also responsible for controlling and checking the legal aspects of the content of the Temporary Migrant Employment Contract.

The Individual Temporary Migrant Employment Contract must include the following aspects: contract duration; position and function that will be performed; compliance with the employment standards in the country of destination, including general statutory holidays, vacations, length of the working day and overtime procedures. It must also include the wage, based on the minimum wage established in the country of destination, the deductions that will be made, social security, housing, labor risk insurance, transportation and housing. The dismissal procedure and lay-off compensation must be made explicit; as well as the workers’ relationship with the unions and respect for the health and safety standards in the workplace, applicable in the country of destination. It must finally be duly signed by the corresponding authorities.

The last step is to provide the Salvadoran workers with passports and visas/work permits in order to be able to travel to Canada. The UTTE pertaining to the Salvadoran Ministry of Labour is in charge of the formalities with the Canadian embassy, which could be done with IOM intermediation, should it so be required. The IOM can provide support to get travel documents and visas, carry out all travel preparations, and accompany migrants to Canada. The management model contains an important component, consisting of preparing and supporting workers. Apart from training them in the specific area they will be working in, in theory workers may approach the IOM in order to receive support in preparing their travel documents, to ask questions about their employment contract, examinations, language training and cultural orientation.

Besides, in accordance with the model, it is important to ensure the workers’ full inclusion not only into their new work environment, but also into the society they will be living in during the months that their contract
Quo Vadis? Recruitment and Contracting:

Different resources are thus made available to the migrant workers so that they can go through a better adaptation to Canada. These resources include an induction into the standard of living they will have in the country of destination, the culture they will be surrounded by, their rights and duties both in the workplace and as temporary residents, the work carried out by the labor inspection authorities in the country of destination, by the consulates and embassies and consul contact information.

During the temporary worker recruitment process, as stipulated by the management model, the IOM operates as a mediator in order to make the process more agile, transparent and fair. Several authors recognize that the abuse by private recruiters is one of the risks of the TFWP system, since the program itself does not regulate their intervention. In many cases where workers use private recruiters to go to Canada, they remain indebted with the recruiters. When this happens in the country of origin, it becomes even more complex to prove the injustice.155

Regulation in El Salvador, like in other Latin American countries, is insufficient. The law makes no explicit reference to the scenario of contracting Salvadorans to work abroad. These cases are dealt with by government authorities specifically involved in migration and foreign affairs issues. Article 67 of the Labor and Social Welfare Sector Organization and Functions Law (1996) regarding worker placement through private agencies controlled by the Ministry of Labor (MTPS), stipulates that if it is proven that an agency deceives the interested parties, it will be closed down and fined independently of the criminal action that might be brought against it. IOM intermediation has been the most widely used option both for the country of origin and Canadian companies.

The proposal for the Salvadoran management model also includes various responsibilities for the diplomatic and consular representations, thus recognizing the essential and ongoing role they play even after the formal contracting has been completed. Through its consular network, the Salvadoran Ministry of Foreign Affairs must inform the corresponding diplomatic and consular representations about the arrival of temporary workers, and each consulate or embassy is obliged to provide assistance and consular protection when required. They must also approach the contracting company to inform it about the protection that the workers are entitled to.

Diplomatic and consular representations are also authorized to visit the companies in which Salvadoran workers are placed in order to check working conditions and provide follow-up information to the corresponding authorities.156 Likewise, consulates have to consult the companies and formulate a report on the performance of the contracted workers in order to have elements with which to assess the work of the institutions participating in worker selection. Lastly, consulates are authorized to take their services close to the workers through mobile consulates. The Vice-Ministry’s objectives include the modernization of the consular network for an effective human rights protection of migrants and the establishment of a legal assistance network for Salvadorans living abroad.


According to the collected information, there is a proposal for consulates to carry out at least one visit to the workplace when a contract has a six-month duration and two visits when contracts last from six months to two years. The collected information indicates that these obligations are still under discussion.

Quo Vadis? Recruitment and Contracting…:
Regulation in Canada

As for the Canadian employers, they are subject to special responsibilities regarding contracting. The Canadian Pilot Project establishes that the employer is obliged to sign an employment contract, cover the recruitment and contracting expenses, help the worker find appropriate housing, and pay for the worker’s return ticket. According to the TFWP, the contracting companies abroad are responsible for informing the institutions in charge of program implementation in case (i) temporary workers get suspended and are not hired; and (ii) their work contract is terminated or renewed. In the case of a contract renewal, the company must inform in writing about the term of the contract through diplomatic and consular representations in the country of destination. These representations are in charge of transferring the information to the Ministry of Labor (MTPS) and the IOM.

Some Canadian provinces have increased worker protection through provincial laws. The province of Manitoba, for instance, introduced the Worker Recruitment and Protection Act in 2009, ruling the operation of foreign worker recruitment even under the TFWP. This law requires employers or contracting agencies recruiting foreign workers to register at the Employment Standard Division, prior to any authorization procedure, and both employers and recruiters must comply with the established conditions and requirements. It also stipulates that the list of authorized recruiters should be available on the Internet for consultation. Besides, the law requires that a letter of guarantee be provided. Should there be a warrant against a recruiter for lack of compliance with the conditions stipulated by law, this letter will be suspended. Recruitment fees are forbidden and workers are entitled to recover any fee that has been illicitly charged.

The Maple Leaf Foods example is germane since it is the company that contracts a greater number of temporary migrant workers in Manitoba and Alberta, most of whom are Salvadorans. As stated in the individual employment contract simple obtained during the research, Maple Leaf Foods is obliged to follow both the provincial employment and the “Collective Agreement” standards, in particular, regarding how much workers get paid, how overtime is estimated, meal times, official statutory holidays, vacations, family leave, and finally benefits and resources. The Collective Agreement refers to the agreement that is applied to migrant workers affiliated with the UFCW, Canada’s largest private sector union.

Note should be made of the important role played by the UFCW in representing temporary migrant workers and achieving better conditions for its members contracted under the TFWP. In January 2009, for example, the UFCW Canada Local 832 members at Maple Leaf Foods in Brandon, Manitoba ratified a new contract that among other benefits agreed that, based on the PNP, the company is required to process all the necessary documentation to help their workers move toward permanent residence status. This made a relevant impact since it enabled migrant workers contracted under the TFWP to join a permanent migration program. In addition, the union negotiated the provision of interpreters by the employer when migrant workers required interpretation, as well as the translation of the collective agreement and the workers’ guide. The new contract also includes an expedited arbitration process, in the event that workers part of the PNP program get dismissed. Repatriation is suspended and they are allowed to remain in the province until a resolution is reached through arbitration. Similar agreements have benefited temporary migrant workers in the province of Alberta through UFCW Local 118.

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157 Recruiting without authorization is an offence that implies a fine of up to $50,000 Canadian dollars.
159 See: http://web2.gov.mb.ca/laws/statutes/ccsm/w197e.nbp
160 A sample of an individual employment contract signed by a worker in September 2008 was revised.
General social security conditions

In accordance with Canadian law, all workers are entitled to protection and to access social rights. Migrant workers are entitled to the same benefits as Canadian workers without discrimination. In addition, as explained in the preceding chapters, all the provinces of Canada have their own legislations regarding health and safety conditions in the workplace.

According to the TFWP, a worker’s pay includes health care insurance until the worker is eligible for a Canadian provincial plan, and the employer is obligated to register the worker under the provincial regime for unemployment and compensation insurance. The individual contract sample for Salvadoran workers that was reviewed includes clauses that incorporate employer obligations in this respect, and do not imply any costs for the worker. However, it is important to take into account that the work performed in the meat processing plants in particular is highly strenuous and physical injuries are therefore common. Besides, handling raw meat implies an increased risk in diseases. For all these reasons, it is important that benefits are made explicit in the contract, but also that access to services be effective.

The contract also stipulates that wage deductions may reach up to 27 percent, including income tax, unemployment insurance, and the Canada Pension Plan. In spite of all this, temporary workers do not enjoy the same access to social security benefits as Canadian citizens and permanent residents, in particular the unemployment insurance. Consulates do offer legal advice and accompaniment for conciliation and arbitration, but do not facilitate legal representation for migrant workers.

Two tendencies can be observed in the debate over social security in El Salvador, which some time in the future may impact Salvadoran migrant workers.

On the one hand, like many countries with medium and low human development, the national social security network coverage has been very low, almost exclusively protecting formal sector workers (which in many cases is a minority sector), and only covers a limited number of benefits (health and retirement). In the year 2011, the United Nations Development Program (UNDP) proposed adopting a new people-based, savings-led development model. In particular, it set forth the creation of a Fund for the Economic Well-Being of Families, based on contributions to savings accounts from both employees and employers. The establishment of this fund responds to two goals: (a) to favor both the family economy and the full development of families; and (b) to serve as a productive investment financing source that can ensure profits for each member, benefit child development, finance housing for affiliates, assist health and education, as well as set up an old-age account for each worker. Contributions will come from the contributions workers make to the Salvadoran Social Security Institute (Instituto Salvadoreño de Seguro Social / ISSS by its acronym in Spanish), the Salvadoran Institute for Professional Training (Instituto Salvadoreño de Formación Profesional) and the pension system. It is suggested that the contribution start with a 2.5 percent of the worker’s wages, supplemented by an equal contribution by the employer. The contribution rate will thus go up when the real wage increase. These initiatives could diversify the unemployment insurance coverage and temporary workers would also be able to access the fund.

The ISSS director recently raised the issue of including Salvadorans living abroad in the national social security. In the presentation of the ISSS activity report to the Salvadoran community in Washington and Los Angeles at the beginning of 2012, he indicated that a comprehensive health care program will be developed under his administration in order to address the Salvadoran community living abroad. In that way they would be

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162 As to health insurance, the contract stipulates, “Maple Leaf Foods agrees to pay health insurance with no cost to the worker until the worker is eligible to apply for the province’s health insurance.” And, in relation to the unemployment and compensation insurance, it stipulates that “Maple Leaf Foods agrees to register the worker under the relevant provincial government insurance plan. Maple Leaf Foods agrees not to deduct money from the worker’s wages for this purpose.”
163 Sample of an individual contract dated September 2008.
able to receive ISSS benefits in the country of residence through payment of a fee yet to be established. He mentioned that a study would be started to measure in order to identify the economic impact and health implications for Salvodorans living abroad.166

The future adoption of any of these two options would benefit the social protection of Salvadoran workers living abroad and their families in the country of origin.

Conclusions and Recommendations

The example of labor migration management analyzed in this chapter demonstrates the recognition by a sending country of a series of real situations regarding workers’ geographic mobility in the world market and its impact on national development. The effort to create a management model full of excellent intentions to promote and protect the rights of co-national migrant workers is considered a best practice in relation to the observed trends, such as the privatization of migrant worker contracting and uncertainty over the access and surveillance of compliance with labor and social security rights.

Although in practice the program has included a limited number of workers, so far its operation represents an example of positive articulation between State agencies of the different government levels (federal and provincial levels) and non-State agents (unions, companies and the IOM of both countries), who might mutually benefit from the process. Should PROSALTEX’s restructuring of the management model materialize as described above, with its corresponding training modules for government officials, it would imply not only taking advantage of good experiences, but also formalizing them to favor migrant workers. It could also encourage an in-depth revision of the internal legislation of other labor exporting and importing countries, in order to recognize migrant work as a need in both countries of origin and reception.

1. There is no formal agreement between Canada and El Salvador to regulate the movement of workers from one country to another. Through their consular representatives and under the framework of the aforementioned programs in both countries, a practical mechanism has been achieved that to a certain extent considers benefits for both countries and their communities. As has been seen, on the Canadian side, both companies and employers have shown flexibility and autonomy in attempting to meet their demand. As for the country of origin, a mechanism has been observed that ranges from approaching recruitment, selection, and contracting through work visas, all the way to the workers’ departure for Canada, which includes a protection component. The logic underlying this modality is that if the government of the country of origin is protecting its workers’ rights, then the government of the country of destination has nothing else to offer. Salvodorans feel that Canada does not intend to join a bilateral labor agreement to protect the rights of temporary migrant workers. From that point of view, violations are thus expected to continue, since it is not possible to cover everything from the country of origin.

2. It is interesting to pay attention to PROSALTEX, a program promoted unilaterally from El Salvador with national government participation in which a private agency also intervenes (IOM connects with private companies in Canada). Besides, workers are essentially protected thanks to the participation of a union that has a good relationship with the same company in different places, and with provincial governments in

166 See: Ramón Jimenez. “Seguridad social con trato más humano.” 19 February, 2012. Available at: http://metrolatinousa.com/?option=com_content&view=article&id=125025:priorizan-el-trato-humano-en-seguro-social-salvadoreno&catid=72:distrito-de-columbia&Itemid=17 Likewise, during the research, contact was made with a researcher from the University of California in Los Angeles, who coordinates a project aimed at exploring the interest of Salvadoran migrants in Los Angeles to join the ISSS, with services offered initially in El Salvador only, mainly for their families or for those workers who have the flexibility to return to El Salvador. Contact was also made with the ISSS Director, Dr. Leonel Flores, who raised for discussion the subject of including Salvodorans living abroad in the Salvadoran social security system. See: http://www.isss.gob.sv/index.php?option=com_content&view=article&id=660:director-del-isss-apuesta-a-la-cobertura-medica-de-nuestros-hermanos-en-el-exterior&catid=1:noticias-ciudadano&Itemid=77
Canada. In other words, this array of factors reflects the potential of non-State actors engaging with State actors to protect the rights of temporary migrant workers. It also provides a glance into the potential achievements that could be reached, including the participation of a company that acts with responsibility toward the workers it contracts.

**Recommendation:** A bilateral agreement between the two countries will provide greater security to the parties involved in terms of the application of laws, and formalize the procedures that have so far been carried out in an ad hoc manner. It will obligate the federal governments to safeguard migrant worker rights and establish a framework to expand consular action in this area. The proposal of the Salvadoran management model regarding worker protection promotes the establishment of this type of bilateral agreement on labor migration between the Salvadoran government and countries of destination, in order to favor respect for the migrant workers’ living conditions and labor rights under the standards of both the country of destination and international conventions. It is important to achieve an appropriate balance between the parties in order to ensure that the good purposes are maintained and avoid detrimental effects on one of the parties.

3. The challenges represented by the TFWP, both in its design and in the difficulty to monitor the contracting process, are still a weakness in the program for the protection of the rights of Salvadoran workers in Canada. As long as work permits continue to be linked to the employer, for example, it is unlikely that temporary migrant workers will receive the same protection as their Canadian counterparts. This difference lies in the fact that the Salvadorans are not free to move and be hired. Moreover, although in some provinces and industries where Salvadoran workers are contracted collective bargaining rights are respected, this is not the case in other provinces.

**Recommendation:** Among the various general recommendations to remedy the TFWP's deficiencies would be extending the rights enjoyed by skilled workers to the lower-skilled workers. A specific possibility to consider would be to link the work permit to a specific industry rather than to a company, and for it to be regulated by federal law. Within this scheme, migrant workers would not be able to work in provinces where the protection to labor mobility is lacking.

4. It would seem that the Salvadoran management model, together with the individual employment contract that is being used for the program with Maple Leaf Foods are complementary in finding remedy to some of the deficiencies at the federal level in Canada. The management model ensures that, even without a formal agreement between the two countries, the Salvadoran government is obliged to safeguard Salvadoran workers' rights through formalizing coordination between the Salvadoran institutions and a comprehensive regulation of the contracting process. The contract itself stipulates the explicit application of the guarantees included in the provincial laws to protect migrant worker rights that go beyond the TFWP.

5. It should be noted that some Canadian provinces have passed laws that are more protective than the federal laws. The Worker Recruitment and Protection Act of the province of Manitoba is a good illustration. According to the UFCW, the Canadian government (the HRSDC, in particular) has not addressed the issue of private recruiters satisfactorily, especially with respect to migrant workers. Of all the Canadian provinces, only Manitoba opened up this possibility through passing the first law on migrant labor in Canada, in 2009. This law prohibits the payment of fees to foreign recruiters, and at the same time obliges the Canadian recruiting agencies to register and provide a guarantor in order to ensure performance.

**Recommendation:** the Canadian government could very well recognize these initiatives and promote them as best practices among the provinces. This legislation is needed in other provinces. It could be achieved through the federal government establishing national standards obligating all the provinces to regulate, monitor and sanction domestic or foreign recruiters. At the same time, the federal government should create mechanisms to oversee the intervening non-State agents in order to avoid abuse or a deterioration of their interventions over time. Under this type of regulation, the provinces that do not comply with the standards would not be able to have access to labor contracting through the SAWP and the TFWP.
6. Throughout this piece of research, it was noted that the first groups of workers who went to Canada through this program managed to get permanent residence via access to the PNP, since it is a right in the provinces of Alberta and Manitoba.

**Recommendation:** the PNP has been a good tool through which to integrate migrant workers into the Canadian society, and the support of the UFCW Canada has been crucial to facilitate the process undergone by workers contracted under the TFWP. If the requirements are met, there is no reason why they should not enjoy the same rights as skilled workers. The possibility of looking into the implementation of similar programs in other Canadian provinces where temporary migrant workers are contracted is recommended.

7. The Salvadoran management model proposal establishes mechanisms for worker identification, selection and recruitment from the country of origin that contain some elements that favor respect for human rights. The model is currently being applied in an ad hoc fashion to the workers who are part of the program and receive support through the consulates around issues they might face with the companies. According to analysts, the development of the current management model has allowed for a restructuring of the program with a view to making it more comprehensive, increasing coordination between the actors involved, and emphasizing mechanisms to respect workers’ labor rights set up in the country of origin, whenever possible. The signing of a memorandum of understanding in June 2012 confirms the government’s commitment to adopt it formally. None of the other countries studied in the region have anything like it. The forecasts and experiences derived from this management model could therefore be incorporated—in general terms—into any future program designed for temporary migrant workers. Several of the elements of this model could be posed as best practices to be considered by other sending countries.

**Recommendation:** For El Salvador, as a sending country, to materialize and implement a new management model for worker migration would reflect a recognition of the importance of the contribution its migrant population makes to the country’s development. In this case, the recommendation would be that the memorandum of understanding be followed up in order to complete the process to formally approve, integrate and operate the management model between the IOM and the authorities. Another recommendation is to integrate the necessary modifications in order to arrive at the coordination required between the entities involved and start its implementation for Salvadoran workers applying for a temporary work program abroad.

**Recommendation:** Given the innovative nature of this model, it is indispensable to integrate a process to follow up and evaluate both the cases and operation of the programs managed under this model. Because of its comprehensive vision and because it includes mechanisms to concretize respect for human and labor rights, the elements contained in the proposed model may potentially lead it to become a best practice.

**Recommendation:** As happens in the Philippines, a series of agencies should be included in the program in order to ensure worker quality. The network of consulates should also be strengthened and transformed in order to ensure that the terms of the contract are complied with and that the rights of the workers involved are respected. At the same time, agreements with other Canadian companies under the same program should be promoted. This would not only imply expanding the consular network, but also encourage consulates to specialize in protection. It is also necessary to make the coordination between the different pieces of the mechanism become efficient and ensure the continuity of qualified staff.

8. As for the regulation of the recruitment and contracting agents, there exists no regulation of the private agencies in El Salvador. Although the Ministry of Labor (MTPS) has the mandate to regularize private agencies, there are no regulatory instruments or specific procedures and mechanisms to implement this mandate. The Ministry of Labor could send officials to inspect these agencies, but this rarely happens and the procedures are still being discussed. Apparently, the reports received by the Salvadoran Ministry of Labor regarding contracting scams are mainly filed by workers going to the USA. In Canada, private agencies are not involved in the labor migration procedures because this is part of the territory of what the Salvadoran government manages through its institutions and the IOM.
**Recommendation:** That a complaint registry be established regarding the recruitment procedures, including programs managed by the IOM and the Salvadoran Ministry of Labor (MTPS), in order to ensure that they are overseen. This would help make a better evaluation of the process in course. Registration, regulation and supervision mechanisms applicable to private recruitment agencies should also be included in the laws and policies ruling the performance of the MTPS.

9. According to the management model, the IOM, a private and intergovernmental body, is the only body that can recruit workers for the pre-selection and previous information phases. The IOM has played a very beneficial role for the government and companies. Experts even refer to a ‘before IOM’ and an ‘after IOM.’ The IOM has mainly played a facilitation role as support for the companies. However, there exists no reliable information regarding how workers experience the IOM. So far, it seems that IOM involvement has been viewed as the best way to solve the legal voids existing in both the country of origin and reception, and avoid recurrent abuse in the recruitment and contracting process. Apparently, the case of PROSALTEX has been a favorable experience for the sectors involved. However, given the risks evidenced in the case of Guatemala, it would be important to evaluate IOM participation from the workers’ point of view. Besides, since the IOM is a private institution, with no independent, governmental or international supervision, IOM intermediation in these programs does not exempt the country from the need to apply supervisory laws to both recruitment and contracting.

**Recommendation:** To make the recruitment procedure carried out by the IOM as transparent as possible. The responsibilities that both the IOM and the Salvadoran Ministry of Labor (MTPS) have towards the workers should be explained to the candidates applying for the positions negotiated with the companies. An independent and objective evaluation of the IOM’s participation should also be conducted, taking into account that the IOM must be subjected to ongoing supervision, given its role as a private recruitment agency.

10. In the case of social protection in particular, the agreement between countries is an essential step for rights to be effective and claimable. However, in the present case, there is no bilateral agreement covering these areas that are regulated through the few provisions that are stipulated both in the TFWP and the individual employment contract. Neither the Salvadoran law nor the management model proposal address social protection. Willingness has been observed within the ISSS to explore possibilities to expand the Salvadoran workers’ access to the country’s social security services, mainly for their family members remaining in El Salvador.

**Recommendation:** To promote greater closeness between the MTPS and the ISSS in order to gain clearer knowledge of the possibilities of integrating access to social security for migrant workers and their family members, thus consolidating social security as part of the management model. Given the good will currently existing in the ISSS to approach the Salvadoran diaspora, the exploratory studies must be continued and a binational scheme with Canada must also be considered that may link the ISSS insurance to an insurance/community health care center in Canada. This could be embodied in the management model as a requirement prior to agreeing to a Salvadoran worker leaving El Salvador under the program’s framework.

**Recommendation:** It would be important for all these efforts not to remain as mere isolated programs within the territory of health care services, but for them to be included within the temporary worker programs that the Ministry of Labor (MTPS) and the Ministry of Foreign Affairs (MRE) continue to expand. At the same time, negotiations could be carried out in order to extend the pension system to workers living abroad, so that when they retire they can enjoy a social benefit (apparently this is part of the social welfare program for the community carried out by the Salvadoran consulate in Los Angeles). It is also important that both consulates and embassies get involved in those activities that benefit Salvadorans living abroad.
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Quo Vadis? Recruitment and Contracting…:


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Background

Mexican workers enter the US economic scene following the abolition of slavery in the 19th century, at a time when that country’s industry began employing Mexican workers as a source of cheap labor. In 1917, the United States passed its first organic Immigration Act, which combined existing legislation and added further restrictions (it outlawed the immigration of illiterates, persons with an unacceptable psychopathic constitution, alcoholics and vagrants; also defining a large zone in Asia from which immigration was banned). It provided for one exception: it permitted the temporal admission of tens of thousands of non-immigrant workers from Mexico and Canada.167 This measure was taken in order to address workforce shortages in the aftermath of World War I.

During World War II the United States initiated the “Bracero” Program with the aim of providing temporary workers to employers mainly in the agricultural sector [“Translator’s note: the Spanish word bracero means day laborer or farmhand”]. This program was established following formal negotiations and a treaty signed between the governments of the United States and Mexico and was implemented in the period between 1942 and 1964. The Bracero Program involved 5 million workers, mainly men, and was predominantly focused on agricultural work.168 It was the first temporary agricultural worker program to contain written agreements with labor and social protection measures, including the withholding of 10 percent of the worker’s wage to include him/her in a pension plan and social security. The deduction was to be deposited in the worker’s bank account in Mexico.169

However, once the War was over conditions changed.170 Measures to ensure compliance with the program were not reinforced, which lead to a general deterioration of working and living conditions of workers inscribed in it. Mexico lost the power of direct supervision over individual contracts, which it previously held, and producers began to recruit workers with almost no government supervision, which eventually led to the program being abandoned.171 The Bracero Program ended after a number of civil society organizations and media outlets denounced the abuses to which workers were exposed.172

While the Bracero Program was the precedent for what would later become a temporary labor visa, H-2 visas for non-immigrants were included in the 1952 Immigration and Naturalization Act, which enabled the contracting of foreign workers to carry out temporary jobs and services. Nonetheless, the use of H-2 visas did not increase significantly until 1964 upon termination of the Bracero Program.173

Between 1964 and 1988 only Caribbean workers participated in the H-2 visa system. During this period, the flow of Mexican workers was self-regulated, thus generating irregular migration. With the aim of regulating the migration flow of Mexican workers to the United States once again, the 1986 Immigration Reform and

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168 Jorge Durand. Programas de trabajadores temporales; Evaluación y Análisis del caso Mexicano, Mexico: Consejo Nacional de Población (CONAPO), November 2006, p. 15

169 Ibid.


Control Act (IRCA) contemplated Mexican workers’ access to H-2 visas, dividing temporary workers into agricultural workers (H-2A) and non-agricultural workers (H-2B). IRCA also regulated the immigration status of those agricultural workers who were able to demonstrate that they had worked in the US agricultural sector for a minimum of 90 days in each of the three years preceding May 1, 1986.174

In brief, the IRCA created the H-2 visa categories of agriculture and services furthered the imposition of sanctions on employers who employed undocumented workers, and established an amnesty procedure to legalize those undocumented workers in the United States who met certain requirements.175

The H-2A and H-2B visas were created in 1964 and 1986 respectively with the aim of alleviating the workforce shortage in the US agricultural sector. Nevertheless, the bilateral character of the Bracero Program disappeared once and for all in spite of the insistence of a number of authors on calling these visas the H-2A and H-2B Temporary Labor “Program.” It is important to remember that participation by the governments of both the sending and receiving country is necessary for the design and implementation of a temporary labor system in order to ensure its characterization as a temporary labor Program and compliance with obligations and protection of both workers and participating employers.

In the following sections we will examine how the way in which workers are contracted to temporarily work in the United States is done unilaterally. The US government imposes visa requirements, the US Department of Labor (DOL) grants certification, and US employers define details of the activities to be carried out, without any intervention by any authority or institution of the Mexican government at any stage of the process.

**General characteristics of H-2 visas**

H-2 visas represent a temporary labor system that is unilaterally managed by the United States to grant temporary work visas. The Mexican government does not participate in this system, despite the fact that it is bound by law to verify recruitment and contracting conditions for Mexican workers to work abroad.176

In most cases, migrant workers who travel to the United States to work under the H-2 visas are recruited in their country of origin by private recruitment agencies. This form of recruitment contributes to violations of migrant workers’ rights, given that the Mexican government does not control, supervise, lay down conditions, keep a register, negotiate or take any action to ensure that Mexican workers take the fewest possible risks.177

There are also no regulations for the recruitment process or the relationship between recruiters and employers in the United States. This opens up a gray area where some employers pay recruiters a certain amount for the recruitment process, while others leave it at the discretion of recruiters to determine the fees they impose on the workers under the pretense of guaranteeing them a job. There have, however, been some advances in establishing certain restrictions on recruiters’ ability to impose charges on workers. H-2A and H-2B visa regulations ban the practice of charging recruitment fees178 as well as visa expenses and transport fees for crossing the border to the worker. However, while the prohibition of charging such fees is clearly established for H-2A

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174 See United States Citizenship and Immigration Services, Special Agricultural Workers (SAW). Available at: [http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb9591f35e666f14176543f6d1a/?vgnextoid=87a9a491c35f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb9591f35e666f14176543f6d1a/?vgnextoid=87a9a491c35f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD)


176 As established by the Mexican Federal Labor Law in its Article 28. See: [http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf)


workers, this is not the case for H-2B workers. The Consulate is authorized to deny a worker his/her visa if he/she admits to having paid such expenses.

Some examples on how recruitment works within the contracting process

In practice there are different scenarios. For example, casinos in Reno, Nevada use migrants’ social networks to recruit migrant workers. Workers are selected in their city of origin and the company covers all expenses: ground transport to the border, visa issuance fees, and the plane ticket to the worker’s final destination. Workers stay with family members who introduce them to the new job. Subsequently, half of the expenses are deducted on a weekly basis (workers with H-2B visas are not granted free housing). In these cases, no form of extortion or other type of irregularity could be determined.

The situation differs in cases where a contractor or recruiter (“enganchador”) intervenes. For example, workers who were hired by the Tobacco Growers Association to cut tobacco in North Carolina and Virginia are contacted by a Mexican contractor who charges a commission fee both to the company and to the workers themselves. In addition, workers have to cover their transport and visa expenses. Upon arrival at the border they are handed over to members of the Tobacco Growers Association who assist them in crossing the border. The onward journey to their workplace is guarded and escorted by company staff. Upon arrival at their destination, workers are obliged to hand their passports to their employer in order for the latter to “look after” them, or perhaps rather in order to “peg” the workforce to the workplace. The passport is returned to the worker when he/she crosses the border on return. During their stay at the place of employment, workers must remain on the ranch at all times and may only leave for a few hours on Sundays in order to buy supplies.

Demanding fees for recruitment leads recruiters to contract more workers than necessary and often forces the workers to take up debts and pay high interest rates prior to commencing their work (some also leave the property deeds of their house or car as a guarantee for compliance with the terms of their employment contract). The use of contractors limits employers’ responsibility and increases migrant workers’ risk of being exposed to abuse.

Mexico has very detailed regulations governing the contracting of Mexican workers to work abroad. The Mexican government has also signed and ratified international treaties on human and labor rights. As will

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181 A detailed description of the interview-based process can be consulted in Durand. Op cit.


183 The Political Constitution of the United Mexican States stipulates in its Article 123, fraction XXV. Employment placement services shall be free of charge for workers, whether they are provided by a municipal office, employment bureaus or any other public or private agency. When providing this service the demand for jobs shall be taken into account and, in equal conditions, the individuals who are the only income source for their families shall have preference.

XXVI. Any labor contract between a Mexican citizen and a foreign employer must be legalized before the competent municipal authority and bear visa by the consul of the nation to which the worker is to go, in the understanding that, in addition to the usual clauses, it shall clearly provide that repatriation expenses shall be born by the contracting employer.

be seen below, little of what is established by law is complied with in practice, as contractors disregard regulations and the Mexican government is not involved in the contracting process.

The recruitment mechanism used and the workers’ subsequent indebtedness, lead to problems that are common in contracting systems where workers are subordinated to the will of their employer. The root of this problem is the requirement to meet a specific demand for workforce certified by a government body.\(^{184}\)

H-2 visas are only valid for employment with the company specified on the visa, thus tying the workers to one employer. It is illegal to change from one company to another without a written permission issued by the Department of Home Security (DHS). Upon expiration of the H-2 visa, workers are permitted to remain in the United States for up to ten days in order to make personal arrangements and return to Mexico. Nevertheless, in many instances this measure restricts the rights of temporary workers, especially in cases of dismissal, since they depend on their employers to be able to remain in the country.\(^{185}\)

Different conflicts and issues emerge upon termination or expiration of the contract. Although Article 20 CFR 655.135(h) of the Code of Federal Regulations (CFR) prohibits unfair treatment, employers are often reluctant to lose their workers and thus refuse to pay the final days of work, withhold their documents, or extort workers by threatening them with deportation should they file a complaint.\(^{186}\) If there is a problem between the worker and his/her employer, it could also happen that the latter places the worker on a black list kept among employers. This means that the worker will not be able to enter the country again on an H-2 visa.

One topic currently under discussion is the over-stay of workers who remain for a longer period than authorized by their visas. Problems arise because these workers cannot be issued new visas and because H-2 visas do not contain a mechanism that permits workers to change their immigration status. They are banned from applying for permanent residence or United States citizenship. Upon return to their country of origin they must present their I-94 form at the border in order to demonstrate that they did not remain in the United States beyond the authorized time period. H-2 visas are “multiple entry” visas, which allows workers to return to Mexico for short periods and return to the United States to continue with their work.\(^{187}\)


\(^{185}\) 20 CFR 655.135(i)

\(^{186}\) Jorge Durand and Enrique Martínez: Interviews in Boise, Idaho, October 1996

\(^{187}\) Consulate General of the United States in Monterrey, Mexico “H-2 Visas – Temporary Laborers.” Available at: http://monterrey.usconsulate.gov/h2_visa.html
H-2A Temporary Worker Program

The H-2A program was created by the Immigration and Nationality Act (INA), section 101 (a) (15) (H) (ii) (a), 8 U.S.C. 1101 and is regulated by the Code of Federal Regulations (CFR) 20 CFR 655, Subpart B – Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers). This program allows US employers to bring foreign workers to the United States to carry out seasonal or temporary agricultural work (usually in relation to crop production and/or harvesting) when there are not sufficient US workers available to perform this work.188

In 2010, around 80,000 H-2A workers were employed in temporary agricultural activities in the United States. These workers were employed in the tobacco industry in North Carolina, apple harvesting in New York, sugarcane harvesting in Louisiana, citrus fruit picking in Florida, and so on in each state.189

Contracting under the H-2A program

The contracting process under the H-2A program initiates at the Department of Home Security (DHS), which, together with the Department of State (DOS), is responsible for approving a list of eligible countries for participation in the program each year. This list is published annually in the Federal Register.190 Three federal agencies are in charge of managing the H-2A program: the Department of Labor (DOL), which issues H-2A labor certification and supervises compliance with labor legislation, U.S. Citizenship and Immigration Services (USCIS), which assesses H-2A visa applications, and the Department of State (DOS), which issues visas to the workers through US consulates abroad.191

There are no annual limits to the number of foreign H-2A temporary workers that can be admitted to the United States. However, under the current Department of Labor (DOL) foreign labor certification process, prior to approval of an employer's request for workers by the U.S. Citizenship and Immigration Services (USCIS), the employer must present a request to Employment and Training Administration (ETA). In this request he must demonstrate, among other things, that there are not enough national workers who are able, qualified, willing and available to fulfill this job. Moreover, the employer must state that the employment of foreigners will not affect the wages and working conditions of those workers who occupy similar positions in the United States. Any employer who uses the H-2A program must first demonstrate that he attempted to fill the vacancies with US workers.192

Only employers can present applications to obtain the H-2A Temporary Employment Certification. Department of Labor regulations define an “employer” as:

“A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment”.

188 See the United States Department of Labor – Wage and Hour Division at http://www.dol.gov/whd/ag/ag_h-2a.htm
189 Farmworker Justice at: http://www.farmworkerjustice.org/content/h-2a-guestworker-program
190 To check which countries were selected for 2012, see: http://www.uscis.gov
192 29 C.F.R. § 501.3(a). Available at: http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48f6ee3b99d3b3a97b1bf189e1757786&rgn=div5&vamp;view=text&node=29:3.1.1.2&namp;idno=29#29:3.1.1.2.1.56.4
193 Ibid. Definition of “employer” in 29 C.F.R. § 501.3(a):
Since employers’ associations are common in the agricultural sector, regulations establish that an employers’ association in the agricultural sector must be considered as a sole employer if this association shows “the characteristics of an employer.” If an employer “shares with a fellow employer” one or more of the characteristics listed in the definition, they are considered to be joint employers. The difference between a sole and a joint employer becomes relevant when it comes to the implementation of regulations.\textsuperscript{194}

Once it has been certified that an employer took all necessary measures to fill the vacancies with national workers, the H-2A regulation establishes additional employment conditions to be stipulated in the contract. The H-2A contract is an official document because it is the same Employment and Training Administration (ETA) form that the employer submitted to the US Department of Labor (DOL) in order to obtain approval of the H-2A visas. The contract must not only contain a description of the job, but must also specify all of the worker’s benefits and responsibilities.\textsuperscript{195}

The employer must provide a copy of the work contract or work order to each worker prior to or during his/her first working day.\textsuperscript{196} Every H-2A contract must stipulate: the start and end date of the contract, as well as all relevant employment conditions, which include expenses that the worker might have to incur, working hours per day and week, the type of work, the wage for each type of work, and a guarantee that the worker will receive compensation foreseen in state legislation.

Their contracts give H-2A workers the right to: receive a refund for their travelling expenses to and from their area of residence on pre-established dates, have rooms that are clean, free of cost and meet certain standards, weekly transport to be able to buy basic supplies, the guarantee that the employer will provide them with at least three quarters of the work offered in the contract, medical insurance, and compensations for injuries sustained on the job.

The employer must pay the H-2A worker the Adverse Effect Wage Rate (AEWR)\textsuperscript{197} or the federal minimum wage (whichever is higher). H-2A visa workers are eligible to receive legal assistance from lawyers of the Legal Services Corporation (LSC).\textsuperscript{198}

Employers are obliged to register each worker’s working hours. In addition, they must keep a register of the hours that they “offered” to workers. Each worker must be in possession of an earnings statement which specifies the hours worked, the hours which he/she refused to work, the payment for each type of crop and the payment basis (i.e. whether the worker is paid by hour, by piece, “task,” etc.). The wage statement must also indicate the total income during the payment cycle, specify all wage deductions, and explain the basis for each of these deductions.\textsuperscript{199}

The Wage and Hour Division (WHD) is the entity responsible for ensuring compliance with contractual obligations and may impose monetary penalties in civil matters as well as recuperate unpaid wages.

\textit{A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:  
  (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;  
  (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and  
  (3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).}

\textsuperscript{194} Ibid.  
\textsuperscript{195} Global Workers Justice Alliance. “Defending Transnational Migrant Workers in the United States.” April 2008  
\textsuperscript{196} 20 C.F.R. § 655.122(q). Available at: \url{http://www.dol.gov/elaws/elg/taf.htm}  
\textsuperscript{197} 29 C.F.R. 502.10(a). The Adverse Effect Wage Rate is a special wage for the H-2A program, which is obtained by averaging hourly wages of all agricultural and livestock workers in one state or region. It is determined by the Department of Agriculture (Author’s note).  
\textsuperscript{198} See 20 C.F.R. § 655.102(b) (9) and 45 C.F.R. § 1626.11. For general information see: United States Department of Labor Wage and Hour Division “Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA).” February 2010. Available at: \url{http://www.dol.gov/whd/regs/compliance/whdfs26.htm}.  
\textsuperscript{199} United States Department of Labor “Work Authorization for Non-U.S. Citizens; Temporary Agricultural Workers (H-2A Visas).” \url{http://www.dol.gov/elaws/elg/taf.htm}
The Employment and Training Administration (ETA) oversees other aspects of legislation, such as the administration of penalties related to the violation of standards.  

An H-2A contract stipulates that the employer will comply with all applicable laws, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and any other federal, state or local legislation applicable to the worker. Thus, a violation of any of these laws constitutes a violation of the H-2A contract. Foreign workers contracted under the H-2A program are not covered by the Migrant and Seasonal Agricultural Worker Protection Act.  

Mexico occupies the first place in the ranking of countries that receive H-2A visas. Each year, it receives around 75 percent of all visas that are issued worldwide. Despite this, there are no clear data on the number of visas issued to Mexicans each year because there is no organized register.  

Table 1 shows the number of H-2A visas for agricultural work per fiscal year (October until September) that have been issued to Mexicans since 2006 according to the Department of Homeland Security and the Department of State. Note the difference among the data of each register.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Department of Homeland Security (DHS)*</th>
<th>Department of State (DOS)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>Total</td>
<td>Total</td>
</tr>
<tr>
<td>Mexico</td>
<td>Mexico</td>
<td>Mexico</td>
</tr>
<tr>
<td>2006</td>
<td>46,432</td>
<td>37,149</td>
</tr>
<tr>
<td>2007</td>
<td>87,316</td>
<td>50,791</td>
</tr>
<tr>
<td>2008</td>
<td>173,103</td>
<td>64,404</td>
</tr>
<tr>
<td>2009</td>
<td>149,763</td>
<td>60,112</td>
</tr>
<tr>
<td>2010</td>
<td>139,406</td>
<td>55,921</td>
</tr>
</tbody>
</table>

*While conducting the research for this study in 2011, information was requested from and denied by both Departments. As a result there are no updated data.

Source: Data were obtained from DHS and DOS reports. The Monterrey Consulate did not publish the number of visas issued to Mexican citizens.

The lack of information, monitoring and register renders it virtually impossible to file complaints about labor rights violations of these workers or to achieve penalties or other measures to ensure that such violations do not recur. US laws establish some minimum rules for temporary migrant workers and there is a strong debate about the conditions under which these workers should be contracted, which will be seen below.

Under the Immigration and Nationality Act (INA) the employer is responsible for verifying the eligibility of each worker to be contracted. Under 2010 regulation, the State Workforce Agency (SWA) is not required to carry out the I-9 employment eligibility verification on candidates within the H-2A program.

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200 Ibid.
203 Ibid.
**H-2B Temporary Worker System**

The Department of Homeland Security (DHS) is under an obligation to consult with other competent bodies prior to admitting a worker under the H-2B visa. The employer has to request temporary employment certification from the Department of Labor (DOL), demonstrating (just like with H-2A visas) that there are not enough US workers who are able and available to perform the requested job. The employer must also specify the location where the foreign worker will work and assure that the employment of foreign workers will not adversely affect wages and working conditions of those workers who occupy similar positions in the United States.

The non-immigrant H-2B visa program allows employers to hire foreign workers who move to the United States temporarily in order to provide services or work in temporary non-agricultural activities during one season, in only one production sector, or for intermittent periods.

Under the H-2B program, foreigners are admitted to work in forestry, construction work, seafood processing, landscaping, tourism and hospitality industries, among other employment areas. There is a statutory limit on the total number of foreigners who can receive this visa or obtain legal status each fiscal year. At present, the maximum number of H-2B visas authorized by Congress is 66,000 per fiscal year (33,000 to be allocated for employment beginning in the first half of the fiscal year, from October to March, and the rest to be allocated for employment beginning in the second half of the fiscal year, from April to September). If the maximum number is not exhausted, unused visas cannot be carried over to the next fiscal year.

**Contracting under the H-2B visa**

Each year the Department of Homeland Security, in consultation with the Department of State, approves a list of countries that are eligible to participate in the program and publishes it in the Federal Register.

