RECRUITMENT RULES: COUNTRIES OF ORIGIN

COMPARATIVE ANALYSIS OF RECRUITMENT LAWS IN MEXICO, GUATEMALA, EL SALVADOR, HONDURAS AND NICARAGUA FOR WORKERS ABROAD.

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For more information or to obtain additional copies:

Global Workers Justice Alliance
789 Washington Avenue
Brooklyn, NY 11238
+1 (646) 351 – 1160

info@globalworkers.org

www.globalworkers.org

Connect:

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INTRODUCTION

Global Workers Justice Alliance was founded in response to a crisis that had developed in the global economy and had not received sufficient attention: the lack of access to justice for migrant workers that have been abused, but had to return to their country of origin prior to achieving justice for wrongs suffered.

Global Workers focuses on improving access to transnational justice through advocacy and litigation, both in countries of origin and in countries of employment. For that purpose, it maintains an alliance with at least thirty organizations in Mexico and Central America who form part of the Global Workers' Defenders Network.

Based on the work completed in recent years, one constant was noted in the lack of protection for workers' rights: a lack of effective laws and regulations that impedes access to transnational justice, and the abuses of unscrupulous recruiters who charge workers excessive sums during the recruiting and hiring process.

The recruiting laws and regulations analyzed in this report focus on recruitment for work abroad. Each year, thousands of Mexicans and Central Americans travel to work in the United States (USA) and Canada with temporary visas. Although no precise number exists, it is estimated that more than 25,000 workers enter Canada and more than 100,000 enter the USA annually to work in agriculture and other low-wage industries.[1] Furthermore, dynamic intraregional migration also takes place. An estimated 40,000 Guatemalans work on farms in the State of Chiapas, Mexico, and nearly 12,000 Nicaraguans work on farmlands in Costa Rica. Temporary work programs lack transparency, making it difficult to calculate exact figures. Even though irregular migration numbers remain high, migration through these temporary visa programs is expanding and growing every year. The importance of a solid legal framework to protect these workers can not be overstated.

We believe that to have long term, sustainable impact on the protection of all migrant workers' rights, it is necessary to establish standard regulations for the region and improve upon the existing frameworks by encouraging regional governments to implement the schema and comply with international standards.

Given the similar conditions observed in the region of Mexico and Central America, [2] and given the political and economic relations between the various countries of origin and employment, we believe that the standardization of regulations and protections of temporary workers' rights could be the way to create a relationship that guarantees these workers' rights. This would prevent recruiting agencies from selecting migrant from the countries of origin with the least protections. Sharing information about problematic recruiting agencies between consulates would also help prevent worker abuse.

This report is a comparative analysis of the regulations that exist on a national level in Mexico, Guatemala, El Salvador, Honduras, and Nicaragua. It is intended to identify both the loopholes that exist and opportunities that allow for dialogue between regional governments, with the goal of beginning the process of standardizing the regulations to protect the rights of migrant workers.

1 See http://www.globalworkers.org/country-data-countries/canada and http://globalworkers.org/visa-pages. (Date of visit: March 4, 2015)

2 In this report, we use the term region to refer to the geographic area of the migrant corridor that includes México, Guatemala, El Salvador, Honduras and Nicaragua to the United States and Canada, as well as the inter-regional migratory dynamics.

Also included in this report are so-called “labor mobility agreements” signed by two countries and private contracts between a country and a private recruiting agency. They are mentioned in this report, but we do not focus on the analysis of their reach or effectiveness in providing protections to workers. However, we have not ignored their importance and recognize the need to review the implications those contracts have on the rights of migrant workers.

As to the structure of the report, we first outline the national laws relating to this topic found in each country, then the specific regulations, special agreements, conventions of the International Labour Organization (ILO).[3] The report concludes with recommendations.