Visas are issued in order of reception of applications. When applying for Temporary Employment Certification (which is sent to the National Processing Center in Chicago), the employer is not obliged to provide the names of the workers he wishes to contract, but can file a request for the number of foreign workers he needs provided that they perform the same work or services, under the same terms and conditions, for the same job, in the same employment sector and for the same period of time. Certification is issued to the employer, not to the worker, and cannot be transferred from one employer to another or from one worker to another.

Generally, USCIS may grant H-2B visas for the period authorized on the Temporary Employment Certification (usually one year is authorized). The maximum period of stay under the H-2B classification is three years. A worker who has held H-2B non-immigrant status for a total of three years has to leave the United States and remain outside for an uninterrupted period of three months prior to requesting readmission as an H-2B non-immigrant.

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204 8 U.S.C 1101 (a)(15)(H)(ii)(b)

205 See: [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2e5b9b5d754f61b1a/?vgnextoid=d1d33e559274210VgnVCM100000082ca60aCRD&vgnextchannel=d1d33e559274210VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2e5b9b5d754f61b1a/?vgnextoid=d1d33e559274210VgnVCM100000082ca60aCRD&vgnextchannel=d1d33e559274210VgnVCM100000082ca60aRCRD)


Due to the fact that H-2B visa certification procedures were established by an internal directive and not by regulation, the fundamental safeguards provided to H-2A workers do not apply to H-2B program workers.\textsuperscript{211} Until the 2012 amendments, employers did not have the obligation to pay for the workers’ transportation to the US, nor to provide housing for them.\textsuperscript{212} H-2B visa workers receive legal assistance from Legal Services lawyers.

In 2012, ETA provisions contemplated by the Code of Federal Regulations 20 CFR Part 655, Subpart A were revised and new provisions were introduced into 29 CFR Part 503. As a result, some of the safeguards provided to H-2A workers have now also been extended to H-2B workers.

The minimum wage guaranteed by the Fair Labor Standards Act includes H-2B workers. Employers benefit enormously from the low wage program. It is therefore not surprising that migrants who have worked under this program report exploitative conditions and violations of their labor rights. The case of Christmas tree farm workers could be mentioned as a paradigmatic example. This activity should be considered as an H-2A visa activity, but employers masked it as an H-2B activity with the aim of paying lower wages, which led to abysmal working conditions for the workers. It is important to clarify that conditions vary from employer to employer. In some instances, workers are asked to change work locations on their day off so that the employer does not have to pay those transportation hours.

It is forbidden for a petitioner, placement agent, facilitator, supplier, recruitment service, or a similar employment service to request a fee or another type of compensation at any time under the excuse of finding employment (directly or indirectly) for an H-2B worker.\textsuperscript{213}

Similar to H-2A visas, the information provided by the authorities on the register of visas issued under the H-2B program is not consistent.

Table 2 shows the number of H-2B visas that were issued to Mexicans to enter the United States legally and engage in “non-specialized” work, according to the Department of Homeland Security and the Department of State.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Department of Homeland Security</th>
<th>Department of State (according to the Mexican Foreign Affairs Ministry)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>Mexico</td>
</tr>
<tr>
<td>2006</td>
<td>97,279</td>
<td>89,483</td>
</tr>
<tr>
<td>2007</td>
<td>75,727</td>
<td>105,244*</td>
</tr>
<tr>
<td>2008</td>
<td>104,618</td>
<td>74,938</td>
</tr>
<tr>
<td>2009</td>
<td>56,381</td>
<td>37,467</td>
</tr>
<tr>
<td>2010</td>
<td>69,395</td>
<td>50,736</td>
</tr>
</tbody>
</table>

*While conducting the research for this study in 2011, information was requested from and denied by both Departments. As a result there are no updated data.

Source: Developed by the author with data obtained from the DHS and DOS. According to staff from the Monterrey Consulate, information requested in relation to visas issued to Mexican citizens by this instance could not be provided due to its “confidential” nature.

\textsuperscript{211} Bonnici. Op. cit. p. 27
\textsuperscript{212} See amendments to the regulation, which have been in force as of April 23, 2012.
Differences between the contracting conditions of temporary workers under H-2A and H-2B visas have become increasingly blurred as of the most recent amendments to the regulation in 2012. Despite these modifications, the recruitment process still contains some uncertainties for temporary workers, due to the lack of participation by the Mexican government in ensuring that both recruiters and contractors comply with Mexican legislation and no fraud is committed by charging contracting fees.

There are minimum standards which contracting agencies for Mexican workers wishing to work abroad should comply with. These are defined in the Placement Agencies Regulation (Reglamento de Agencias de Colocación), published in the Mexican Federal government’s Official Gazette on March 3, 2006. The Mexican government has nonetheless failed to apply this Regulation to the H-2A and H-2B visa process for temporary employment in the United States.

General social security conditions

In addition to H-2A and H-2B visa specifications, the main federal laws include employment rights and conditions for these workers. Among these laws are the National Labor Relations Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), as well as Title VII of the Civil Rights Act. Many labor regulations are left to the discretion of state authorities and there are a large number of laws in each state that are also relevant for an analysis of workers’ employment conditions.

Workers’ Compensation

Worker’s Compensation is a form of compensation that requires all employers to purchase insurance to cover medical treatment and lost wages for temporary migrant workers who are injured on the job or who suffer an occupational disease. In some cases this compensation is used to get workers to waive their right to sue their employer for damages.

In the United States, the workers’ compensation system for work-related accidents is not a federal matter, which means that it operates at state level with laws that vary from one state to another.

Employers generally purchase insurance from private companies, although there are some states that offer their own program (North Dakota, Wyoming, Ohio and Washington). Many states have funds to cover damages incurred by workers employed by companies that purchased fraudulent insurance or insurance that only covers emergencies.

Under the workers’ compensation system, injured workers must receive immediate medical treatment without cost and regardless of who is directly responsible for the accident. The majority of state laws provide for coverage of emergency medical attention, hospital care, physical therapy and rehabilitation, doctor’s appointments and transportation from the workers’ residence to the specialist’s office.

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214 For further information and an analysis of the obligations of the Mexican Ministry of Labor, see the regulation in Annex 5.
215 A list of some of the most important laws and the rights they stipulate for H-2A and H-2B workers in terms of their access to social security can be found at the end of this chapter.
216 See Farmworker Unit “Workers Compensation”: http://www.farmworkerlanc.org/know-your-rights/workers-compensation
218 Ibid.
If the employer or the insurance company ignore the accident report or deny the request, a complaint can be filed at the Division of Workers’ Compensation. The decision made by this division may be appealed against. All labor laws contemplate specific resources for hiring lawyers.219

All H-2A workers have the right to workers’ compensation insurance. When employers request authorization of H-2A workers at the Chicago National Processing Centre (NPC), they must present a copy of the insurance policy number for the workers, which must meet the requirements established by state law or contemplate coverage benefits equivalent to those established by state law for similar types of employment.220

Coverage of H-2B workers depends on the manner in which each state regulates workers’ compensation insurance (in some states it is mandatory, in others optional, and yet in others it depends on the numbers of workers, and so forth). Variations among such regulations entail that compensation is more accessible in some states than in others.221

The type of work temporary workers perform –lifting heavy loads, handling dangerous machinery, using sharp objects, being exposed to heat and pesticides – implies that accidents and illness are common features of these programs. One example is the case of female H-2B workers who travel to the United States to work in the crab-processing industry and are mainly Mexican. They cut their hands with the knives they use and with the edges of the crab shells. Such cuts often cause skin infections or ulcers. Additionally, women who have worked in the industry for a long time frequently develop arthritic hands as a result of constant crab picking.222

Workers face myriad difficulties to claim their right to workers’ compensation. These difficulties are related to a lack of information among health professionals on how the compensation system works,223 and failure to provide services that respond to the needs of workers who speak a foreign language. There are also difficulties related to the transnational character of their employment, because if workers file a complaint due to an occupational illness, they would very likely be cited to a hearing and would be unable to attend once the employment terminated and they had returned to their country of origin.224

Unemployment Insurance

Unemployment compensation is paid to workers that meet certain requirements at the time of losing employment in order to compensate for loss of income. In the United States, this insurance is regulated by the Federal Unemployment Tax Act (FUTA) and the State Unemployment Tax.225

The United States Unemployment Insurance (UI) system is a federal–state program that is jointly financed by taxes levied on employers’ federal and state payrolls. In general, employers pay the federal and state unemployment tax if: 1) they pay employee wages of a total of USD $1,500 or more in any quarter of the year, and 2) they had at least one employee during any day of the week during 20 weeks of a calendar year, regardless of whether these weeks were consecutive or not. Nevertheless there are some exceptions to this rule.226

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219 Ibid.
221 For more information on how each state deals with workers’ compensation, see: http://www.farmworkerjustice.org/resources/health-and-safety-resources
223 See: http://www.farmworkerjustice.org/content/workers-compensation
226 Amy Kandilov and Ivan T. Kandilov. Job Displacement from Agriculture. RTI and North Carolina State University, February 2009. pp. 3–4. Available at:
A worker’s stay in the country must be legal and he/she must hold a valid work permit in order to receive unemployment insurance benefits. Dismissal of temporary workers is usually the consequence of fluctuations in temporary work cycles, which would make unemployment insurance very important. However, there are numerous qualification requirements and workers must demonstrate: that they have received a specific amount of employment wages in the recent past; that they are able and willing to work, and that they are looking for work.

As a result, non-immigrant H-2B workers, who only have permission to work for the employer who requested their visa, cannot be “available to work” if they are dismissed and consequently do not meet one of the essential criteria of state unemployment insurance laws.  

Employers of H-2A workers are not subject to FUTA tax and states tend to exclude them from unemployment insurance required by their laws. However, employers of H-2A agricultural workers are obliged to guarantee employment for a minimum of three quarters of the time period established in the contract, or pay workers the amount corresponding to the days not worked, unless the workers themselves refused to do the work, did not follow the rules, or were unable to work due to adverse weather conditions.

While at federal level FUTA does not require “small” farms to participate in the UI program, some states have extended its coverage to include agriculture. Of the ten states with the largest number of agricultural workers, five (Kentucky, North Carolina, Minnesota, Michigan and Iowa) follow federal directives and do not require the “small” agricultural employers to participate in the UI system. The other states (California, Washington, Texas, Oregon and Florida) have significantly extended coverage to “small” agricultural employers. This measure is important for H-2B workers in sectors such as forestry and pine straw harvesting, who are protected under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

Agricultural workers contracted through contractors could be considered as being employed by the contractor rather than by the farm they work on. In such cases the responsibility to report and pay unemployment insurance rests with the contractor, who often refuses to comply with these obligations.

Pensions

United States Social Security can provide benefits for retirement, disability and survival to temporary migrant workers and members of their families. This government program, called Medicare, is financed by monthly contributions and covers a substantial part of expenses incurred by persons from the age of 65 onwards.

The majority of private sector employers are obliged to pay Social Security and Medicare contributions on behalf of each employee, and they must withhold a part of the employee’s wage and transfer it to the Internal Revenue Service (IRS), the national tax collection office. At the same time, the employer must notify the Social Security Administration, which is responsible for registering each user and assigning him a social security number.

A worker can become a Social Security beneficiary if he/she has worked for a specific period of time, during which he/she paid government and Social Security contributions (generally 40 credits are required, which represent ten years worth of contributions). Workers thus obtain credits for each four-month period during which they were employed. For persons born after 1960, the retirement age is 67.

The IRS has developed specific guidelines for H-2A agricultural workers. These workers are exempt from taxes for Social Security and Medicare in the United States. The employer has the duty to report the wages

http://www4.ncsu.edu/unity/lockers/users/v/vukina/AG_ECO_Workshop/Spring_09/KandilovKandilovAgDispl.pdf


228 Kandilov and Kandilov. Op. cit. p. 4


230 Ibid.
paid to foreign H-2A agricultural workers, using the 1099-MISC form, if the amount paid in one year is equal or above USD$600. Besides, the employer has no obligation to withhold taxes from wages unless the beneficiary (the H-2A worker) fails or refuses to provide his/her Social Security Number (SSN) or his/her Individual Taxpayer Identification Number.231

H-2B workers are covered by the program but often do not work in the United States for a sufficient amount of four-month periods to qualify for and receive its benefits.232 Social Security contributions, which are usually established by law, are paid on behalf of the worker even though it is quite unlikely that he/she will be able to enjoy these benefits. Generally speaking, there is little official guidance on fiscal requirements and workers are not informed about wage deductions and the possibility of recovering them in the future.233

In some cases, migrant workers might face difficulties if they are accepted and receive Social Security benefits, because their employers failed to report their work credits or because they were not correctly registered with the Social Security Administration.

Under current legislation, a Mexican citizen working in the United States is required to pay Social Security taxes, but cannot combine the total time he/she worked in both countries (Mexico and the United States) in order to be able to request access to the program’s benefits.

In June 2004, the United States and Mexico signed a Totalization Agreement with the aim of enabling workers to enjoy social security benefits. The agreement eliminates dual social security taxation and allows for the combination of employment credits accumulated in each country. However, the Agreement has not entered into force, as it has not yet passed the requirements for approval. The delay can be attributed to the effect that the Agreement may have on undocumented workers and the respective costs to be assumed by both the United States and Mexico.234

Some employers voluntarily set up private pension and health care plans for their workers, in accordance with the terms of collective work agreements signed with unions.235

Safety and health conditions

The Occupational Safety and Health Act (OSH)236 is the most important federal law for the promotion of safety and health of workers in the United States. This law is administered and implemented by the Occupational Safety and Health Administration (OSHA), which is part of the United States Department of Labor.

The Occupational Safety and Health Act authorizes states to implement safety and health laws locally, if these laws establish state safety and health programs which are at least as efficient as the federal program.237 The responsibility for implementing these programs lies with a state agency or branch of the local government, as well as with the county’s or township’s health department.238

The Occupational Safety and Health Act provides extensive coverage and makes no distinction between national and foreign workers.239 As a result, both H-2A and H-2B workers are covered by its provisions.

233 American University Washington College of Law and Centro de los Derechos del Migrante, op.cit., p. 26
237 See: http://www.osha.gov/OSHA_FAQs.html
239 29 CFR §1910.2 (d): “Employee means an employee of an employer who is employed in a business of his employer which affects commerce.”
However, OSHA may not apply the Occupational Safety and Health Act to agricultural employers who employ up to ten workers, unless that employer also operates a camp to accommodate the workers. This restriction is not applied at a local level, which means that states can make exclusive use of their state resources. It is left to a state’s discretion whether or not to apply safety and health norms to small farmers and, as a result of this, only 22 of them do so.

Hence, given that 47 percent of all hired agricultural workers are estimated to be employed in farms with less than eleven workers and without a temporary labor camp, many temporary agricultural migrant workers are not protected. Many agricultural employers do not have to comply with the Occupational Safety and Health Act because 91 percent of United States farms employ less than ten workers.\textsuperscript{240}

Broadly speaking, the Occupational Safety and Health Act establishes that employers must provide their employees with a workplace that does not harbor serious risks and complies with all OSHA safety and health standards. In order for workers to enjoy their rights without fear of reprisals or discrimination, OSHA would have to inspect the workplace, inform and train workers about dangers, methods to avoid damage, and OSHA standards applicable to their workplace (in cases of reprisals an “adequate compensation” is foreseen, which may include the re-hiring or reinstallation to the previous position with a right to back pay).

Such training must be provided in a language that the worker can understand and he/she must receive a copy of test-results in order to identify the risks at his/her workplace. The worker must also be able to consult records of work-related injuries and diseases and receive copies of medical records.\textsuperscript{241}

If employers fail to comply with these obligations and it can be shown that workers were exposed to a dangerous situation, OSHA has the power to impose fines or penalties. The federal government is the only entity that may initiate actions in relation to the Occupational Safety and Health Act.

There are special regulations that specifically benefit agricultural workers and protect their safety and health in the fields and while working with pesticides (the Wage and Hour Division holds the sole authority for implementing OSHA sanitation norms in the fields).\textsuperscript{242}

The Field Sanitation standard\textsuperscript{243} stipulates that agricultural employers with eleven or more manual workers must provide them with sufficient amounts of drinking water, as well as with one sanitary facility for each twenty workers (or faction thereof), where workers can wash their hands within 400 meters of the worksite on the field. All of this must be provided at no cost to the worker.

In 1992, the Environmental Protection Agency (EPA) examined the Worker Protection Standard (WPS) for Agricultural Pesticides, 40 CFR 170. Worker protection standards are regulated at federal level and require employers to train workers on the dangers of pesticides and limit their exposure to them.\textsuperscript{244} Some states, such as California, have their own pesticide safety programs.

In practice it appears to be very difficult to ensure compliance with these regulations, given that employers are rarely penalized for non-compliance. H2 workers are those most exposed to agro-chemicals and are also most vulnerable to them due to their lack of training and information on the proper handling of pesticides, the risky tasks perform, and the lack of protective gear.\textsuperscript{245}


\textsuperscript{241} United States Department of Labor – Organizational Safety and Health Administration. Op. cit.


\textsuperscript{243} 29 C.F.R. 1928, p. 110

\textsuperscript{244} See: \url{http://www.epa.gov/pesticides/health/worker.htm}

The right to unionize

Ten percent of US private sector workers are unionized and only very few agricultural workers are represented by unions. Employers show resistance to the organization of unions. The National Labor Relation Act (NLRA) grants workers the right to form and join unions without reprisals from their employers, and creates a working framework for collective bargaining between employers and unions once the majority of workers have voted in favor of being represented by a union.

The main mechanism to protect the right of workers to organize, collective bargaining or strike is found in Sections 8(a) and (b) of the Wagner Act (NLRA), which define discriminatory labor practices that constitute a violation of the Act and are subject to sanctions.

The rights safeguarded by the NLRA are only applicable to workers who fall within the definition of “employee,” which excludes agricultural workers. This means that all agricultural workers, including farm and ranch workers are excluded, while the majority of workers on packaging or processing plants for fruit, vegetables, poultry and meat are covered.

Entry on an H-2A visa does not guarantee the right to exercise freedom of association. The exclusion of agricultural workers from NLRA provisions means that an agricultural workers’ union cannot rely on federal legislation to compel a company to participate in collective bargaining. It is important to note that excluded workers can still organize and reach a collective bargaining agreement, but they would do this without the protection of the NLRA. This means that an excluded worker could legally be dismissed for organizing a union.

Some State Constitutions contain specific provisions to safeguard the rights of agricultural workers (including H-2A workers) to organize and collective bargaining. These states are: California (with the most comprehensive laws), Arizona, Florida, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, Oregon, Texas, Washington, Wisconsin and Wyoming.

H-2B workers are covered by the NLRA and therefore have the right to unionize and collective bargaining. Workers have nonetheless faced many challenges in asserting their rights at work. Lack of unionization means that these workers have no mechanisms to ensure their employer’s compliance with the terms of their contracts.

The right to collective bargaining

The right of migrant workers to join unions and enjoy the benefits of collective bargaining agreements is stipulated both in Article 6.1 of ILO Convention 97, which explicitly mentions freedom of association and protection of the right to organize, and in ILO Convention 98, which refers to the right to unionize and collective bargaining.

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248 Ibid.
249 Ibid.
250 See: http://www.globalworkers.org/
The United States Constitution does not specifically mention the right to collective bargaining. Freedom of association is nonetheless protected by the First Amendment to the Constitution and, following Court interpretation, includes a worker’s right to form and join unions.\(^{252}\)

A collective bargaining agreement is a negotiation tool between employers and workers that grants a worker the right to legal representation and to expression. Moreover, this type of agreement is considered a key element to ensure labor rights, including wages and the improvement of working conditions.\(^{253}\)

At federal level, the National Labor Relations Act (NLRA) guarantees the right of workers to organize, form, join or associate with labor organizations, collective bargaining through representatives of their own choice, and participate in other concerted actions aimed at engaging in collective bargaining or other mutual protection activities. It further establishes that workers have the right to refuse participation in such activities and contemplates certain limitations to the organization of strikes and boycott actions.\(^{254}\)

The NLRA bestows collective bargaining rights onto the majority of private sector workers, with the exception of rail and air transport industry employees, independent contractors, domestic workers, agricultural workers, employees of small businesses, supervision or management personnel, as well as federal, state and local government employees.\(^{255}\)

This implies that H-2A workers are not covered by this Act, while H-2B workers are covered at least in writing. One of the Act's requirements is that at recruitment stage the employer must contact local unions and inform them about the H-2B visa employment offer.

In practice, workers' attempts to exercise their rights is usually frustrated by an infinite number of obstacles: among others, they are not allowed to receive visitors, are subjected to intimidation campaigns led by employers to keep them beyond the reach of a union. If they do participate, they are placed on black lists, and personal documents, such as passports, are withheld by the employer.\(^{256}\)

Some states have passed their own laws to regulate agricultural labor relations. Thus, for example, in 1975 the state of California passed the Agricultural Labor Relations Act (CALRA), which includes all agricultural workers not covered by the NLRA. In California, agricultural workers have the right to unionize, join or affiliate with labor organizations, collective bargaining through representatives of their own choice, and participate in other concerted activities of mutual support and protection. With some limitations, agricultural workers in California have the right to strike, but are not allowed to participate in secondary boycotts.\(^{257}\)

H-2A workers are beginning to participate in unions that defend their rights. Since 2004, collective bargaining agreements reached by agricultural workers' unions, such as the Farm Labor Organization Committee (FLOC), and United Farm Workers of America (UFW), have extended labor protection to H-2A workers. For example, the agreement reached between FLOC and the North Carolina Growers Association (NCGA) includes 8,000 temporary guest workers who travel from Mexico to work on the fields of North Carolina each year.\(^{258}\)

FLOC is the first guest worker organization to gain union representation and a collective bargaining agreement that creates a contracting system that assigns “working positions according to seniority and within the rank of seniority according to union membership.” In addition, the collective bargaining agreement creates a complaints procedure exclusively for H-2A workers. It stipulates that both dismissal and the refusal to hire must have just cause and allows FLOC to supervise the contracting process of foreign workers in Mexico. An

expedited 21-day complaint procedure allows workers to file complaints about work-related matters without having to fear reprisals. As a result of this agreement, successful claims have been made regarding reimbursement of travelling expenses, payment during illness, bereavement leave and wage loss.  

Under Mexican legislation, the right to freedom of association is well protected, at least in principle. The Mexican Constitution “grants workers the right to associate freely, organize unions, as well as the right to strike” and agricultural workers are not excluded from this right. The Federal Labor Law reiterates these rights and establishes rules for collective bargaining. Although the substantive guarantees of union rights are strong, their enforcement is weak or, more precisely, "selective."  

The current situation of H-2A and H-2B visas

Under the Bush Administration in 2008, the Department of Labor proposed a series of legal reforms aimed at “modernizing” the H-2A program. These measures, which became effective in 2009, gave rise to much controversy because they favored employers to the detriment of foreign worker rights. In March 2009, two months after President Obama took office, a nine-month suspension of the H-2A visa program modifications approved by the previous administration was announced. The Department of Labor proposed drastic changes to the contracting system and a wage rise in the sector, while at the same time modifying the H-2A program regulations once again. These modifications entered into force on March 15, 2010.

Employers view regulations currently in force as being very bureaucratic and expensive, given the changing needs of the agricultural sector. In 2011, administrative judges of the Department of Labor received a record number of appeals presented by farmers against the Department’s decisions in cases of foreign labor certification for the H-2A program.

Over the past years, workers have also denounced many types of violations of their rights. Cases of human trafficking and forced labor, as well as deficient living conditions, failure to pay wages, erroneous payments, and non-compliance with worker’s compensation payment, have been denounced, among many other violations.

A number of bills have been proposed, two of which are of particular importance in relation to H-2A workers. These are the Agricultural Job Opportunities, Benefits and Security Act (AgJOBS) and the E-Verify Program.

The former proposes a revision of the H-2A program, the issuance of a “blue card” for temporary migratory status with the possibility of gaining legal residence through continuous work in the agricultural sector, and allowing agriculture business owners to participate in the program. It is a bipartisan proposal and both workers and employers are in favor of its approval.

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259 Ibid.
262 Approximately 440 cases were presented, double the amount of appeals presented within the same period during the previous year. See “H-2A Temporary Agricultural Visa Program FY 2012-Quarter 3: Select Statistics, Employment and Training Administration, U.S. Department of Labor.” Available at: http://www.foreignlaborcert.doleta.gov/pdf/h_2a_selected_statistics.pdf
263 For more information, see: http://www.guestworkeralliance.org/
The latter proposes the creation of a new “H-2C” program, the requirement for employers to use a federal electronic system, “E-Verify” (DHS), to demonstrate that the contracted workers have papers, place the program under the management of the Department of Agriculture, and that workers may only work for one employer. This is a Republican proposal supported by some employer organizations, such as USA Farmers.

For over two decades there were no specific statutory guarantees to protect H-2B workers. Although the controversial 2005 Save Our Small and Seasonal Businesses Act (SOSSB) helped to define the conditions under which H-2B visas may be allocated, the number of visas that can be issued each year and the processes through which companies request workers, it failed its mission to create strict protection standards for the rights of H-2B workers. Thus, the wage is still contingent on job type and task description.

In January 2009, former President Bush announced the first formal regulations regarding the H-2B program. Prior to this, there were no clear regulations governing how the DOL certified employers for H-2B visas. Despite the fact that these regulations were aimed at protecting the H-2B workers, in practice it was the employers who benefitted because they removed the government’s formal supervision of the contracting process and employment practices. In addition, regulations undermined years of jurisprudence on the rights of H-2B workers, including the requirement for employers to reimburse expenses for the journey, recruitment and visa.

Working conditions established by this regulation grant the employer excessive control over the employment relationship and place workers at risk of exploitation. This has had a significant impact on forced labor and human trafficking.

Further modifications to the H-2B Program, which became effective on April 23, 2012, added some protections for H-2B workers which are similar to the protections granted to H-2A workers. Whether they can be enforced remains to be seen. Employers reject these modifications because they raise their expenses, whereas worker organizations welcome them, although with some skepticism.

As aforementioned, over the past months a number of immigration bills addressing temporary migrant worker programs have been introduced, and it has been confirmed that other bills are currently being developed. All these bills are unilateral. Some are limited to addressing specific issues, while others aim at carrying out a comprehensive revision of current programs. The Mexican position with regard to the possibility of a bilateral agreement is unclear.

It also appears as though none of the projects defends the ability of immigrants to participate as political, economic and cultural actors. It is important for the Mexican government to get involved and to create special safeguards for the most vulnerable groups.

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266 Ibid.
Conclusions and Recommendations

1. H-2A and H-2B temporary work visas represent a unilateral temporary work system. They are not based on the principle of bilaterality that a Temporary Work Program would imply.

2. Only the US Government participates in this temporary work system, creating the rules of the game for Mexican workers who decide to apply for an H-2 visa, as a response to its needs for cheap labor.

3. US human rights organizations, workers’ centers and unions have made numerous attempts to find a response to the implications of temporary work, which is becoming more and more permanent, given that workers almost always return to those workplaces where they gained not only work experience but also developed interpersonal relationships.

4. Nevertheless, if the system’s design and implementation is not truly bilateral, measures to improve contracting conditions, including the recruitment process, as well as social security conditions for the workers that travel on these types of visas will be viewed as acts of good will of some employers and as highly dignified, though isolated, initiatives.

5. A person’s immigration status can in no way be used to justify the denial of the enjoyment and exercise of his/her human rights, including labor rights. Upon entering into a labor relation, the migrant gains rights as a worker, which must be recognized and guaranteed from the moment in which he is contracted in his community of origin onwards, because such rights are a direct consequence of the employment relation. With this aim in mind, positive measures must be adopted and measures and practices that limit or violate fundamental rights must be eliminated.

6. The treatment temporary workers should receive is usually an essential aspect of the “comprehensive immigration reform” debate. Among the voices raised, some advocate the elimination of this type of programs, while others emphasize that they should be made more flexible in order to thus benefit employers. Yet again others insist that respect for the rights of workers must be ensured.

7. The Advisory Opinion OC-18 issued by the Inter-American Court of Human Rights stipulates that: “The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.”

8. For this to be possible it is first necessary for the Mexican government to take matters into its own hands at local, state and federal level and to start participating in the program’s management. It must be present at each step of the contracting process in order to ensure that the rights of its nationals are not violated. What is needed is an active State that participates in debates, negotiates conditions, supervises and controls the program’s implementation, and which protects workers’ rights by opening a space for complaints.

9. There is an urgent need to create binding regional standards for the protection of migrant workers.

10. Similarly, it is necessary for governments to engage in joint efforts to control recruitment agents. Many violations of workers’ rights occur at this particular stage, where workers find themselves in a vulnerable situation due to their need for employment, and their willingness to accept an unfavorable bargain in order to get the job. As a result, it is necessary to have a transparent mechanism in place through which workers can verify the authenticity of those who are contracting them.

11. Employers should take on the total costs of recruitment, visa issuance, work equipment and transportation. Workers must be able to learn about all their rights prior to their journey to the country of employment.

12. Should irregularities be denounced, workers must have prompt access to mechanisms to safeguard their rights. Such mechanisms must be effective in sanctioning those employers who fail to comply through fines or revocation of their authorization to participate in the program. A mechanism for H-2A workers’ access to United States federal courts must also be established.

13. Employers must guarantee equal wages and working conditions for workers with temporary work visas. There needs to be a discussion on the requirement to tie the visa to a single employer. The worker

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must have the right to change his/her employment in the event that contractual obligations are not complied with. In this manner, many abusive practices registered over the past years could be prevented, such as the retention of documents, black lists, coercion, threats of deportation, and any other form of reprisals.

14. The US Department of State and the Mexican Ministry of Labor and Social Welfare (Secretaría del Trabajo y Previsión Social) should publish information on their websites regarding the number of visas issued and the employers they were granted to. Employers should also be required to provide a contracting record.

15. Temporary migrant workers should be able to apply for permanent residence under certain requirements.

16. All States must provide laws safeguarding workers’ participation in unions. Engagement in collective bargaining is crucial for the improvement of workplace conditions.

17. All temporary migrant workers should have the right to gain social security benefits and to have mechanisms in place to make these effective wherever they are. In order for this to occur, processes must be accelerated and countries must devise an agreement to facilitate the transnationalization of such benefits. Contributions made by each worker when he/she pays taxes would thus no longer futile.

18. A transnational justice mechanism for temporary workers should be established with the faculty to ensure not only the best possible contracting conditions in the country of origin as well as transportation and payment in accordance with the laws of the country of destination, but also the right to denounce violations of the workers’ rights at the location where they took place, whether the workplace itself or on route. Such a mechanism should be promoted and financed by both the Mexican and the United States governments.

19. It is equally necessary for the Mexican government to assume its responsibility, as established by the Mexican Federal Labor Law, and to create a public register for international migrant worker contracts that lists contractors and the conditions under which workers are contracted with transparency.

20. Finally, it is of vital importance to identify the clear need to grant migrant workers the right to transnational labor citizenship, thus ensuring that parallel to economic globalization and the opening of borders to large employers, i.e. transnational companies, these borders also be open to migrant workers and that their labor rights be ensured.269

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References


**Legislation**


**Regulations and bills**


34. *Title 29: Labor: Part 501 — Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted under Section 218 of the Immigration and Nationality Act*, Electronic Code of Federal Regulations (CFR), last updated: April 2, 2013. Available at: [www.ecfr.gov/cgi-bin/textidx?c=ecfr&sid=48d6ec3b99d3b3a97b1bf189e1757786&amp;rgn=div5&amp;view=text&amp;node=29:3.1.1.1.2&amp;idno=29#29:3.1.1.1.2.1.56.4](http://www.ecfr.gov/cgi-bin/textidx?c=ecfr&sid=48d6ec3b99d3b3a97b1bf189e1757786&amp;rgn=div5&amp;view=text&amp;node=29:3.1.1.1.2&amp;idno=29#29:3.1.1.1.2.1.56.4)

**Websites**

35. Consulate General of the United States in Monterrey, Mexico: [www.spanish.monterrey.usconsulate.gov/h2_citas.html](http://www.spanish.monterrey.usconsulate.gov/h2_citas.html)

36. Farmworker Justice: [www.farmworkerjustice.org/content/h-2a-guestworker-program](http://www.farmworkerjustice.org/content/h-2a-guestworker-program)

37. Farmworker Unit “Workers Compensation”: [www.farmworkerlanc.org/know-your-rights/workers-compensation](http://www.farmworkerlanc.org/know-your-rights/workers-compensation)


40. United States Citizenship and Immigration Service “Cap Count for H-2B Nonimmigrants.” Last updated April 2, 2013: [www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66ff614176543ff6d1a/?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD#](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66ff614176543ff6d1a/?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD#)


44. United States Department of Labor – Organizational Safety and Health Administration “Frequently Asked Questions”: http://www.osha.gov/OSHA_FAQs.html
|---------------------------|-------------------------------------------------------------------------------|------|------|---------------------------------------------------------------------------|------|------|
| On labor relations        | NRLA: National Labor Relations Act  
- Unionization  
- Collective Bargaining  
- Strike  
- Does not grant workers a private right to action.  
- The National Labor Relations Board (NLRB) holds discretion to establish penalties for violating the law and has the faculty to award back pay. | X    | X    | Some states have specific legislation that protects the right to organize of agricultural workers.  
- California Agricultural Labor Relations Act (CALRA)  
- Unionization  
- Collective Bargaining  
- Strike | X    |      |
| On equal employment       | Title VII of the 1964 Civil Rights Act and the Equal Educational Opportunity Act (EEOA)  
- Prohibits discrimination on grounds of race, religion, national origin or gender. It also prohibits reprisals against workers who denounce discrimination.  
- The worker first has to file a complaint through a state human rights commission. | X    | X    | The majority of States pronounce: “Fair Practices” through Fair Employment Practices Agencies (FEPAs)  
Complaints are made to a state human rights commission. | X    |      |
complaint at the Equal Employment Opportunity Commission (EEOC). The Commission can:
- file a lawsuit in the federal court
- grant the workers a “right to action” in the federal court for a specific time period
- Sanctions: back pay, damages or compensation can be awarded.
- Ability to file a class action lawsuit.

<table>
<thead>
<tr>
<th>On fair labor conditions</th>
<th>Fair Labor Standards Act (FLSA)</th>
<th>X</th>
<th>X</th>
<th>Each state has its own legislation on minimum wages and over time. Only CA, HI and MD pay agricultural workers over time.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Minimum wage (with the exception of employers who have employed less than seven full time workers in one year)</td>
<td></td>
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<tr>
<td></td>
<td>Exact payroll registers</td>
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<tr>
<td></td>
<td>Over time, but not for agricultural workers</td>
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</tbody>
</table>

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<thead>
<tr>
<th>On Health and Safety</th>
<th>Occupational Safety and Health (OSH)</th>
<th>X</th>
<th>X</th>
<th>Safety Plans approved by the Federal Government - 26 States have such a</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Risk-free atmosphere</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Minimum health standards</td>
<td></td>
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</tbody>
</table>
On compensation for workplace accidents and injuries

There is no federal law regulating this matter. Employers of H-2A workers must provide compensation for workplace accidents and injuries. Compensation paid to H-2B workers depends on the legislation of the state where they are working.

Each state manages this issue differently:
- There are 36 jurisdictions where compensation insurance is mandatory.
- It is optional in five.
- 12 do not have it at all.

Many states limit access to medical care when the worker left the state where he/she was working. Other states limit the benefits that a foreign beneficiary can claim.\textsuperscript{270}

On health insurance\textsuperscript{271}

There is no federal legislation on H-2A employers’ obligation to provide health insurance to their workers. H-2B workers can qualify for virtually no state obliges employers to provide health insurance to their workers. Under the Patient Protection and

\textsuperscript{270} See: \url{http://www.splcenter.org/publications/close-to-slavery-guestworker-programs-in-the-united-states/injuries-without-effective-r}

\textsuperscript{271} For more information see: \url{http://farmworkerjustice.org/sites/default/files/documents/H-2A%20webcast%20-%20Final4-30-12.pdf}. 
| On unemployment insurance | Federal Unemployment Tax Act (FUTA) | Each state has its own unemployment insurance requirements, but generally temporary migrant workers are excluded. | X | X |

| Emergency Medicaid | Affordable Care Act (PPACA), H-2 workers could be eligible for entering state exchanges, but assessing the impact of this recent reform on temporary workers requires further research. Few states (such as Vermont) have established universal access to health care based on PPACA, but it is still possible that temporary workers will not qualify for these programs because they are not “state residents.” |  |  |
- H-2B workers cannot benefit from the program either, since they are not “available” to work for another employer. H-2B worker employers have to pay the FUTA tax. H-2A worker employers do not have to pay the FUTA tax.

<table>
<thead>
<tr>
<th>On social security benefits</th>
<th>Public sector pensions for retirement.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Not very likely given the type of temporary labor, the lack of employer’s contributions or failure to make payments to the social security office.</td>
</tr>
<tr>
<td></td>
<td>- H-2A workers who entered after 1996 are expressly excluded.</td>
</tr>
<tr>
<td></td>
<td>- Social security and Medicare taxes are deducted from the wages of H-2B workers, but not from those of H-2A workers (nevertheless, the possibility of claiming the benefits of these programs is slim for both H-2A and H-2B workers).</td>
</tr>
<tr>
<td>Federal Legislation</td>
<td>H-2A</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>The Migrant and Seasonal Agricultural Worker Protection Act</td>
<td>Regulates:</td>
</tr>
<tr>
<td></td>
<td>- Agricultural subcontractors by creating a register of subcontractors. They must register to receive an authorization to function as one. Sanctions are applicable in cases where they operate without authorization. They can be sued.</td>
</tr>
<tr>
<td></td>
<td>- Housing</td>
</tr>
<tr>
<td></td>
<td>- Transport</td>
</tr>
<tr>
<td></td>
<td>- Grants the right to file private action lawsuits with Federal courts without distinction in relation to immigration status.</td>
</tr>
<tr>
<td></td>
<td>- Grants a right to complain to the Department of Labor.</td>
</tr>
<tr>
<td></td>
<td>- Sets up class action or collective judgements.</td>
</tr>
<tr>
<td>Type of Norm</td>
<td>Federal Legislation</td>
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<td>-----------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
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</tbody>
</table>
| Against human trafficking | Trafficking Victim Protection Reauthorization Act (TVPRA)  
- Victims of labor trafficking  
- Establishes criminal sanctions and the private right of action before a Federal Court.  |      | X    |
|                       | Alien Tort Claim Act (ATCA)  
- Violations of International Law.  
- Violations of conventions ratified by the US  
- Grants a private right to action  
- Can be utilized in cases of slavery, trafficking or severe violations of labor rights. |      | X    |
H-2A Program

H-2A visa regulations prohibit the renunciation of rights granted

<table>
<thead>
<tr>
<th>Minimum working conditions</th>
<th>Employment contract</th>
<th>Reimbursements</th>
<th>Registers</th>
<th>Bodies</th>
<th>Legal Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Minimum wage*</td>
<td>Workers must receive a copy, which specifies:</td>
<td>Travel expenses:</td>
<td>Of payments received by the worker</td>
<td>Department of Labor (DOL), Wage and Hour Division (WHD): administers the program and is in charge of ensuring its fulfillment, as well as having the task of investigating denunciations of contract violations, which workers can present to any Department of Labor branch or any state Employment Office.</td>
<td>-Reprisals against complaining workers are prohibited. - They have the right to free legal services to assist them in cases of breaches with the terms of their contracts. The lawyers cannot represent H-2A workers in criminal cases, immigration matters, and those that would imply the charging of fees. -The right to appeal a decision</td>
</tr>
<tr>
<td>- The worker must be notified about the terms of the contract. -Reimbursement of travelling expenses</td>
<td>- The duration of the contract -Information regarding minimum conditions - Working hours - Wage specifications - Nature of employment - Tools and equipment which the employer has to provide -assurance that they will be covered by</td>
<td>-Outward journey upon completion of 50% of the contract. - Return - Travel allowance</td>
<td>-Of the worker’s total income during the period of payment, explaining any deductions made. -On payment day: a detailed statement of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- At least three quarters of the work offered to workers must be guaranteed.</td>
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</tr>
</tbody>
</table>

*Agricultural producers must pay the highest wage among: the Adverse Effect Wage Rate (AEWR), the federal minimum wage, and the currently valid wage published by State of Working

Quo Vadis? Recruitment and Contracting…:
| America (SWA) | compensation insurance | hours and income -They must be kept for three years upon termination of the contract | -This body can: impose fines and back charges, obtain injunctions against employers and deny future applications. | is limited to cases of breaches of contracts. |
**H-2B Visa:** Until April 23, 2012, 2009 conditions applied. Following the 2012 reforms, some conditions improved.\(^{272}\)

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Employer submits and receives a prevailing wage determination and then submits an Application, ETA Form 9142, from which ETA determines the need for temporary labor and assesses the employer’s test of the labor market.</td>
<td>Employer submits and receives a prevailing wage determination and then submits an H-2B Registration (after the transition period), from which ETA certifies temporary need for up to three years. Each season, employer submits an Application, ETA Form 9142, a copy of the job order, and additional documentation from which ETA assesses the employer’s job opportunity and then orders recruitment to ensure a thorough test of the labor market. The Application, ETA Form 9142, and required documents must be submitted 75 - 90 calendar days before the employer’s date of need.</td>
</tr>
<tr>
<td>Temporary need</td>
<td>Limited to 10 months.</td>
<td>Limited to 9 months.</td>
</tr>
<tr>
<td>Job Contractors</td>
<td>Participation of job contractors permitted. They must declare as joint employers.</td>
<td>Participation of job contractors is limited. They must declare as joint employers.</td>
</tr>
<tr>
<td>Recruitment</td>
<td>Employers must attest being unable to locate sufficient number of qualified U.S. workers. Employers must submit a recruitment report with the Application at time of filing.</td>
<td>Recruitment must take place after applying, and must demonstrate that it not possible to locate sufficient number of U.S. workers. Employer must submit recruitment report.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Definition of full-time</th>
<th>30 hours.</th>
<th>35 hours.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disclosure of foreign recruitment</td>
<td>Employers must contractually prohibit recruiters from seeking or receiving fees from prospective workers.</td>
<td>Must provide copies of any agreements with recruiters engaged in international recruiting with the names and locations of sub-contractors hired by the recruiter.</td>
</tr>
<tr>
<td>Termination of job order</td>
<td>Unforeseen acts. The employer may petition for early termination of job order.</td>
<td></td>
</tr>
<tr>
<td>Disclosure</td>
<td>Employers must disclose the job order to all H-2B in a language understood by the workers.</td>
<td></td>
</tr>
<tr>
<td>Wage</td>
<td>Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage. Offered wage equals or exceeds the highest of the prevailing wage or Federal, State, or local minimum wage. Either in cash or negotiable instrument payable at par. Employer must pay every two weeks or according to prevailing practice in the area of intended employment.</td>
<td></td>
</tr>
<tr>
<td>Deductions</td>
<td>All deductions required by law</td>
<td>All deductions required by law. Worker-authorized voluntary deductions to third parties for the benefit of the worker.</td>
</tr>
<tr>
<td>Employer provided items</td>
<td>Employer must provide, without charge or deposit, all tools, supplies, and equipment needed to perform the job.</td>
<td></td>
</tr>
<tr>
<td>Three-fourths guarantee</td>
<td>At least three-fourths of the workdays in every 12-week period (or, for job orders less than 120 days, every 6-week period).</td>
<td></td>
</tr>
<tr>
<td>Earning statements</td>
<td>Employer must keep accurate pay and hours records and supply workers with earnings statement on or before each payday.</td>
<td></td>
</tr>
<tr>
<td>--------------------</td>
<td>------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Strikes</td>
<td>H-2B job may not be vacant because former occupants are on strike or locked out.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>H-2B job may not be vacant because former occupants are on strike or locked out in any of the employer’s worksites within the area of intended employment.</td>
<td></td>
</tr>
<tr>
<td>Required recruiting activities</td>
<td>SWA job posting for at least a 10-day period before contracting is started. Newspaper ad for 2 days during the 10-day SWA posting. The callback and offer of re-employment to U.S. workers laid off within 120 before date of need. Union referrals where the employer is party to a CBA covering the occupation.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>SWA job posting 21 days before the date on which contracting starts. Newspaper ad for 2 days (one a Sunday). The callback and offer of re-employment to U.S. workers laid off the previous year. Contacting the bargaining representative or posting the job for 15 business days. Contacts the union, where the occupation or industry is customarily unionized. Send the job order to DOL for posting on the national job registry.</td>
<td></td>
</tr>
<tr>
<td>Revocation</td>
<td>ETA may revoke a labor certification for a variety of reasons, including noncompliance of contract conditions; failure to cooperate with DOL or law enforcement; or failure to comply with DOL sanctions.</td>
<td></td>
</tr>
<tr>
<td>Transportatio n</td>
<td>Employer is liable under H-2B regulations only for outbound travel and only when the worker is dismissed prior to the end of the certified period of employment.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Employer is liable under H-2B for reasonable cost of inbound travel, including daily subsistence expenses, for workers who complete 50% of the job order. Employer is liable for outbound travel, including daily subsistence expenses, for workers who work until the end of the job order or are dismissed early.</td>
<td></td>
</tr>
</tbody>
</table>
All transportation provided by the employer must comply with applicable US laws and regulations.

<table>
<thead>
<tr>
<th>Visa and visa-related expenses</th>
<th>Not an employer obligation under H-2B. May be covered under FLSA in first workweek.</th>
<th>Employer is required to pay or reimburse in the first workweek the full cost of visa and visa-related expenses.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certified occupation</td>
<td>Inaccurate statements on the Application regarding the occupation and job duties may be pursued as willful misrepresentations of the Application.</td>
<td>Employers may not place H-2B workers in a job opportunity not certified on the Application.</td>
</tr>
<tr>
<td>Workers rights poster</td>
<td>Employer must post a workers’ rights poster in the workplace in a language the workers will understand.</td>
<td></td>
</tr>
<tr>
<td>No unfair treatment</td>
<td>The employer may not intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR Part 655, Subpart A, 29 CFR Part 503, or any other Department of Labor regulation promulgated thereunder: has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with a workers’ center, community organization, labor union, legal assistance program or attorney; or exercised or asserted on behalf of himself/herself any right or protection.</td>
<td></td>
</tr>
<tr>
<td>Compliance with other employment-related laws</td>
<td>During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws.</td>
<td>During the period of employment, employers must comply with all other employment-related laws, including employment-related health and safety laws. It is prohibited for employers and their agents to</td>
</tr>
</tbody>
</table>
confiscate or hold the workers’ documents.

<table>
<thead>
<tr>
<th>Revocation</th>
<th>ETA may revoke a labor certification for a variety of reasons, including fraud; willful misrepresentation of a material fact; substantial failure of a term or condition of employment; failure to cooperate with DOL or law enforcement; or failure to comply with DOL remedies, sanctions, or decisions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debarment</td>
<td>WHD does have independent debarment authority to debar employers, agents, and attorneys. Debarment extends to all other labor certifications (other visa programs) with DOL. Offenses which may be cause for debarment are broader than in 2009 regulations. The Debarment period can be between one and five years.</td>
</tr>
</tbody>
</table>
3.5 The Guatemala/Mexico System: Border Visa System

**Background and characteristics of migration flows**

The border region between Mexico and Guatemala is the site of an intense phenomenon of international migration, originating in large part from the countries that make up Central America’s Northern Triangle, particularly Guatemala. Mexico’s southern border is formed by the states of Chiapas, Tabasco, Campeche, and Quintana Roo, which geographically border Guatemala and Belize along 1,149 kilometers, of which 956 kilometers correspond to the border with Guatemala. The presence of migrant workers in this region of Mexico represents one segment of these labor flows and reflects one of the primary flows of migrants who view Mexico as a destination country. This chapter will address the mechanisms in place to regulate the mobility of Guatemalan temporary migrant workers who primarily seek work in the Mexican state of Chiapas.

Temporary workers have been arriving in this region since the late 19th century, which marked the beginning of a key period in the history and economy of Chiapas, especially in regards to the phenomenon of migration from Guatemala. Following Mexico’s enactment of the 1883 Land and Colonization Law, a group of prospective German plantation owners settled in the Soconusco territory to engage in coffee farming on large plantations, generating an intense demand for workers. Since then, temporary agricultural workers from Guatemala have played a key role in sustaining the local economy in Chiapas. The majority of these workers arrive from neighboring towns, entering and exiting the Soconusco region of Chiapas through the department of San Marcos, Guatemala.

According to the most recent Mexican population census, more than 30,000 people currently residing in Chiapas are foreign-born, of which 10,271 live in the municipality of Tapachula. The various manifestations of cross-border human mobility in the region can be categorized according to migrants’ length of stay and reasons for migration. Four main types of migration flows can be identified in the border region: 1) temporary cross-border workers, 2) border residents, 3) local temporary visitors, and 4) transmigrants (migrants in transit) who are traveling through Mexico, usually en route to the United States. Although our understanding of these migration flows remains fragmented, it is clear that the Mexico-Guatemala border is characterized by a high intensity of border crossings occurring in both directions on a daily basis, revealing the complexity involved in designing and implementing a comprehensive strategy to address this phenomenon. It is important to take into account the strategic relevance of Mexico’s southern border regarding national security, which has a direct impact on migration policies.

Temporary migrant workers represent an essential workforce, responding to the demands generated by the agricultural sector in Chiapas, particularly the harvest of coffee, tobacco, soybeans, sugarcane, papaya, and bananas, as well as livestock. Migrants are predominantly Guatemalan, male, rural, and engaged in temporary or circular migration, with a high degree of illiteracy.

According to studies carried out by researchers at El Colegio de la Frontera Sur (College of the Southern Border, or ECOSUR by its Spanish acronym) and by the Fray Matías de Córdova Human Rights Center (Fray Matías HRC) based in Tapachula, the population of women border workers has been increasing in recent years, due to a demand for domestic workers, female workers in the informal economy, and sex trade. The majority of these workers are indigenous women from rural farming communities in Guatemalan municipalities located in the departments of San Marcos, Quetzaltenango, Huehuetenango, and Retalhuleu, located in southwestern Guatemala.

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273 The information presented in this chapter reflects data up to May 31, 2012.
274 This mobility mainly occurs in towns near the Pacific coast, whereby migrants leave from Tecún Umán or El Carmen in Guatemala to arrive in Chiapas via Ciudad Hidalgo or Talismán, respectively. These migrants are primarily from the departments of San Marcos, Quetzaltenango, Huehuetenango, and Retalhuleu, located in southwestern Guatemala.
275 INEGI, 2010 Population and Housing Census.
close to or along the border with Mexico. Although women are exposed to numerous risks and face different conditions of vulnerability (such as precarious work, unfair wages, and abuse), their reason for migrating is similar to that of men: to work, or accompany a family member who aims to work, for a defined period of time until they are able to return to their country of origin. It is also important to highlight the participation of Guatemalan children and adolescents who also migrate to work in the informal economy.

In addition to the traditional flow of agricultural migrant workers, in recent years a growing number of migrant construction workers (builders or bricklayer) have also arrived in Chiapas, following the destruction caused by hurricanes as well as the post-conflict situation in Central America. In addition, new flows of migrant workers are also taking up service jobs (in auto repair shops, as carpenters or drivers, etc.). All of these migrant workers mainly go to Tapachula or smaller cities throughout the border region, due to urban growth that has led to increased demand for labor.

Based on data from various studies, it is estimated that there is an average of between 75,000-100,000 to 250,000-300,000 temporary migrant workers in the state of Chiapas alone. According to data from the National Population Council (CONAPO by its acronym in Spanish), the number of entries into Mexico by documented border workers was 23,526 in 2008, 46,477 in 2009, and 84,107 in 2010. With increased access to legal immigration status due to the creation of new visas, the number of workers registered by the National Institute of Migration (INM by its acronym in Spanish) has clearly increased. However, because the majority of migrant workers still lack work visas, in general there is very little systematic information on this population, despite the fact that their presence and productive contribution can be observed on a daily basis, particularly in the urban areas of the region.

As part of a broader regional and hemispheric context in which migration and national security have become closely linked, a new set of institutional standards and mechanisms have been established between Mexico and Guatemala in recent decades. Although historically the relationship between Mexico and

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278 Marta Rojas. Mujeres y Migración en la Frontera Sur. Available at: http://alhim.revues.org/2252
280 The same person may have entered the country on more than one occasion, as a specific registry is not available. Since 2008, the Temporary Agricultural Worker visa was replaced by the Border Worker visa. Source: CONAPO, 2011, based on data from the Center for Migration Studies pertaining to the National Migration Institute (CEM-INM by its acronym in Spanish), consisting of information recorded at entry points.
281 The existing sources of information are a start but they have limitations: (a) Regarding existing academic research on Guatemalan migrant workers in the southern and southeastern states of Mexico (COLMEX, ECOSUR, CEM-INM): no quantitative studies have been carried out; (b) Regarding INM administrative records on the documentation of workers in Chiapas, according to existing visa categories: until 2009 these records only included agricultural workers and focused solely on Chiapas; (c) The Survey on Migration along the Southern Border, 2004-present (COLEF, STPS, INM, CONAPO and SRE), only includes Chiapas and focuses on the flows of migrants entering and exiting Mexico, excluding the population of settled migrants.
283 The numerous institutional and policy instruments that dictate Guatemala-Mexico relations on issues of international migration include: the Mexico-Guatemala Binational Commission/Binational Group on Migratory Affairs (established in 1989)/ Mexico-Guatemala Ad Hoc Group on Guatemalan Temporary Migrant Workers and Migratory Affairs (1991-2002, when it was institutionalized)/ The Subgroup on Agricultural Labor Affairs (established in 2002); the High-Level Mexico-Guatemala Border Security Group (GANSEF by its acronym in Spanish, established in 2002), including representatives from Belize in 2005; the Memorandum of Understanding on the Human Rights of Migrants between Mexico and Guatemala (2002); the Memorandum of Understanding for the Protection of Women and Children as Victims of Human Trade and Trafficking on the Mexico-Guatemala Border (2004); Survey on Migration along the Guatemala-Mexico Border/ COLEF, INM, CONAPO, SRE, STPS, INCEDES (2004); shared participation in the Convergence at the Regional Conference on Migration, Regional Parliamentary Council on Migrations (COPAREM) as a legislative space of convergence among the SICA member states and Mexico, among others.

Quo Vadis? Recruitment and Contracting…:
Guatemala has been strategically important for the development of both countries, the focus has now shifted to security, border control, and the promotion of specific economic interests. To date, Mexico and Guatemala have yet to establish an agreement that addresses the issue of cross-border migration with a focus on human development and respect for the human rights of migrant workers and their families, even though both countries have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was adopted by the United Nations General Assembly on December 18, 1990 in its Resolution 45/158.

In this context, it is important to mention the Comprehensive Plan for the Southern Border, or the 2008-2012 National Program for the Southern Border, aimed at promoting organized migration flows, coordination between state and federal authorities, and security both for those who reside in the border region and for those who pass through in transit or live there, in addition to combating the widespread impunity that encourages organized crime. As such, the five pillars of this strategy are as follows: 1) encourage formality and promote a culture of legality; 2) increase border security as well as customs and immigration control; 3) strengthen the social and economic development of the region, promoting sustainable human development; 4) improve the infrastructure and equipment of the authorities present in the region; and 5) increase cooperation with other government offices and with the governments of Guatemala and Belize. In practice, most of the actions that stem from this plan or program are focused on immigration control and border security.

The rights of migrants in Mexico are protected by the Mexican Constitution, the Federal Labor Law, and the 2011 Migration Law, among other policies and international agreements. The Mexican Constitution establishes that certain workers’ rights are guaranteed at the constitutional level, including the right to organize, the right to a safe workplace, and the right to receive equal pay for equal work. The Federal Labor Law governs relations between employers and employees, and covers issues such as collective bargaining agreements, the right to a safe workplace, protection against discrimination, the role of subcontractors or other intermediary employers, and other issues. Labor disputes are handled by the Office of the Federal Attorney for the Defense of Labor (PROFEDET by its acronym in Spanish)285 as well as the Federal Conciliation and Arbitration Board286 and, in the state of Chiapas, by the local Conciliation and Arbitration Board. On some issues, states are responsible for the enforcement of the Federal Labor Law.

Despite ambiguities in the recognition of migrant rights derived from the obsolete General Law of Population, in 2008 the Mexican Supreme Court ruled that all migrant workers, regardless of immigration status, have the same labor rights and access to protection as Mexican nationals.287 This obligation was further upheld in Article 6 of the new Migration Law, which states that the Mexican government must guarantee the rights and freedoms of all foreigners regardless of immigration status, as established in the Mexican Constitution and in the international treaties and conventions to which Mexico is party, in addition to other applicable legal measures. Nevertheless, it is important to mention that the publication of the new law’s regulations, which are essential to ensuring its effective implementation, has taken over a year to finalize, resulting in the continued application of the regulations previously used under the General Population Act. As such, at the time of completing this research, it had not yet been possible to evaluate the impact of the new policy on the situation of migrant workers in the border region.

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285 See: www.profedefet.gob.mx
286 See: www.stps.gob.mx/bp/secciones/junta_federal/index.html
Visa system for Guatemalan workers in Chiapas, Mexico

According to various scholars, the need to regulate migrant labor flows and temporary migration in the region was prompted by the political conflict in Guatemala, resulting in the arrival of thousands of Guatemalan refugees to Mexico, and by the emerging phenomenon of transit migration through the region. However, this did not necessarily lead to the adoption of a comprehensive migration policy. The current systems in place to regularize cross-border migrants (workers as well as visitors) are relatively recent, and reflect Mexican policy efforts to control migration flows across the southern border. This chapter will specifically address the following categories of visas: the Border Worker visa (FMFT), which replaced the Temporary Agricultural Worker visa (FMVA), and the Local Visitor visa (FMVL).

1. Temporary Agricultural Worker visa (FMVA) - 1997-2007

The traditional influx of temporary migrant workers into the agricultural sector in Chiapas was not regulated until the 1980s, when immigration authorities began to issue permits for a period of 30 or 60 days, during which plantation owners could hire temporary agricultural workers. These permits were issued on a collective basis and were granted to the employer, rather than to the individual workers.

In an effort to prevent the many abuses associated with the collective permits, Mexican authorities decided to reform the process and instead issue individual work permits. In 1997, the Temporary Agricultural Worker visa was established, an individual visa valid for one year, which was restricted to migrants seeking work in the state of Chiapas. For the first time, this new procedure formalized the responsibilities of all parties involved: immigration authorities, employers, workers, and employment recruiters. Until 2008, the official statistics on border workers gathered by the INM were based on the issuance of these visas. Guatemalan consular officials had no official record of the visas issued to their citizens, and instead relied on information regularly requested from the Mexican authorities.

The Temporary Agricultural Worker visa was issued to individual temporary migrant workers but was not extended to their spouses, children, siblings, or others who accompanied them during their stay. These migrants were not recognized as workers even when they carried out work that contributed to the income of the registered worker, or facilitated their living and working conditions, as in the case of the women who prepared their food. As a result, these migrants were not included in the official statistics.

At the time, this visa program for temporary agricultural workers was considered a positive advance, forming part of a progressive immigration policy that facilitated legal certainty and safe transit, and benefited employers as well as workers. The provision of visas to migrants was the first key development that provided insight into the nature of this flow of migrants and drew attention to migrants’ living and working conditions. A subsequent program evaluation pointed to a variety of problems, such as poor coordination between Mexican and Guatemalan authorities, inadequate oversight of documentation, omissions in entry and exit records, negligence and abuse by contractors and employers, as well as abuse and corruption on the part of immigration, police, and military officials.

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289 Although the FMVL did not grant the right to work, this was the visa most commonly used by migrants to prove their legal status in Mexico while carrying out informal work in the border region, often on an ongoing basis.
292 CNDH 1996, Informe de la CNDH sobre los migrantes en la frontera sur.
2. Local visitor visa (FMVL) - 2008-2012

Since the year 2000, in response to the growing phenomenon of cross-border mobility, special procedures were put in place for local Guatemalan visitors residing in the departments that border Mexico. In 2008, the Mexican government formally created the Local Visitor visa (FMVL) in order to facilitate the temporary admission of Guatemalans wishing to visit the Mexican border region for a period of up to three days. The Local Visitor replaced the "local pass" that Guatemalan authorities had been issuing to their citizens to allow them to cross into the Mexican border region.294

The process for obtaining the Local Visitor visa was free and could be carried out at authorized border crossings and INM offices near the border. Guatemalan citizens were eligible for the visa if they were residents of the departments of Quetzaltenango, San Marcos, Huehuetenango, Quiché, Petén, Retalhuleu, and Alta Verapaz. They were allowed to legally enter Mexico via any authorized border crossing and stay for a maximum of three days in border towns located in the states of Chiapas, Tabasco, and Campeche. In addition, visa holders were allowed to acquire assets, property, and goods, as well as make bank deposits. Children were also allowed access to educational institutions.295

The Local Visitor visa was granted in the form of an ID card, which was valid for five years from the date of issue (one year for children under three years of age), and could be used for multiple entries. The basic requirements included: Original and photocopy of the applicant’s Guatemalan identity card or valid passport, as well as two standard ID photos in black and white or color. Unaccompanied minors were required to present proof of permission granted by their parents or legal guardian authorized by the Guatemalan government. FMVL holders had to carry their visa with them at all times during their stay and could not remain in the Mexican border region for more than three days. Failure to comply with these conditions would result in the cancelation of the Local Visitor visa and the enforcement of a penalty ranging from a fine to deportation.

It is worth noting that the Local Visitor visa did not grant permission to work. In practice, however, migrant workers on the southern border of Mexico commonly used this visa to regularly enter the country for the permitted period of 72 hours, thus allowing them to work in Mexico without the formally required authorization.

Lastly, it will be important to evaluate the impact of Article 52 of the 2011 Migration Law,296 which establishes three different types of temporary visas (the Local Visitor visa was replaced by the Regional Visitor visa):

I. VISITOR WITHOUT PERMISSION TO ENGAGE IN GAINFUL OCCUPATIONS

Authorizes a foreigner to travel or stay in Mexico for up to 180 consecutive days from the date of entry, without permission to perform activities subject to remuneration in the country.

II. VISITOR WITH PERMISSION TO ENGAGE IN GAINFUL OCCUPATIONS

Authorizes a foreigner who has received a job offer from any academic, artistic, sporting, or cultural institution or authority for which he or she will receive remuneration in Mexico, or a foreigner who comes to Mexico to engage in a gainful occupation for a seasonal period under an interinstitutional agreement established with foreign institutions, to stay in the country for up to 180 consecutive days from the date of entry.

III. REGIONAL VISITOR

Authorizes a foreign citizen or resident of a neighboring country to cross into the Mexican border region, with the right to enter and exit Mexico as many times as he or she wishes as long as the visit does not exceed three days. This visa does not grant permission to receive remuneration in the country.\[297\]

It is important to note that the creation of the Regional Visitor visa extends access to this type of visa to all citizens and permanent residents of neighboring countries. The regulations of the Migration Law published in the Official Gazette of the Federation on September 28, 2012 establish the following requirements for the provision of a Regional Visitor visa:

Article 132. The status of Regional Visitor defined under Article 52, section III of the Law may be granted to a foreigner who proves to have citizenship or permanent residence in a neighboring country and fulfills the other requirements established by the general regulatory measures issued by the Ministry of the Interior (SEGOB by its acronym in Spanish) and published in the Official Gazette of the Federation.

The application to obtain this type of visa must be filed at the office of the INM located at a land border crossing in one of the states that comprise the border region.

Article 133. Holders of a valid and current Regional Visitor visa are subject to the rights and obligations set forth below:

I. The rights of Regional Visitors include:

a) Enter and travel throughout the border region, as defined by the general administrative measures that will be published in the Official Gazette of the Federation.

b) Visit the border region as many times as they wish during the validity of their Regional Visitor card with a maximum stay of three days each time.

c) All other rights granted by the Law, its implementing regulations, and other applicable legal measures.

II. The obligations of Regional Visitors include:

a) Enter and exit the country only via the land border crossings authorized for international transit along Mexico’s border with the neighboring country. Each time they enter or exit the country they must identify themselves with their Regional Visitor card and provide the necessary data for their registration;

b) Refrain from staying in the border region for more than three days;

c) Carry their valid Regional Visitor card with them at all times during their stay in the country;

d) Refrain from attempting to obtain a different category of visa or immigration status at the same time. It is not possible to concurrently acquire more than one type of immigration status, in accordance with Article 154 of the implementing regulations;

e) Present their Regional Visitor card when required to do so by immigration officials; and

f) Not engage in gainful occupations.

Should the visitor fail to comply with these or any other obligations established in the Law and its implementing regulations, his or her Regional Visitor card will be canceled and a penalty will be imposed, in accordance with the corresponding legislation.

\[297\] Article 52 (III) of the Mexican Migration Law states that "By means of administrative measures, the Ministry shall define the valid timeframe of the visa and identify the municipalities and states that comprise the border regions, for the purposes of granting the Regional Visitor visa."
The procedure for obtaining this visa is as follows:

**Article 136.** The procedure for obtaining the status of Regional Visitor or Temporary Border Worker is as follows:

I. The foreign applicant must visit the authorized land border crossing for international transit located closest to his or her place of residence;

II. An immigration official will interview the foreigner to obtain biographic and biometric data to fully verify the applicant’s identity and duly fill out the visa application; and

III. Upon reviewing compliance with the assumptions and requirements set out in the implementing regulations and other applicable legal measures, and having verified that the applicant does not appear on any immigration control lists, the immigration official will immediately issue his or her decision:

   a) If the application is approved, the official will issue the corresponding visa that authorizes the applicant’s status as a Regional Visitor or Temporary Border Worker, or

   b) If the application is denied, the applicant will be provided with an official explanation in writing that details the reason for the denial.

Because this new policy only recently entered into force, it is not possible at this time to assess the impact of its implementation.

3. **Border Worker visa (FMTF) - 2008-2012**

Stemming from internal Mexican policies aimed at increasing border security and managing migration flows, particularly along the southern border, in 2008 the Border Worker visa was created (replacing the Temporary Agricultural Worker visa), in order to facilitate admission of Guatemalans and Belizeans to undertake temporary employment in various sectors (agriculture, livestock, construction, and services) in the states of Chiapas, Tabasco, Campeche, and Quintana Roo, regardless of where the visa was issued.

To apply for this visa, applicants must be Guatemalan or Belizean citizens over 16 years of age, with a lawful and honest job offer from a Mexican employer, and no criminal record abroad, nor a history of having violated national laws. The required documentation must be submitted at an authorized border crossing and consists of: a valid identity document (ID card or passport), proof of payment of visa fees (although the Federal Law on Public Fees makes an exception for those whose income is below minimum wage), a job offer in writing stating the wage that will be paid and signed by the employer or his/her legal representative, and two photos. The process by which the INM officials review the required documentation, interview the applicant, and

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300 According to the 2008 updates to the Federal Law of Fees, the relevant fees are 1,904 pesos [around USD$144]. The migrant worker is exempt from paying these fees if the payment he/she will receive in Mexico is less than the minimum wage (49.50 pesos per day for a general wage [not even USD$4] or up to 148.05 pesos per day for specialized jobs [around USD$11]).
perform necessary security checks to complete the applicant’s file aims to be agile and simple. Once the
application has been approved, the visa is issued immediately.301

According to the rules for obtaining the Border Worker visa, the employer’s file must contain: a) a copy of
the ID of the person who signed the job offer, b) a list of the personnel currently working with the employer,
including name and nationality; c) the by-laws or other legal document that confirms the existence of the
company, duly registered at the Public Registry of Commerce, and d) the company’s most recent tax return. The
employer must also pay the foreign worker equal pay for equal work, and must inform immigration authorities,
within a period of 15 days, of completion of their labor relation with him/her. Employers are prohibited from
withholding foreign workers’ migration documents, and should only hire foreigners who can confirm their legal
entry and status in the country.

The Border Worker visa holds two important benefits for border workers. First, although a job offer is
required to apply for the visa, the worker is not tied to a specific employer or job. Rather, the visa is granted for
the activity that corresponds to the job offer. Workers can change jobs and continue to use the same visa, under
the condition that they notify the INM of their change of employer within 30 days. This flexibility has the
potential to prevent situations of exploitation and trafficking that sometimes occur in this context, and also
reflects the reality of the border labor market. Second, the Border Worker visa also allows workers to apply for
their spouses and children to enter Mexico as dependents, thus recognizing the right to family unity.

The other potential benefits of the Border Worker visa, such as greater legal certainty, security, protection
of rights, reduced vulnerability in relation to employers, and market flexibility, tend to be contingent on the
actual context experienced by each worker.

One of the great disadvantages of the FMTF is that this visa is only valid for one year from the date of
issue, without the possibility of extension. As such, if foreigners wish to work in the border region for a longer
period of time, they must repeat the application process, including the payment of visa fees, on a yearly basis. In
addition, despite its flexibility, the permission to work, live, and travel in Mexico granted by the Border Worker
visa is restricted to the Mexican states of Chiapas, Tabasco, Campeche, and Quintana Roo. If border workers
travel beyond this defined region, they are considered to be in violation of the terms of their visa. Workers are
required to carry their Border Worker visa with them at all times, to leave the country when their visa has
expired, and to hand over their visa to an INM official at an authorized border crossing upon the conclusion of
their employment in Mexico. Violation of any of the terms of the Border Worker visa would result in a penalty
ranging from the payment of a fine, to detention or even deportation, which would appear on the worker’s
record and could negatively affect future attempts to obtain a visa to Mexico. It will be important to evaluate the
specifications regarding these requirements included in the new implementing regulations of the Migration Law.

Since 2011, the INM has collected biometric data on the holders of Border Worker visas and has
established an electronic system for registering the entry of documented workers along the southern border.
However, there is also a parallel pattern of migration occurring in which undocumented workers or workers with
inadequate documentation (such as the Local Visitor visa) enter the country primarily to seek temporary
employment in the municipalities closest to the border, arriving directly to the farms to request work. According
to a recent statement by the Consul General of Guatemala in Tapachula, at least half of the Guatemalans
working in Chiapas have been hired in an irregular fashion.302

In practice, the Border Worker visa has been issued mainly to men, primarily for employment in the
agricultural sector and, to a lesser extent, construction. Considering that a large number of border workers are
engaged in informal employment such as building and domestic service, including a significant proportion of
women, it is clear that the scope of this visa should be broadened significantly in order to improve its
effectiveness and ensure the protection of human rights, especially labor rights, throughout the border region.

Article 52, section IV of the 2011 Migration Law establishes the following new category of immigration status for border workers:

IV. TEMPORARY BORDER WORKER

It authorizes foreign citizens of countries that share a border with Mexico to remain in the country for a period of up to one year, in the states defined by the Ministry. Temporary border workers will have permission to engage in paid work in Mexico, in the activity that corresponds to their job offer, with the right to enter and exit the country as many times as they wish.

The implementing regulations of the Migration Law establish the following:

**Article 134.** According to Article 52, section IV, of the Migration Law, the status of Temporary Border Worker can be granted to foreigners who comply with the following requirements:

I. Hold citizenship of a country that shares a border with Mexico, and

II. Have a job offer that indicates the type of employment, required length of stay, designated wage package or minimum wage, location of employment, and proof of employer’s registration.

The corresponding documentation needed to verify compliance with these and all other relevant requirements are established in the general administrative regulations issued by the Ministry and published in the Official Gazette of the Federation.

The application to obtain this type of visa must be filed at the INM office located at an authorized land border crossing in one of the states designated by the Ministry.

Visa applicants are able to request the entry of their spouse, common-law spouse, or equivalent partner, as well as that of young children or adolescents under their legal guardianship or adults under their legal guardianship due to a judgment of interdiction, as long as proof of the relationship has been provided. Migration documents may be issued to these family members once the primary applicant has obtained the Temporary Border Worker visa.

**Article 135.** Holders of a valid and current Temporary Border Worker visa are subject to the rights and obligations set forth below:

I. The rights of border workers include:

a) Enter and travel throughout designated Mexican states, as established in the general administrative provisions issued by the Ministry and published in the Official Gazette of the Federation.

b) Carry out paid activities in these designated states, regardless of the place of issue of their visa.

c) Request the entry of their husband or wife, common-law spouse, or equivalent partner, as well as that of young children or adolescents under their legal guardianship or adults under their legal guardianship due to a judgment of interdiction, in accordance with the terms established in the previous article.

II. The obligations of border workers include:

a) Enter and exit the country only via authorized land border crossings. Each time they enter or exit the country they must identify themselves with their Temporary Border Worker card and provide the necessary data for their registration.

b) Carry their valid Temporary Border Worker card with them at all times during their stay in the country and present the card when requested to do so by immigration officials.
c) Refrain from attempting to obtain a different category of visa or immigration status at the same time. In accordance with Article 155 of the implementing regulations, it is not possible to concurrently acquire more than one type of immigration status.

Should the border worker fail to comply with these or any other obligations established in the Migration Law or its implementing regulations, his or her Temporary Border Worker card will be canceled and a penalty will be imposed, in accordance with the corresponding legislation.

The formalities to obtain the Temporary Border Worker visa are the same as those for the Regional Visitor visa: The applicant must visit the authorized land border crossing for international transit located closest to their place of residence, where he or she will be interviewed by an immigration official to obtain biographic and biometric data to fully verify the applicant’s identity and duly fill out the visa application. Upon reviewing compliance with the assumptions and requirements set out in the implementing regulations and other applicable legal measures, and having verified that the applicant does not appear on any immigration control lists, the immigration official will immediately issue his or her decision. If the application is approved, the official will issue the corresponding visa. If the application is denied, the applicant will be provided with an official explanation in writing that details the reason for the denial.

4. Regularization programs

An analysis of these visas must take into account the migration regularization programs implemented by the Mexican government with the goal of regulating a segment of the undocumented population. The most recent program was in place from November 2008 to May 2011. During 2011, 802 of the 1,808 program regularizations were carried out in the state of Chiapas. These programs have clearly served as a complement to the visa system for border workers. Considering the vast influx of migrants into Mexico, it is critical to undertake efforts to continue these efforts and expand existing regularization programs in order to make them more comprehensive.

5. Statistics regarding visas issued to foreigners

Data obtained from the 2009 Survey on Migration along the Southern Border (2009 EMIF-Sur by its acronym in Spanish) reveals that only nine percent of the migrant workers interviewed in the southern border region had a valid work visa (either the Temporary Agricultural Worker visa or the Border Worker visa), whereas the remaining 91 percent were working without legal permission (70 percent had the Local Visitor visa, and 21 percent were undocumented). This means that only a minimum percentage of the migrants working in the region had actually been granted a visa that allows them to work, pointing to the need for greater regularization.

In addition, 2009 estimates from the National Population Council show that 85 percent entered using the Local Visitor visa, while 1.4 percent of migrants crossing into Mexico via the southern border entered with the Border Worker visa, and 10.9 percent with the Temporary Agricultural Worker visa. This data highlights the large percentage of migrants that enter the country without a work permit, using a local visiting visa instead.

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303 The 2008 Migrant Regularization Program allowed foreigners to obtain immigrant status (FM2) in Mexico if they were employed as professionals, managers, scientists, technicians, artists, athletes or other such positions. The program was aimed at foreigners of any nationality who had been living in the country without legal permission prior to January 1, 2007 and expressed their interest to reside in Mexico.

304 The EMIF-SUR is conducted in the areas of the Guatemalan border region with the largest migrant presence, with the goal of measuring and characterizing the flows of migrants who seek work in Mexico and/or the United States, particularly migrants coming from Mexico, Guatemala, and the United States who cross over the southern border of Mexico. EMIF-Sur 2009, INM- Centro de Estudios Migratorios; and Ernesto Rodríguez, “Los trabajadores guatemaltecos en el sur de México: opciones de política.” Presentation, June 2010.

305 Source: CONAPO estimates based on data from STPS, CONAPO, INM, SRE and COLEF, 2008-2009 Survey on Migration along
This data is confirmed by the annual statistics collected by the INM that show that in 2009, a total of 397,797 applications were successfully processed for the adjustment of immigration status and issuing new visas to foreigners throughout the country, including 134,721 Local Visitor visas for Guatemalan and Belizean citizens and 30,080 Border Worker authorizations for Guatemalans, as well as 2,880 adjustments under the Regularization Program.  

According to the INM’s Annual Statistical Bulletin, 27,597 border workers were granted the Border Worker visa in Chiapas in 2011 (along with an additional 2,951 dependents of workers). Of these workers, all of whom were Guatemalan, 82 percent were men and 18 percent were women, while 18 percent were between 16 and 19 years of age. In addition, 60,9891 Local Visitor visas were issued to Guatemalans in Chiapas during the same year.

It is worth mentioning that these statistics have evolved over time, as a result of the creation of visa systems for the southern border region and the institutionalization of data collection through the efforts of the INM’s Center for Migration Studies (CEM-INM). Despite this progress, the study of the nature of these migration flows remains limited. Statistics regarding the Border Worker visa, for example, record the issuance but not the renovation of these visas, and very little data is disaggregated by sector, separating agricultural workers from migrants working in other sectors.

Meanwhile, the Guatemalan authorities still heavily rely on Mexican migration authorities for information regarding the admission of Guatemalan workers into Mexico and their return to Guatemala. According to those interviewed, information regarding Border Worker and Local Visitor visa holders and those passing through the Talismán/El Carmen border crossing is improving as a result of the increased ability to register the entry and exit of workers.

6. Pending policy definitions to the Migration Law and its implementing regulations

As a result of the new provisions in the Migration Law, additional modifications regarding labor migration will be made to the current system, in an effort to “modernize” the legislation that regulates it.

In Article 18, the Migration Law authorizes the Ministry of the Interior (SEGOB) to "set quotas, requirements, or procedures for issuing visas and authorizing immigration status" and "determine the municipalities or states that comprise the border regions, or those which will receive temporary workers, as well as the designated length of stay for the type of visa issued in those regions." These decisions will be made after gaining support from the Ministry of Labor and Social Welfare (STPS by its acronym in Spanish; from here on, Ministry of Labor), and taking into account the views of other agencies mentioned in the regulations.

Article 57 also authorizes the Ministry of the Interior to establish a points system that will allow foreigners to acquire permanent residence more quickly than the current standard, which requires four years of prior residence. According to this measure, the points system would consider the corresponding quotas, as well as the "capacity of the applicant, taking into account the schooling level, work experience, skills in areas related to the development of science and technology, international recognition, and the ability to perform activities required by the country.”

The definition of both the quota system as well as the point system remains pending as of the writing of this report.

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307 Ibid.
308 Recently, the INM established the Electronic System for Migration Procedures (SETRAM), a mechanism to record and track online applications related to migration procedures, which aims to be more modern and efficient. However, because the procedure is conducted electronically, this new system is not accessible to people with limited resources. Human rights organizations have pointed to this new system as evidence of the INM’s lack of knowledge and awareness of the living conditions of migrants in southern Mexico.
Contracting temporary migrant workers

Labor intermediation in the agricultural sector

According to information provided by the Guatemalan Consulate in Tapachula, between August 2011 and February 2012, during the coffee harvest, approximately 40,000 Guatemalan workers were brought by contractors from border communities to the INM offices at the so-called “Casa Roja” [Red House] in Talismán, Mexico, where visas for temporary agricultural migrant workers have traditionally been processed. Currently, these applications can also be carried out in Ciudad Cuauhtémoc and Ciudad Hidalgo in Chiapas.

To date, the procedures for contracting migrant workers have changed very little, reflecting only a few improvements. According to experts and human rights organizations in the region, these practices have been defined as “pre-capitalist” due to the nature of the employer-employee relationship that dates back to the time of the large estates called haciendas, characterized by abuse, labor exploitation, breach of contract, and the withholding of wages.

In the agricultural sector, there has traditionally been a mixed system of recruitment and contracting. Most temporary migrant workers are contracted by plantation owners through intermediaries known as "contractors," "recruiters" or "enablers." In contrast, owners of small-scale farm owners and communal landholders tend to directly hire workers at the informal labor markets found in public parks in border cities such as Unión Juárez, Ciudad Hidalgo, Talismán and Tecún Umán. As explained below, this dichotomy is a reflection of the circularity of temporary labor migration and everyday life as experienced in the border region.

The contractor plays an intermediary role between the worker and the employer, and has been authorized by the labor and migration authorities of both Guatemala and Mexico to meet the demand for labor generated by the productive sectors in Chiapas, through the identification and recruitment of Guatemalan workers, followed by their transfer to the large-scale farms. Contractors tend to be Guatemalan community leaders from indigenous communities along the Guatemalan border, who have been granted permission to work in Mexico (usually under the FM3 non-immigrant visa). The contractors operate in response to landowners’ requests for workers, generally partnering with the same landowners for many years.

These contractors have a considerable amount of power. Some are even unionized. After obtaining relevant information from the farms, each year they recruit workers from a particular community, in order to transfer them as a group via an established route. They recruit directly in the communities by way of community radio as well as family and social networks, and then oversee the visa application process for the group of workers through the INM office.

The workers are generally indigenous language speakers with no knowledge of Spanish and no formal education, which leaves them completely dependent on the contractor to understand the terms of their hiring (what matters most to them is the wages). Because they are not formally organized, the workers have no real bargaining power in relation to the contractor, and even less so with the employer. Cases have been reported in which, under such situations of unequal power distribution, temporary workers are deceived by the intermediaries and the most they are able to negotiate for is the provision of food. Moreover, in most cases, migrant workers have no information about their labor rights, nor do they see themselves as rights holders, especially indigenous women temporary workers, as they have historically been denied the opportunity to publicly speak out and protest.

Under Mexican law, the contractor or intermediary incurs responsibility for the work they perform. As stipulated in Articles 13 and 14 of the Federal Labor Law, intermediaries, along with the beneficiaries of the work or services provided, are jointly responsible for upholding all obligations towards the workers. Likewise, the employers who rely on intermediaries for hiring purposes are responsible for the obligations arising from the law and from the services provided. The law also stipulates that contractors may not receive any payment or commission deducted from the workers’ wages.
One of the goals of the reformed mechanisms for visa provision implemented by the Mexican authorities (in 1997) was to put an end to this intermediary role, but the use of contractors remains widespread, as the vast majority of plantation owners view this strategy as a way to ensure available labor. The persistence of this hiring system is also due to the fact that unionized contractors are reluctant to give up their work, since not only their livelihood depends on it, but also that of a network of assistants who work with them to recruit temporary workers. This system has maintained many of the hiring practices used during the early 20th century. Today, the use of contractors in the agricultural sector in Chiapas continues to be a somewhat taboo issue and information about how the system operates remains limited. Based on the research carried out, there is no reason to think that contracting practices have substantially changed as a result of the implementation of the Border Worker visa, as the new legal measures have been adapted to reflect traditional labor relations in rural areas along the Mexican border.

According to available information, the formal process for contracting workers has operated as follows. The contractor creates a list with the name, nationality, age, and ID number of the recruited workers. This list is then submitted to an office of the Guatemalan Ministry of Labor and Social Welfare located in one of the border departments in order to obtain the Ministry’s official approval. The contractor also obtains a letter from the employer requesting the workers’ entry into Mexico, in addition to collecting the required photographs, birth certificates or passports, and copies of the ID cards of the recruited workers.

The contractor accompanies the workers to the INM office to apply for their work visas. The INM analyzes the case of each worker and issues Border Worker visas to the applicants as well as their accompanying family members. The visa is usually granted for six months, allowing migrants to work in Mexico during the harvest, and then return to their farmland in Guatemala, often re-entering Mexico again the following year. Once they have received their visas, the agricultural workers are taken by the contractor to the plantation where they will be working, the transportation costs being covered by the employer. The contractor is responsible for the temporary migrant workers until they are received by the employer.

The impact of migration documentation on access to rights in the agricultural sector

Due to the slow processing of the Border Worker visas by the INM, combined with the large number of workers required during the harvest and the urgency of the requests made by Mexican plantation owners, contracting processes are often conducted outside the legal framework. This is a clear reflection of the border dynamics. Contractors tend to resort to irregular border crossings to meet the labor demands of their employers, and often hire temporary workers whether or not they have work visas. This situation is due in large part to the fact that coffee farmers and their contractors risk incurring significant losses if the harvest is squandered. Besides, despite the fact that in principle the Border Worker visa allows border workers to continue using the same visa even if they change employers, provided that they give notice to migration authorities, in practice this does not occur because migration procedures are handled by contractors on behalf of a group of workers, thereby impeding the mobility of individual workers.