3 We did not include the 1990 International Convention on the Protection of the Rights of Migrant Workers and Their Families from the United Nations, given that it does not regulate the recruiting of temporary workers. We focused instead on the International Labour Organization’s Conventions 96, regarding fee-charging placement agencies, and 181, regarding private employment agencies.

MEXICO

LAWS

Article 28 of the Federal Labor Law

On November 30, 2012, the Mexican government reformed the Federal Labor Law (Spanish acronym: LFT).[4] The same contains regulations for temporary programs that employ Mexican workers abroad.

Given the impact these reforms have had on the rights of temporary migrant workers, we want to highlight the most important modifications contained in Article 28 of the Federal Labor Law that are relevant to this issue.

Before the 2012 reforms, Article 28, Section I, paragraph b) clearly established the employer's obligation to cover the transportation costs of repatriation, transfer to the site of origin, and food for the worker and his/her family during transit, as well as all costs originating from border crossings and compliance with migration laws, or from any similar concepts. In current form, the Article states that the employer would be solely responsible for the costs of repatriation.

Said paragraph established a salary protection with respect to the aforementioned costs, indicating that "the worker will receive the complete salary to which he/she is entitled, as no quantity may be deducted for those concepts." After the 2012 reform, this protection was left out. This omission implies that the worker now lacks legal protection, and can be interpreted to mean that the parties to the contract may establish who must cover transport, repatriation, transfer to the place of origin, and food costs for the worker and his/her family, as well as those costs originating from border crossings, compliance with migration laws, and from similar concepts. Now, those costs may well fall upon the worker, or be shared between the worker and the employer.

The reform also omits mention of other employment benefits[5], which were previously addressed in paragraph c) of Article 28 prior to the 2012 reform. Benefits have been reduced to getting simple medical attention. In other words, workers lose the possibility of benefiting from any benefits provided by the countries to which they travel for work[6]. Also absent from the contents of this paragraph is any mention of workers' compensation for on-the-job risks. According to the highest standards of protection for workers' rights, employment benefits and workers' compensation are not rights that may be waived[7]. Therefore, their omission from the labor reform is another setback for migrant workers and a grave violation of labor rights. Likewise, it implies a failure to comply with the obligations of the Mexican state to respect and protect those rights[8].

Furthermore, the reform does not require that a worker be provided with housing as a job condition.

The information in paragraph d) of the reformed Article 28 regarding consular services and the authorities of the country of employment, to whom the worker might turn in cases where his/her

4 See: http://www3.diputados.gob.mx/camara/001_diputados/003_comisiones/001_ordinarias/trabajo_y_prevision_social/reforma_laboral

5 Such as retirement, medical benefits upon their return.

6 Before the reforms, Mexican law recognized that the workers where entitled of these benefits, even when they didn't have jurisdiction on it.

7 see: http://www.ilo.org/global/standards/lang--en/index.htm

8 Mexican government is supposed to protect their nationals rights

rights have been violated, could be considered an advancement for workers' rights. However, our analysis shows that these advances are outweighed by the accumulation of the aforementioned setbacks that are so detrimental to workers.

Another regressive measure comes from the interpretation of Section 2 of Article 28. This section states that the employer will be required to post a bond or deposit to guarantee his compliance with all obligations only in cases where the employer has no offices or business representatives in Mexico. The drafting of this section leads one to believe that, in cases where the employer does have offices in Mexico, he will be exempt from paying said bond. This situation could leave workers defenseless, as it would be more difficult for them to demand payment in breach of contract cases. While the worker could bring a breach of contract suit before the Commission of Conciliation and Arbitration, the truth is that not requiring that a bond be deposited by the employer lessens the likelihood that adequate reparation for said breach will be available.

There is no requirement that a document containing the work conditions be approved by the country of employment's consul. This makes it all the more difficult to officially notify the employer abroad when filing suit. The same applies to the possibility of executing any judgment[9] on properties outside of Mexican territory. In the new text, it is only required that the employer and the worker affix the visa or work permit issued by the country of employment to the work contract.