One of the main benefits of this visa is that they are issued with individual names and number codes. Institutions from both countries are better able to manage migration flows, keeping a registry of the names of migrant workers and where they are working. It is clear, however, that the Border Worker visa on its own is no guarantee of special treatment or improved access to services. The contracts remain in the hands of the contractor/supervisor, who is in charge of recruiting and transporting the temporary workers and maintaining the relationship with the plantation owner. Moreover, the contract is generally based on the number of baskets

309 Rojas and Ángeles, 2006.
311 The increased demand for workers is due in part to the fact that less Guatemalan young people are accompanying their families to carry out temporary work in Mexico, opting instead to attempt to cross the border without documents in hopes of reaching the United States. Temporary workers are thus older on average, resulting in reduced productivity per person.
harvested each day, without taking other factors into account. The workers have no bargaining power, nor do they have any representation beyond the contractor/supervisor, who is employed by the large-scale plantation owner.

In both Mexico and Guatemala, family cooperation is critical in the agricultural sector. In places where there is a high demand for labor or where workers are paid per task or according to output it is common for several members of the family to work, including adolescents as well as children (both boys and girls). In accordance with Article 23 of the Mexican Federal Labor Law, adolescents over 16 are free to work, with restrictions, while those between 14 and 16 are required to obtain permission from their parents or legal guardians. The latter are subject to certain minimum standards regarding their working conditions, such as the number of hours worked and exposure to occupational hazards, and are under the special protection and supervision of the Labor Inspection Authority pertaining to the Ministry of Labor. In addition, in accordance with Article 174 of the Federal Labor Law, minors between the ages of 14 and 16 cannot be hired by an employer without first obtaining a medical certificate confirming that he/she is fit for the job. The employer must also keep a special record detailing their date of birth, type of work, hours, pay, and other relevant working conditions, and provide this information to the authorities upon request (Article 180 of the Federal Labor Law).

According to the IOM, one of the positive outcomes of the creation of the Border Worker visa has been the ability to control child labor more efficiently. The new contracting process has served as an opportunity to raise awareness among INM officials at the “Red House”, contractors, and families of migrant workers regarding the importance of obtaining a visa for minors, so as to prevent child trafficking and labor exploitation. However, there is no information available regarding monitoring efforts carried out by the actual plantations. According to several civil society organizations and the Human Rights Ombudsman of Guatemala, the inspections required by Mexican law are not being carried out as part of the contracting process.

The Consul of Guatemala in Tapachula has confirmed that Guatemalan temporary workers who seek employment in Mexico, the vast majority of whom are monolingual indigenous people, continue to be subjected to obsolete hiring and supervision systems in addition to deplorable living and working conditions, particularly in regards to food, housing, and transportation. However, the Consul also claims that the conditions of temporary workers on coffee plantations have improved significantly in recent years, as employers have become more organized and contractors have grown increasingly aware of the situation. Since the entry into force of the new Migration Law, more attention has been placed on improving working conditions and access to health care, for example, by modernizing the dormitories and kitchens used by workers as well as the hygiene systems available to them.

While having a visa does place temporary border workers at a lower risk of abuse and mistreatment by employers, allowing them to seek the help of labor officials in the event of unpaid wages or a flagrant violation of their contract, in reality their legal status is no guarantee that temporary migrant workers will be paid their full wages, nor does it ensure their access to health services or to education for their children. A visa is not an end in itself and, according to some scholars, it serves more as a means to promote the notion that being documented has advantages, both for workers as well as employers. Possession of a visa should facilitate and guarantee access to human and labor rights. However, the lack of comprehensive policies and treatment towards migrant workers in Mexico often means that the only advantage experienced by documented workers is not being held in an immigration detention center and deported to their country of origin.

Human rights monitoring by organizations such as the Fray Matías de Córdova Human Rights Center (Fray Matías HRC for short), which includes interviews conducted with migrant border workers at authorized border crossings, indicates that the new visas have not had an impact on workers’ access to basic rights such as fair and equal employment, decent housing, access to food and medical services, among others.

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312 MENAMIG et al. Diagnóstico de menores de edad y mujeres trabajadores agrícolas temporales en Chiapas, Mexico. 2006.
313 Manuel Ángel Castillo, Reforma, January 5, 2012. Available at: http://www.reforma.com/nacional/articulo/640/1279485/
Cases of non-compliance with contracts and abuse of temporary migrant workers have continued to be documented, although many are not reported to the authorities, in part because those affected are unaware of their labor rights and also because they lack effective access to law enforcement or labor conciliation mechanisms. According to documentation by the Fray Matías HRC, workers are housed in unsanitary rustic facilities with dirt floors known as “chicken coops,” and are provided with insufficient, poor quality food. With the goal of establishing a forum for the ongoing documentation of abuse against migrants, in late 2010 the Fray Matías HRC joined the Institute for Security and Democracy (INSYDE by its Spanish acronym) in launching the Observatory for Migrant Human Rights Advocacy with headquarters in Tapachula, Chiapas. The Observatory is expected to begin to generate reports that will be useful for research as well as public dissemination.

It should be noted that among those interviewed, representing both government institutions and civil society organizations, respondents agreed that the situation differs significantly for the workers employed at plantations and packing industries handling bananas, sugarcane, papaya, and mango. These plantations are usually located directly adjacent to the border (while the coffee plantations are located a certain distance away) and do not have the infrastructure to provide housing for the workers. They therefore rely on temporary workers living in communities very close to the border that cross the border every day in order to go to work. An estimated 20,000 to 30,000 people work on these plantations mostly without a contract and without a work permit or appropriate documentation.

Situation of temporary migrant workers in other sectors

As for temporary migrant workers employed in sectors other than agriculture, the situation is different because traditional contracting channels are not used. The aforementioned information regarding the provision of visas reflects the reality of the border context, characterized by a demand for informal labor. It is clear that to date the vast majority of Guatemalans who cross the border to carry out temporary work have the Local Visitor visa, despite the fact that it does not include permission to work. It is also difficult to differentiate between workers who cross for a day, a week, a month or a longer period of time. In order to obtain the Border Worker visa or the Temporary Border Worker visa, the worker must have a formal job offer, which is not feasible in many of the sectors that contract temporary migrant workers, and requires that an intermediary take on the responsibility of processing the visa. Non-agricultural workers are more likely to remain in Mexico to work throughout the year, returning to their communities in Guatemala only a few days per year to visit family, signaling the need to establish mechanisms to facilitate improved access to Temporary Border Worker visas.

According to interviewees, the two most important groups of temporary migrant workers, due to their large number and their conditions of vulnerability, are domestic workers and adolescents employed as informal street vendors. The conditions of poverty experienced in many border communities require young women to contribute to the family income, causing them to leave home in search of work in urban centers located along the border. The abuse and risks faced by these women have not yet been adequately studied, due to the clandestine conditions in which many of them are forced to work.

Guatemalan domestic workers migrate primarily from the border states of San Marcos and Huehuetenango. These migrants have generally entered the country legally using a Local Visitor visa but violate the terms of their visa by staying longer than the 72-hour time limit and by engaging in paid work without permission. Although some domestic workers have been able to obtain the Border Worker visa or Temporary Border Worker visa with the help of their employers or civil society organizations, this number is practically insignificant compared to the thousands of Guatemalan domestic workers employed in an irregular manner, particularly in Tapachula.

In addition, the nature of the labor supply and the informal recruitment of domestic workers in urban

314 See: http://www.observatoriodemigracion.org.mx/
parks limits their access to a legal immigration status appropriate for their situation, which means that although they may have entered the country legally, they end up violating the terms of their stay. Part of the difficulty stems from the fact that the Border Worker visa and the Temporary Border Worker visa cannot be granted without a job offer, and the housewives who employ domestic workers do not understand the importance of their domestic workers obtaining a work visa.

**Responsibilities of the Mexican labor authorities**

With regard to the supervision carried out by the Mexican authorities, Article 540 of the Federal Labor Law establishes that the Labor Inspection Authority is responsible for monitoring labor standards, and Article 541 stipulates that this office should provide technical information and assistance to workers, carry out inspection visits to companies and establishments during working hours, and inform the labor authorities of all deficiencies, among other responsibilities.

In addition, regulations have been formulated for the activities of private employment agencies, establishing minimum standards that should be met for the recruitment and contracting of workers in Mexico as well as for Mexican employment agencies who contract foreign workers to work in Mexico. Under these regulations, recruitment services, for instance, should be free of charge for workers, and agencies are prohibited from establishing an agreement with employers to deduct payment for these services from workers’ wages. The regulations also forbid discriminatory contracting practices, and require such agencies to register and report on information regarding the labor market, job vacancies, and other statistical data. However, the Mexican government has failed to implement these regulations as part of the process of issuing border visas for temporary work in Mexico.

Indeed, according to interviewees, there is no ongoing system of supervision or inspection to monitor recruitment and contracting conditions, the services provided by private employment agencies and contractors, nor the working conditions on the large-scale farms or plantations—not even of those workers who are formally contracted with a Border Worker visa or a Temporary Border Worker visa. The inspection is carried out in response to formal complaints, i.e., if serious violations of human or labor rights on the plantations are filed. On occasion, inspection visits have been carried out by officials of the state-level Ministries of Labor and Health in Chiapas, or by the human rights commissions (both national and state-level).

According to government institutions, knowledge regarding the general profile of temporary workers and where they are employed has allowed labor authorities to have information about migrant workers, thus being able to understand the changes in labor flows in the border region and plan their visits to workplaces. However, according to information documented by human rights organizations, there are no claims offices where temporary workers can anonymously file a report regarding violations committed against them, nor has firm action been taken against workplaces that are known to commit labor rights violations, such as coffee, banana, tobacco, and mango plantations, among others.

In addition, it has been reported that often when temporary workers seek to take action regarding a labor dispute, the only resource at their disposal is the Guatemalan consulate in Tapachula. In accordance with the Mexican Federal Labor Law, labor disputes should be delegated to the local Labor Conciliation Boards, which in turn redirect the case to their federal counterpart upon noting that the case involves foreign workers. In practice, however, the task of labor conciliation is passed on to the Guatemalan consulate. Although the government of the workers’ country of origin could play a supervisory role in these cases, the fact that the Guatemalan consulate has taken on the role of conciliator in these labor disputes is incongruent with the law, as

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this responsibility pertains to the Ministry of Labor—a responsibility with which the Ministry has failed to comply.

Guatemalan politics, law, and practices applicable to temporary migrant workers

Analyzing this situation from the perspective of the country of origin, it can be observed that Guatemalan law regulates the contracting of national workers for employment abroad, in accordance with the provisions of the Guatemalan Labor Code, which extends the same protection to temporary migrants workers as that provided to national workers. The Guatemalan Ministry of Labor and Social Welfare is responsible for ensuring compliance with the working conditions established in the Labor Code for all Guatemalan workers, regardless of whether they are working in their home country or abroad, or whether they were contracted in Guatemala in a regular or irregular manner. The Ministry is also responsible for investigating and mediating labor disputes between employers and employees.

In contrast with a country like El Salvador, for example, Guatemala has no laws, policies, or special programs to promote decent conditions for labor migration, or to protect the labor rights of Guatemalan temporary workers abroad. Since its establishment in 2009, the Guatemalan National Council for Migrants (CONAMIGUA by its acronym in Spanish) may potentially play a key role. However, to date, its activities and impact have been limited, focusing primarily on Guatemalan migrant communities in the United States.

Guatemalan civil society organizations have highlighted the lack of involvement of Guatemalan authorities and institutions in this matter and have questioned the role of the Ministries of Labor and Foreign Affairs, regarding the extent to which they have complied with their obligations to protect the rights of their citizens who have been contracted to work in Mexico.

Article 5 of the Guatemalan Labor Code defines the role of the contractor as an intermediary who contracts a worker or group of workers, who work directly for the contractor by performing services for another employer. The employer is then jointly liable for the actions of the contractor towards the workers regarding their labor rights. The Guatemalan Ministry of Labor permits contractors to recruit workers for employment in Mexico.

The minimum standards of protection granted to temporary migrant workers during the contracting process are established in the Labor Code. Under Article 34, their recruitment and contracting in Guatemala require prior permission from the Ministry of Labor, whose authorization depends on the fulfillment of the following requirements (at the discretion of Ministry): (i) The recruiting agent or company must have a permanent address in the national capital for the duration of the contract, as well as a legal representative with the capacity to settle claims filed by workers or their family members in regards to the implementation of the terms of the contract. (ii) The recruiting agent or company should cover the cost of transportation from the worker’s normal place of residence to the workplace, as well as visa expenses. These costs should also be covered for the accompanying family members of migrant workers, if permitted by the company. (iii) The recruiting agent or company should file an advanced payment via bond or a deposit made to a national bank payable to the Ministry of Labor, to ensure that the repatriation costs of the migrant workers (and their families) will be covered upon termination of the contract. This advance may also be used for payment in the case of claims filed with the national labor authorities, the only institutions with the capacity to order the payment of compensation or benefits owed to workers. (iv) The recruiting agent or company must present four copies of the written employment contracts, one copy for each party and two copies that must be submitted to the Ministry of Labor by the agent or company at least five days prior to the workers’ departure. (v) The Ministry of Labor is required to send one of these copies to the diplomatic or consular representative in the place where the contracted work

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316 Article 14 of the Guatemalan Labor Code stipulates that legal measures aimed at protecting workers apply to those contracted in the country to carry out work abroad. Article 34 regulates the recruitment and contracting process.
will be carried out, requesting, to the extent possible, supervision of compliance with the terms of the contract. This representative is responsible for submitting reports to the Ministry of Labor on a monthly basis and on special cases, as appropriate. (vi) The contracts should include a clause stating that all mentioned expenses will be paid for by the recruiting agent or by the company on behalf of which the recruitment agent is acting, in addition to making reference to the other legal provisions established in the Code that protect the workers. (vii) The contracts should also specify how the workers will be transported and housed, as well as the form and conditions under which they will be repatriated.

Article 35 prohibits the authorization of contracts in the event that (i) the recruited workers are minors; (ii) the workers are unable to adequately ensure the provision of food for their financial dependents; (iii) the workers are deemed essential for the national economy; and (iv) the contracts injure the dignity of Guatemalan workers, or they have been contracted under inferior conditions with respect to the rights of citizens in the country in which they intend to work (if the laws of that country contain guarantees beyond those established in the Guatemalan Code), or which in any way could be detrimental to the workers.

The guarantees contained in this legal framework are clearly aimed at groups of workers who are contracted by large-scale companies through formal channels, such as employers in the agricultural industry (as in the case of Canada) or in construction. The law does not seem to take into account the reality of border workers, such as crossing the border on a daily basis to find work with small and medium employers. As a result, these terms are not met in the case of border workers.

The experts who were interviewed agreed that the attention, control, support, and resources provided by the Guatemalan State to temporary workers is considerably weak, both in terms of the provision of information as well as advocacy and representation in cases of labor exploitation and conditions of slavery experienced by Guatemalans in the neighboring country of destination.317 This was confirmed in interviews with other institutional actors working on the southern border, where it is clear that the current humanitarian crisis faced by undocumented migrants in transit and the increased incidence of deportation has taken precedence over the situation of border workers, in terms of funding, human resources, and media attention.

Although the approval of employment contracts for minors is prohibited, the Ministry of Labor has issued work visas for youth aged between 14 and 17 and authorized their departure to work on plantations in Chiapas, despite the lack of mechanisms for monitoring their working conditions. According to the Ministry of Labor, this system has facilitated the creation of a public registry of these children, so as to prevent illegal adoption, human trafficking and trade, as the birth certificate of all minors accompanying migrant workers is requested during the process of issuing their visas. However, such actions do not reflect existing legislation that could provide necessary legal protection, thus placing minors who leave the country as temporary workers at risk.

It is interesting to analyze the mechanisms that were previously in place in this context in order to evaluate their applicability for the protection of border workers’ human and labor rights today. According to reports by government institutions and civil society organizations, in 2005 a registry was created of employer representatives engaged in recruiting farm workers and the border workers who were contracted, in addition to documenting their contracting conditions.318

It was the responsibility of the contractors319 to complete registration cards for each worker they contracted. The registry included a photograph and basic information on each employer representative. It also allowed the Guatemalan Ministry of Labor, migration offices, and consulates access to information on border...
workers. In the event that employers failed to comply with their obligations or violated a worker’s labor rights, the affected worker could file a claim with the Ministry of Labor, through the consulates or Ministry of Labor offices on the border, and monitor progress on the case.

According to the information gathered, there were two Ministry of Labor offices located on the border with Mexico, one in Tecún Umán and another in El Carmen, which oversaw the supervision of agricultural border workers. The registry appeared to function well for a period of time, because the registration cards allowed the Ministry to identify if the agricultural workers had been the victims of abuse or human rights violations, particularly in regards to labor rights such as unpaid wages, wrongful termination, etc. In addition, the registry allowed the authorities to map the destinations of this population and identify the plantations where they were employed, as well as gaining a clearer understanding of the activities in which they were engaged and the duration of their stay abroad. However, there was resistance to using the registration cards on the part of Mexican officials, due to the time and attention required to complete them. Because the registry was viewed as an inconvenient accountability mechanism since it contributed to identifying the contractors, employers, and plantation owners employing temporary workers, so that they could be monitored and pressured to comply with basic rights protection.

According to the Guatemalan civil society organizations interviewed, Mexican officials stopped using this procedure around 2008, as they did not feel obligated to do so. Currently, the only border office is located in El Carmen, which offers guidance to Guatemalan agricultural workers and provides follow-up on a few cases. According to those interviewed, the lack of infrastructure available to Guatemalan officials impedes the maintenance of a reliable and systematized registry of contractors, while the lack of resources does not allow them to sufficiently address the issues at hand. This lack of investment in addressing migrant workers’ rights is largely due to the perception that the situation of border workers has improved as a result of the new visas created by the Mexican government, in addition to the fact that it has not been possible to ensure that Mexican plantation owners and their contractors comply with the registry.

Lastly, the organizations assert that although the expansion of visas and the resources to access them would seem to be an improvement, there are still no information, dissemination, and monitoring systems on the part of the Guatemalan Ministry of Labor to identify abuses committed by Mexican employers. In addition, there are very few organizations that are monitoring the situation of temporary migrant workers and there are no reports that show a positive change in the contracting and employment conditions.

In a meeting of civil society organizations, institutions of both governments, and migrant workers, a proposal was made to open a claims office for migrants, under the responsibility of the Commission on Migration pertaining to the Congress of Guatemala. The representative present at the meeting accepted the proposal, thereby requiring the commission members to take on the tasks of creating a registry of key actors, investigate the claims and monitor the complaints filed against any of the institutions, companies, or organizations, following the existing model of the claims office that handles reports on violence against women.

General social welfare conditions

Like other countries in Latin America, both Mexico and Guatemala have a social protection system based on social security, which means that if a worker cannot provide proof of employment or is unable to make the corresponding dues, he/she is excluded from national coverage. These systems are not designed to respond to labor mobility, which means that there is still a long way to go to achieve social protection for temporary migrant workers. In Mexico, just over half of the population has a formal social insurance policy through a Mexican social security institution.320

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To carry out this analysis, it is important to note that although Mexico and Guatemala are not part of a regional integration process, each is a member of a group of countries in which the issue of labor migration has taken on great importance, including discussion of the labor and social rights of temporary migrant workers. Mexico is part of the North American Free Trade Agreement (NAFTA) and recently signed the Single Free Trade Agreement with Central America, while Guatemala forms part of the Central American Integration System (SICA by its acronym in Spanish). Although SICA has established an agreement on social security, it has not yet entered into force because thus far only Costa Rica has officially signed on to the agreement. In addition, both countries participate in the Central American Parliament (PARLACEN by its acronym in Spanish) (Mexico as an observer), and the Regional Parliamentary Council on Migrations (COPAREM by its acronym in Spanish) as well as at the Regional Conference on Migration, which have recently included the issue of labor migration and labor markets on their agendas.

It is important to note that most Latin American countries have included agreements on the social security of people who migrate for work as part of their regional integration process (the Southern Common Market-MERCOSUR, the Caribbean Community and Common Market-CARICOM, and the Andean Community of Nations-CAN). In contrast, Mexico has no multilateral agreements that ensure the social security of migrant workers in Mexico, who are thus left unprotected as a result. To date, agreements and conventions that have been negotiated between Mexico and Guatemala at the binational and regional levels have to do primarily with the issue of hemispheric and border security, rather than issues of regional social policy and even less the protection of the human rights of migrant workers.

In accordance with international agreements, Mexico is obligated to respect basic social security standards: equal treatment of national and foreign workers, the application of a single law to avoid double benefits and/or double obligations, the maintenance of acquired benefits and the payment of social security benefits acquired abroad, or the exportation of said benefits; the maintenance of rights to social security in course of acquisition, and reciprocity. Regardless of whether workers are national or foreign, formal or informal, documented or undocumented, each person has the right to access social protection and the State has an obligation to ensure their protection.

The legal regulations regarding the Local Visitor and Border Worker visas and the new conditions established for border workers to stay in the country make no mention of access to social protection, nor do they provide mechanisms for obtaining such protection. However, workers’ rights are guaranteed in relevant legislation, particularly the Federal Labor Law and the Mexican Social Security Institute Law. Although one of the main deficiencies of this system of temporary work visas has been the absence of bilateral cooperation, it is important to also review the relevant Guatemalan regulations when analyzing the working conditions of temporary workers under the Border Worker visa.

In Mexico, all workers, including foreigners and those without a formal work permit, have the right to receive social security benefits if they are registered with the Mexican Social Security of Institute (IMSS by its acronym in Spanish), which is the institution responsible for providing a range of benefits to workers who are not government employees. Employers are required by law to register all of their workers with the IMSS, which means that this is not the responsibility of the individual worker. It is important to note that agricultural workers in Mexico have the same right to be insured by the IMSS as workers in other sectors, and the corresponding deductions that can be made to workers’ wages are established by law and exclude those who earn less than

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322 The North American Agreement on Labor Cooperation, which forms part of NAFTA, is the only document that refers to the living and working conditions of migrants from the three countries. Specifically, the clause relating to compensation for occupational injuries or diseases includes the only reference to the social protection of migrant workers. Mexico has also maintained a Cooperation Agreement on Social Security with the Belize Social Security Board since 1987. However, this agreement is primarily aimed at technical cooperation and health care referrals, rather than the protection of temporary workers.
minimum wage. In addition, workers who are self-employed can voluntarily register with the IMSS, which is of particular relevance for domestic workers and those working in informal trade.

Social protection through the IMSS is granted through a contract and the regular payment of individual contributions. Various programs are included, such as the Family Health Insurance program, which consists of medical, surgical, pharmaceutical, hospital, and maternity benefits. In theory, all workers can register themselves and their family members to receive social security benefits. However, the individual contributions are excessively high, and are paid in advance on a yearly basis, which makes it practically impossible for temporary migrant workers to register and access these benefits.

It is important to highlight the wide range of coverage available through the IMSS in regards to old age, disability, and survivors’ benefits, including disability insurance, compensation for occupational injuries and diseases, and pension schemes for retired persons, surviving spouses, orphans, and surviving dependents.

In 2003, Mexico created a new social protection measure focused on medical assistance called Popular Health Insurance, which has been gradually expanding. It is not necessarily an insurance program, despite the fact that the publicity campaigns have presented it as such. It is geared towards people who are not already insured through social security institutions, such as informal and self-employed workers and families of Mexican migrants, among others. Coverage is not only available for the policy holder but is also extended to his or her spouse, direct descendants under 18 years of age, and/or unmarried children who are 18-25 years old and enrolled in secondary or higher education. In addition, eligibility is also extended to dependent children with disabilities, direct ancestors over 64 years of age, economic dependents living in the same household, as well as individuals over 18 years of age, with the condition that they pay only 50 percent of the applicable family contribution.

The cost of these fees is affordable for most people and coverage includes sickness and maternity benefits (medical attention as well as pharmaceutical costs). However, in contrast with other insurance schemes, this program cannot be legally enforced, and offers contingency coverage that provides palliative care in the lowest levels of health services, which is not feasible for more serious conditions.

Civil society organizations working in the border region nonetheless state that most temporary workers lack access to medical services. On the coffee plantations, if a worker has an accident or health problem, he/she is usually taken to the regional hospital in Tapachula, and more recently to the IMSS clinics that have committed to serving migrant workers. Although widespread denial of medical care to migrants should halt as a result of the implementation of the new Migration Law, it should not be ignored that temporary migrant workers continue to experience serious situations of discrimination in Mexico, even in access to basic services.

In its most recent report submitted to the Mexican State in 2011, the United Nations’ Committee on Migrant Workers expressed concern about the situation of migrant workers and their families, as they continue to face various forms of discrimination as well as stigmatization in the media and in society at large, particularly ethnic- and gender-based discrimination.

At the same time, the absence of collective organizing by workers and the lack of effective regulation on the part of labor authorities makes it difficult to demand that plantation owners comply with measures to protect the health of their employees, especially regarding the use of toxic chemicals.

According to both IOM and ILO, due to the contexts in developing countries, social protection can be progressively implemented. In other words, protection can be gradually increased, with complementary regulation on matters of health care and occupational health and safety. However, insufficient social security

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323 Detailed information on these various programs can be found in: OIM, OIT, CISS, OEA. Migración y Seguridad Social. 2010.
coverage risks leading to palliative and partial solutions for social protection in Mexico. To date, none of the federal programs address temporary migrant workers. Nevertheless, it is important to recognize the efforts that have been made at the local level, primarily on the part of the government of the state of Chiapas, which have led to small improvements. Although the Border Worker visa is merely a migration document, the discussion that has unfolded about migrants’ rights and development in the southern border region has begun to extend to local labor conditions. A few very small steps can be observed with regard to a clarification of the worker/employer relationship and the definition of a “workplace.” Initial efforts by the state-level Ministry of Labor and Institute of Health in the state of Chiapas have focused on monitoring and promoting concrete improvements in the conditions of health and hygiene at coffee plantations. In the case of communal lands, such as those that harvest sugarcane and papaya, access to social protection continues to be a point of concern for the Guatemalan consulate as well as civil society organizations.

Lastly, it is important to take into account the proposal by the Mexican Senate to establish a binational agreement on the issue of health security along the southern border. In late 2011, the Senate urged President Calderón to promote the creation of a binational health security program between Mexico and Guatemala, through the cooperation of different offices of the federal government. The Senate also requested the development of an inter-institutional agenda between the Ministries of the Interior, Health, and Foreign Affairs with the aim of addressing the health needs of migrant groups, in addition to the creation of the binational health security program for the border between both countries.

On the part of Guatemala, the Guatemalan Constitution and existing labor laws include broad and sufficient coverage of the basic rights of workers, including the right to social security. This legal protection is also complemented by the international labor agreements ratified by Guatemala. For example, Article 8 of the Constitution establishes the social security scheme as a single, national, and compulsory public service, the implementation of which corresponds to the Guatemalan Social Security Institute (IGSS by its acronym in Spanish). The State, employers, and workers must all contribute to the scheme, and employers are required to register if they have three or more employees in the department of Guatemala, and five or more employees in the rest of the country. The IGSS manages two programs: Sickness, Maternity and Accident benefits and Disability, Old Age and Survivors’ benefits. The Constitution also establishes basic compensation for unfair dismissal, until the development of another system that may grant improved benefits to workers.

However, in practice, for the thousands of Guatemalan temporary workers who leave their country in search of income to sustain a basic standard of living, the requirement to participate in formal employment in Guatemala impedes their ability to exercise their labor rights and access social security, including access to the benefits established by law. At a minimum, the Guatemalan State should ensure the protection of the families of temporary migrant workers, even while these workers are out of the country, taking into account that much of their pay is sent back to Guatemala in the form of remittances.

In this regard, it is interesting to reflect on the phenomenon of informal employment and the exclusion of these workers from the Guatemalan social security scheme, which in turn relates to the lack of coverage for temporary migrant workers in Mexico. Based on data provided by the Guatemalan National Income and Employment Survey, informal workers can be classified into four different categories: (i) self-employed workers: these workers are not dependent on an employer and are completely excluded from the IGSS scheme; (ii) private employees: the vast majority of these workers have little or no access to the protections guaranteed by labor laws such as minimum wage, set working hours, seventh day overtime pay, annual bonus, holiday and vacation leave, and other benefits granted by law, and have limited access to coverage under the social security system; (iii) unpaid workers: this group mainly includes family members (wives and minor children) who receive no remuneration for their work in subsistence businesses and farming; (iv) day laborers: primarily agricultural


Quo Vadis? Recruitment and Contracting…:
workers, the vast majority of whom do not have a formal employment relationship. This category largely refers to workers who engage in temporary employment in agricultural harvests.\textsuperscript{327}

Unlike the Mexican social security system, the IGSS does not allow self-employed workers to register for benefits, even if they are able to pay the corresponding contributions as both employer and employee. The other categories of informal workers are also excluded from coverage, especially those who are engaged in informal employment in another country. All informal workers, including those in Guatemala as well as those engaged in temporary work in Mexico, should be incorporated into the social security scheme to allow them access to services under the sickness, maternity, and accidents program. Their incorporation would also allow them access to benefits for themselves and their spouses or minor children under the disability, old age, and survivors program.

Conclusions and recommendations

The example of the Border Worker visa, and more recently the Temporary Border Worker visa provided to migrant workers in the southern border region of Mexico highlights the importance of distinguishing between a labor migration program and a visa system that attempts to manage a migration process that responds to a tradition of cross-border agricultural labor.

1. The Border Worker visa and the Temporary Border Worker visa represent a unilateral mechanism on the part of the Mexican State to instruments for immigration control, they provide a basis for the exercise of rights held by all migrant workers in the country. This form of regularization does not presuppose a binational system for contracting workers, in which monitoring and control standards should be established to ensure rights and working conditions. This shows once again that the essence of Mexican migration policy is the management of migration flows. The lack of involvement of the Mexican and Guatemalan Ministries of Labor in the registration, regulation and supervision of temporary migrant workers and the shortage of resources at the disposal of Guatemalan consulates are striking, considering the current context of mass deportations, organized crime, and the overall lack of access to justice for migrants. While it is argued that the creation of visas such as the Border Worker visa and the Temporary Border Worker visa have facilitated the creation of a database, the generation of some statistics, and the identification of the largest employers in the region, in practice these visas serve little more than to provide documentation for workers during their stay in the country and thereby avoid deportation by the INM.

Recommendation: Given the historical relationship between the two countries that share the southern border of Mexico, a bilateral labor agreement, or at least a memorandum of understanding that reflects and addresses the reality of labor migration in the border region should be negotiated. In addition, the agreement could also ensure the participation of government institutions from both countries as well as coordination between them to improve the living and working conditions of temporary workers, and to promote their visibility as a workforce in the region. Mechanisms could also be implemented to ensure effective collaboration between the Ministries of Foreign Affairs of both countries. The key role of the state of Chiapas in these efforts should also be recognized, given the progress that has been achieved locally.

Recommendation: Under a bilateral agreement, it would be possible to ensure the participation and commitment particularly of the Mexican and Guatemalan labor authorities, in order to effectively ensure mutual benefits for the workers as well as the employers. In the case of Guatemala, the recruitment and migration procedures could be carried out prior to the departure of the workers. This would require the Guatemalan Ministry of Labor offices located in the border states to be better equipped, and would demand greater control

over the registry of workers’ exits and re-entries into the country. Temporary workers who migrate to work during the harvest represent a relatively predictable labor migration flow, which would reduce the burden and the degree of interpretation related to visa procedures at the “Red House.” Moreover, a comprehensive effort involving the coordination of all institutions that have an impact on migrants is required, especially those responsible for social policies, such as the Ministries of Health, Social Security, and Education.

**Recommendation:** The Guatemalan State should revise mechanisms such as the registry of representatives of the plantations employing migrant workers, which previously represented a step forward in the guarantee and protection of migrant workers’ labor rights, and should refine these mechanisms as part of a bilateral agreement that would require the commitment of Mexican officials and farm owners. In addition, it is necessary to strengthen the capacity of the Guatemalan Ministries of Labor and Foreign Affairs, so that they can assume the responsibilities and functions that correspond to them by law in regards to the protection of temporary workers, agricultural or otherwise. These efforts would also help to improve mechanisms for ensuring that contractors also comply with the law. All of these actions should be accompanied by a national/binational campaign to generate discussion, particularly in Guatemala, about the situation of temporary migrant workers.

**Recommendation:** As part of the annual statistics gathered by the Migration Studies Center at the Migration Policy Unit pertaining to the Ministry of the Interior, a matrix should be established that would include quantitative and qualitative variables to reflect the various forms of recruitment/contracting as well as access to social security among border workers.

**Recommendation:** In accordance with the recommendations presented to Mexico by the Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families, Mexico should ratify the following ILO conventions: No. 97 (1949) regarding migrant workers, No. 143 (1975) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment for migrant workers, and No. 189 (2011) on domestic workers.

2. Although the creation of the Temporary Border Worker visa does not form part of a temporary labor migration program, it nevertheless represents a government action that generates specific obligations and responsibilities, including the establishment of measures for migrant workers in the most vulnerable and precarious conditions. The Mexican State cannot excuse itself from its obligations by simply claiming that by law foreign workers have the same rights as Mexican workers, or that resources are limited, or that certain government offices are concerned with the situation. Behind the doublespeak of Mexican migration policy, and Mexico’s investment in a pro-human rights image while at the same time linking migration with the issue of national security, temporary migrant workers are left at the mercy of the well-known complexities that currently characterize the Mexican context.

**Recommendation:** Specific concrete actions are imperative to reverse the tradition of abuse of temporary migrant workers, who are treated simply as units of labor rather than as rights holders. The participation and strengthening of civil society organizations and communities of workers in this regard is also essential, as is the enforcement of sanctions for public officials involved in corruption and organized crime.

**Recommendation:** The role of the Mexican Congress should not be overlooked in the process of reaching consensus regarding a labor agreement. In fact, the participation of the Senate Commission on Southern Border Issues would be of particular importance, as the commission has played a key role in promoting recent proposals.

3. The Temporary Border Worker visa does not appear to be an attractive mechanism for migration regularization, and in practice the benefits it aims to provide, such as labor flexibility and the ability to apply for the visa independently, have not proven to be useful due to the lack of regulation of the visa’s implementation. Those who have greater access to the visa are migrant workers who have already been living in Mexico for a significant period of time (in this sense, they are not exactly "temporary" workers) as well as those who are contracted as part of a group of seasonal workers from their community via an intermediary to carry out agricultural work, mainly on coffee plantations. However, those who cross the border to work in orchards or sugarcane plantations, and those who are recruited in the public parks of border towns to engage in domestic
work or other services, fit the profile of the temporary workers who would fare to benefit the most from migration regularization, as they are usually working in the country independently. However, in practice, they lack access to this visa for many reasons: the absence of a labor migration system that responds to the reality of migrant labor in the border region, the lack of information on the part of migrants, and the limited willingness of employers. Those who are able instead obtain the Regional Visitor visa to enter the country on a regular basis, falling into an irregular immigration status upon extending their stay and working without permission.

**Recommendation:** This visa system in general, and particularly the Temporary Border Worker visa, needs to be redesigned in a holistic and comprehensive way in order to be more useful for all parties. Workers who have been living in Mexico for a significant period of time should be able to access a legal immigration status beyond that of a temporary worker, such as a temporary resident, which would allow them to stop being “guests” and begin to accrue the time of legal residence necessary to obtain permanent residence or citizenship. The consulate in collaboration with the INM could be in charge of carrying out this work. Moreover, workers who are contracted by a contractor should have the support of the consulate as well as labor authorities to access more equitable contracting and working conditions, and eradicate this patriarchal figure that continues to characterize the agricultural sector. With the proper support, perhaps through a labor attaché at the consulate, temporary workers would have more certainty regarding their labor and immigration status, thereby allowing them greater labor mobility.

**Recommendation:** Evaluated on their own, the conditions and requirements for obtaining a Regional Visitor visa and a Temporary Border Worker visa are not contradictory, given that permission to travel into a border region for general reasons does not exclude the need for a work visa, and vice versa. In the future, it would be worth considering regulations that would allow qualified applicants to hold both visas.

**Recommendation:** In addition, a dissemination strategy is needed in order to raise awareness of the different types of visas available, both in Guatemala as well as in the Mexican states where temporary workers are currently employed, often in an irregular fashion.

4. Given the absence of specific data on the subject, it is estimated that overall recruitment and contracting practices continue to operate in the same way as before the creation of the Temporary Border Worker visa, including both agricultural workers contracted to work on large plantations via a community intermediary as well as those who cross the border to seek work on the communal farms adjacent to the border and those hired as service employees in the public parks of border towns. In the first category of workers, there are problems related to a lack of transparency in the recruitment process resulting in irregularities and fraud. For example, Mexican authorities should have a registry of employers and recruiters, but they do not make this information public. With regard to the other categories, the hiring process primarily operates in a clandestine fashion. It is also clear that for temporary migrant workers life has not changed substantially as a result of supposedly greater migration regulation. Nevertheless, it is important to recognize that some progress has been achieved in the coffee sector, particularly the prevention of child labor, as a result of increased awareness among INM officials and contractors. In addition, following the documentation of rights violations and pressure from academic institutions, the IOM, and the National Human Rights Commission (CNDH by its acronym in Spanish), combined with increased control of migration flows, it has been possible to influence employers to view employing workers with a legal immigration status as a benefit. In other sectors, however, immigration regulations continue to be ignored.

**Recommendation:** First, migration regulation is important, but should form part of a broader labor migration system. It is necessary to inform and incentivize employers, especially small and informal employers, so that they understand the benefits of regularizing their migrant workers.

**Recommendation:** In the case of larger and more formal employers that have a regular or relatively predictable demand for workers, a system could be established through the Mexican Ministry of Labor to register this labor demand, as part of a temporary labor migration system. For employers without a regular demand for workers, job openings could be registered with the National Employment Service (SNE by its acronym in Spanish).
addition, SNE modules could also be established in places where non-agricultural workers have traditionally been recruited.

**Recommendation:** These efforts should be accompanied by mechanisms for regulating the recruitment process and the actions of intermediaries, as it would be unrealistic to seek to completely eliminate this role, which has been solidified through generations of border labor. For example, a public registry could be set up to regulate intermediaries, including the establishment of specific conditions for their work and the provision of permits. As mentioned previously, incentives could also be offered to persuade employers to only use authorized contractors. Failure to comply with the established conditions would result in their permit being revoked.

**Recommendation:** The aforementioned recommendations should be complemented by ongoing actions by the Mexican Ministry of Labor as well as the state-level Ministry of Labor in Chiapas to monitor the large-scale farms and plantations.

5. The priority of institutions such as the IOM, the ILO, the Human Rights Commission, and the Chiapas Ministry of Labor has been to inform and train authorities and other sectors regarding human trade, labor exploitation (especially child labor), the situation of sex workers, and trafficking undocumented people. Some experts are of the opinion that in recent years the issue of human trafficking for sexual and labor exploitation has been overestimated, to such a degree that all situations are viewed through the lens of human trafficking, when in fact the violation is of a different nature that cannot be identified nor constituted as the crime of trafficking. This focus has ignored the importance of raising awareness of labor rights violations experienced by temporary migrant workers in Mexico, despite the fact that many advocates of Mexican migrants in the United States have devoted significant attention to the issue of labor rights.

**Recommendation:** It is necessary to emphasize the importance of respecting the labor rights of temporary migrant workers in Mexico, among government authorities, employers, and society at large, placing the rights violations associated with the crimes of human trade and illicit trafficking into proper perspective. This would allow for greater interaction with employers of female non-agricultural workers, especially those working in domestic service, in order to inform them of the importance of labor rights and regularization, without these employers feeling threatened that they will be accused of human trade. Along the same lines, although perhaps slightly more complex, these efforts would contribute to diminishing the anonymity of employers that offer jobs to homeless adolescent girls. If they could be reassured that they would not be accused of human trade, they would be more likely to participate in a process of dialogue and negotiation about the working conditions they offer their employees, including obtaining legal immigration status for these workers through the provision of the Temporary Border Worker visa.

6. An important obstacle that has quickly stalled previous attempts to negotiate a bilateral labor agreement has been the capacity (or lack thereof) of business owners in Chiapas to assume the consequences posed by a labor migration system. Resistance is mainly rooted in terms of the need for financial sustainability, which they argue would impede their ability to comply with labor laws. Business owners claim that due to the agricultural crisis and current coffee prices, it would be impossible to ensure the wages, conditions, and access to social security that would be required.

**Recommendation:** The existing real and presumed obstacles to take first steps toward a labor agreement between Mexico and Guatemala should be identified. Spaces should be opened for dialogue with business and civil society representatives, as well as worker representatives themselves. This dialogue could lead to the development of a plan for the gradual fulfillment of labor standards on the part of employers, which should involve strategies to strengthen the representation of migrant workers. To do so, the commitment of labor authorities and consular representations of both countries is required.

**Recommendation:** A proposal should be made for a group of civil society organizations to collaborate with selected universities to develop a Certificate of Decent Working Conditions. After having evaluated the treatment of workers by plantation owners using clearly defined and measurable indicators, this certificate could
be granted to farms that comply with established standards. These farms would then be authorized to advertise
the certificate when marketing their coffee and other agricultural products.

7. As for access to social security, based on the information provided in this report, it can be observed that although
in principle Mexico respects equality of treatment between citizens and foreigners, in practice, due to social,
cultural, labor, and migration conditions, temporary migrant workers working in agriculture as well as other
sectors, rarely have access to the benefits granted to them by law. In addition, without a binational agreement
with Guatemala, it is not possible to comply with other commitments related to social security, for example the
maintenance of acquired rights and reciprocity, among others.

**Recommendation:** The main objective of the development of a social security agreement is to ensure and
safeguard the right to social security as guaranteed in the legislation of two or more countries. For example, in
the event that a migrant worker contributing to the social security systems of both Mexico and Guatemala
should not fulfill the requirements to access his/her pension or other benefits taking into account the time he/she
has been contributing to one of the systems, there would need to be a legal instrument to allow for the combined
accrual of time worked in each country where workers have been employed, thereby enabling access to benefits.

**Recommendation:** Both Mexico and Guatemala should adhere to the Ibero-American Multilateral Agreement
on Social Security, signed in 2007, which ensures the portability of social security benefits for migrants.

8. Regardless of the entry into force of the Migration Law, and the current increase in social and political
interest in the issue of immigration, the current system continues to operate immersed in indifference,
corruption, and doublespeak on the part of migration authorities. Recent developments such as the new law,
updated visa categories, and regularization programs have been mechanisms that react to the demands of civil society, offering more form than substance. The law is applied with a wide range of interpretation, characteristic of this institution. Suffice it to observe the dynamics of the Suchiate River border crossing, the number of undocumented migrants working on the streets of Tapachula, or the hordes of people who are deported every day to understand the reality of the migration phenomenon and the intentions of Mexican migration policy. In addition, the responsibility to promote and protect migrants’ rights continues to be attributed to the Ministry of the Interior and the INM, which is inappropriate since these institutions are also responsible for immigration control.

**Recommendation:** The Mexican Migration Law should be implemented by interpreting all its provisions from a
human rights-based perspective, in accordance with its statement of purpose and the true spirit of the law. In
addition, mechanisms should be implemented to sanction officials who do not enforce the law or become
involved in corruption. Given the concentration of responsibilities assigned to the Ministry of the Interior and
the INM regarding migration, public human rights institutions, such as the National Human Rights
Commission and the state-level commissions, must assume a more significant role as guarantors of the human rights of temporary migrant workers, especially considering the difficulties they face in accessing justice as well as the absence of significant representation of migrant workers.

9. It can be observed that a large part of the limited resources available to the Guatemalan consulate are allocated
to humanitarian issues, particularly for children and adolescents in the process of deportation, and migrants in
need of medical care due to injuries in transit or as victims of violence. Other issues of a binational focus are the
commercial development of Mexico’s southern border and national security.

**Recommendation:** According to the experts interviewed on both sides of the border, including the Human
Rights Ombudsman of Guatemala, more resources should be allocated to initiatives such as the Mexico-
Guatemala Binational Commission and the Cross-Border Working Group. These forums offer an ideal
opportunity for the inclusion of migrant worker human rights advocacy as part of the binational relationship. In
Guatemala, mechanisms must also be sought to strengthen the operations of State institutions via programs
specifically focused on border workers, with an explicit commitment to supporting Guatemalan citizens working
in Mexico. Finally, consulates should take a stronger role in the prevention of fraud and extortion committed
against temporary workers and in the dissemination of information to prevent abuse.
10. Independently of the bilateral agreement or the actions of the Mexican State, as a country of origin Guatemala does not have a mechanism in place to ensure the social protection of temporary migrant workers abroad. Even at the national level, Guatemalan workers who are not employed in the formal sector have no access to the national social security system.

**Recommendation:** It is incumbent upon Guatemala to also take responsibility for meeting the need for access to social security among temporary migrant workers instead of relying solely on the good will of Mexican officials and the operation of social security systems in Mexico.

**Recommendation:** It would be worthwhile to advocate for the IGSS to establish conditions whereby temporary migrant workers employed in any country could register with the Guatemalan social security system, whether individually, as private sector employees, or as relatives of a migrant worker, by making the necessary changes to the regulations to ensure that these constitutional rights become a reality.

**Recommendation:** Mechanisms must be developed to facilitate the practical implementation of social security coverage regarding provision and access to benefits, thus preventing administrative obstacles for migrants.

**Recommendation:** It will be necessary to carry out a far-reaching information and awareness-raising campaign directed at migrant workers to promote access to information regarding migration procedures through the offices of the Mexican Ministry of Labor. In addition, the IGSS must broaden its service provision, especially regarding matters of health care, maternity, and accidents, so that there is an immediate incentive for migrant workers and their families who remain in the country to register with the social security system.
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Background and characterization of migration flows

Labor migration from Nicaragua to Costa Rica began to be perceived as a contemporary phenomenon over the past four decades, beginning in the 1980’s, at the time of the fall of the Sandinista government. The country underwent a significant decline in employment, primarily in the public sector, and from that time to date, the flow of migration has not ceased mainly due to the permanence of structural causes and personal or family motivations that drive displacement. Poverty, unemployment and underemployment, as well as living conditions and wages that are insufficient to satisfy basic needs, are other factors that drive migration; people observe the advantages and compare wages on the Costa Rican market, despite the current economic crisis.

The real wage gap in dollars between Nicaragua and Costa Rica has grown from $6.03 US dollars in 2000 to $9.24 US dollars in 2007. In addition, the significant presence and multiplication of family and migration networks has been identified, as well as high rates of domestic and gender violence in Nicaraguan society and a search for family reunification, as factors that continue to drive this migration flow.

According to figures from the National Statistics and Census Institute of Costa Rica (INEC by its acronym in Spanish), in 2009, 91.5 percent of the total population was born in the country and 7.8 percent comes from a foreign country, while .5 percent did not indicate a country of birth. Of the total population that migrates to Costa Rica, 75.5 percent are from Nicaragua, representing 241,822 people out of a total of 376,359 regular residents. According to these figures, this is the largest intra-regional flow of a foreign population in any country in Latin America, with an estimate of between 100,000 and 125,000 migrants in an irregular situation, most of which are from Nicaraguan origin.

The dimension of the migration flow between these two countries in recent years has driven the search for political and institutional measures, resulting in a series of bilateral agreements that aim to regulate the entry of members of the Nicaraguan workforce who seek employment. The most noteworthy and thorough agreement is the binational agreement celebrated between representatives of the Costa Rican and Nicaraguan governments on December 17 and 18, 2007. This agreement established the “Costa Rica-Nicaragua Procedures for Migration Management of Temporary Workers,” also known as the “Co-Development Agreement.”

As indicated in a recent study, all of these programs are currently operating, unless otherwise indicated by the corresponding agencies. Likewise, Costa Rica issues immigration visas that operate unilaterally to control migration flows, particularly special visas for temporary workers and cross-border workers.

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328 The information in this chapter was last updated on May 31, 2012.
329 Sarah Gammage. *Migración intrarregional y mercados laborales en Centro América: ¿Qué sabemos? CEPAL.*
Nicaraguan people who move to temporarily work in Costa Rica are employed in the following sectors: construction; agriculture, hunting and forestry; and services (restaurants, hotels and domestic services).\textsuperscript{333} A large part of the workforce demand, particularly in agriculture, is located in rural areas on the border with Nicaragua, where labor conditions are characterized by heightened exclusion and vulnerability. According to household surveys carried out by INEC, 89 percent of migrants who work in the agriculture sector are from Nicaragua. In recent years, there has been a growth in crops in order to create an agro-industrial system for the export market, mainly grounded in the use of the Nicaraguan workforce.

Despite its tradition of supporting international human rights law, it should be noted that Costa Rica has yet to ratify important instruments for the international protection of human rights. To date, it has yet to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), or other ILO conventions on these issues, such as Convention 97 concerning Migration for Employment, Convention 19 concerning Equality of Treatment (Accident Compensation), Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, and Convention 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. While it is true that many of the guarantees considered in these instruments are also included in the national legislation of Costa Rica, the Attorney General’s Office of Costa Rica itself recommended ratification of this instrument in the conclusions of Legal Opinion 045-2009:

> From a legal, technical standpoint, we believe it is important for the Costa Rican State to assess the possibility of ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families because this instrument would effectively guarantee the human rights of migrants and their families regardless of their legal condition or status in the country, thus avoiding the abuses to which they are exposed, especially migrants with irregular status, women and minors.\textsuperscript{334}

This research project analyzed this setting and the situation of temporary Nicaraguan migrant workers in Costa Rica, taking into consideration recruiting/contracting conditions and worker access to social security. Initially, the Co-Development Agreement can be said to represent an innovative effort in the region. Workers who are hired under this agreement are documented under a special immigration category of “temporary worker.”

The new Migration and Immigration Act (Act 8764)\textsuperscript{335} came into effect in 2010, establishing some interesting elements in regards to the protection of migrant workers, particularly with regard to their integration into the receiving country. However, the full scope of these measures will not seen until the necessary regulations for their application are issued. On the other hand, in terms of public policy, different experts agree that despite efforts in previous years, at this time, the Costa Rican government is still lacking explicit migration policy and thus, also lacks specific labor policy.\textsuperscript{336} In accordance with the Migration and Immigration Act, the National Council on Migration\textsuperscript{337} will have to establish this policy.

\textsuperscript{334} Legal Opinion 045-2009 of the Office of the Attorney General, p. 12
\textsuperscript{335} Available at: http://www.tse.go.cr/pdf/normativa/leygeneraldemigracion.pdf
\textsuperscript{336} Consult the 2011 IOM/ILO Report.
\textsuperscript{337} The National Council on Migration is comprised of the Minister of the Interior and Police (the head of this Ministry), the Minister of Foreign Affairs and Worship, the Minister of Labor and Social Security, the Minister of National Planning and Economic Policy, the Minister of Health, the Minister of Education, the General Director of Migration and Immigration, the Executive President of the Costa Rican Institute of Tourism, the Executive President of the Costa Rican Social Security Fund and two representatives of civil society organizations linked with issues of migration, appointed by the Office of the Ombudsman (Act 8764, art. 180).
The Binational Agreement “Costa Rica-Nicaragua Procedures for Migration Management of Temporary Workers”: The Co-Development Agreement

The precursors of the Co-Development Agreement date back to the mid 1990’s with the first binational agreements that established mechanisms to regulate temporary migrant labor (called “seasonal labor”) through specific visas. Since that time, decisions made by the Ministry of Labor and Social Security (MTSS) of Costa Rica were associated with labor market needs. Moreover, although there were no seniority rights for future changes in migratory status, the importance of compliance with Costa Rican labor laws for temporary Nicaraguan workers was recognized.

Starting in 2002, efforts from a vision of greater bilateralism were reinforced and commitments of interest to a shared agenda were established, including consolidation of the capacity of labor authorities from both countries in regards to labor migration and workplace inspection. In 2005, an agreement was made to implement binational labor migration policy between the two countries that eventually gave way to the adoption of the Binational Agreement “Costa Rica-Nicaragua Procedures for Migration Management of Temporary Workers” in December 2007. The latter, which is based on the co-development model in which the IOM has participated, is the focus of our study.

Before entering into the details of the Co-Development Agreement, it is necessary to reflect upon its relevance as an option to address the phenomenon of labor migration. Co-Development Agreements sought to be a type of bilateral agreement that includes efforts to promote economic development in the country of origin through the use of mechanisms for the organized acquisition of skills in the receiving country, the return and ordered reintegration of migrant workers, development in communities of origin and participation of migrant communities in decisions aimed to benefit their native countries.

These agreements are often promoted as a best practice because they include mechanisms aimed to ensure temporality of labor migration and even incentives to encourage return. However, they have also been questioned with regard to the human rights of migrant workers regarding integration into the receiving country and the will to return. France and Spain are the countries that have traditionally promoted this model.

The Co-Development Agreement for temporary Nicaraguan migrant workers in Costa Rica responds to an interest of the receiving country, but it is interesting to note that this is the only agreement involving two developing countries, one of which receives a significant amount of labor migration from the other. This effort emerged in the context of a project financed by the Spanish Agency for International Development Cooperation (AECID by its acronym in Spanish) and implemented in Costa Rica by the International Organization for Migration (IOM) between 2008 and 2011. The purpose of AECID support and IOM coordination was to facilitate institutional strengthening in both countries and to generate mechanisms in an existing framework of bilateral agreement to implement joint procedures regarding recruiting and workplace inspection.

From the AECID’s perspective, this cooperation project aims to increase the contributions of migration to development processes in both countries by improving social conditions in areas with high migration rates in Costa Rica and Nicaragua, and by promoting processes for economic growth in these areas. The project also seeks to help regulate the flow of Nicaraguan migrants to Costa Rica, by favoring their conditions for insertion into the labor market, improving the psychosocial situation of migrants and their families and promoting their social integration. Some of the most important components of this project are as follows: the development of a study to determine the economic contributions of migrants in Costa Rica; the establishment of telephone hotlines for the migrant population; and institutional capacity building at the General Directorate of Migration and Immigration (DGME by its acronym in Spanish) at the MTSS/CR and consular services, in order to address labor migration, as well as to improve migrant worker recruitment processes.

338 Consult the 2011 IOM/ILO Report for a systematized review of all bilateral efforts.
339 Information consulted at www.aecid.cr
This agreement is comprised of 10 points that regulate procedures for the entry of Nicaraguan workers to Costa Rica to carry out agricultural, agro-industrial and construction activities, seeking to increase regular temporary migration and to fill labor market demands in these sectors. The agreement is limited to Nicaraguan workers over the age of 18 and explicitly makes employers in Costa Rica responsible for filing applications to obtain authorization to hire Nicaraguan workers.\textsuperscript{340}

The MTSS/CR, the General Directorate of Migration and Immigration (DGME/CR), its counterpart in Nicaragua (DGME/NIC) and the Nicaraguan Ministry of Labor (MITRAB) regulate these procedures. The necessary documentation must be presented to these institutions, which are responsible for defining resolutions and accepting or rejecting applications. In 2008, Nicaragua created a Labor Migration Office pertaining to the Ministry of Labor, as well as a one-stop shop services for labor migration at Migration and Immigration in order to process migrant workers’ paperwork and procedures.

It is important to take into account that the Co-Development Agreement is part of a broader system in Costa Rica under which, in general terms, contracting of migrant workers under regular status is regulated by a law that establishes step-by-step procedures to be followed for migration and labor issues. In general, the system requires a labor market study, as part of the recommendation regarding productive activities that the MTSS/CR makes through the National Directorate of Employment (DNE by its acronym in Spanish) and its Labor Migration Department, in order to identify where a complementary workforce to the national workforce is needed. Once this study has been carried out, a certain number of positions are authorized for migrants. Nevertheless, there are many workers who work with irregular status in the country that are not embraced under the Co-Development Agreement, nor are they considered under the categories of migrant regularization and work permits that operate in a parallel fashion to this agreement.

In accordance with Act 8764, the special category of “temporary workers” refers to foreigners who are authorized for entry and permanence in the country by the DGME/CR in order to carry out temporary economic activities at the request of an interested party in the country or at the interest of the worker from abroad. These people may remain in the country for the period determined by the DGME/CR and are only allowed to develop paid labor activities according to the authorized terms, conditions, regions and employers, based on MTSS/CR recommendations. Using technical and market studies to determine the contingent of temporary workers, this body defines the temporary labor activities that require authorization for the entry and permanence of foreign workers (Act 8764, art. 98-99).

Likewise, the special category of “cross-border workers” refers to foreigners residing in zones adjacent to the borders of Costa Rica who are authorized by the DGME/CR to enter and exit national territory in order to carry out paid activities, which are authorized by the DGME/CR based on technical studies carried out by the MTSS/CR, as well as other sources. In addition to the other obligations established under the law and the Costa Rican legal system, these workers should be registered and pay contributions to the Costa Rican Social Security Fund (CCSS by its acronym in Spanish) and the Workplace Risk System of the National Insurance Institute (INS) (Act 8764, art. 97).

**Contracting temporary migrant workers**

*Labor market study*

Productive activities, specific occupations and worker quotas are regulated by the MTSS/CR, under the Labor Migration Department (DML) at the National Directorate of Employment (DNE), and can vary depending on demand and other existing circumstances. Under the framework of the Co-Development Agreement and seeking to structure a form of entry for Nicaraguans according to the needs of the Costa Rican labor market, in

2008, the MTSS/CR defined the productive sectors with the greatest demand for a complementary workforce and specific occupational activities. This task was carried out in response to requests from the Chambers of Commerce and Industry, resulting in quotas or total numbers of workers for the three sectors defined by the agreement: agriculture, agro-industry and construction.

For example, a special recommendation was established for the construction sector in particular, based on workforce need as proposed by the Costa Rican Chamber of Commerce for Construction (CCC). Together, the MTSS/CR, the General Directorate of Migration and Immigration, and the CCC decided to set a quota of workers for the construction industry. This quota is filled in accordance with the applications processed by each company and when the quota has been reached, possibilities for increasing it for the future are studied. In 2008, based on “Technical Study ML-DEN-015-2007,” the MTSS/CR recommended the authorization of 10,000 workers for the following occupations: construction foreman, carpenter, bricklayer, plumber, welder, tinsmith, house painter, granite and marble rock cutter and installer, and workmen.

For that same year, the Co-Development Agreement allowed the gradual entry of 41,500 Nicaraguan workers each year, 10,000 of which would be employed by the construction industry, an additional 10,000 in coffee plantations, and the rest in other agricultural activities such as pineapple, cantaloupe and sugarcane harvesting.

However, different results have been observed in practice. In a 2011 report, the Nicaraguan Human Rights Center (CENIDH by its acronym in Spanish) pointed out that the agreement actually only allowed entry to 4,082 workers in 2008, 2,000 in 2009 and 2,099 in 2010. Costa Rican companies contracted a total of 8,181 Nicaraguan workers under the parameters of the agreement at that time, which is equivalent to a little more than 19.71 percent of the foreseen goal, implying that the agreement has not reached its expected results, neither for workers, nor for employers.

According to labor authorities, this occurs because many employers do not respect the agreement: they proceed to contract workers directly in the zones neighboring the border in order to avoid formalities and the intervention of labor authorities from both countries. They are not required to contract workers under the protection of the agreement. Moreover, through fieldwork on the border, the CENIDH has verified that financing for implementing the agreement had been exhausted by 2010 and that the governments had not provisioned a budget allocation to sustain the agreement over time. Thus, the public officials responsible for the agreement continued in their positions although they were actually dedicated to other activities.

Implementation of the agreement has had greater impact on agriculture (on temporary migrants, the majority of which are men, and in the Peñas Blancas border zone) and much less impact on the construction industry. According to experts, the agreement would seem to accommodate better to so-called seasonal workers and less so to more permanent workers as needed in the construction industry. Others point to the fragmentation of the contracting process with its different types of intermediaries, as well as increased labor informality in the construction sector, in part derived from the uncertainty recession imprints on this sector.

While the pilot program supported by AECID and IOM officially operated for three years, from 2008 to 2010, in theory it is still in force and, furthermore, the category of temporary worker continues to exist in the Immigration Act. Organizations mention that the IOM is carrying out an evaluation on the Co-Development Program that appears to be pending conclusion and has also yet to be published.

In the case of the category of cross-border workers, the Center for the Social Rights of Migrants (CENDEROS) has documented the inexistence of the technical study referred to in article 97 of Act 8764 that,

343 Ibid.
in principle, corresponds to the DML. It would appear that the absence of this study is justified by failure of companies to present a report regarding their workers.

**Bilateral procedures**

In accordance with the Co-Development Agreement, Nicaraguan workers can be contracted through two different modalities: under the migration status entitled “special category” and under the subcategory of “temporary worker.” Workers can be contracted in their country of origin or in national territory as long as they have entered the country legally and are within the period authorized for legal stay as a tourist. The contracting party holds the responsibility of filing the application for contracting Nicaraguan workers. The application should be filed with the MTSS/CR (specifically with the Labor Migration Department at the National Directorate of Employment). This application includes company contact information, the employment activity, the number of workers required for each occupation, the estimated duration of the job, project location, the form of hiring, a certification that indicates registration of the contracting party as the employer, as well as the identity and residence of the company’s legal representative.

Also in accordance with the Co-Development Agreement (which is currently in force), employers are directly responsible for filing the applications to have Nicaraguan workers at their disposal. The MTSS/CR makes its determination and issues a favorable or unfavorable recommendation. Likewise, the employer (or the legal representative of the contracting party) should present a copy of the model employment contract, a copy of the MTSS/CR official documentation, authentication of special power under the name of the person who will be responsible for transporting the workers and a copy of the company’s certified articles of incorporation.

Under the first modality, the case of Nicaraguan workers contracted directly in Nicaragua, parallel procedures are carried out in the country of origin, that is to say the contracting party must also request permission to recruit workers in Nicaragua and authorization for the recruited workers to leave the country. The employers (or their legal representative) are responsible for preparing the company’s documentation, legalizing it in Nicaragua and presenting it to MITRAB. MITRAB verifies the documentation and issues authorization to recruit employees in Nicaragua and, where applicable, provides access to the database of applicants who are registered with Employment Public Services pertaining to the General Directorate of Employment and Wages, as well as other databases of applicants registered with other sources of worker recruitment. In addition, the employers are allowed to use their own means to carry out the recruitment process, under supervision of Employment Public Services. The employers must compile copies of each worker’s passport or safe-conduct permit, fill out the MITRAB form with the personal information of recruited workers and present the documentation to MITRAB and the DGME/CR.

With these authorizations, the employer produces employment contracts for each recruited worker and files them with MITRAB. MITRAB then verifies the working conditions established in the contracts and proceeds to endorse them. The employer is responsible for transportation for departure from Nicaragua to the construction site or the farm in Costa Rica. The employer presents each worker’s documentation at the border checkpoint to obtain authorization for exit and entry.

The employer enters Costa Rican territory with the workers and requests authorization from the DGME/CR for temporary work permits. At the time at which notification of authorization is given, a security deposit of 20 dollars must be paid. This payment is individual so that each bank deposit or transfer slip has the

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345 A safe-conduct permit is an alternative document to a passport that is issued by the DGME/NIC. This document exonerates Nicaraguan workers from having to present a visa, proof of means of economic solvency, a criminal record and a birth certificate when applying for a position of employment with a Costa Rican employer. However, this document is only good for purposes of recruitment; it is not equivalent to permission to stay or work in Costa Rica.
full name of the worker who joined the construction project or farm. These security deposits are a management responsibility and they are refundable, thus they should not be charged to the workers nor deducted from their wages. The purpose is to cover the costs of deportation in case the Nicaraguan worker does not leave the country voluntarily. The employer presents the bank slips and passports or original safe-conduct permits to the DGME/CR and with the corresponding resolution, workers are authorized to carry out their labor activities. Finally, it is important to mention that once the employment contract has been concluded, the employer should formally request the worker’s departure from the country or an extension of the contract. Extensions are only granted once and must be requested 30 days prior to the expiration date of the contract.

Authorized companies can directly contract Nicaraguan workers in the country of origin through employment agencies or their collaborators or they can seek support from the MITRAB Employment Public Services database. Among the different services provided by this office, if an authorized company so desires, the General Directorate of Employment and Wages has an available workspace for companies to carry out interviews and worker selection.

The Co-Development Agreement establishes some additional elements for the protection of migrant workers’ rights. It is the responsibility of each hired worker to carry an unaltered official identification in good condition, whether a passport or original safe-conduct permit stamped with authorization from the DGME/CR. The employer cannot withhold or safeguard passports or original safe-conduct permits since they are for the exclusive use of the bearer of the document. The employer has the obligation to provide housing that guarantees the workers’ physical safety and that has the corresponding permission from the Ministry of Health at no additional cost to the worker.

Under the second modality, in the case in which a company wishes to contract Nicaraguan workers directly in Costa Rica, with authorization from the MTSS/CR, an employer can recruit workers over the age of 18 (who have a passport and valid tourist visa). Together with documentation from the company and the recruited workers, the employer files an application for a work permit with the DGME/CR. With the corresponding authorization and payment of the security deposit, the employer produces employment contracts. Upon conclusion of the contract, the employer can request departure for the worker or a contract extension. As in the case of the previous modality, an extension can only be granted once and must be requested 30 days prior to the end date of the contract.

In this case as well, the employer is responsible for the permanence and departure from Costa Rica of each contracted worker, since each one of them moved from the “non resident” migration category (tourist) to the “special” migration category, under the “temporary worker” subcategory. It is important to mention that a contracted worker cannot work with any other employer besides the authorized employer nor may he/she carry out any other kind of activity, unless the authorized employer wishes to assign the worker to a different construction project or farm or with another employer, in which case the DGME/CR must be notified.

Limitations to the Agreement

The only independent study carried out on the Co-Development Agreement points to important legal deficiencies. The first deficiency is that the agreement does not observe the formalities of an international convention nor even of an international protocol, rather it is simply an institutional procedure for a specific type of migration management and it is not binding for the parties involved. Recruitment of migrant workers from Nicaragua can be carried out in ways different from the ones mentioned in the agreement. In other words, the document establishes a form of recruitment of migrant workers coming from Nicaragua but it is not the only legally viable way.


Quo Vadis? Recruitment and Contracting…: 133
According to the author of the aforementioned study, in order for the procedure in the agreement to be unique and binding, the agreement would need to be incorporated to Costa Rican law by means of an international convention, a protocol to a convention previously ratified by Costa Rica or the law of the Republic. In particular, ratification of ILO Convention 97 would provide the necessary institutional and legal backing for both this Co-Development Agreement and future bilateral agreements since it contemplates a series of commitments for recruiting, placement and conditions for migrant workers that have been contracted by virtue of agreements on collective migration celebrated under government control. However, at the time at which the present study was concluded, the Legislative Assembly of Costa Rica had yet to sign this convention.

With regard to the agreement’s contents and application, several limitations can be listed, some were mentioned by the author of the aforementioned study and others were corroborated and developed by civil society organizations and experts working closely with migrant workers. First of all, the Co-Development Agreement only applies to agricultural, construction and agro-industry activities, thus excluding in practice contractual guarantees for the majority of women workers since their participation in the labor market usually occurs as domestic workers. It also excludes minors since the agreement sets a minimum age of 18. This means that minors who are workers continue to carry out temporary work on farms but without the protection of the agreement.

Under the Co-Development Agreement, the “temporary worker” category represents the path to migratory regularization. It does not however represent a solution for the vast majority of migrant workers who have irregular immigration status in Costa Rica and it also excludes workers who, under the law, are considered to be “cross-border workers.”

According to available data and interviews with experts, in practice, the application of the agreement has been very weak since mainly only agricultural workers in a limited border region have been contracted under this modality. Moreover, one of the procedural weaknesses pointed out by experts is the fact that migrant workers do not travel to Costa Rica with a visa but with a safe-conduct permit that is stamped on the border and is usually valid for three months only.

The government of Costa Rica, through the Ministry of Labor and Social Security, has the obligation to safeguard minimum labor conditions and compliance with labor law. However, many labor rights are merely wishful thinking since inspection is not adequately regulated and insufficient resources have been allocated for this purpose.\textsuperscript{347} In addition, the Co-Development Agreement does not include institutional mechanisms for labor union organizations from both countries to be able to participate in checking contracts or procedure fulfillment; neither have they been able to participate in proposing modifications to the agreement as worker needs change.

The nature of contracting processes in the construction industry gives way to outsourcing migrant workers. In practice, this implies that both the employer’s legal entity and responsibility is dispersed among several employers. According to some analysts, this situation lends itself to the omission of management responsibilities, based on a myth believed by many migrant workers and their employers that outsourcing does not establish employer obligations to employees, i.e., that in this case it is the outsourcer who holds management responsibilities (and not the employer), which has no legal basis whatsoever. At times, this results in impunity and, in this case, in the difficulty to execute the contracting procedure as stipulated in the Co-Development Agreement.\textsuperscript{348}

\textsuperscript{347} According to Bolaños (2009), in 1995, each labor inspector covered an employee population of 19,148 workers, which has grown to 21,752 to date. Likewise, current estimates indicate that approximately 5.9 percent of all employers are inspected, meaning that for every 100 employers, 94 do not receive a work inspection throughout the entire year.

What social actors think about the agreement

For civil society organizations and unions, the application of the Co-Development Agreement has been insufficient since it only embraces documented temporary migrant workers who have an employment contract. Since under the established procedures recruitment and contracting are not compulsory, there is a large number of employers who go directly to the border in search of undocumented temporary migrant workers who do not benefit from the improvements established under this agreement.

According to information obtained through interviews regarding the participation of intermediaries in the contracting process, intermediaries tend to create companies to recruit and contract workers and in case they are sanctioned for lack of compliance with the official requirements, the company is dissolved and reappears the following year under a different name. Furthermore, there is a lack of control over informal labor migration, giving way to employer non-compliance with labor conditions established by the MTSS/C. In addition there are not enough labor inspectors to supervise and monitor farms and other workplaces that hire undocumented labor.

While the agreement is focused on prioritizing recruiting and contracting procedures, it is clear that, in addition to its legal limitations, there are also serious political limitations. Interviewees mentioned difficulties that MINTRAB faces for validating workers, as well as pressure from the corporate sector that, to a certain extent, has undermined the agreement’s usefulness. In practice, this had a significant impact in practice since Costa Rican authorities tended to choose simpler procedures than those prescribed by the agreement. In other words, because the MTSS/CR was unable to carry out studies exactly as prescribed, work permits were issued without requiring this Ministry’s participation.

According to obtained information, this occurred more often in some sectors than in others, depending on the relationship between employer groups and the authorities. Besides, in cases where the requirements established under the agreement were respected, government bureaucracy delayed resolutions until the majority of producers decided to carry out contracting outside of the agreement’s framework. According to some sources, DML officials pertaining to the MTSS/CR have become highly aware of this situation, although this is not the case with officials in the labor inspection department. The lack of MTSS/CR independence undermines the benefits of the Co-Development Agreement since the Ministry lacks control to supervise and monitor labor conditions.

The very challenge that Costa Rica has faced to enforce labor rights is the strongest critique to the implementation of the Co-Development Agreement. On the one hand, as aforementioned, there is institutional weakness to ensure employer compliance with labor and migration laws. On the other, there is a lack of incentives for employers to register their workers and adopt the procedures stipulated under the agreement. There have been some efforts on this matter, such as official trade authorizations that condition employers to have workers registered in the CCSS and INS.349

It is also important to mention the critique that several experts in Nicaraguan labor migration to Costa Rica make, noting that the agreement does not respond to the reality of labor migration. The agreement includes the workforce of the largest industries but it leaves out the increasing number of temporary migrant workers providing services as chauffeurs, security guards and domestic workers. This is extremely relevant, especially due to the high participation of Nicaraguan women in the labor market, mainly as domestic workers, and a culture in the receiving country that does not tend to consider domestic activities to be “work.”

Although they are not very powerful, compared to the power employers and industry chambers have in the media, some unions350 have started to become involved in the field of temporary migrant workers. There is

349 The role played by these two social protection institutions will be described below. The former has done a good job, but the latter is much weaker in taking initiative for labor inspections.

an effort to work in a bilateral fashion to strengthen South-South solidarity in order to support workers, for example, through information centers and advisory support. These efforts need to be strengthened in the region.

Finally, it is important to point out that interviewees affirm that international attention and cooperation have been critical for Nicaragua, as a country of origin, to address the agreement at an institutional level. However, some state that the government has failed to make protection of the human rights of temporary Nicaraguan migrant workers the priority it deserves to be. The guarantees and supervision of the Nicaraguan authorities still depend on the continuity of institutional and technical support.

Despite this and according to experts in Costa Rica, the lag in migration and labor policies is not allowing the agreement to meet its objectives. It is important to point out that since unemployment rates have increased, xenophobic feelings towards the migrant population have intensified, particularly towards Nicaraguans. This may also be determining the limited use of the agreement in practice.

Finally, as the country evolves towards practices of integration, as contemplated under the new law, Act 8764, Costa Rican public policy is headed towards opening up to greater respect for the human rights of temporary Nicaraguan workers.351

Contracting and the situation of the rights of migrant workers

Concerning previous references to the practical application of the Co-Development Agreement, we believe it is relevant to pose some of the situations related to contracting temporary Nicaraguan migrant workers who do not have access to the benefits of the measures of this agreement.

Based on the information obtained and compiled from interviews with several different experts, we will describe some of the applicable legal dispositions and the conditions that more vulnerable sectors face, for example, along the border and on non-regulated types of jobs.

According to CENDEROS, no rigorous study has been carried out on the functioning of the agro-industry farms (if they use direct company-worker relations, if there are intermediaries or contractors and, if so, how they operate). CENDEROS affirms that the consequence is a practice that benefits few workers (the “legal” workers) and that puts others at risk, based solely on possession of immigration documentation.352

Given the lack of information and official data regarding claims filed by migrant workers, we resort to information compiled by civil society organizations that have documented the type and frequency of abuses through their daily work providing legal aid and social support to the migrant population, as well as through field studies.

Although entry to Costa Rica is relatively simple since only a passport and a tourist visa is required, migrant workers who wish to obtain a work permit and a Costa Rican residence card face great obstacles to regularize. Work permits are only granted for certain economic sectors that have been predefined by the Costa Rican government. Women are the ones, out of the entire migrant population, who face the greatest obstacles to obtain a work permit, particularly women who work in domestic service since this kind of employment is not regulated in Costa Rica.

Only the employer can carry out the procedure to get a work permit, and to obtain a residence card, the person needs to have a Costa Rican child or be married to a Costa Rican citizen or to a foreigner with permanent residence. Besides, the costs are very expensive. Lack of documentation of this kind results in an irregular immigration status that facilitates the violation of labor rights and human rights.353

351 Ibid.
Civil society organizations also point to the lack of clarity and transparency in migration procedures for migrants to regularize their status, as well as discretionary action by the authorities in the application of migration requirements since these procedures have yet to be included in the regulations that were approved for Act 8764.\textsuperscript{354}

Consequently, cross-border workers are unfamiliar with these procedures and are uncertain about the administrative process. They do not know the geographic boundaries of the “border” zone nor the specific government department that can authorize a continued stay. Civil society organizations have also identified errors and confusions in the application of the legal mechanisms: in the border zones, there are both “border workers” (those who live in the country in a temporary or permanent fashion) and “cross-border workers” (the ones referred to in Article 97).\textsuperscript{355}

It is important to mention that according to the Political Constitution of the Republic of Costa Rica, the right to work is a fundamental right (Article 56) that prohibits discrimination against foreigners in terms of “wages, advantages or working conditions” (Article 68). In practice, this is very different and migrants face a variety of obstacles to gain decent employment. The cultural conditions that are typical of the receiving country immerse Nicaraguan migrant workers in social exclusion, making it more difficult for migrants to access decent work, placing them in a vulnerable situation or even exposing them to labor exploitation.

According to immigration law, the contracting of migrant workers who are in the country with irregular immigration status or who do not have permission to carry out work activities, although they have legal status to be in the country, is prohibited (Act 8764, Art. 175). In effect, the law requires all employers, intermediaries and contractors to check the legality of a person’s presence in the country and his/her authorization to work—which can be requested directly from the DGME/CR—when they hire a person. In the case of non-compliance, employers can be sanctioned with a fine, depending on the seriousness of the facts and the number of migrant workers who have been employed under such conditions.

Upon request, employers are required to send the DGME/CR a report on the migrant workers that they have contracted and they are required not to hinder workplace inspections carried out by immigration authorities. Penal sanctions can be applied if an employer fails to comply. Finally, in detriment to migrant workers, in accordance with Article 129, the DGME can cancel a foreigner’s authorization for permanence and residence in the country if he/she fails to comply with the requirements, including carrying out remunerated activities without authorization.

Since it protects their labor rights, Costa Rica’s Labor Code establishes a legal guarantee to meaningful equality for temporary migrant workers. Under the law, foreign workers possess the same rights as nationals (Act No. 2, Art. 200) and the application of the law is public policy for all labor relations throughout the country, regardless of a person’s nationality (Act No. 2, Art. 14). However, as some studies indicate and given the evidence of violations to migrant workers’ rights, it is necessary to have effective procedural laws, as well as an administrative system for labor and migration inspection and courts capable of enforcing the law.\textsuperscript{356}

According to a report presented by different civil society organizations and labor unions to the Inter-American Commission on Human Rights (IACHR), the high degree of informality of jobs in the construction industry has a direct impact on the labor conditions of migrant workers.\textsuperscript{357} Academic studies have demonstrated

\textsuperscript{354} Act 8764 is regulated by several different theme-specific regulations; the procedures regarding different categories of work permits are not included in the regulations that have been issued on migration control and entry visas.


\textsuperscript{356} 2011 IOM/ILO Report.

\textsuperscript{357} Servicio Jesuita a Migrantes and Sindicato Unitario de Trabajadores de la Construcción y Similares (SUNTRACS). Informe Costa Rica ante la Comisión Interamericana de Derechos Humanos; Audiencia Temática: Derechos laborales de las personas migrantes. (Document developed for a thematic audience at 143rd regular sessions of the IACHR. 2011.) This report indicates that there were 128,386 positions in the construction industry in 2009. However, only 73,372 construction workers were registered as insured with the Costa Rican Social Security Fund (CCSS), (i.e., 57.14 percent).
that at least 29,000 of the 123,386 workers employed in construction in 2009 were foreigners and 92 percent of these foreigners were from Central America, the majority from Nicaragua.\footnote{FLACSO. \textit{Investigación Flujos migratorios laborales intrarregionales: Situación actual, retos y oportunidades en Centroamérica y República Dominicana. Informe de Costa Rica.} 2011.}

Notwithstanding the recession affecting this sector, the construction industry continues to attract migrant workforce despite the unfavorable labor conditions because there is a perception that construction pays higher wages than jobs in the informal sector.

In terms of the type of recruitment, complaints have been filed regarding the behavior of intermediaries since they are the only “employers” that the workers know. In general terms, there is a lack of data regarding the actual legal representatives of the contracting company and, on some occasions, the workers only know the company’s commercial name. This situation makes them highly vulnerable.

In the agriculture sector, Nicaraguan labor migration is characterized by its seasonal and circular nature, with terms of contracting that last for three to four months. Recent studies demonstrate a certain preference by employers to hire migrant workers, since this allows them to reduce costs in terms of wages and social benefits. Furthermore, they have workers who are more willing to work longer hours and on statutory holidays, as well as occupy low-skilled positions.\footnote{2011 IOM/ILO Report.}

In its 2011 report, the IACHR presents complaints documented by organizations such as Caritas of Costa Rica, CENDEROS and the Labor Rights Center (CDL by its acronym in Spanish) of violations to migrant worker rights across different labor sectors. The most recurring violations are as follows: breach of clauses of individual employment contracts (whether written or verbal); non-compliance of payment of minimum wage and overtime; contract termination due to the employer’s responsibility; arbitrary actions that affect the thirteenth monthly payment and social benefits; actions that violate the integrity of working hours and the workday; violation of occupational health and safety standards; dismissal of workers who organize in labor unions and discrimination against union leadership.

They also point to a lack of compliance and respect for legal guarantees and discrimination for accessing labor justice. According to this report, another violation needs to be added to these violations, as confirmed by the National Institute of Statistics and Census (INEC by its acronym in Spanish): violation of the right to social security and occupational hazards insurance. Testimonies from CENDEROS make apparent the poor conditions where child labor is occurring and they denounce the degree of impunity of these violations due to the State’s inability to provide agile mechanisms for mediation and unobstructed, effective access to labor justice.\footnote{Servicio Jesuita a Migrantes and the Sindicato Unitario de Trabajadores de la Construcción y Similares (SUNTRACS). 2011.}

\textit{Current labor migration initiatives}

There are currently a series of initiatives in planning stages, both on behalf of the governments of Costa Rica and Nicaragua at a binational level, as well as on behalf of local town halls along the border region and civil society organizations. According to information obtained from interviews with CSO experts, these new proposals target a group of migrant workers that is very important to the Costa Rican economy: border workers who cross the border on a daily basis or each season to work. Town halls on both sides of the border, based on cultural and historical affinity, become involved in this issue but do not receive very much support from federal authorities in their own countries. The mid-term goal is to establish a bilateral agreement between Nicaragua and Costa Rica that responds to the reality of labor migration and that is able to remedy the problems of prior agreements.

Also, a pilot labor migration program is being designed for a group of cross-border migrant workers in the region of Upala, Costa Rica. While the details of this program have yet to be defined, this is proposed to be the most progressive, liberal effort in the subject matter to date. There is a proposal that the new pilot program

\begin{footnotesize}
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\item[359] 2011 IOM/ILO Report.
\item[360] Servicio Jesuita a Migrantes and the Sindicato Unitario de Trabajadores de la Construcción y Similares (SUNTRACS). 2011.
\end{itemize}
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for border workers adopt the best elements of the Co-Development Agreement in terms of participation and coordination by authorities in both countries and the guarantees for the contracting process, but alleviate the levels of bureaucracy and allow freedom of movement for workers and flexibility for labor mobility.

The different proposals include: access to a renewable work permit; an open on-line database of border workers so that any resident of the Upala region can register; work permits issued at a municipal, rather than a federal, level; and information sharing procedures between the CCSS, INS and MINTRAB for comprehensive attention for migrant workers. This registry proposes to avoid the need of intermediaries for the recruitment process since the idea is that workers themselves can register, be contracted and receive a one-year work permit. While it is likely that this permit be limited to a specific employer, if the worker is dismissed, he/she continues on the registry to be contracted at another occasion.

At the same time, at the moment this investigation was closed in May 2012, Costa Rica and Nicaragua signed a new labor agreement and El Salvador is proposed to be included in the near future.

**General social security conditions**

*The Costa Rican legal framework*

In accordance with the Costa Rican Labor Code, the institution responsible for applying compulsory social security is the Costa Rican Social Security Fund (CCSS), an independent institution responsible for social security governance and administration (CCSS Charter No. 17, Art. 1). CCSS insurance covers risks of illness, maternity, disability, old age and involuntary retirement, as well as participation in the economic burden of maternity, family, widowhood, orphanage and a funeral insurance (Act No. 17, Art. 2). This is compulsory insurance for all workers who earn a wage, whether a migrant or national, and it is the employer's responsibility. The employer has the obligation to enroll all of its workers, deduct corresponding amounts from the worker's wage and deliver them to the CCSS.

There are employer sanctions for failing to enroll workers on time, for not deducting employee contributions, for failing to pay the employer contribution, for omitting workers from the pay sheet or for registering false information in regards to employee wages, payments, net income or the information used to calculate the amounts of contributions to the social security system. Moreover, the law determines that foreigners in Costa Rica are subject to paying the same taxes or social security as Costa Rican nationals.

The new Migration and Immigration Act (Act 874) assigns a specific role to the CCSS as a component of immigration policy; according to Article 7, every migration procedure should consider the insurance coverage provided by the CCSS as a basic requirement, in order to ensure access to social security to migrant peoples. This is adopted for all the different categories of migratory procedures for migrant workers (Art. 80 for “temporary residents” and Art. 97 for “cross-border workers”).

It is worth noting the language used in these articles since it seems to transfer responsibility for insuring workers with the CCSS and for workplace risks with the INS to the worker, when the Labor Code clearly establishes this to be an employer responsibility. Apparently, from a migration viewpoint, the obligatory nature of social security contributions for migrants is based on promoting integration and equity for access to public services. In theory, this represents progress, however, in addition to contradicting labor legislation, in practice it presents a problem for those migrants who have insufficient resources to pay their contribution.

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361 Art. 80. “In order to renew their status as a migrant and when appropriate, temporary residents must confirm they have insured themselves with CCSS insurance from the moment at which they are granted residency and in an uninterrupted fashion until the moment at which they renew their immigration card.”

Art. 97. “In addition to other obligations established under the law and the Costa Rican legal system, these workers should pay contributions to the CCSS social security system and the Workplace Risks System of the National Insurance Institute (INS).”
In terms of inter-agency coordination, Article 8 of Act 8764 indicates that the planning process of the migration and immigration policy should (in coordination with the National Insurance Institute, the Department of Rehabilitation of the Costa Rican Social Security Fund, the Ministry of Health and similar bodies) rely on input provided by MTSS reports on the Costa Rican labor situation.

At this Ministry, the General Labor Inspectorate is responsible for safeguarding compliance and respect for relevant regulations regarding working conditions and social benefits. It also has the authority to support inspectors from the Costa Rican Social Security Fund. Inspectors can visit workplaces at different times of the day or night, as necessary, and if they encounter unjustified resistance on site, they are obligated to notify a labor judge (Act 1860, Art. 89). They can act on their own accord or in response to a worker claim. On the other hand, the MTSS Office for Occupational Health and Safety is responsible for supervising occupational hazards and workplace conditions (Act 1860, Art. 63). It promotes the creation of industrial safety commissions and the development of occupational health and safety codes and manuals (Act 1860, art. 64-66). In particular, it supervises compliance with all regulations and standards regarding prevention of workplace accidents and occupational diseases (Act 1860, Art. 90).

With regard to oversight of legal compliance, the Migration and Immigration Act indicates that the process to verify offenses to the law on inspections does not excuse employers from obeying their worker-management obligations (including the payment of social security). Likewise, the DGME/CR and the MTSS must check, coordinate and report any non-compliance in the contracting process associated to a person’s immigration status.

Finally, the Immigration Act includes a new interesting mechanism: the creation of a migration fund (the Social Migration Fund) to support processes of social integration of the migrant population to national services in the areas of migration, health, education, security and justice, and to address humanitarian needs to repatriate Costa Ricans from abroad. 25 percent of the funds will be allocated to public health equipment and infrastructure. The funds come from migrants through the payment of migrant administrative procedures as established in Article 33 of the aforementioned act.

Access to social security in Costa Rica

Another indicator of the vulnerable condition of migrant people from Nicaragua in Costa Rica is their level of contribution to social security, since this is directly related to the different forms of labor contracting. The lack of social security for many Nicaraguan workers affects them directly, impeding their access to services and guarantees provided by the CCSS, particularly protection in case of an accident, especially because they work in sectors such as construction, agriculture and security that present a high risk of accidents and occupational illness.

With regard to the levels of migrant worker contributions to social security in Costa Rica, according to data from the Household Survey for Multiple Use carried out by the National Institute of Statistics and Census (INEC) regarding labor conditions of the employed population in Costa Rica, by 2009, 25.16 percent of Nicaraguan migrant workers were insured as wage-earning workers. The percentage of wage-earning men was 35.2 percent and of women was 15.8 percent. Migrant workers lacking access to social security represented 47.3 percent. By 2010, there was a global increase in the number of contributors: the sector of children born abroad grew by 10.29 percent, compared to children born in Costa Rica, which grew by only 3.63 percent in the same period. This may be due to recovery from the global financial crisis by 2010, as well as to the coming into force

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362 Data from the report presented to the IACHR. Servicio Jesuita a Migrantes and Sindicato Unitario de Trabajadores de la Construcción y Similares (SUNTRACS). 2011.
of the new Migration and Immigration Act that establishes registration in the CCSS's national health system as a requirement for immigration regularization.\textsuperscript{363}

According to civil society organizations, this requirement of registration for migrant workers prior to conferment of a work permit, in accordance with the law, may appear to be a positive measure, but actually becomes an additional burden for migrant workers because employers are evading this obligation.\textsuperscript{364} The Costa Rican State does not have the ability to check respect for the applicable labor standards in these cases.\textsuperscript{365}

Studies and interviews carried out by civil society organizations demonstrate a situation of even greater concern for women migrant workers and poorer sectors. While the INEC’s household survey registered a total of 138,000 women employed as domestic workers, the CCSS barely registers 9,400 people insured in this sector, equivalent to 7 percent of all domestic workers. Furthermore, in the current moment of the economic crisis, a tendency towards fragmented hours and hourly hiring can be observed. This limits access to social security even more.

According to analysis carried out by FLACSO, in the case of domestic service, a sector occupied by women, total coverage is lower than any other sector: 38 percent of workers are insured as wage-earners and 20 percent are self-insured or insured through a family member. Moreover, poor Nicaraguans face a double disadvantage, due to their nationality and their situation of poverty. Social security coverage is 25 percent higher for Nicaraguan women and men who are not poor than for poor Nicaraguans.

\textit{Access to health care}

Temporary migrant workers have great difficulty to access public health care. With a so-called \textit{illegal} status, there is no way for them to be insured, in many cases impeding them from receiving health care at health clinics in Costa Rica. Although officially non-insured individuals receive health care, at least in cases of emergencies, some qualitative studies that include interviews with migrants reveal other realities: many people who are not insured by their employers and who are even willing to pay a voluntary insurance policy cannot do so because they lack the necessary documentation to be associated with the public health system.

As for access to health care, specifically with regard to possession of medical insurance, according to the same survey, 15.50 percent of Costa Rican workers lack health insurance, whereas 41.20 percent of the Nicaraguan population in Costa Rica lacks insurance.\textsuperscript{366}

For women migrant workers, different studies reveal unsatisfactory fulfillment of women’s rights to sexual and reproductive health due to the lack of access to both information and programs for the prevention of HIV/AIDS and other sexually transmitted diseases, as well as gender violence prevention. These issues are largely addressed by civil society organizations that work with migrants. The problem of access to information and medical care related to sexual and reproductive health is more severe in rural zones and on the border zone with Nicaragua.\textsuperscript{367}

In a report developed in 2011, the DGME/CR underscores the demand for health care for foreigners in Costa Rica. Another interesting analysis put forth by this report is the demand for health care for the population born in Nicaragua: there are more cases of hospital admissions and discharges than out-patient appointments

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\textsuperscript{363} Costa Rica Dirección General de Migración y Extranjería. \textit{Migración e integración en Costa Rica: Informe Nacional 2011.}

\textsuperscript{364} According to Act 8764, the procedure to confirm enrollment in national social security occurs prior to obtaining a work permit. Later, the same DGME established that this enrollment process should take place after the work permit is granted. In any case, the issue is that employers are not fulfilling the obligation to enroll workers in social security and they are leaving it to the responsibility of migrant workers.

\textsuperscript{365} Servicio Jesuita a Migrantes and Sindicato Unitario de Trabajadores de la Construcción y Similares (SUNTRACS). 2011.

\textsuperscript{366} Voorend and Robles. \textit{Migrando en la crisis: La fuerza de trabajo inmigrante en la economía costarricense: Construcción, agricultura y transporte público.} San Jose, Costa Rica; OIM/MTSS/Canadian government, 2011.

and emergency room visits, indicating the importance of reinforcing health prevention programs among foreign populations residing in the country.\textsuperscript{368}

\textit{Access to occupational health}

As for access to occupational health, the Costa Rican Labor Code is applied that, according to article 201, requires employers to have insurance against occupational hazards for their workers’ benefit. This insurance is exclusively provided by the National Insurance Institute (INS) and is accredited by insurance policies. Signing of an employment contract or issuing a work permit is prohibited without the prior presentation of an insurance policy against occupational hazards on behalf of the interested parties. Municipal inspectors from the MTSS and INS can call for complete interruption of activities and even closure of a workplace if they verify that work is taking place without this insurance.

The employer is required to adopt preventive measures with regard to occupational health and, at each workplace with ten or more employees, there is an obligation to create occupational health commissions, which the Occupational Health Council judges to be necessary. It is important to mention that these obligations exist whether the contract is for a definitive or indefinite period of time, per hours or per project, and regardless of the type of work carried out. Otherwise, the INS enters into action, immediately proceeding to fine the employer for all medical-safety benefits or for the necessary rehabilitation.

It is important to mention that the presence of work-related risk rules out the intervention of the public health sector. In other words, a worker cannot request medical assistance from the CCSS since the INS monopolizes responsibility for medical care in these cases under the law. Civil society organizations have documented a vicious circle in which the worker is referred from one place to another, without the employer or any institution taking responsibility for his/her case.

In a recent report, CENDEROS documented mass mobilizations of employees when an “administrative visit” took place, i.e., an occasional inspection from the Ministry of Health or the MTSS.\textsuperscript{369} Since these are not surprise visits, but rather planned visits, this allows the employer to gather all authorized workers at the workplace in order to comply with legal requirements, while workers lacking proper authorization are temporarily moved to other zones or plantations, or they are simply told not to report to work that day.

With regard to domestic service workers, according to situations documented by CENDEROS, normal practice in the case of a workplace accident is to move the domestic worker to a hospital or a CCSS clinic but under the condition that the worker claim that she suffered the accident in her own home and not at the workplace. Moreover, the migrant stigma generates a myth that undocumented migrant workers have no right to complain about their working conditions.

It is even more complicated when, in order to receive good occupational health care, legal requirements establish that in order to go to an INS medical center, a worker must have valid ID and a notification of occupational accident issued by the employer or, in its absence, a letter of dismissal. In addition to problems for presenting an ID, asking an employer for an accident notification always implies a high risk of being dismissed and, in the case dismissal does occur, the employer usually does not issue a letter.

As this report clearly indicates, the infringement of labor rights of cross-border workers responds to the difficulty to achieve full administrative control able to verify the that the legal requirements have been met.

\textsuperscript{368} Costa Rica Dirección General de Migración y Extranjería. 2011.

Regional efforts

It is important to mention that several efforts to facilitate access to social security can be identified at the regional level. The Multilateral Agreement on Social Security of the Central American Integration System (SICA) has existed for more than four decades, as ratified by Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama on October 14, 1967. This agreement recognizes social security coverage to be a fundamental right of workers who move throughout Central America, as well as for their families, together with the right to receive social security benefits. This agreement also considers the following: benefits for illness and maternity; a funeral insurance; disability, old age and survival benefits; and benefits in the case of occupational accidents or illness. However, this agreement is not yet valid since it requires two ratifications by member countries and to date, it has only been ratified by Costa Rica.

In recent decades, SICA has become the new political space with potential for addressing several topics related to regional integration, including labor markets and the social protection of temporary migrant workers. While Central American integration is the most long-standing in the region and has been favored by these countries’ common history, as well as by their relatively small size as countries, a circumstance that helps and stimulates integration, this trajectory has not resulted in the achievement of great accomplishments. To the contrary, efforts to function as a block have been stifled due to the complex and bureaucratic institutional structure, as well as reluctant political will on behalf of the national governments to grant SICA greater authority to decide, implement and execute regional policies.

Finally, we cannot lose sight of existing asymmetries among the different Central American countries and the lack of funds to eradicate them, as well as episodes of political instability. However, regional integration continues to exist as a framework for promoting competitiveness, job creation, sustainable development and cooperation for development by means of a single element: integration.

Conclusions and recommendations

The example of the Co-Development Agreement between Costa Rica and Nicaragua for South-South migration in the Central American region represents an important effort to establish a mechanism, through a bilateral agreement, for hiring temporary migrant workers with the participation and responsibility of both countries. In essence, the agreement is a migration management mechanism using a combination of labor and migration procedures.

In recent years, this kind of agreement has been promoted as a best practice for regulating labor migration flows and for the respect of migrant worker human rights. From our analysis of this agreement and the context in which it operates, we highlight the importance of framing any effort at labor migration programs within a solid structure of a compulsory nature of laws, policies, and oversight, as well as to consider financial sustainability to ensure its implementation and continuity.

1. In principle, the Co-Development Agreement represents positive progress for temporary migrant workers since it emphasizes the importance of greater responsibility by the States of the country of origin and the receiving country, as well as by the employer. Formal development and approval of these bilateral procedures are a unique example in the context of South-South migration in the region. Building awareness among authorities from both countries and holding the Nicaraguan consulate and MINTRAB representatives accountable have been important steps forward, including greater meticulousness to protect their own workers.

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370 Regional integration processes began in Central America over 60 years ago, but it was not until the 1990’s, in the context of a peace-making process in the region, that the Central American Integration System emerged. This system is comprised of seven member countries: Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama; an Associated State consisting of the Dominican Republic; three Regional Observer countries that are Brazil, Chile and Mexico; and finally China, Germany and Spain, as Extraregional Observers. The fundamental objective of this block is to achieve Central American integration in order to create a “region of peace, liberty, democracy and development.” Consult IOM, Migración y seguridad social en América Latina.
2. Under the agreement, employers have the obligation to produce an employment contract, solicit permission, provide transportation to and from the site of origin and destination, provide free housing to workers, supply information to government agencies about the entry and exit of the workers, as well as pay the security deposits established by law.

Recommendation: It is important to consider that the concept of co-development as conceived under the agreement does not necessarily imply the guarantee, promotion or protection of migrant worker rights. The precepts are different. Despite the aspects that help to make progress on this issue, a model based on co-development should not be promoted as “the” model for designing temporary work programs because, although it includes some important components for contracting procedures, there is still much to be done. During the development of new proposals, such as the cross-border pilot project, the co-development model should not be completely rejected, but rather its positive components should be considered and mechanisms should be included to counteract its faults for practical implementation.

3. While this agreement, like other preceding agreements, represented some progress, its overall level of effectiveness has been low, mainly because it has not been very functional in practice. This is due, on the one hand, to weaknesses in institutional capacity to implement the agreement according to its original terms and, on the other, to insufficient political will to institutionalize these mechanisms and to make them compulsory so that workers can effectively access its benefits in both countries. In fact, the agreement has needed greater continuity in terms of resources allocated to the operation of procedures and to oversight of enforcement. Also, the protection of human rights of temporary Nicaraguan migrant workers has not been made the institutional priority that it deserves. The agreement still depends on continued institutional and technical support from Nicaraguan authorities for guarantees and supervision to function accordingly.

Recommendation: Provide continuity to labor migration agreements and programs with support of the international community (the ILO, AECID, IOM and others) through institutional, technical and financial support, and by the States, Costa Rica and Nicaragua, in order to strengthen appropriate management mechanisms for channeling labor migration. There is a need to allocate resources and to train Nicaraguan consulates and Costa Rican authorities, especially in the border zones. Likewise, institutions should be strengthened to be able to carry out monitoring and the necessary supervision for effective implementation and practice.

4. The Co-Development Agreement does not have the formalities of an international convention or protocol; it is simply an institutional procedure for a specific type of migration management and it is not even binding for the parties involved. Furthermore, the obligations of the authorities involved in these mechanisms are not established by law, which hinders effective implementation of the agreement. Recruitment of migrant workers from Nicaragua, for example, can be carried out in ways different from the ones mentioned in the agreement. Thus, despite the existence of the agreement and other mechanisms like the ones for cross-border workers, worker contracting under irregular conditions is common practice, as a mechanism to avoid employer responsibility and to reduce production costs.

Recommendation: In order to secure a framework of protection for the rights of migrant workers under a bilateral agreement, we urge the State of Costa Rica to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), in addition to ILO conventions on these issues, including Convention 97 concerning Migration for Employment, Convention 19 concerning Equality of Treatment (Accident Compensation), Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, and Convention 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. In particular, ratification of ILO Convention 97 would provide the necessary institutional and legal support for the Co-Development Agreement and future bilateral agreements, since it contemplates a series of commitments for recruitment, placement and conditions for migrant workers who have been hired by virtue of agreements on collective migration celebrated under government control.
**Recommendation:** The benefits of the Co-Development Agreement could be strengthened if this agreement were incorporated to the law or a protocol of an international convention.

**Recommendation:** In order to strengthen binational coordination, precise studies on the needs and conditions for contracting migrant workers carried out by the MTSS are essential, together with systematic and continuous promotion of information systems on labor markets. The obligation requiring the MTSS to carry out these technical studies already exists, what needs to be strengthened is company compliance with reporting requirements regarding their temporary migrant workers.

5. An interesting aspect of the agreement is the procedure established for Costa Rican companies to hire temporary Nicaraguan labor. Employers are directly responsible for filing the applications to import labor. However, in practice, Costa Rican employers have few incentives to use the mechanism established by the agreement to register their workers under its terms. According to several different sources, this is mainly due to the bureaucratic procedures and high costs of registering workers with the CCSS and INS, which is why many employers prefer not to register their workers. While the agreement sought to reduce the role of intermediaries through its bilateral procedure for recruitment and contracting, their participation has not disappeared. On the contrary, they have found ways to transform this business. The lack of a compulsory nature for the agreement is one of the reasons for this, particularly in the case of migrant workers who are contracted in Costa Rica.

**Recommendation:** Authorize the MTSS/CR under the law and its regulations to play its part in the procedure established in the agreement, as well as to implement mechanisms to ensure independence for labor inspections. According to the new Immigration Act, Act 8764, the DGME/CR is authorized in this arena but the role of the MTSS/CR has not been established. Moreover, corresponding regulation to Act 8764 should be issued to enforce employer sanctions and fines in order to discourage evasion of compliance and to regulate coordination among participating authorities. Employers could thus be required to use the mechanism, even when intermediaries are used for the contracting process, and authorities would have more effective control, making practical implementation of the agreement more effective.

6. The Co-Development Agreement has certain limitations that leave out a large percentage of the migrant worker population that could benefit from its management procedures. The agreement only covers certain activities and establishes a minimum age of 18, excluding guarantees for contracting women and men workers in different services such as chauffeurs, security guards and domestic workers, and especially the large majority of women workers and minors who continue to carry out temporary jobs without the protection of the agreement. Furthermore, the agreement fails to mention access to social security for workers.

**Recommendation:** Expand the activities covered under this agreement to include women migrant workers in domestic service and other workers in services and small industries. Recognize that child labor is a reality and include procedures to secure the protection of workers who are minors during contracting and for guaranteeing access to social security. Include the option of the “cross-border worker” category in the agreement’s framework of protection. Include a guarantee of access to health care services and social security in general in a future bilateral agreement.

7. In principle, in Costa Rica, temporary migrant workers have the same labor rights as Costa Ricans. However, implementation of and access to these rights is what places them at risk. In practice, migrant workers do not have effective access or guarantees of these rights due to the challenge of claiming labor rights in the country. Moreover, the immigration law seems to make the migrant worker responsible for CCSS enrollment although, according to labor law, this is an employer obligation.

**Recommendation:** It is necessary to have effective procedural laws, as well as an administrative apparatus for labor and migration inspection and tribunals within the justice system that are able to enforce the labor code. In particular, it is necessary to strengthen monitoring and supervision of compliance with labor standards, including worker affiliation with the CCSS and INS. It is also necessary to strengthen mechanisms for access to justice for Nicaraguan workers in Costa Rica and, also, upon their return to Nicaragua.

*Quo Vadis? Recruitment and Contracting...*
Recommendation: The DGME/CR and CCSS should seek mechanisms to guarantee that affiliation for workers who seek work permits is an employer responsibility, as established under national legislation. While voluntary affiliation does exist, this should be the last option.

Recommendation: Clarify under the law and in policies that migrant workers, regardless of their immigration status, have the right to health and should have access to health care, especially migrant women workers to receive basic services for their comprehensive health care, sexual and reproductive health and mental health.

8. The obstacles that exist for achieving respect for the human rights of temporary migrant workers belong to a broader arena than a simple bilateral agreement carried out by the Executive Branch. Many of these obstacles not only affect migrant workers but also Costa Rican workers, as in the case of the absence of appropriate workplace inspection.

Recommendation: Consider dissemination of information on procedures to obtain work permits, rights, and complaint mechanisms in the case of the violation of worker rights as a component of any future program or regulation on temporary labor.

Recommendation: Increase the role of labor unions, through bilateral agreements for cooperation among labor unions, to provide transnational legal aid to workers and, also, to detect the more vulnerable and exploited undocumented workers so that unions can play a more effective role in defending them.

Recommendation: As for access to social security, especially in terms of occupational health, the regimen of company inspection and verification of requirements should be strengthened in coordination with health, labor and local authorities. In addition, sanctions should be applied to companies who fail to comply with their obligation to insure their workers against workplace accidents, among other obligations.

9. At this time, the concept of co-development seems to be of secondary importance in more recent proposals in Costa Rica, due to a series of aspects than have not turned out satisfactory in practice. Criticism of the agreement has been less aimed at the intention and language of the agreement and more at supervision and the challenges of labor law enforcement. Costa Rica is currently considering models other than the co-development model, given the limitations observed for implementation. One of these projects is a pilot border program.

Recommendation: In future consideration of any labor migration agreement or program between Nicaragua and Costa Rica, it will be important to place this topic within the framework of a comprehensive bilateral agenda. Greater accompaniment will be needed to facilitate negotiation, rapprochement between the two countries, and both bilateral and internal coordination. Given the complexity of political and economic issues, the effectiveness of an agreement rests on political will to make participating authorities comply with the established procedures, as well as upon the generation of resources to strengthen the institutional capacity of the parties involved.

Recommendation: Some organizations have proposed the creation of a binational, inter-institutional committee to be integrated by representatives of public human rights bodies, labor unions, migrant workers’ associations, and other civil society organizations. This body would address a series of actions related to the implementation of bilateral labor migration agreements. With this mechanism, this body could propose actions to facilitate recruitment and contracting in accordance with established bilateral procedures, and could review issues such as documentation, joint monitoring, and channeling and attention of worker complaints.
Bibliographical references


2. AECID, UNFPA, CENDEROS. *Nudos Críticos que Afrontan las Mujeres Migrantes y Transfronterizas en Condiciones de Violencia de Género para Acceder a la Justicia*. Available at: http://www.cenderos.org/document/nudos-criticos-que-afrontan-las-mujeres-migrantes/


Other references (laws, jurisprudence, surveys, websites, etc.)

3. Código de Trabajo Costarricense (Ley No. 2)
4. Dirección General de Migración y Extranjería Costa Rica www.migracion.go.cr
5. Dirección General de Migración y Extranjería Nicaragua www.migob.gob.ni
7. Ley Constitutiva de la Caja Costarricense de Seguro Social (Ley No. 17)
10. Ministerio del Trabajo Nicaragua www.mitrab.gob.ni/
IV. Conclusions

This research has analyzed a wide diversity of temporary labor migration systems operating on the American continent. Among the systems addressed, the common factor reflected in receiving countries is the goal to regulate labor migration flows and incorporate temporary workers into the workforce. The systems are differentiated, both in their vision and in their specific goal, by the participation of a diversity of actors, the system’s formality in labor terms, and the assurance of migrant worker rights.

In spite of the existence of a considerable number of international standards ruling labor migration, there are still gaps in the protection of migrant worker rights in all countries and in every single one of the work migration systems analyzed. The systems’ diversity has enabled the identification of positive aspects that must be taken into account in any debate on labor migration. It has also provided elements that contribute toward improving the living conditions of migrant workers. It is necessary to highlight that apart from the urgent need to strengthen migrant worker recruitment and contracting, it is also imperative for migrant workers to gain access to existing social protection rights.

On the characteristics of the migrant labor systems

1. It was confirmed that in the six temporary labor systems targeted by this study, there exists a tendency to meet the labor market needs of the receiving country’s economy (Canada, United States, Mexico and Costa Rica) without necessarily taking into account the principles of bilaterality and equality regarding the need for a supply of workers from the country of origin. The existing approach considers the worker as a labor unit, rather than as a person, which has had a direct impact on his/her human labor rights.
2. Concurrently, it has been confirmed that some of the analyzed systems were created as a reaction to solve existing issues with migration flows, and as a response to the search for mechanisms to regulate irregular migration and facilitate the regular admission of migrants for the purpose of employment. This approach only sees migrant workers as statistics without considering their contribution to both the labor market and the society of the receiving country.
3. The study only identified two systems with bilaterality in the agreements signed between sending and receiving countries: the SAWP between Mexico and Canada, and the Co-Development Agreement between Nicaragua and Costa Rica.
4. The remaining systems that were analyzed are unilateral and are not temporary work programs. They are actually temporary labor migration management systems.
5. Although some of the systems may be seen as bilateral agreements, they do not meet ILO standards.
6. There is no comprehensive labor migration policy in the region to deal with the temporary labor systems studied. There is no policy to make sure that the needs of both the demand from the receiving country and the supply from the sending country are met in a responsible way, adhering to national and international human rights standards.
7. There is a progressive tendency towards the privatization of agencies intervening in the temporary labor systems. This generates competition in the countries of origin, and causes a deterioration of the conditions under which workers are contracted. In other words, the countries of origin are willing to accept worse hiring and working conditions.
8. In each of the analyzed systems, it is clear that there is a need to strengthen the legal frameworks and the administration system in order to ensure access to justice and the protection of worker rights.
9. In the systems under study, the States’ participation in temporary labor management, operation and surveillance has been waning. A privatization of recruitment processes has been observed. This opens the
door to more violations and less supervision/penalties, which implies that both mechanisms and rights are being diluted. Recent examples in Central America encourage more involvement of the labor ministries, such as the Co-Development Agreement, which involves both mechanisms and rights, and the El Salvador Program, which attempts to keep vigil over migrant workers’ rights.

Actors involved

10. Unions can play an important role in representing workers in relation to companies, ensuring compliance regarding rights and benefits not only for migrant workers, but also for their family members. UFCW in Canada, for example, has promoted standards for rights and their compliance in the provinces. Unions recognize the importance of including temporary migrant workers and their family members. As opposed to the USA, the UFCW from Canada not only has a policy to support migrant workers’ help centers, although they cannot be part of them, but has also created a national alliance.

11. Civil society organizations also play an important role in defending and advocating temporary migrant worker rights. They carry out essential work, documenting and monitoring the situation of migrant workers. In some cases, they act in place of the surveillance, monitoring and information work carried out by governmental bodies. In other cases, they support the workers through organizations that work with migrants.

12. Consulates in the receiving countries have sometimes represented a space where migrant workers can get support and information. However, due to the lack of a comprehensive regulation of labor migration policy, on some occasions consulates have acted to the detriment of the rights of temporary migrant workers.

Recruitment and contracting

13. Most countries of origin and destination have insufficient sources of official information about labor migration, regarding migrant workers’ entry and exit, and their location and employment. In particular, no systematized information exists about the number of migrant workers or the professional categories required by the receiving countries or the employers requesting migrant labor. There is no information about migration candidates in the sending countries either.

14. Contracting modalities do not tend to be obligatory. They are therefore left to the discretion of labor market’s demand. A good example can be found in the procedures followed by the SAWP-Mexico, where contracting is carried out through governmental bodies only.

15. The lack of a regulatory framework aimed at recruitment and contracting companies leads to the infringement of worker rights. In some countries, provisions regulating contracting do exist, but are not implemented.

16. Because most of the analyzed systems do not derive from a bilateral agreement, work agreements are difficult to enforce. Compliance with the “contract” (whether verbal or in writing) is left to the employer’s discretion. Temporary migrant workers therefore move within a less regulated territory where the capacity to demand compliance with standards is hindered.

17. In all the analyzed systems, the lack of occupational mobility continues to restrict worker rights. As a result, both women and men workers are in a situation of vulnerability, since their stay in the country depends on the employer. The case of the Mexican border worker visa (FMTF by its acronym in Spanish) should be noted since, like any other visa, it allows workers to change employer without having to leave the country.

18. Temporary migrant workers lack information about their rights when they are contracted to work in another country.

19. Most temporary labor systems reveal systematic violations of migrant worker rights in the recruitment and contracting processes: lack of truthful information, undue fees, fraud, lack of payment, wage
deductions, discrimination and document confiscation, among other violations.

20. Although labor inspections in most cases are part of the duties of the labor authorities, in practice there are limitations to carrying out this work. Mechanisms to supervise compliance with both the contract itself and labor law, for instance, are missing. This is particularly germane since otherwise it is impossible to be able to identify non-compliance with the labor law and therefore take action to correct such situations.

21. The procedure followed by labor and migration authorities from Nicaragua and Costa Rica, which is the cornerstone of the Co-Development Agreement, has been identified as a good example, due to their participation, coordination and formalization in bilateral procedures. Another example would be the participation of the national employment service, like in SAWP-Mexico.

22. The importance of implementing programs in the country of origin, to safeguard the rights of their own workers should also be noted. El Salvador’s management model represents a good practice that seeks protection for Salvadoran workers abroad through the regulation of the recruitment and contracting processes.

**Social security**

1. Given the lack of a bilateral agreement, most of the systems fail to have mechanisms that enable the involved States to ensure migrant workers the economic benefits derived from the work agreement.

2. Most systems fail to establish obligatory equal treatment regarding the taxes, fees and fiscal payments migrant workers must make. There is also a lack of agreement among the States involved regarding the avoidance of double taxation.

3. In all of the systems, one of the main identified problems related to the right to social security is the lack of mechanisms, both in the countries of origin and destination, to ensure that migrant workers enjoy basic social security rights, such as health care, satisfactory working conditions, old-age and disability retirement rights, compensation for work-related accidents, maternity and paternity leave, etc. Costa Rica is the closest example of a universal protection system, and the new law stipulates that migrant workers are required to register under the social security system.

4. None of the systems include prior identification of the mechanisms and types of social security migrant workers should be entitled to, by the governments of the countries participating in the formulation of temporary labor programs or visas.

5. The rights migrant workers are in the process of acquiring or have acquired once they are working have not been identified either. The possibility of the rights and the entirety of the contributions or benefits received in a foreign country being transferable to the country of origin has also not been identified. Without these rights, there is no way migrant workers can access social security.

6. The right to housing or accommodation is an important component of satisfactory working conditions. Most systems do not comply with this right or do not even contemplate it. In those cases in which this right is stipulated in the work agreement, no mention is made of the conditions.

7. In the case of the right to social security, the lack of bilaterality, state surveillance and administration in most of the temporary work systems analyzed led to the following most recurrent infringements: violation of the right to health care, violations regarding satisfactory working conditions, work hour violations, lack of overtime payment, lack of job training, lack of work accident compensation, paycheck deductions for social rights, such as the right to paternity and maternity leave and the right to a pension, as well as the lack of enforcement of the right to social security.
V. Recommendations

The existence of temporary work systems is based on an imbalance or difference between employers and workers; and between countries with a workforce demand and countries with unemployment and underemployment. Within the context of the current economy and global migration, countries will evidently keep seeking alternatives to promote or regulate labor mobility as well as labor immobility (depending on each specific case). In part, the recommendations aim at balancing or bridging the different levels in order to help avoid labor migration without protection and under conditions of risk for migrant workers and their families.

For this to be possible, there needs to be significant restructuring at different levels in order to set up systems that respond to the present context, integrate into a labor migration policy framework with its corresponding institutionalization and coordination of governmental responsibilities, protect and promote migrant workers’ social and economic rights, and eliminate the differentiated treatment derived from earlier models in order to create conditions for a win-win situation favoring the interests of the sending and receiving countries, as well as the interests of the migrant workers themselves.

Upon evaluating some of the good practices in the six analyzed systems, it can be concluded that migrant worker protection against abusive practices in the recruitment and contracting processes will only move forward if governments adopt an active regulatory role, preferably in a bilateral and coordinated manner. In other words, greater participation by both sending and receiving countries in the different aspects of labor migration would help compensate the power imbalance which has allowed governments and employers from the receiving countries to impose unfavorable conditions on migrant workers.

Likewise, in order to improve temporary migrant workers’ access to social protection, it is essential to eliminate the obstacles they face that make it impossible for them to enjoy the corresponding rights. In this case, bilaterality would also favor migrant workers receiving the same treatment as national workers.

General recommendations

1. In 1999, ILO noted the advantage of bilateral agreements to adapt to the particularities of specific migrant groups. That way, both the sending and receiving States share the responsibility of ensuring adequate living and working conditions as well as monitoring and more actively managing the labor migration process as a whole. Likewise in 2004, ILO considered that bilateral instruments, in spite of not providing an exhaustive solution to issues brought up by international workforce migration, are still a useful tool to ensure a better protection for migrant workers, and also a more effective means for managing labor migration flows. The analysis developed in this document thus demonstrates that it is essential that the governments of the analyzed countries consider formulating their temporary labor systems under the principle of bilaterality in order to thus ensure the rights of migrant workers.

2. In theory, temporary labor systems must be based on an empirical confirmation that a country is experiencing worker shortage. The contents of the agreements must therefore reflect the situation in the labor market, and must have the flexibility to adapt to fluctuations. These elements are the cornerstone of bilateral agreement sustainability. Temporary labor systems should be based on studies regarding the demand and supply of temporary migrant workers, and on the needs of the labor market in both the

372 ILO Recommendation 86 contains an agreement type that details the methods that should be used in order to apply the principles established in Convention 97 and its recommendation destined to serve as a model for the States to follow upon signing bilateral agreements. See Annexes 3 and 4.
373 Ibid.
countries of origin and destination. This will ensure that they are responding to the labor migration dynamics without affecting the rights of migrant workers. Knowledge about the labor market should be favored with contributions from labor market units of governments, consulates in receiving countries, research institutes, independent consultants and the private sector.

3. Temporary labor systems must be framed within a context of comprehensive labor migration policies in both the countries of origin and destination. A diagnostic analysis of the existing system’s strengths and weaknesses, consultation with other involved sectors (employers, workers, civil society, academia, etc.), concordance with each country’s development policies, consistency with national and international regulations, and a budget allocated for a sustainable implementation of the program, should also be considered.

4. Interinstitutional mechanisms with different actors may be established in order to design or update temporary migrant worker systems.

5. In order to strengthen inner and bilateral coordination, institutions devoted to labor, migration and social security policies, from both the country of origin and the receiving country, must get involved in designing the system.

6. The systems must incorporate resources and procedures for appropriate planning, monitoring, evaluation and follow-up.

7. The countries interested in developing bilateral temporary labor systems must reinforce their internal regulatory framework through signing, ratifying and adhering to the fundamental UN and ILO conventions on human rights. In particular, the conventions that more specifically protect migrant worker rights regarding contracting and access to social security: Conventions 97 and 143 (related to migrant workers), Convention 181 (regarding the regulation of private employment agencies), the Palermo Protocols (regarding human trade or human trafficking), and Conventions 102 and 118 (regarding the minimum standards for social security and equal treatment therein, respectively); as well as the 1990 Convention on the Protection of the Rights of All Migration Workers and Members of Their Families.

Recommendations on recruitment and contracting

1. Throughout the study, it was observed that the fact that a program exists, whether as a bilateral program (such as SAWP-Mexico, and to a certain extent the Co-Development Agreement between Costa Rica and Nicaragua) or as a unilateral program, with the purpose of protecting worker rights (such as the Salvadoran IOM-mediated program with private companies), can lead to the regulation of the recruitment, selection and contracting processes. It could also lead to the regulation of the working conditions of a certain number of migrant workers, the elimination of the intermediary function of contractors, the formalization of hiring through contracts, and thus reduce the violation of migrant worker rights.

2. In the face of the increasing privatization of the temporary labor systems’ administration, it is necessary to involve the governments of the countries sending and receiving temporary migrant workers in the management, operation, and surveillance of temporary labor systems. Efficient internal regulatory measures must be legislated so that governments can supervise and monitor recruitment, contracting and placement of workers from other countries.

3. Regardless of who is conducting the recruitment, selection and contracting process, in accordance with the national and international laws in force, the governments of both countries must regulate this process. It must be transparent and fair, with full respect for migrant workers’ rights. A specific recommendation is to establish procedures to regulate private action in contracting migrant workers.

4. The mechanisms recommended for the regulation of private recruitment agents include:
   a. the creation of a registry in both countries so that recruiters can be identified by government agencies;
   b. recruitment agency licensing should only be obtained under the condition that the agents pass an exam indicating their knowledge of the labor rights of workers;
c. limits should be placed on the fees that recruitment agents charge migrant workers;
d. government labor intermediation offices should be established in order to concentrate all services;
e. minimum standards should be set for the formulation of work agreements;
f. the signature of work agreements validated with the approval of the government of the countries of origin and destination should be obligatory;
g. recruiters should be required to deposit a guarantee to repair possible damage caused to the migrant workers who have paid for their services;
h. effective control procedures should be established; and
i. joint responsibility between recruiters and employers should be introduced so that, in case of contract violation, migrant workers can appeal, even if they have returned to their country of origin.

5. Temporary labor systems should ensure the workers’ labor mobility in order to avoid vulnerability vis-à-vis employer mistreatment or violations of their labor rights.

6. It is important to provide extensive support services to workers both in the countries of origin and destination, including the provision of information before departure and upon arrival in the receiving country. Training courses in migrant worker labor rights and obligations, orientation courses regarding social and legal support services in the country of destination through consular representation, as well as training for the work they will actually be performing should be implemented.

Recommendations on social security

1. Similar to the process involved in contracting conditions, the temporary labor systems that are designed bilaterally with the participation of the governments of both countries should ensure more concrete access to social security programs. In the case of the SAWP between Canada and Mexico, in spite of the progress in hiring conditions without intermediaries (directly between government offices), access to participation in unemployment programs and family health care continues to be a restrictive process that offers limited access to workers and their families. As for bilateralism, the creation of a mechanism to exchange administrative information between participating countries is recommended. This would be aimed at providing migrant workers with information regarding social security systems and how to access them.

2. Like other studies, one of the identified challenges for migrant workers to access social security is the lack of information regarding how to make use of the services, as well as lack of trust. The social security policies accompanying labor policies must therefore be developed with insertion strategies for migrant workers, whether or not they are temporary workers.

3. Because of the lack of bilaterality in the development of temporary labor systems, it has been detected that workers usually pay taxes both in their country of origin and in the country where they work, thus leading to double taxation. In view of this situation, the governments of the countries participating in the temporary labor systems are recommended to identify the social security mechanisms and types of benefits migrant workers and their families are entitled to, and to inform about them from the moment the workers are hired.

4. The governments of the countries participating in the temporary labor systems are recommended to identify whether migrant workers receive the same treatment as national workers, and to formulate mechanisms to ensure equal treatment.

5. The governments of the participating countries are recommended to establish a mechanism through which to identify not only the rights the workers are in the course of acquiring, as well as the rights acquired once the labor relationship has been established, but also the possibilities of receiving benefits from taxation paid in the receiving country. In order to ensure that migrant workers will receive social
security benefits, a mixed committee should be designed to carry out ongoing monitoring of the conditions enabling workers to access social security benefits.

6. Pension and health care benefits for migrant workers were identified to be of vital importance to migrant workers and their families. Bilateral or multilateral social security agreements between governments of countries participating in the temporary labor systems are a necessary instrument to ensure the right to social protection via social security systems for workers. To move forward in this direction, governments of the countries of origin and destination should promote an ongoing dialogue about this topic that comprises the standards pertaining to the right to social protection that migrant workers and their families are entitled to.

**Recommendations on standard supervision, monitoring and compliance**

1. Inspection is a key action in the protection of labor rights, not only of migrant workers, but also of workers in general. The countries receiving temporary workers must periodically and proactively carry out inspection visits to check compliance with labor rights in the workplace. Inspection has a triple dimension: It is dissuasive (persuading the employer to comply with the standards), educational (informing about how to comply with the labor law) and indicative (guiding the actions needed to improve compliance).

2. In order to expand migrant worker protection, sending countries must strengthen their capacity to monitor and revise working conditions.

3. Mechanisms for effective access to labor justice by migrant workers hired through temporary labor programs should be promoted.

4. Unions that are not yet part of the temporary labor migration agenda are recommended to include the issues of temporary migrant workers within their internal and international work agenda. At the same time, they can also help to disseminate information on migrant workers’ labor rights and procedures.

5. Considering the relevance of the work civil society organizations carry out in documenting and monitoring the migrant labor theme, it is recommended that both the governments of the analyzed countries, and international foundations and coops support the development of the institutional capabilities of civil society organizations. In particular, documentation, monitoring of the conditions of both temporary migrants and the defense of exemplary cases that help evidence the structural problems of the temporary labor systems should be supported.

6. Given the importance of the aforementioned actors, the governments of the analyzed countries are recommended to open spaces for these actors to participate in the design and evaluation of temporary labor systems.

7. Civil society organizations and unions are recommended to participate in interinstitutional processes that enable the design and updating of temporary labor systems, as well as to promote actions for impact evaluation with an emphasis on rights compliance and access to labor justice. They are also recommended to help identify good practices that allow for improvements in the conditions of temporary migrant workers.

8. Consular representations are recommended to develop their skills in the protection and representation of temporary migrant workers. They are recommended to strengthen information services for temporary migrant workers, as well as to ensure greater closeness to temporary migrant workers when they are at work in another country. They are also recommended to generate systems to monitor the hiring conditions of temporary workers.
VI. General references

12. Primer Informe Periódico de México al Comité de Protección de los Derechos de Todos los Trabajadores Migratorios y de sus Familiares.

Links of interest
Annexes
### Annex 1: Acronym Glossary

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<tr>
<th>Acronym</th>
<th>Name</th>
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<tbody>
<tr>
<td>AECID</td>
<td>Agencia Española de Cooperación Internacional para el Desarrollo</td>
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<tr>
<td>CBSA</td>
<td>Canada Border Services Agency</td>
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<tr>
<td>CCSS</td>
<td>Caja Costarricense de Seguro Social</td>
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<tr>
<td>CDHFMC</td>
<td>Centro de Derechos Humanos Fray Matías de Córdova (México)</td>
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<tr>
<td>CIC</td>
<td>Citizen and Immigration Canada</td>
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<tr>
<td>CIDH</td>
<td>Comisión Interamericana de Derechos Humanos</td>
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<tr>
<td>CONAMIGUA</td>
<td>Consejo Nacional de Atención al Migrante de Guatemala</td>
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<td>CONAPO</td>
<td>Consejo Nacional de Población (México)</td>
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<tr>
<td>COPAREM</td>
<td>Consejo Parlamentario Regional sobre Migraciones</td>
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<tr>
<td>CRM</td>
<td>Conferencia Regional de Migración</td>
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<tr>
<td>DGME</td>
<td>Dirección General de Migración y Extranjería (Costa Rica; Nicaragua)</td>
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<tr>
<td>DML</td>
<td>Departamento de Migraciones Laborales (Costa Rica)</td>
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<tr>
<td>DNE</td>
<td>Dirección Nacional de Empleo (Costa Rica)</td>
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<tr>
<td>FMTF</td>
<td>Forma Migratoria para Trabajador Fronterizo (México)</td>
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<td>FMVA</td>
<td>Forma Migratoria Visitante Agrícola (México)</td>
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<td>Human Resources and Skills Development Canada</td>
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<td>IMSS</td>
<td>Instituto Mexicano del Seguro Social</td>
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<td>INEC</td>
<td>Instituto Nacional de Estadística y Censo (Costa Rica)</td>
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<td>Instituto Nacional de Migración (México)</td>
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<td>INS</td>
<td>Instituto Nacional de Seguros (Costa Rica)</td>
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<td>IRPA</td>
<td>Immigration and Refugee Protection Act (Canadá)</td>
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<tr>
<td>ISSS</td>
<td>Instituto Salvadoreño de Seguridad Social</td>
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<tr>
<td>LMO</td>
<td>Labor Market Opinion</td>
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<td>Ministerio del Trabajo (Nicaragua)</td>
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<td>MRE</td>
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<td>Organización Internacional del Trabajo</td>
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<td>Parlamento Centroamericano</td>
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<tr>
<td>PIB</td>
<td>Producto Interno Bruto</td>
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<td>PNP</td>
<td>Foreign Worker Provincial Nominee Program</td>
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<td>PNUD</td>
<td>Programa de Naciones Unidas para el Desarrollo</td>
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PROSALTEX  Programa de Trabajadores Temporales Salvadoreños en el Exterior
PTAT  Programa de Trabajadores Agrícolas Temporales México-Canadá
PTET  Programa de Trabajadores Extranjeros Temporales (Canadá)
PTET/Piloto  Proyecto Piloto para Calificación Baja (Pilot Project for Occupations Requiring Lower Levels of Formal Training)
SICA  Sistema de la Integración Centroamericana
SEGOB  Secretaría de Gobernación (México)
STPS  Secretaría del Trabajo y Previsión Social (México)
TLC  Tratado de Libre Comercio de América del Norte
UFCW  United Food and Commercial Workers Canada (UFCW Canada),
UTTE  Unidad de Trabajadores Temporales en el Ext
Annex 2: Summary of International Agreements and Conventions

C97 Convenio sobre los trabajadores migrantes (revisado), 1949.

Por medio de este Convenio, los Estados miembros se comprometen a informar sobre la política y la legislación nacional referentes a la emigración y a la inmigración; disposiciones especiales relativas al movimiento de trabajadores migrantes y a sus condiciones de trabajo y de vida; los acuerdos generales y los arreglos especiales en estas materias, celebrados por el Miembro en cuestión.

El convenio establece las obligaciones que los Estados miembros tendrán para con los trabajadores migrantes que se encuentren legalmente en su territorio y reglamenta el trato que los mismos deben recibir durante su estancia en el país de destino – no discriminatorio y en ciertos temas no menos favorable que el que aplique a sus propios nacionales (art 6).

Asimismo, los Estados se obligan a garantizar que las operaciones efectuadas por su servicio público del empleo no ocasionen gasto alguno a los trabajadores migrantes; a permitir, según los límites fijados por la legislación nacional relativa a la exportación y a la importación de divisas, la transferencia de cualquier parte de las ganancias y de las economías del trabajador migrante que éste desee transferir. También, cuando el número de migrantes que van del territorio de un Miembro al territorio de otro sea considerable, las autoridades competentes de los territorios en cuestión deberán, siempre que ello fuere necesario o conveniente, celebrar acuerdos para regular las cuestiones de interés común que puedan plantearse al aplicarse las disposiciones del presente Convenio.

El Convenio cuenta con tres anexos:

El Anexo I se aplica a los trabajadores migrantes que no hayan sido reclutados en virtud de acuerdos sobre migraciones colectivas celebrados bajo el control gubernamental. Este anexo define conceptos tales como: reclutamiento, introducción, y colocación, establece el deber de los estados de reglamentar dichas operaciones, así como que organismos estarán autorizados para efectuar dichas operaciones y que las mismas efectuadas por los servicios públicos de empleo deberán ser gratuitas. Aquellos que cuenten con un sistema para controlar los contratos de trabajo celebrados entre un empleador, o una persona que actúe en su nombre, y un trabajador migrante deberá cumplir con ciertas exigencias establecidas en el art 5 del anexo 3.

El anexo II trata los mismos temas que el anexo I, pero se aplica a trabajadores migrantes que hayan sido contratados en virtud de acuerdos sobre migraciones colectivas celebrados bajo el control gubernamental.

El anexo III trata sobre el tratamiento que se le debe dar a los efectos personales, herramientas y equipo de los trabajadores migrantes.

C143 Convenio sobre los trabajadores migrantes, (disposiciones complementarias), 1975

Los agentes de reclutamiento pueden ser públicos o privados, empresas establecidas o individuos con relación con la comunidad de origen; su función es facilitar la movilidad de trabajadores tras fronteras nacionales y colocarlos en empleos en otro país. Sin embargo, debido a cuestiones estructurales (como la pobreza, el

374 A los efectos del Convenio, la expresión trabajador migrante significa toda persona que emigra de un país a otro para ocupar un empleo que no habrá de ejercer por su propia cuenta, e incluye a cualquier persona normalmente admitida como trabajador migrante y contempla algunas excepciones estipuladas en el art. 11
desempleo y la diferencia salarial entre países de origen y de destino), la oferta de trabajadores de menor calificación sobrepasa por mucho la demanda de mano de obra. Hay más trabajadores que desean trabajar en otro país para mejorar sus condiciones de vida, que puestos de empleo, lo cual coloca a los trabajadores migratorios en una situación de vulnerabilidad ante abusos en el proceso de reclutamiento y contratación. Existe muy poca información sobre sus prácticas y lo que estas implican para los trabajadores migrantes, principalmente debido a la falta de datos confiables y la amplia variedad en las políticas de los países, desde una política de laissez-faire respeto a reclutadores privados a un monopolio estatal de intercambio laboral.375

C181 sobre agencias privadas de reclutamiento, 1997

El Convenio define conceptos como agencia de empleo privada376, trabajadores y tratamiento de los datos personales de los trabajadores. Tiene por finalidad permitir el funcionamiento de las agencias de empleo privadas, así como la protección de los trabajadores que utilicen sus servicios, en el marco de sus disposiciones. Establece que los estados miembros podrán en ciertas circunstancias: prohibir el funcionamiento de agencias de empleo privadas respecto a ciertas categorías de trabajadores o en ciertas ramas de actividad económica o excluir a los trabajadores de ciertas ramas de actividad económica, del campo de aplicación del presente Convenio, o de algunas de sus disposiciones.

Establece que la determinación del régimen jurídico de las agencias de empleo privadas se efectuar de conformidad con la legislación y la práctica nacionales, previa consulta con las organizaciones más representativas de empleadores y de trabajadores y que todo miembro deberá determinar, mediante un sistema de licencias o autorizaciones, las condiciones por las que se rige el funcionamiento de las agencias de empleo privadas.

Los estados adoptarán medidas para asegurar que los trabajadores contratados por las agencias de empleo privadas que prestan los servicios no se vean privados del derecho de libertad sindical y del derecho a la negociación colectiva.

Que el tratamiento de los datos personales de los trabajadores por las agencias de empleo privadas deberá efectuarse en condiciones que protejan dichos datos y que respeten la vida privada de los trabajadores y limitarse a las cuestiones relativas a las calificaciones y experiencia profesional de los trabajadores en cuestión y a cualquier otra información directamente pertinente.

Establece a su vez la gratuidad de las agencias de empleo privadas quienes no podrán cobrar a los trabajadores, ni directa ni indirectamente, ni en todo ni en parte, ningún tipo de honorario o tarifa; y que los estados miembros deberán garantizar a los trabajadores migrantes reclutados o colocados en su territorio por agencias de empleo privadas gocen de una protección adecuada y para impedir que sean objeto de abusos. Esas medidas comprenderán leyes o reglamentos que establezcan sanciones, incluyendo la prohibición de aquellas agencias de empleo privadas que incurran en prácticas fraudulentas o abusos y la posibilidad de concluir acuerdos laborales bilaterales entra países para evitar abusos y prácticas fraudulentas en materia de reclutamiento, colocación y empleo. Los estados deben asegurar que las agencias de empleo privadas no recurran al trabajo infantil ni lo ofrezcan. Estados deben adoptar medidas necesarias para asegurar que los trabajadores empleados por agencias

375 Christiane Kuptsch. Merchants of Labour.
376 Agencia de empleo privada: toda persona física o jurídica, independiente de las autoridades públicas que presta a) servicios destinados a vincular ofertas y demandas de empleo, sin ser parte en las relaciones laborales que pudieran derivarse; b) servicios consistentes en emplear trabajadores con el fin de ponerlos a disposición de una tercera persona, física o jurídica ("empresa usuaria"), que determine sus tareas y supervise su ejecución) otros servicios relacionados con la búsqueda de empleo, como brindar información, sin estar por ello destinados a vincular una oferta y una demanda específicas.
de empleo privadas gozén de una protección adecuada en materia de derechos humanos laborales y medidas para responsabilizar a las agencias en caso de no hacerlo.


En la Primera Parte, define la trata de personas como la captación, el transporte, el traslado, la acogida o la recepción de personas, recurriendo a la amenaza o al uso de la fuerza u otras formas de coacción, al rapto, al fraude, al engaño, al abuso de poder o de una situación de vulnerabilidad o a la concesión o recepción de pagos o beneficios para obtener el consentimiento de una persona que tenga autoridad sobre otra con fines de explotación. Esa explotación incluirá, como mínimo, la explotación de la prostitución ajena u otras formas de explotación sexual, los trabajos o servicios forzados, la esclavitud o las prácticas análogas a la esclavitud, la servidumbre o la extracción de órganos.

En el Protocolo se establece que, a los efectos de esa definición, el consentimiento dado por la víctima no se tendrá en cuenta cuando se haya demostrado el recurso a medios ilícitos. De esa manera, en el Protocolo se admite que el ejercicio de la libre voluntad de la víctima a menudo se ve limitado por la fuerza, el engaño o el abuso de poder. Asimismo, el protocolo excluye toda posibilidad de consentimiento cuando la víctima es menor de 18 años. A su vez, este instrumento internacional estipula la obligación de los estados de adoptar las medidas legislativas y de otras índoles necesarias para tipificar en su derecho interno la trata de personas.

La definición de trata, según el Protocolo, está constituida por tres elementos básicos: en primer lugar, la acción (de captación, etcétera); en segundo lugar, los medios (la amenaza o el uso de la fuerza u otras formas de coacción, etc.); y, en tercer lugar, el fin de explotación. En consecuencia, cualquier conducta que combine las acciones y medios enunciados y se realice con cualquiera de los fines indicados debe considerarse un delito de trata.

En la Segunda Parte, se analiza el tema de la asistencia y protección a las víctimas de trata. Régimen aplicable a las víctimas en el estado receptor; así como la repatriación de las víctimas.

En la Tercera Parte, se desarrollan las medidas de prevención, cooperación y otras medidas de información y capacitación. También medidas fronterizas, seguridad y de control de documentos.

La convención internacional sobre la protección de todos los trabajadores migrantes y sus familias de Naciones Unidas, 1990

La convención internacional sobre los trabajadores migratorios da un marco jurídico mínimo, sobre las condiciones laborales de los trabajadores migratorios. La convención busca implantar medidas para erradicar los movimientos migratorios clandestinos, castigando principalmente a traficantes, pero también a empleadores de migrantes en situación irregular.

La Parte I: La presente Convención será aplicable, salvo cuando en ella se disponga otra cosa, a todos los trabajadores migratorios durante todo el proceso de migración de los trabajadores migratorios y sus familiares, que comprende la preparación para la migración, la partida, el tránsito y todo el periodo de estancia y de ejercicio de una actividad remunerada en el Estado de empleo, así como el regreso al Estado de origen o al Estado de residencia habitual.
Define "trabajador migratorio" toda persona que vaya a realizar, realice o haya realizado una actividad remunerada en un Estado del que no sea nacional; "trabajador fronterizo" todo trabajador migratorio que conserve su residencia habitual en un Estado vecino, al que normalmente regrese cada día o al menos una vez por semana; "trabajador de temporada" todo trabajador migratorio cuyo trabajo, por su propia naturaleza, dependa de condiciones estacionales y sólo se realice durante parte del año; entre otros.

La Parte II: No discriminación en el reconocimiento de los derechos La Convención busca garantizar el trato igualitario y las mismas condiciones laborales para migrantes y nacionales

La Parte III: Derechos humanos de todos los trabajadores migratorios y sus familias

Libertad de movimiento: Los trabajadores migratorios y sus familiares podrán salir libremente de cualquier Estado, incluido su Estado de origen. Ese derecho no estará sometido a restricción alguna, salvo las que sean establecidas por ley, sean necesarias para proteger la seguridad nacional, el orden público, la salud o la moral públicas o los derechos y libertades ajenos y sean compatibles con otros derechos reconocidos en la presente parte de la Convención; y tendrán derecho a regresar en cualquier momento a su Estado de origen y permanecer en él.

Prevenir condiciones de vida y de trabajos inhumanos, abuso físico y sexual y trato degradante, esclavitud ni servidumbre, ni trabajo forzado (artículos 10-11, 25, 54); Garantizar los derechos de los migrantes a la libertad de pensamiento, de expresión y de religión (artículos 12-13); Garantizar a los migrantes el acceso a la información sobre sus derechos (artículos 33, 37); Asegurar su derecho a la igualdad ante la ley, lo cual implica que los migrantes estén sujetos a los debidos procedimientos, que tengan acceso a intérpretes, tratamiento en caso de detención y que no sean sentenciados a penas desproporcionadas como la expulsión entre otras medidas, no se podrá someter a los inmigrantes a expulsiones masivas, derecho de protección y asistencia por funcionarios consulares (artículos 16-20, 22); Garantizar a los migrantes el acceso a los servicios educativos y sociales (artículos 27-28, 30, 43-45, 54) Asegurar que los migrantes tengan derecho a participar en sindicatos (artículos 26, 40).

La Convención también sostiene que los migrantes deben tener derecho a mantener contacto con su país de origen, lo que implica:

Asegurar que los migrantes puedan regresar a su país de origen si así lo desean, permitirles efectuar visitas ocasionales e incitarlos a mantener lazos culturales (artículos 8, 31, 38); Garantizar la participación política de los migrantes en el país de origen (artículos 41-42); Asegurar el derecho de los migrantes a transferir sus ingresos a su país de origen (artículos 32, 46-48).

Parte IV: Otros derechos de los trabajadores migratorios y sus familiares que estén documentados o se encuentren en situación regular. Derecho a transferir sus ingresos y ahorros, derechos en relación al pago de impuestos, no doble tributación, libertad de elegir actividad remunerada (art 47, 48), entre otros.

Parte V: Disposiciones aplicables a categorías particulares de trabajadores migratorios y sus familiares: trabajadores fronterizos (art. 58), trabajadores de temporada (art. 59), itinerantes (art 60), vinculados a un proyecto, por cuenta propia (art.63)

Parte VI: Promoción de condiciones satisfactorias, equitativas, dignas y lícitas en relación con la migración internacional de los trabajadores y sus familiares
C102 Convenio sobre la seguridad social (norma mínima), 1952

El convenio establece las reglas sobre como deberá proveerse la asistencia médica de carácter preventivo o curativo en los casos de estado mórbido, embarazo y sus consecuencias, cuales son las personas protegidas y cuales prestaciones medicas les corresponden. Asimismo establece las reglas en cuanto a las prestaciones monetarias por enfermedad (incluye los casos de incapacidad), las prestaciones de desempleo variando los pagos y las formas según la categoría de asalariado y el tiempo por el cual se otorgue, las prestaciones de vejez edad a la que se adquiere, monto, a quienes comprende, las prestaciones en caso de accidente del trabajo y de enfermedad profesional, las prestaciones familiares, las prestaciones de maternidad, las prestaciones de invalidez, las prestaciones de sobrevivientes todas establecen que comprende, quienes están protegidos, en que deberá consistir según tipo de incapacidad, por cuanto tiempo se recibirán.

Asimismo establece la normativa respecto al cálculo de pagos periódicos (salario).

C118 Convenio sobre la igualdad de trato (seguridad social), 1962

Todo Estado Miembro para el que el presente Convenio esté en vigor deberá aplicar las disposiciones del mismo por lo que concierne a la rama o ramas de la seguridad social respecto de las que haya aceptado las obligaciones del Convenio en las siguientes ramas de la seguridad social: a) asistencia médica; b) prestaciones de enfermedad; c) prestaciones de maternidad; d) prestaciones de invalidez; e) prestaciones de vejez; f) prestaciones de sobrevivencia; g) prestaciones en caso de accidentes del trabajo y de enfermedades profesionales; h) prestaciones de desempleo; e i) prestaciones familiares.

Los estados deberán concede a los nacionales de todo otro Estado Miembro, igualdad de trato respecto de sus propios nacionales por lo que se refiera a su legislación, tanto en lo que concierne a los requisitos de admisión como al derecho a las prestaciones, en todas las ramas de la seguridad social respecto de las cuales haya aceptado las obligaciones del Convenio. No obstante, con respecto a las prestaciones de una rama determinada de la seguridad social, un Estado Miembro podrá derogar las disposiciones del Convenio respecto de los nacionales de todo Estado Miembro que, a pesar de poseer una legislación relativa a esta rama, no concede igualdad de trato a los nacionales del primer Estado Miembro en la rama mencionada.

En cuanto concierne al beneficio de las prestaciones, deberá garantizarse la igualdad de trato sin condición de residencia. Sin embargo, dicha igualdad puede estar subordinada a una condición de residencia respecto de los nacionales de todo Estado Miembro cuya legislación subordine la atribución de prestaciones de la misma rama a la condición de que residan en su territorio, excepto casos de asistencia médica, prestaciones de enfermedad, prestaciones de accidentes del trabajo o enfermedades profesionales y de las prestaciones familiares

Establece también que los Estados Miembros deberán esforzarse en participar en un sistema de conservación de derechos adquiridos y de derechos en vías de adquisición, y establece que estos deberán prever la totalización de los períodos de seguro, de empleo o de residencia y de los períodos asimilados para el nacimiento, conservación o recuperación de los derechos, así como para el cálculo de las prestaciones y ciertas reglas.

C157 Convenio sobre la conservación de los derechos en materia de seguridad social, 1982

La Parte I establece que el convenio se aplica a las mismas ramas de la seguridad social mencionadas en el Convenio 118 respecto los regímenes generales y a los regímenes especiales de seguridad social, de carácter
contributivo o no contributivo, así como a los regímenes legales relativos a las obligaciones del empleador, establecidas por ley, respecto de esas ramas.

Los Miembros podrán satisfacer sus obligaciones dimanantes de las disposiciones del Convenio por medio de instrumentos bilaterales o multilaterales. Establece las ramas de la seguridad social, las categorías de personas protegidas por los instrumentos, las modalidades de reembolso de las prestaciones otorgadas y de los demás gastos sufragados por la institución de un Miembro por cuenta de la institución de otro Miembro, salvo cuando se haya acordado renunciar al reembolso; las reglas destinadas a evitar la acumulación indebida de cotizaciones u otras formas de contribución o de prestaciones.

La Parte II establece la legislación aplicable que se determinará de común acuerdo entre los Miembros interesados, a los efectos de evitar los conflictos y deberá hacerse de conformidad con ciertas reglas fijadas en el convenio.

La Parte III trata de la conservación de los derechos en curso de adquisición y establece que todo miembro deberá esforzarse en participar en un sistema de conservación de los derechos en curso de adquisición respecto de toda rama de seguridad social mencionada en favor de las personas que hayan estado sujetas sucesiva o alternativamente a las legislaciones de dichos Miembros y que este deberá prever la totalización de los períodos de seguro, de empleo, de actividad profesional o de residencia, según los casos, cumplidos bajo las legislaciones de los miembros, que los períodos cumplidos simultáneamente bajo las legislaciones de dos o más Miembros sólo deberán tomarse en cuenta una vez. Que los estados deberán ponerse de acuerdo en las modalidades particulares para la totalización de los períodos de diferente naturaleza y de los períodos que permitan causar derecho a las prestaciones de los regímenes especiales.

La Parte IV establece el régimen de conservación de los derechos adquiridos y provisión de las prestaciones en el extranjero.
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**Significado de los Dígitos:****

- **1:** Acogida.
- **2:** Ratificación.
- **3:** Aceptación.
- **4:** Ratificación con reserva.

**Aplicación:**

- **Sí:** Aplicada.
- **No:** No aplicada.

**Firma:**

- **Sí:** Firma previa a la ratificación.
- **No:** No firma.

**Firma:**

- **Sí:** Firma notarial.
- **No:** No firma notarial.

**Nota:**

- **Sí:** Sí al tratado.
- **No:** No al tratado.
**Annex 4: Matrixes: Comparison of Temporary Migrant Labor Systems**

I. General characteristics of temporary migration schemes for workers

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Tipo</strong></td>
<td>Memorandum de entendimiento intergubernamental</td>
<td>Memorandum de entendimiento privado entre un ente de empleadores de Canadá y la Oficina Internacional de Migraciones</td>
<td>Gestiones privadas entre gobierno de El Salvador y empresas privadas canadienses. Intermediación por parte de la OIM bajo convenio de cooperación con gobierno de El Salvador.</td>
<td>Visa para trabajo agrícola temporal. Programa unilateral de reclutamiento del país emisor.</td>
<td>Visa para trabajo no agrícola temporal. Programa unilateral de reclutamiento del país emisor.</td>
<td>Visa migratoria mexicana; unilateral con facilidades para la internación y estancia en el país.</td>
<td>Acuerdo bilateral intergubernamental, con apoyo de cooperación internacional de AECID y OIM</td>
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</tr>
<tr>
<td>Dependencias, entidades y actores participantes (país receptor)</td>
<td>Canadá: CIC, HRSDC Operación: Entes no gubernamentales de empleadores (FARMS, FERME)</td>
<td>Canadá: CIC, HRSDC y CBSA y gobiernos provinciales</td>
<td>Canadá: CIC, HRSDC y CBSA y gobiernos provinciales</td>
<td>DOL- OFLC y ETA, USCIS, DOS, intermediarios, empresas y contratistas</td>
<td>DOL- OFLC y ETA, USCIS, DOS, intermediarios, empresas y contratistas</td>
<td>México: INM</td>
<td>Costa Rica: MTSS, DGME. Notable el Departamento de Migración Labora L de la Dirección Nacional de Empleo del MTSS.</td>
</tr>
<tr>
<td>Sectores de actividad principal</td>
<td>Industria Agrícola</td>
<td>Campos de hortalizas, siembra de árboles y granjas agrícolas</td>
<td>Industria agrícola (procesamiento de carnes); trabajo agrícola; servicios hoteleros</td>
<td>Agricultura: trabajo de campo, en invernaderos y viveros, siembra y recolección (naranja, tomate, lechuga, tabaco, cebolla)</td>
<td>Actividades temporales no agrícolas como: industria forestal, labores de construcción, procesamiento de mariscos, paisajismo, turismo y hospitalidad</td>
<td>Agrícola, ganadero, construcción, servicios; únicamente en los estados de Chiapas, Tabasco, Campeche y Quintana Roo de México.</td>
<td>agricultura, industria agrícola, construcción</td>
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</tr>
</tbody>
</table>

**LINEAMIENTOS GENERALES**

<table>
<thead>
<tr>
<th>Período contractual</th>
<th>Mínimo: 240 horas de trabajo durante 6 semanas</th>
<th>MÁximo: ocho meses</th>
<th>El tiempo de los contratos de trabajo varía entre 3 a 8 meses al año.</th>
<th>1 año, renovable</th>
<th>Menos de 12 meses, salvo circunstancias extraordinarias. Es una visa renovable</th>
<th>No más de 9 meses. Renovables hasta por 3 años</th>
<th>1 año, renovable</th>
<th>1 año, renovable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comida y alojamiento</td>
<td>Proporcionadas por el empleador (con costo)</td>
<td>Proporcionadas por el empleador (con costo)</td>
<td>Proporcionado por el empleador (con costo)</td>
<td>Comidas: el empleador debe proveer a cada trabajador con tres comidas al día o debe proporcionar servicios gratuitos de cocina. Puede cobrar por dichas comidas (§ 655.173). También se establece el derecho a habitaciones limpias, sin costo. 29 CFR 1910.142.</td>
<td>Comida: No se contempla. Alojamiento: A cargo del trabajador</td>
<td>No se contempla.</td>
<td>Responsabilidad del empleador (sin costo)</td>
<td></td>
</tr>
<tr>
<td>Salarios y seguros</td>
<td>Los salarios se negocian anualmente. Protección del Salario mínimo. Similares a los demás jornaleros</td>
<td>Similares a los demás jornaleros. Por ley tendrían que ser los mismos que reciben los trabajadores agrícolas canadienses aunque cada provincia tiene sus códigos laborales y se establecen algunas diferencias por provincia.</td>
<td>Similares en Canadá. De acuerdo con el contrato de trabajo temporal del modelo de gestión, se requiere el cumplimiento con las normas de empleo del país de destino.</td>
<td>Derecho a recibir el seguro de compensación obrera – el que establezca la ley del estado o beneficios de cobertura equivalentes-. Salario: el más elevado entre salario de efectos adversos (AEWR), el salario mínimo federal o estatal y el salario vigente que publica el SWA</td>
<td>El mayor de todos los salario prevaleciente entre el Federal, Estatal o local (reglamentación 2012)</td>
<td>No se contempla. Según ley mexicana.</td>
<td>Según ley costarricense.</td>
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<td>-------------------------------------------------</td>
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</tr>
<tr>
<td>Transporte</td>
<td>Una agencia de viajes afiliada a FARMS organiza el transporte a Canadá. Empleadores adelantan el costo del boleto y luego deducen el 4% de los salarios de los trabajadores para recuperar el costo</td>
<td>Proporcionado por el empleador (con costo), la OIM compra los boletos de avión para los trabajadores los cuales son pagados directamente por la FERME. Cuando un trabajador regresa por despido tienen que pagar su boleto de avión de regreso.</td>
<td>Proporcionado por el empleador, según el contrato de trabajo temporal</td>
<td>Gastos de transporte: De ida una vez cumplido 50% del contrato-vuelta-viáticos</td>
<td>Gastos de transporte: De ida una vez cumplido 50% del contrato-vuelta-viáticos</td>
<td>No se contempla.</td>
<td>Responsabilidad del empleador (sin costo)</td>
<td></td>
</tr>
<tr>
<td>Tendencias recientes</td>
<td>La operación por parte de Canadá se ha privatizado, cediendo funciones a entes de los empleadores</td>
<td>El modelo de gestión del PROSALTEX para la contratación de trabajadores está en proceso de reestructuración, con tendencia a mayor protección de los derechos de los trabajadores. Los acuerdos con empresas canadienses se establecen en los términos del modelo de gestión, incluyendo el contrato de trabajo temporal.</td>
<td>El empleador está obligado a pagar o reembolsar en la primera semana de trabajo el costo total de la visa y los gastos relacionados con el visado (según la nueva reglamentación a partir del 2012)</td>
<td></td>
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</tr>
</tbody>
</table>
II. Features and procedures of recruitment of temporary migration schemes for workers

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Definición de necesidades de contratación</td>
<td>Los empleadores registran sus necesidades de contratación ante los centros de recursos humanos locales y reciben la certificación del gobierno de Canadá.</td>
<td>Los empleadores registran sus necesidades de contratación ante los centros de recursos humanos locales y reciben la certificación del gobierno Canadiense.</td>
<td>Empresas registran sus necesidades de contratación y reciben la certificación del gobierno de Canadá. De acuerdo con el modelo de gestión salvadoreño, el MTSS, el MRE y la OIM son los que reciben las solicitudes de contratación.</td>
<td>El empleador completa una aplicación para la certificación de empleo temporal. También la puede completar los subcontratistas.</td>
<td>Empleador determina y contrata.</td>
<td>MTSS; empleadores</td>
<td></td>
</tr>
</tbody>
</table>
### Responsables del reclutamiento / Procedimiento de selección

<table>
<thead>
<tr>
<th>Rol</th>
<th>Descripción</th>
</tr>
</thead>
<tbody>
<tr>
<td>A cargo de la STPS, a través del Servicio Estatal de Empleo, Functionarios de los países de origen y Agencias privadas de colocación, que han ido adquiriendo importancia y cobran una tarifa por sus servicios.</td>
<td>Recluta la OIM directamente y luego los representantes del MTyPS y del MRE aprueban los trabajadores previamente seleccionados por la OIM. A cargo de la OIM junto con la empresa canadiense. El empleador, contratistas y reclutadores nacionales y extranjeros. El empleador, contratistas y reclutadores nacionales y extranjeros. Empleador, mediante contratistas intermediarias. Empleadores, a través de MITRAB, o agencias o contratistas independientes. Si la empresa lo desea, puede ser directamente MITRAB con su Servicio Público de Empleo.</td>
</tr>
</tbody>
</table>

### Participación del gobierno emisor

<table>
<thead>
<tr>
<th>Rol</th>
<th>Descripción</th>
</tr>
</thead>
<tbody>
<tr>
<td>El SEE anuncia la oportunidad de empleo. La STyPS recluta y selecciona a los trabajadores, la SS les practica exámenes médicos en México y la SRE otorga pasaportes especiales y brinda atención consular en Canadá.</td>
<td>El memorándum de entendimiento no está firmado por los gobiernos, y si bien establece que varias organismos del estado tienen una participación definida en la administración del PTAT-C, en la realidad su participación es difusa. Gestiona acuerdo con la empresa, y participa en y vigila proceso de contratación, según el modelo de gestión del PRÓSALTEX. No participa en ninguna de las instancias. No participa en ninguna de las instancias. No se contempla en el sistema unilateral. Según ley guatemalteca, se deben registrarse los contratistas con MTPS. MITRAB certifica empleador costarricense para reclutar en Nicaragua; vigila proceso de contratación; verifica las condiciones laborales en los contratos, DGME/NIC autoriza salida.</td>
</tr>
<tr>
<td>Participación del gobierno receptor</td>
<td>HRDC y CIC comparten la responsabilidad sobre el ingreso de trabajadores externos.</td>
</tr>
<tr>
<td>Participación de entes privados</td>
<td>Por parte de Canadá, parte importante de la operatividad se ha dejado a entes de los empleadores. Los actores privados y sus roles están definidos en el programa y regulados por el gobierno. FARMs y FERMES se encargan de transmitir y procesar órdenes de empleo aceptadas por los Centros de Recursos Humanos.</td>
</tr>
<tr>
<td>Requisitos que se piden a los trabajadores</td>
<td>Disparidad en los requisitos. Ser jornalero agrícola, campesino o peón y tener experiencia laboral en dichas ocupaciones. Ser de nacionalidad mexicana, preferentemente de 22 a 45 años, ser casado o vivir en unión libre, contar con estudios mínimos de 3º de primaria y máximo de media superior, saber leer y escribir y radicar en zona rural.</td>
</tr>
<tr>
<td>Entrevistas y exámenes</td>
<td>Los solicitantes deben cumplir varios trámites ante la STPS: Pre-selección de candidatos: entrevista y la revisión inicial. Sistema de evaluación de una sola vía: a su vuelta cada trabajador debe presentar una evaluación sellada completado por el empleador al ministerio de trabajo, en México.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Gestión del permiso de trabajo</td>
<td>Un ente intermediario de los empleadores se encarga de la parte operativa</td>
</tr>
<tr>
<td>Exámenes médicos</td>
<td>Aplicados en México en los centros de salud aprobados por Canadá. En México la Secretaría de Salubridad y Asistencia (SSA) descentralizó los exámenes médicos que se les aplican a los trabajadores.</td>
</tr>
</tbody>
</table>
| Otros pagos o apoyos | El Gobierno de México apoya a los trabajadores que van por primera vez con $3,000 para pasajes a la Ciudad de México donde se les informa sobre el trabajo. | Exámenes médicos, deposito de garantía, visa de tránsito hacia México y visa de trabajo, gastos de transportación desde el lugar de origen a la capital para realización de trámites y el plan de servicios médicos ofrecido por OIM (cubre a las familias y son pagados con remesas). | Capacitación para el empleo por parte de la empresa canadiense. Apoyo por parte de OIM para preparación de documentos, preguntas sobre contratos laborales, exámenes, capacitación en idioma y orientación | No se contempla | No se contempla | No se contempla.
<table>
<thead>
<tr>
<th>Transporte</th>
<th>Los empleadores lo cubren y posteriormente deducen 4% de los salarios</th>
<th>Pagados por el ent empleador</th>
<th>Cubierto por el empleador, según PTET y el contrato bajo el modelo de gestión salvadoreña.</th>
<th>Gastos de transporte: De ida una vez cumplido 50% del contrato-vuelta-viático</th>
<th>Gastos de transporte: De ida una vez cumplido 50% del contrato-vuelta-viático (regulación 2012)</th>
<th>No se contempla.</th>
<th>Responsabilidad del empleador (sin costo)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Observaciones</td>
<td>Relevante papel del sindicato UFCW Canadá para promoción y protección de los derechos de los trabajadores.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Procedimiento de reclutamiento bilateral con participación de ambos gobiernos, y la empresa. Procedimiento de retorno también está establecido.</td>
</tr>
</tbody>
</table>
III. Social protection schemes temporary migration of workers

|-----------------------------|----------------|-------------------|---------------------|--------------|--------------|-------------------|-----------------------|

Marco jurídico para la protección social

- De acuerdo a las leyes canadienses, la protección social de los trabajadores migrantes temporales debe ser igual a la de los demás trabajadores. Las leyes específicas varían por provincia. El Acuerdo de empleo estándar entre el empleador, el trabajador y el agente gubernamental del país emisor establece que será regulado por las leyes de Canadá y
- De acuerdo a las leyes canadienses, la protección social de los trabajadores migrantes temporales debe ser igual a la de los demás trabajadores. Las leyes específicas varían por provincia.
- De acuerdo a las leyes canadienses, la protección social de los trabajadores migrantes temporales debe ser igual a la de los demás trabajadores. Las leyes específicas varían por provincia.
- La ley general del Migración (INA) y las regulaciones departamentales prevén regulaciones respecto a los salarios y las condiciones de trabajo. No están cubiertos por la Migrant and Seasonal Agricultural Worker Protection Act (MSPA), sin embargo, se les aplican varias otras leyes a nivel federal y estatal.
- Nuevas regulaciones departamentales prevén regulaciones respecto a los salarios y las condiciones de trabajo (20 CFR Parte 655, subparte A). Leyes federales y locales según tema
- Siendo visa migratoria y no programa laboral, no se contempla el acceso a la protección social en el sistema, ni provee facilidades para ello. Los derechos de los trabajadores están garantizados en la legislación laboral y de seguridad social. El problema es, de acceso a los servicios y al aseguramiento para trabajadores migrantes, independientemente de las garantías en la ley migratoria.
- Código de Trabajo costarricense, Ley Constitutiva de la CCSS: aseguramiento obligatorio en la CCSS; INS. Responsabilidad del empleador.
<table>
<thead>
<tr>
<th>Seguridad e higiene</th>
<th>Derecho a participar en comités, rehusarse a trabajo riesgoso y derecho a información sobre riesgos</th>
<th>Derecho a participar en comités, rehusarse a trabajo riesgoso y derecho a información sobre riesgos</th>
<th>La ley OSH aplica -atmósfera libre de riesgos -normas mínimas de higiene (salvo que los estados asuman esta tarea por medio de un plan aprobado) Excepción: productores agrícolas con menos de once trabajadores y sin campamentos laborales</th>
<th>No hay distinción entre nacionales y extranjeros. La ley OSH aplica -atmósfera libre de riesgos - normas mínimas de higiene (salvo que los estados asuman esta tarea por medio de un plan aprobado)</th>
<th>No se contempla.</th>
<th>Incluido en CCSS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seguro ocupacional/ Compensación por accidentes del trabajo</td>
<td>Debe cubrirla el empleador.</td>
<td>Según el PTET, debe cubrirla el empleador y según el contrato, el empleador tiene la obligación de registrar el trabajador bajo el régimen provincial para el seguro ocupacional.</td>
<td>Los empleadores de los trabajadores H-2A deben proporcionarles un seguro equivalente al del estado en que trabajen.</td>
<td>La cobertura de los trabajadores H-2B va a depender del trato que cada estado tenga sobre el seguro de compensación obrera (en algunos</td>
<td>No se contempla.</td>
<td>Incluido en CCSS</td>
</tr>
<tr>
<td></td>
<td>incluyen: pago de los costos médicos, salarios perdidos y rehabilitación.</td>
<td>es obligatorio, en otros opcional, en otros depende de la cantidad de trabajadores, etc).</td>
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</tr>
<tr>
<td><strong>Seguro de desempleo</strong></td>
<td>Por ley de carácter federal. Se descuenta un cuota al trabajador, aunque el carácter temporal le impide reunir el mínimo de cotizaciones.</td>
<td>No están sujetos al impuesto FUTA y los estados suelen excluir a estos trabajadores de la cobertura de compensación por desempleo exigida por sus leyes. Sin embargo los empleadores están obligados a garantizarles el trabajo durante por lo menos tres cuartas partes del contrato.</td>
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<tr>
<td></td>
<td>Por ley de carácter federal. Se descuenta un cuota al trabajador, aunque el carácter temporal le impide reunir el mínimo de cotizaciones.</td>
<td>No se contempla.</td>
<td>Incluido en CCSS</td>
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</tbody>
</table>

Quo Vadis? Recruitment and Contracting...
<table>
<thead>
<tr>
<th>Plan de pensiones</th>
<th>Fallecimiento, discapacidad, edad avanzada. Acuerdos recíprocos con otros países. Los trabajadores pagan el plan de pensiones a través de deducciones sobre sus cheques de pago. Esto generalmente no se traduce en una cobertura adecuada o el acceso pleno a los beneficios. Hay un Convenio sobre Seguridad Social entre estos países, pero excluye a los jornaleros mexicanos. Los trabajadores de la agricultura que ganan menos de 250 dólares o trabajaron menos de 25 días al año no están sujetos a deducciones.</th>
<th>Derecho a pensión después de cubrir 10 temporadas.</th>
<th>Descontado del salario.</th>
<th>El IRS ha desarrollado pautas específicas para H-2A de trabajadores agrícolas.</th>
<th>Los trabajadores H2B están cubiertos por el programa pero podrían no trabajar suficientes cuatrimestres en los EE.UU. para ser elegibles a beneficios</th>
<th>No se contempla.</th>
<th>Incluido en CCSS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cuidado de salud</td>
<td>Acceso a servicios de salud pública a residentes con más de 6 meses. En otros casos mediante arreglos que haga el</td>
<td>La OIM ofrece planes de servicios médicos con costo para el migrante</td>
<td>PTET obija y contrato estipula pago de seguro médico hasta que el trabajador esté elegible para un plan provincial</td>
<td>Los empleadores tienen que proveer para sus empleados un lugar de trabajo que no tenga</td>
<td>Los empleadores tienen que proveer para sus empleados un lugar de trabajo que no tenga</td>
<td>No se contempla.</td>
<td>Incluido en CCSS</td>
</tr>
</tbody>
</table>
Los trabajadores migrantes deben ser cubiertos por los programas de salud provinciales. En las provincias donde no se cubre el acceso a la salud, el empleador debe adquirir seguros de salud privados. El acceso a los servicios de salud pública sólo se otorga a los que tienen una residencia de seis meses.

**Prestaciones por paternidad**

<table>
<thead>
<tr>
<th>Empleador</th>
<th>Canadiense. Según el contrato, no se puede cobrar al trabajador.</th>
<th>Peligros serios y seguir todos los estándares de seguridad y salud de OSHA</th>
<th>Trabajo que no tenga peligros serios y seguir todos los estándares de seguridad y salud de OSHA</th>
</tr>
</thead>
</table>

**Ayuda económica**

- Si tiene un hijo o un año después. Los hombres pueden reclamarla si su esposa está embarazada y su hijo es menor de un año de edad cuando regresan a México.
- Seguro parental: descuento mensual al salario bruto de 4%. Beneficio si tiene un hijo mientras está trabajando en Canadá o naciera dentro de un año después de su regreso y haya acumulado más de 600 horas de trabajo al final de su temporada.

<table>
<thead>
<tr>
<th>Prestaciones por paternidad</th>
<th>Seguro parental descuento mensual al salario bruto de 4%</th>
<th>No se contempla.</th>
<th>Incluido en CCSS</th>
</tr>
</thead>
</table>

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| Observaciones generales | El contrato estipula que las deducciones del salario pueden llegar al 27% incluyendo impuesto sobre la renta, seguro de desempleo y el plan de pensiones de Canadá. |  |  | Siendo visa migratoria y no programa laboral, no se contempla el acceso a la protección social en el sistema, ni provee facilidades para ello. Los derechos de los trabajadores están garantizados en la legislación laboral y de seguridad social. El problema es esencialmente uno de acceso a los servicios y al aseguramiento para trabajadores migrantes, independientemente de las garantías en la ley migratoria. | Ley laboral establece que registro al CCSS y INS es responsabilidad del patrón, y contiene sanciones. Pero nueva ley migratoria parece trasladar responsabilidad al trabajador |
Annex 5: The Bilateral Agreement Model

Artículo 1. Intercambio de información

1. La autoridad competente del territorio de inmigración deberá proporcionar, periódicamente, información apropiada a la autoridad competente del territorio de emigración [...] sobre:
   a) las disposiciones legislativas y administrativas referentes a la entrada, empleo, residencia [...] de los migrantes [...];
   b) el número, las categorías y las calificaciones profesionales de los migrantes deseados;
   c) las condiciones de trabajo y de vida de los migrantes, y en especial el costo de vida y los salarios mínimos en función de las categorías profesionales y de las regiones de empleo, las asignaciones suplementarias, si las hubiere; la naturaleza de los empleos disponibles, las bonificaciones de contratación, si las hubiere; los regímenes de seguridad social y de asistencia médica, las disposiciones relativas al transporte de los migrantes y de sus bienes y herramientas, las condiciones de vivienda y las disposiciones sobre el suministro de alimentos y vestido, las medidas relativas a la transferencia de los ahorros de los migrantes, y de otras sumas debidas en virtud de lo dispuesto en el presente acuerdo;
   d) las facilidades especiales, si las hubiere, concedidas a los migrantes;
   e) las facilidades de instrucción general y de formación profesional concedidas a los migrantes;
   f) [...];
   g) [...].

2. La autoridad competente del territorio de emigración [...] deberá poner esta información en conocimiento de las personas y organismos interesados.

3. La autoridad competente del territorio de emigración [...] deberá proporcionar, periódicamente, información apropiada a la autoridad competente del territorio de inmigración sobre:
   a) las disposiciones legislativas y administrativas referentes a la inmigración;
   b) el número y las calificaciones profesionales de las personas que deseen emigrar, [...];
   c) el régimen de seguridad social;
   d) las facilidades especiales, si las hubiere, concedidas a los migrantes;
   e) [...];
   f) [...]

4. La autoridad competente del territorio de inmigración deberá poner esta información en conocimiento de las personas u organismos interesados.

5. Cada una de las partes en cuestión deberá, igualmente, comunicar la información mencionada en los párrafos 1 a 4 del presente artículo a la Oficina Internacional del Trabajo.

Artículo 2. Acción contra la propaganda que induce en error

El texto de este extracto corresponde al acuerdo tipo que figura como anexo a la Recomendación No. 86 de la OIT sobre trabajadores migrantes. No incluye las disposiciones correspondientes a migrantes permanentes, refugiados y personas desplazadas.

Quo Vadis? Recruitment and Contracting…:
1. Las partes convienen en tomar todas las medidas pertinentes que concierren a sus territorios respectivos, siempre que lo permita la legislación nacional, para impedir toda propaganda relativa a la emigración e inmigración que pueda inducir en error.

2. A estos efectos, las partes colaborarán, si ello fuere necesario, con las autoridades competentes de otros países interesados.

**Artículo 3. Formalidades administrativas**

Las partes convienen en tomar medidas a fin de acelerar y simplificar la realización de las formalidades administrativas relacionadas con la salida, viaje, entrada, residencia [...] de los migrantes, y siempre que ello fuere posible, de los miembros de sus familias; estas medidas deberán incluir, cuando ello fuere necesario, la organización de un servicio de interpretación.

**Artículo 4. Validez de los documentos**

1. Las partes determinarán las condiciones que deba reunir, a fin de que se reconozca su validez en el territorio de inmigración, cualquier documento expedido por la autoridad competente del territorio de emigración, y referente a los migrantes [...] en lo que concierne a:
   a) su estado civil;
   b) su situación judicial;
   c) sus calificaciones profesionales;
   d) su instrucción general y su formación profesional; y
   e) su participación en regímenes de seguridad social.

2. Las partes también determinarán el alcance de dicho reconocimiento.

3. [...]
a) con respecto a la selección médica:
   i) la naturaleza del examen médico al que someterán a los migrantes (examen médico general, examen radiológico, examen de laboratorio, etc.);
   ii) la elaboración de listas de enfermedades y defectos físicos que constituyan claramente una incapacidad para el empleo en ciertas profesiones;
   iii) las condiciones mínimas de higiene prescrita en convenios internacionales sobre higiene y relativa a los movimientos de población de un país a otro;

b) con respecto a la selección profesional:
   i) las calificaciones de los migrantes exigidas en cada profesión o grupo de profesiones;
   ii) las profesiones alternativas que exijan de los trabajadores calificaciones o capacidades análogas, a fin de satisfacer las necesidades de profesiones determinadas en las que sea difícil reclutar un número suficiente de trabajadores calificados;
   iii) el desarrollo de los tests psicotécnicos;

c) con respecto a la selección basada en la edad de los migrantes: la flexibilidad con que deba aplicarse el criterio sobre la edad, a fin de tener en cuenta, por una parte, los requisitos de diversos empleos y, por otra, las diferencias de capacidad de los individuos de una edad determinada.

Artículo 6. Organización del reclutamiento, introducción y establecimiento
1. Las personas u organismos que efectúen operaciones de reclutamiento, introducción y colocación de migrantes [...] deberán ser nombrados por las autoridades competentes de los territorios interesados [...], a reserva de la aprobación de ambas partes.

2. A reserva de las disposiciones del párrafo siguiente, el derecho a efectuar las operaciones de reclutamiento, introducción y colocación sólo incumbirá a:
   a) las oficinas públicas de colocación u otros organismos oficiales del territorio donde se realicen las operaciones;
   b) los organismos oficiales de un territorio distinto de aquel donde se realicen las operaciones, que estén autorizados a efectuar dichas operaciones en ese territorio en virtud de un acuerdo entre las partes;
   c) cualquier organismo establecido de conformidad con las disposiciones de un instrumento internacional.

3. Además, en la medida en que la legislación nacional de cada una de las partes lo permita, y a reserva de la aprobación y de la vigilancia de las autoridades competentes de dichas partes, las operaciones de reclutamiento, introducción y colocación podrán ser efectuadas por:
   a) el empleador o una persona que esté a su servicio y actúe en su nombre;
   b) agencias privadas.

4. Los gastos de administración ocasionados por el reclutamiento, introducción y colocación no deberán correr a cargo del migrante.

Artículo 7. Exámenes de selección
1. Todo candidato a la emigración deberá someterse a un examen adecuado en el territorio de emigración; dicho examen deberá entrañar las menores molestias posibles para el migrante.
2. Con respecto a la organización de la selección de los migrantes, las partes se pondrán de acuerdo sobre:

a) el reconocimiento y la composición de los organismos oficiales y de los organismos privados que hayan sido autorizados por la autoridad competente del territorio de inmigración para efectuar las operaciones de selección en el territorio de emigración;

b) la organización de los exámenes de selección, los centros donde habrán de celebrarse y la distribución de los gastos ocasionados por estos exámenes;

c) la colaboración de las autoridades competentes de ambas partes, y en particular de sus servicios de empleo, en la organización de la selección.

Artículo 8. Información y asistencia a los migrantes

1. El migrante que haya sido admitido, después de su examen médico y profesional, deberá recibir en el centro de reunión o de selección, en un idioma que comprenda, toda la información que aún pudiere necesitar en relación con la naturaleza del trabajo para el que haya sido reclutado, la región del empleo, la empresa a la que haya sido destinado y las disposiciones tomadas para su viaje, así como las condiciones de vida y de trabajo, comprendidas las condiciones de higiene y demás condiciones afines que existan en el país y en la región adonde se dirija.

2. A su llegada al país de inmigración, al centro de recepción, si lo hubiere, o al lugar de residencia, los migrantes [...] deberán recibir todos los documentos que necesiten para su trabajo, su residencia [...] en el país, así como información, instrucciones y consejos relativos a las condiciones de vida y de trabajo, y cualquier otra ayuda que pudieren necesitar para adaptarse a las condiciones del país de inmigración.

Artículo 9. Educación y formación

Las partes deberán coordinar sus actividades en lo que concierne a la organización de cursos para migrantes, los cuales incluirán una información general sobre el país de inmigración, la enseñanza del idioma de este país y la formación profesional.

Artículo 10. Intercambio de practicantes

Las partes convienen en favorecer el intercambio de practicantes y en determinar, en un acuerdo separado, las condiciones que regirán dichos intercambios.

Artículo 11. Condiciones de transporte

1. Durante el viaje desde el lugar de su residencia hasta el centro de reunión o de selección, así como durante su estadía en dicho centro, los migrantes [...] deberán recibir de la autoridad competente del territorio de emigración [...] cualquier ayuda que pudieren necesitar.

2. Las autoridades competentes de los territorios de inmigración o emigración deberán, cada una dentro de su jurisdicción, proteger la salud y el bienestar de los migrantes [...] y prestarles cualquier ayuda que pudieren necesitar durante el viaje desde el centro de reunión o selección hasta el lugar de su empleo, así como durante su estadía en un centro de recepción, si lo hubiere.

3. Los migrantes [...] deberán ser transportados en la forma que merecen los seres humanos, y de acuerdo con la legislación vigente.

4. Las partes deberán determinar, de común acuerdo, los términos y las condiciones para la aplicación de las disposiciones del presente artículo.
Artículo 12. Gastos de viaje y de manutención

Las partes deberán determinar los métodos para sufragar los gastos de viaje de los migrantes [...] desde el lugar de su residencia hasta el lugar de destino, los de su manutención mientras viajen, los ocasionados por enfermedad y hospitalización, así como los relativos al transporte de sus efectos personales.

Artículo 13. Transferencia de fondos

1. La autoridad competente del territorio de emigración deberá, en todo lo posible y de conformidad con la legislación nacional en materia de importación y exportación de divisas extranjeras, autorizar y facilitar a los migrantes [...] el retiro, de su país, de las sumas que puedan necesitar para su establecimiento inicial en el extranjero.

2. La autoridad competente del territorio de inmigración deberá, en todo lo posible y de conformidad con la legislación nacional en materia de importación y exportación de divisas extranjeras, autorizar y facilitar la transferencia periódica, al territorio de emigración, de los ahorros de los migrantes y de cualesquiera otras sumas debidas en virtud del presente acuerdo.

3. Las transferencias de fondos autorizadas en los párrafos 1 y 2 de este artículo deberán efectuarse de acuerdo con el tipo oficial de cambio existente.

4. Las partes deberán tomar todas las medidas necesarias para simplificar y acelerar las formalidades administrativas relativas a las transferencias de fondos, a fin de que estos fondos se reciban por los derechohabientes en el plazo más breve posible.

5. Las partes deberán determinar si podrá obligarse al migrante a transferir una parte de su salario para el mantenimiento de la familia que haya quedado en su país o en el territorio del cual emigró, así como las condiciones en que deba realizarse dicha transferencia.

Artículo 14. [...]

Artículo 15. Vigilancia de las condiciones de vida y de trabajo

1. Se deberán tomar disposiciones para que la autoridad competente, o los organismos debidamente autorizados del territorio de inmigración, velen por las condiciones de vida y de trabajo de los migrantes, comprendidas las condiciones de higiene.

2. Cuando se trate de migraciones temporales, las partes deberán tomar las medidas necesarias, si ello fuere pertinente, para que representantes autorizados del territorio de emigración [...] colaboren con la autoridad competente o con organismos debidamente autorizados del territorio de inmigración en el ejercicio de esta vigilancia.

3. Durante un período determinado, cuya duración se fijará por las partes, los migrantes deberán recibir una asistencia especial en lo que concierne a las cuestiones relativas a sus condiciones de empleo.

4. La asistencia relativa a las condiciones de empleo y de vida podrá ser prestada por el servicio ordinario de inspección del trabajo del país de inmigración, o por un servicio especial para los migrantes, con la colaboración, cuando ello fuere necesario, de organizaciones voluntarias reconocidas.

5. Se deberán tomar medidas, cuando ello fuere necesario, para que representantes del territorio de emigración [...] puedan colaborar con dichos servicios.

Quo Vadis? Recruitment and Contracting…: 189
Artículo 16. Solución de conflictos

1. En caso de conflicto entre un migrante y su empleador, el migrante tendrá acceso a los tribunales competentes o podrá presentar en cualquier otra forma sus reclamaciones, de conformidad con la legislación del territorio de inmigración.

2. Las autoridades deberán establecer cualquier otro procedimiento necesario para la solución de todo conflicto que surja al aplicarse el acuerdo.

Artículo 17. Igualdad de trato

1. La autoridad competente del territorio de inmigración deberá conceder a los migrantes [...], en lo que concierne a los empleos para los cuales son elegibles, un trato no menos favorable que el que aplique a sus nacionales en virtud de las disposiciones legislativas o administrativas, o de los contratos colectivos de trabajo.

2. Esta igualdad de trato se deberá aplicar, sin discriminación de nacionalidad, raza, religión o sexo, a los inmigrantes que se encuentren legalmente dentro del territorio de inmigración, en relación con las materias siguientes:

   a) siempre que estos puntos estén reglamentados por la legislación o dependan de las autoridades administrativas:

      i) la remuneración, comprendidos los subsidios familiares cuando éstos formen parte de la remuneración, las horas de trabajo, el descanso semanal, las horas extraordinarias, las vacaciones pagadas, las limitaciones al trabajo a domicilio, la edad de admisión al empleo, el aprendizaje y la formación profesional, el trabajo de las mujeres y de los menores;

      ii) la afiliación a las organizaciones sindicales y el disfrute de las ventajas ofrecidas por los contratos colectivos;

      iii) la admisión a las escuelas, al aprendizaje y a los cursos o escuelas de formación profesional y técnica, siempre que esta admisión no perjudique a los nacionales del país de inmigración;

      iv) las medidas de recreo y de bienestar;

   b) los impuestos, derechos y contribuciones que deba pagar, por concepto del trabajo, la persona empleada;

   c) la higiene, la seguridad y la asistencia médica;

   d) las acciones judiciales relativas a las cuestiones comprendidas en el presente acuerdo.

Artículo 18. [...]

Artículo 19. Suministro de alimentos

Los migrantes [...] deberán gozar del mismo trato que los trabajadores nacionales de la misma profesión, en lo que se refiere al suministro de géneros alimenticios.

Artículo 20. Condiciones de vivienda
La autoridad competente del territorio de inmigración deberá cerciorarse de que los migrantes [...] tienen una vivienda higiénica y conveniente, siempre que se disponga de las instalaciones necesarias.

**Artículo 21. Seguridad social**

1. Ambas partes deberán determinar, en un acuerdo separado, los métodos para aplicar un régimen de seguridad social a los migrantes y a las personas a su cargo.

2. [...]  

3. [...]  

4. El acuerdo impondrá la obligación, a la autoridad competente del territorio de inmigración, de tomar medidas que garanticen, a los migrantes temporales y a las personas a su cargo, un trato no menos favorable que el que aplique a sus nacionales, quedando entendido que en caso de regímenes obligatorios de pensión se tomarán medidas adecuadas para el mantenimiento de los derechos adquiridos por los migrantes y de aquellos otros en curso de adquisición.

**Artículo 22. Contratos de trabajo**

1. En los países donde se haya establecido un sistema de contratos-tipo, el contrato individual de trabajo de los migrantes se basará en un contrato-tipo elaborado por las partes para las principales ramas de la actividad económica.

2. El contrato individual de trabajo deberá establecer las condiciones generales de contratación y de trabajo previstas en el contrato-tipo y deberá traducirse en un idioma que comprenda el migrante. Se deberá remitir al migrante una copia del contrato antes de su salida del territorio de emigración o, si se conviniere entre las partes, a su llegada al centro de recepción del territorio de inmigración. En este caso, el migrante deberá estar informado por un documento escrito que se refiera a él individualmente, o a un grupo de migrantes del que forme parte, de la categoría en la que estará empleado y de las demás condiciones de trabajo, especialmente del salario mínimo que se le garantice.

3. El contrato individual de trabajo deberá contener todos los datos necesarios, tales como:
   a) el nombre y apellidos del trabajador, el lugar y la fecha de su nacimiento, su estado familiar y el lugar de residencia y de reclutamiento;
   b) la naturaleza del trabajo que va a efectuar y el lugar donde deba realizarse;
   c) la categoría profesional en la que está clasificado;
   d) la remuneración de las horas normales de trabajo, de las horas extraordinarias, del trabajo nocturno y del realizado en días festivos, así como la forma de pago;
   e) las primas, indemnizaciones y asignaciones, si las hubiere;
   f) las condiciones en las que el empleador podrá estar autorizado a efectuar descuentos de la remuneración del interesado, y su cuantía;
   g) las condiciones de alimentación, cuando ésta la proporcione el empleador;
   h) la duración del contrato, y las condiciones para renovarlo y denunciarlo;
   i) las condiciones en que se autorice la entrada y residencia en el territorio de inmigración;
   j) el modo de sufragar los gastos de viaje del migrante [...];
k) cuando se trate de migraciones temporales, el modo de sufragar los gastos de regreso al país de origen o al territorio de emigración, si ello fuere necesario;

l) los casos en los que se pueda terminar el contrato.

**Artículo 23. Cambio de empleo**

1. Si la autoridad competente del territorio de inmigración considera que el empleo para el que el migrante ha sido reclutado no corresponde a sus aptitudes físicas o profesionales, deberá facilitar la colocación de dicho migrante en otro empleo que corresponda a sus aptitudes y que esté autorizado a ocupar de conformidad con la legislación nacional.

2. Durante los períodos de desempleo, el método de mantenimiento de los migrantes [...] se determinará por las disposiciones de un acuerdo separado.

**Artículo 24. Estabilidad en el empleo**

1. Si, antes de la expiración de su contrato, el trabajador migrante queda sobrante en la empresa o en la rama de actividad económica en la que fue contratado, la autoridad competente del territorio de inmigración facilitará, a reserva de las cláusulas del contrato, su colocación en otro empleo que corresponda a sus aptitudes y que esté autorizado a ocupar de conformidad con las legislación nacional.

2. En caso de que el migrante no tuviese derecho a las prestaciones previstas en un régimen de asistencia o de seguro de desempleo, su mantenimiento, [...] se asegurará durante todo el periodo en que permanezca desempleado, de conformidad con las disposiciones establecidas en un acuerdo separado, siempre que ello no fuere incompatible con los términos de su contrato.

3. Las disposiciones de este artículo no menoscabarán el derecho del migrante a beneficiarse de las ventajas que pudieren preverse en su contrato de trabajo, en caso de que el empleador lo termine prematuramente.

**Artículo 25. Disposiciones relativas a la expulsión**

1. La autoridad competente del territorio de inmigración se obliga a no enviar al migrante, [...] al territorio del que emigró, a menos que así lo desee el migrante, si a causa de enfermedad o accidente no pudiera ya ejercer su profesión.

2. El gobierno del territorio de inmigración se obliga a no enviar a su país de origen a los [...] migrantes que no deseen regresar a su país de origen, por razones políticas, cuando el territorio de origen no sea el territorio en que fueron reclutados, a menos que formalmente expresen este deseo en una solicitud escrita dirigida a la autoridad competente del territorio de inmigración [...] .

**Artículo 26. Viaje de regreso**

1. Los gastos del viaje de regreso de un migrante que, habiendo sido introducido en el territorio de inmigración de conformidad con un plan ejecutado bajo los auspicios del gobierno de dicho territorio, se vea obligado a dejar su empleo por razones ajenas a su voluntad y no pueda, en virtud de la legislación nacional, colocarse en un empleo para el cual sea elegible, se regularán en la forma siguiente:

   a) el costo del viaje de regreso del migrante y de las personas a su cargo no podrá, en ningún caso, recaer sobre el migrante;
b) el método para sufragar los gastos del viaje de regreso será determinado por acuerdos bilaterales complementarios;

c) de todos modos, aun en el caso de que no se haya incluido ninguna disposición a este efecto en un acuerdo bilateral, se especificará en la información que se proporcione a los migrantes, al reclutarlos, la persona o el organismo a quien incumba la carga del viaje de regreso, en las condiciones previstas en el presente artículo.

2. Conforme a los métodos de colaboración y consulta convenidos en virtud del artículo 28 de este acuerdo, ambas partes determinarán las medidas que deban tomarse para organizar el regreso de esos migrantes y para garantizarles, durante el viaje, las condiciones de higiene y de bienestar y la asistencia de que gozaron durante el viaje de ida.

3. La autoridad competente del territorio de emigración exonerará de todo derecho de aduanas la entrada de:

   a) los efectos personales;

   b) las herramientas manuales portátiles y el equipo portátil de la clase que normalmente poseen los trabajadores para el ejercicio de su oficio que hayan estado en la posesión y uso de dichas personas durante un período apreciable, y que estén destinados a ser utilizados por los migrantes en el ejercicio de su profesión.

Artículo 27. Doble impuesto

Ambas partes determinarán, en un acuerdo separado, las medidas que deban adoptarse para evitar el doble impuesto a las ganancias de los trabajadores migrantes.

Artículo 28. Métodos de consulta y colaboración

1. Ambas partes convendrán los métodos de consulta y colaboración necesarios para cumplir las disposiciones de este acuerdo.

2. Cuando lo soliciten los representantes de ambas partes, la Oficina Internacional del Trabajo estará asociada a dicha consulta y colaboración.

Artículo 29. Disposiciones finales

1. Las partes deberán determinar la duración del presente acuerdo y el plazo para su denuncia.

2. Las partes deberán determinar igualmente las disposiciones del presente acuerdo que permanecerán en vigor después de la expiración de este último.
SECRETARIA DEL TRABAJO Y PREVISION SOCIAL
REGLAMENTO de Agencias de Colocación de Trabajadores.

Al margen un sello con el Escudo Nacional, que dice: Estados Unidos Mexicanos.- Presidencia de la República.

VICENTE FOX QUESADA, Presidente de los Estados Unidos Mexicanos, en ejercicio de la facultad que me confiere la fracción I, del artículo 89 de la Constitución Política de los Estados Unidos Mexicanos, y con fundamento en los artículos 13, 27, 28, 34 y 40 de la Ley Orgánica de la Administración Pública Federal; 28, 29, 537, fracción II, 538, 539, fracción II, 539-C, 539-D, 539-E y 539-F de la Ley Federal del Trabajo, y 79 y 80 de la Ley General de Población, he tenido a bien expedir el siguiente

REGLAMENTO DE AGENCIAS DE COLOCACIÓN DE TRABAJADORES

CAPÍTULO I DISPOSICIONES GENERALES

Artículo 1. El presente Reglamento tiene por objeto normar la prestación del servicio de colocación de trabajadores. Sus disposiciones son de orden público e interés social y regirán en todo el territorio nacional.

En los actos, procedimientos y resoluciones a que se refiere el presente Reglamento, se deberá atender, en lo conducente, las disposiciones de la Ley Federal de Procedimiento Administrativo.

Artículo 2. Para los efectos de este Reglamento, se entenderá por:

I. Agencia de colocación de trabajadores con fines de lucro: Las personas físicas o morales de derecho privado, dedicadas a prestar el servicio de colocación de trabajadores y que obtienen por ello una retribución económica.

II. Agencias privadas y oficiales de colocación de trabajadores sin fines lucrativos: Toda persona física o moral, dependencia u organismo oficial que preste el servicio de colocación de trabajadores, sin obtener por ello una retribución económica;

III. Ley: La Ley Federal del Trabajo;

IV. Secretaría: La Secretaría del Trabajo y Previsión Social;

V. Servicio de colocación de trabajadores: A todas las acciones cuyo objeto principal sea el reclutamiento, selección de personal y localización de vacantes, para vincular laboralmente a un trabajador con un empleador o a éste con aquél, bajo cualquier modalidad, y

VI. Servicio Nacional del Empleo: Las unidades administrativas de la Secretaría del Trabajo y Previsión Social y de los gobiernos de las Entidades Federativas y del Distrito Federal, que prestan el servicio de colocación de trabajadores, en términos de los artículos 538 y 539-D de la Ley Federal del Trabajo.

Artículo 3. Las oficinas del Servicio Nacional del Empleo, no serán consideradas como agencias de colocación de trabajadores, para los efectos del presente Reglamento.

Artículo 4. Para el funcionamiento de las agencias de colocación de trabajadores con fines de lucro, se deberá obtener previamente autorización y registro de funcionamiento, de acuerdo con lo dispuesto por este Reglamento.
Las agencias oficiales y privadas de colocación de trabajadores sin fines lucrativos, solamente deberán informar a la Secretaría acerca de su constitución e inicio de funcionamiento, para fines de registro y control, así como para que ésta coordine las acciones en la materia, en los términos previstos en el presente Reglamento.

**Artículo 5.** La prestación del servicio de colocación de trabajadores será gratuita para éstos en todos los casos. Queda prohibido cobrar cantidad alguna por cualquier razón o concepto a los solicitantes de empleo.

**Artículo 6.** Los prestadores del servicio de colocación de trabajadores no podrán establecer distinciones por motivo de origen étnico, sexo, edad, discapacidad, condición social o económica, condiciones de salud, embarazo, lengua, religión, opiniones, preferencias sexuales, estado civil o cualquier otra, que tenga por objeto impedir o anular el reconocimiento o el ejercicio de los derechos y la igualdad real de oportunidades de las personas.

No se considerarán discriminatorias las distinciones basadas en capacidades o conocimientos especializados para desempeñar una actividad determinada.

**Artículo 7.** Las agencias de colocación de trabajadores con fines de lucro que desarrollen acciones de vinculación para colocar trabajadores en campos agrícolas dentro del territorio nacional, estarán sujetas a las disposiciones de este Reglamento.

**Artículo 8.** Las agencias de colocación de trabajadores podrán establecer sucursales. Para efectos de control, deberán presentar un aviso a la Secretaría, dentro de los quince días siguientes a la fecha de inicio de operaciones de las sucursales.

Procederá la inscripción de sucursales cuando se cumpla con los requisitos conducentes a que se refieren los Capítulos III y IV de este Reglamento, según corresponda.

**Artículo 9.** Las agencias de colocación de trabajadores estarán obligadas a:

I. Prestar sus servicios con pleno respeto a la dignidad de los trabajadores solicitantes de empleo, sin incurrir en conductas discriminatorias; así como participar en la integración de un sistema nacional de empleo;

II. Proporcionar semestralmente la información relativa a su participación en el mercado de trabajo, mediante las formas de registro estadístico que al efecto expida la Secretaría. Dicha información deberá presentarse a la Secretaría a más tardar los días 15 de los meses de enero y julio, según corresponda;

III. Ser veraces en su publicidad e informar ampliamente a los solicitantes de empleo respecto de las vacantes que se ofrezcan, especificando las características y condiciones del empleo, las cuales harán referencia exclusivamente a las capacidades o conocimientos especializados para desempeñar una actividad determinada;

IV. Indicar en la publicidad su nombre o razón social, domicilio, teléfono y el número de autorización y registro de funcionamiento;

V. Dar aviso por escrito a la Secretaría, dentro de los 30 días siguientes, respecto de:
   a) El cambio de domicilio de la matriz o sucursales;
   b) La suspensión temporal de actividades, o
   c) El cierre definitivo de la agencia o sucursales.

VI. Adoptar las medidas conducentes para que el transporte, alojamiento y alimentación para el traslado de los trabajadores que vayan a laborar en centros de trabajo que se encuentren a una distancia superior a 100 kilómetros del lugar de reclutamiento, sea debidamente proporcionado sin costo alguno para ellos;

VII. Permitir a las autoridades laborales la inspección y vigilancia de sus establecimientos, con el propósito de verificar el cumplimiento de las disposiciones aplicables al servicio de colocación de trabajadores, proporcionando la información que para tal efecto les sea requerida, y
VIII. Vigilar que su personal se abstenga de realizar actos de hostigamiento sexual, así como conductas discriminatorias en agravio de los solicitantes de empleo.

El cumplimiento de las obligaciones a que se refieren las fracciones II y V de este artículo se podrá realizar a través de medios electrónicos, para lo cual los interesados deberán ingresar a la página de Internet de la Secretaría.

La Secretaría hará llegar copia de la información a que se refiere el párrafo anterior a la oficina del Servicio Nacional del Empleo que corresponda.

Artículo 10. Queda prohibido a las agencias de colocación de trabajadores:

I. Efectuar cualquier cobro a los trabajadores solicitantes de empleo, ya sea en dinero, servicios o especie, en forma directa o indirecta, incluyendo los gastos por difusión y propaganda de sus solicitudes de empleo, el costo de cursos de capacitación o adiestramiento o cualquier otro concepto análogo;

II. Convenir directa o indirectamente con los empleadores a los que presten el servicio, que sus honorarios sean descontados parcial o totalmente del salario de los trabajadores colocados;

III. Ofrecer un empleo ilícito, una vacante inexistente, características o condiciones de empleo falsas y, en general, cualquier acto u omisión que constituya un engaño para el solicitante, y

IV. Cobrar a los empleadores por la prestación del servicio, cuando se trate de agencias de colocación de trabajadores sin fines lucrativos, salvo la cuota que se apruebe en términos de este Reglamento, que tenga el propósito de recuperar los gastos administrativos de la agencia.

Artículo 11. Las agencias de colocación de trabajadores tienen derecho a solicitar a los usuarios del servicio, la información y documentación relativa a sus capacidades y conocimientos necesarios para gestionar la colocación o publicitar la oferta o demanda de empleo.

Las agencias de colocación de trabajadores serán responsables del uso indebido que se haga de la información y documentación que proporcionen los usuarios.

Artículo 12. Las agencias de contratación colectiva para la migración de trabajadores mexicanos sólo podrán establecerse en el país previa autorización de la Secretaría de Gobernación, en términos de lo dispuesto por la Ley General de Población y su Reglamento.

Las agencias de colocación deberán proporcionar a los trabajadores mexicanos que vayan a laborar al extranjero, material informativo sobre las condiciones generales de vida y de trabajo a que estarán sujetos, así como sobre la protección consular a la que tienen derecho y la ubicación de la Embajada o Consulados mexicanos en el país que corresponda.

El material informativo a que se refiere el párrafo anterior será elaborado por la Secretaría, en coordinación con las respectivas unidades administrativas de las Secretarías de Gobernación, de Economía y de Relaciones Exteriores.

Artículo 13. Corresponderá a la Secretaría vigilar, dentro del ámbito de su competencia, que en la contratación de nacionales para laborar fuera del país, se cumpla con las disposiciones contenidas en la fracción XXVI del Apartado “A” del Artículo 123 de la Constitución Política de los Estados Unidos Mexicanos, en los artículos 28 y 29 de la Ley Federal del Trabajo y las aplicables de la Ley General de Población y su Reglamento.

En todo caso, las autoridades competentes vigilarán que las condiciones de trabajo pactadas sean iguales o superiores a las mínimas establecidas en la legislación del país de que se trate para la actividad respectiva, y que los derechos pactados en contratos subsecuentes no sean inferiores a aquéllos establecidos en contratos anteriores.

Artículo 14. A las personas físicas o morales que utilicen medios de difusión masiva cuyo objeto principal sea el reclutamiento y selección de personas, con o sin fines lucrativos, que se realice de forma individual o colectiva, así como la localización de vacantes que se realice a favor de un tercero, con el propósito de vincular laboralmente
a trabajadores con empleadores o a éstos con aquéllos, cualquiera que sea su modalidad, le son aplicables las disposiciones del presente Reglamento.

Para los efectos de este artículo se consideran como medios de difusión masiva los periódicos, revistas, boletines, folletos, volantes, radio, televisión, medios electrónicos y los demás análogos.

El reclutamiento de personal hecho por los empleadores en forma directa, haciendo uso de anuncios a través de cualquier medio de comunicación, no se considerará como prestación de servicios de colocación para los efectos de este Reglamento.

**Artículo 15.** Las agencias de colocación de trabajadores que editen o utilicen para sus fines los medios de difusión mencionados en el artículo anterior, deberán indicar en dichos medios el número de registro respectivo para operar como tales.

**Artículo 16.** La Secretaría publicará en el Diario Oficial de la Federación el Acuerdo respectivo para dar a conocer los requisitos y formatos de los trámites que deriven del presente Reglamento.

**CAPÍTULO II DE LAS AUTORIDADES EN MATERIA DEL SERVICIO DE COLOCACIÓN DE TRABAJADORES**

**Artículo 17.** La aplicación de las disposiciones del presente Reglamento compete a la Secretaría.

La Secretaría se auxiliará de las oficinas del Servicio Nacional de Empleo, en el ámbito de sus respectivas competencias, para el desempeño de las facultades que la Ley y el presente Reglamento establecen en materia de colocación de trabajadores.

Para tales efectos, la Secretaría podrá acordar con las oficinas del Servicio Nacional de Empleo, que funjan como ventanilla para la recepción de documentos. En este caso, las solicitudes y los documentos que reciban serán turnados a la Secretaría para su atención y despacho, en la inteligencia de que los plazos con que cuente la Secretaría para contestar las solicitudes, comenzarán a correr hasta que ésta reciba la documentación respectiva.

**Artículo 18.** La Secretaría podrá celebrar convenios con los Gobiernos de los Estados y el del Distrito Federal, para establecer la coordinación, auxilio y unificación de procedimientos que permitan la adecuada vigilancia y cumplimiento de los preceptos jurídicos en materia del servicio de colocación de trabajadores.

**Artículo 19.** La Secretaría tendrá las siguientes facultades:

I. Coordinar las acciones de colocación de trabajadores y establecer los mecanismos de colaboración y complementación entre los agentes públicos y privados que realicen dicha actividad;

II. Autorizar y registrar el funcionamiento de agencias de colocación de trabajadores con fines de lucro y llevar el registro de aquéllas que no tengan tales fines;

III. Aprobar las tarifas de las agencias de colocación de trabajadores con fines de lucro, así como las cuotas de recuperación de gastos administrativos ocasionados por la prestación del servicio, a las agencias de colocación de trabajadores sin fines lucrativos;

IV. Vigilar que las agencias de colocación de trabajadores cumplan con las disposiciones que regulan el servicio de colocación de trabajadores. La vigilancia se efectuará por conducto de la Inspección Federal del Trabajo, la que se auxiliará de las autoridades locales en los términos de las disposiciones aplicables;

V. Requerir a las agencias de colocación de trabajadores la información sobre el mercado de trabajo captada por ellas, y

VI. Las demás que le atribuye la Ley, el presente Reglamento y otras disposiciones jurídicas aplicables.
CAPÍTULO III DE LAS AGENCIAS OFICIALES Y PRIVADAS DE COLOCACIÓN DE TRABAJADORES SIN FINES LUCRATIVOS

Artículo 20. Para fines de registro y control, las agencias oficiales y privadas de colocación de trabajadores sin fines lucrativos, deberán presentar aviso a la Secretaría respecto a su constitución e inicio de funcionamiento, dentro de los 15 días hábiles siguientes de haber iniciado operaciones, mediante el formato que al efecto emita la Secretaría.

Tratándose de personas morales, el aviso deberá ir acompañado del original o copia certificada del instrumento jurídico en que conste su constitución y de la constancia de inscripción en el Registro Federal de Contribuyentes, así como copias fotostáticas de dichos documentos para su cotejo y certificación.

En el caso de personas físicas, se deberá acompañar el original de la constancia de inscripción en el Registro Federal de Contribuyentes y copia del mismo para su cotejo y certificación.

Artículo 21. Las agencias privadas de colocación de trabajadores sin fines lucrativos, que pretendan establecer una cuota de recuperación para sufragar los gastos administrativos ocasionados por la prestación del servicio, deberán solicitar a la Secretaría la aprobación de la cuota respectiva, en el formato que al efecto emita.

Las cuotas de recuperación no serán consideradas como retribuciones económicas para efectos de este Reglamento.

En todo caso, la cuota de recuperación no deberá exceder el equivalente al importe de diez veces el salario mínimo general vigente en el lugar en que se encuentre instalada la agencia, por cada trabajador colocado.

Artículo 22. Las agencias privadas de colocación de trabajadores sin fines lucrativos, que pretendan convertirse en agencias lucrativas, deberán solicitar la autorización y registro de funcionamiento, así como la aprobación de la tarifa respectiva, en los términos de lo dispuesto por el Capítulo siguiente.

CAPÍTULO IV DE LAS AGENCIAS PRIVADAS DE COLOCACIÓN DE TRABAJADORES CON FINES DE LUCRO

Artículo 23. La autorización y registro de funcionamiento de las agencias de colocación de trabajadores con fines de lucro, así como la aprobación de sus tarifas, se deberán solicitar mediante la presentación del formato que emita la Secretaría.

Para tales efectos, los interesados deberán proporcionar y presentar la siguiente información y documentación:

I. Nombre, denominación o razón social del solicitante. Tratándose de personas morales deberán acompañar original o copia certificada del acta constitutiva y, de sus reformas, en los casos de cambio de objeto o denominación social, y del instrumento mediante el cual se acredite la personalidad jurídica de su representante, así como copias fotostáticas de dichos documentos para su cotejo y certificación;

II. Domicilio;

III. Original y copia para cotejo de la constancia de inscripción en el Registro Federal de Contribuyentes;

IV. Registro patronal ante el Instituto Mexicano del Seguro Social, en su caso, y

V. La tarifa que se pretende cobrar.

Artículo 24. La Secretaría, dentro de los 15 días hábiles siguientes a la recepción de la solicitud, resolverá acerca de la autorización y registro de funcionamiento y, en su caso, aprobará la tarifa correspondiente.
De las resoluciones que emita la Secretaría se hará llegar copia a las oficinas del Servicio Nacional del Empleo, según corresponda al domicilio del solicitante.

**Artículo 25.** Cuando la solicitud no cumpla con los requisitos a que se refiere el artículo 23, la Secretaría prevendrá al solicitante para que subsane las deficiencias detectadas. En todo caso, la prevención deberá realizarse dentro de los cinco días hábiles siguientes a la recepción de la solicitud. El solicitante deberá subsanar las omisiones en un plazo de cinco días hábiles contados a partir del día hábil siguiente al de la notificación de la misma o, de lo contrario, se tendrá por no presentada la solicitud.

**Artículo 26.** Si la Secretaría no resuelve dentro del término a que se refiere el artículo 24, se entenderá otorgada la autorización y registro de funcionamiento, así como la aprobación de la tarifa respectiva.

A petición del interesado se deberá expedir constancia de tal circunstancia, dentro de los dos días hábiles siguientes a la presentación de la solicitud correspondiente.

**Artículo 27.** La autorización y registro de funcionamiento de las agencias de colocación de trabajadores con fines de lucro tendrá una vigencia de cinco años.

Los interesados podrán solicitar que se prorrogue la vigencia de la autorización y registro de funcionamiento, por lo menos con quince días hábiles de anticipación a la fecha en que concluya la vigencia respectiva. En estos casos, la solicitud se deberá presentar en el formato que para tal efecto expida la Secretaría.

**Artículo 28.** Las agencias de colocación con fines de lucro que requieran modificar su tarifa, deberán presentar su solicitud a través de los formatos que para tal efecto emita la Secretaría, por lo menos con cinco días hábiles de anticipación a la fecha en que se desee hacer efectiva la nueva tarifa.

Dentro de los tres días hábiles siguientes a la presentación de la solicitud, la Secretaría resolverá sobre el nuevo monto de la tarifa. De no emitir respuesta en dicho plazo, se tendrá por aprobada la modificación de la tarifa.

**Artículo 29.** Además de las obligaciones consignadas en el artículo 9 de este Reglamento, las agencias de colocación de trabajadores con fines de lucro estarán obligadas a colocar la autorización y registro de funcionamiento en lugar visible para el público, así como la leyenda de que sus servicios son gratuitos para los trabajadores.

**CAPÍTULO V DE LA VIGILANCIA, INSPECCIÓN Y SANCIONES ADMINISTRATIVAS**

**Artículo 30.** La Secretaría, a través de la Inspección Federal del Trabajo, tendrá a su cargo la vigilancia del cumplimiento de las disposiciones constitucionales, de la Ley, de sus reglamentos y demás aplicables en materia de colocación de trabajadores, la que contará con el auxilio de las autoridades del trabajo de las Entidades Federativas y del Distrito Federal, en términos de las disposiciones aplicables.

Cuando la Secretaría detecte el incumplimiento de disposiciones jurídicas relacionadas con la materia de colocación de trabajadores, cuya aplicación y vigilancia competa a otras dependencias de la Administración Pública Federal, lo notificará a éstas dentro de los siguientes 5 días hábiles, enviando copia del acta de inspección respectiva para los efectos legales procedentes.

**Artículo 31.** La función de inspección en materia de colocación de trabajadores se realizará en los términos que establece la Ley, sus reglamentos aplicables y la Ley Federal de Procedimiento Administrativo.

**Artículo 32.** Las violaciones a las disposiciones que regulan el servicio de colocación de trabajadores serán sancionadas administrativamente por la Secretaría, de conformidad con lo establecido en los artículos 992, segundo párrafo y 1002 de la Ley, sin perjuicio de las sanciones que proceda imponer por parte de otras autoridades, de conformidad con las disposiciones legales y reglamentarias aplicables.

*Quo Vadis? Recruitment and Contracting…:*
Artículo 33. Las violaciones a las disposiciones que regulan el servicio de colocación de trabajadores, se sancionarán en los siguientes términos:

I. Multa:
   a) De 3 a 105 veces el salario mínimo general, a las agencias de colocación de trabajadores que violen las disposiciones contenidas en los artículos 8, 9, fracciones II, IV y V, 15, 20 y 29 de este Reglamento;
   b) De 3 a 210 veces el salario mínimo general, a las agencias de colocación de trabajadores que violen las disposiciones contenidas en los artículos 10, fracción IV, 21, primer párrafo y 28 de este Reglamento;
   c) De 3 a 315 veces el salario mínimo general, a las agencias de colocación que violen las disposiciones contenidas en los artículos 4, primer párrafo, 5, 6, 9, fracciones I, III, VI y VIII, 10, fracciones I, II, y III y 22 del presente Reglamento;
   d) De 15 a 315 veces el salario mínimo general, a las agencias de colocación de trabajadores que no permitan la inspección y vigilancia de sus establecimientos, con el propósito de verificar el cumplimiento de la Ley, este Reglamento y demás disposiciones jurídicas aplicables, proporcionando la información que para tal efecto les sea requerida.

II. Suspensión temporal de la autorización de funcionamiento de la agencia de colocación, y

III. Revocación de la autorización de funcionamiento correspondiente y la cancelación del registro.

Artículo 34. Si aplicada alguna de las multas a que se refiere la fracción I del artículo anterior, la agencia de colocación, en un lapso de dos años, reincide en infringir las disposiciones que regulan el servicio de colocación de trabajadores contenidas en los artículos 5, 6, 9, fracciones I, III, VII y VIII, y 10, fracciones I, II, y III del presente Reglamento, se le aplicará la sanción de suspensión temporal de la autorización, que podrá ser de entre 5 y 30 días.

Artículo 35. Si aplicada la sanción a que se refiere el artículo anterior se detecta una nueva infracción a las disposiciones que regulan el servicio de colocación de trabajadores, se procederá a revocar la autorización de funcionamiento y a cancelar el registro respectivo a las agencias de colocación de trabajadores.

CAPÍTULO VI DEL RECURSO DE REVISIÓN

Artículo 36. Contra las resoluciones que nieguen la autorización y registro de funcionamiento de las agencias de colocación, la aprobación de la tarifa, así como las que pongan fin al procedimiento administrativo sancionador, procederá la interposición del recurso de revisión ante la Secretaría, en la forma y términos previstos por la Ley Federal de Procedimiento Administrativo.

TRANSITORIOS

PRIMERO. El presente Reglamento entrará en vigor al día siguiente de su publicación en el Diario Oficial de la Federación.

SEGUNDO. Se abroga el Reglamento de Agencias de Colocación de Trabajadores, publicado en el Diario Oficial de la Federación el 23 de noviembre de 1982.

TERCERO. Dentro de los quince días siguientes a la entrada en vigor del presente Reglamento, la Secretaría del Trabajo y Previsión Social deberá publicar en el Diario Oficial de la Federación, el Acuerdo a que se refiere el artículo 16 del presente ordenamiento.
CUARTO. Las agencias de colocación de trabajadores que se encuentren funcionando a la fecha de entrada en vigor del presente Reglamento, deberán realizar los trámites para efectos de registro y control a que se refiere este ordenamiento, en un plazo no mayor de tres meses contados a partir de la fecha en que la Secretaría del Trabajo y Previsión Social dé a conocer los requisitos y formatos de los trámites aplicables.