The 2012 reform creates Articles 28-A and 28-B[10] to cover situations when workers are recruited in Mexico for work abroad. Article 28-A refers to Mexican workers placed by mechanisms agreed upon by the Mexican government and a foreign government, for example, the bilateral agreement with Canada.[11] Article 28-B refers to Mexican workers placed through private placement agencies.

REGULATIONS

Regulation of Worker Placement Agencies (Spanish acronym: RACT)

As part of the labor reforms undertaken by the government of Mexico, and apart from those approved in the aforementioned Federal Labor Law, reforms to the Regulation of Worker Placement Agencies (Spanish acronym: RACT) were approved in May 2014. These reforms modify the March 2006 RACT. [12]

Despite the fact that the impact of existing regulations could be reduced by the lack of special treatment for temporary migrant work, the recent reforms to RACT advance the regulation of recruiting agencies and provide some protections for temporary workers abroad.[13]

In its current form, the RACT regulates the recruitment and placement of workers within and outside of national territory.

The reforms to the RACT introduce gender and migrant status as criteria in the prevention of discrimination in Article 6, Paragraph V. However, it offers no special protections to vulnerable groups, such as women and indigenous people.[14]

9 See: http://sncedj.ijf.cjf.gob.mx/Doctos/IntrFuncionJuris/TecnicaElabSent/Docs/1.4.%20Sentencia.pdf

10 Art. 28-A regulates the recruitment of workers by a public or government agency, while Art. 28-B regulates the recruitment by private agenices

11 See: http://www.ordenjuridico.gob.mx/Publicaciones/CDs2010/CDConsular/pdf/T51.pdf

12 See http://www.dof.gob.mx/nota_detalle.php?codigo=5345536&fecha=21/05/2014

13 Gutiérrez, Paulina. (2014) RACT. Evaluation Study of the Regulation of Worker Placement Agencies and information mechanisms between Mexico and the United States regarding the recruiting and hiring of Mexican temporary migrant workers under the H-2A and H-2B visa schemes.

The RACT requires recruiting agencies to submit quarterly reports to the Secretariat of Labor and Social Welfare (Spanish acronym: STPS).

The RACT includes the changes made to Article 28 of the Federal Labor Law regarding the employer's obligation to cover the costs of transportation and food and lodging during the worker's travel, adopting measures to ensure that these services are provided free of charge for workers more than 100 km from their homes.[15] However, there is no clarity regarding whose responsibility it is to ensure these measures are complied with, as there is no indication as to who will be responsible for covering these expenses.

The agencies are also required to make public their authorization and operating license and include a clear statement that their services are free of charge. This is important given the frequency with which placement agencies charge workers for their services.[16]

Placement agencies must verify job offers and adopt measures to verify working conditions, housing, and other employment benefits. In the cases of workers abroad, the regulations of the country of employment apply, and as such, placement agencies have hardly any ability to ensure that those laws are followed. Furthermore, as civil organizations have shown, in the recruiting and contracting processes, the placement agencies themselves violate workers' rights more often than anyone else.

It is also left to the recruiting agencies to verify that workers have complied with all visa applications and work permits, to inform workers about their rights to consular protection and access to justice in the country of employment, as well as guarantee or cover repatriation costs for workers in cases of breaches of work conditions.[17]

Although placement agencies must post a deposit or bond to cover the aforementioned costs, these important issues are again relegated, making it possible for them to manipulate information and take advantage of workers' lack of knowledge of the general process[18].

Included in the restrictions placed on the agencies is a prohibition on withholding personal documents and on the direct or indirect management of applications for visas, permits, passports, etc., that workers need.[19] In practice, this is not beneficial because the restriction only applies to recruiting agencies -- other agents and intermediaries that provide third-party assistance with the aforementioned applications apparently are not covered by this law.

The new regulation eliminates the Interior Ministry's previous power of authorization for recruiting agencies, leaving the Secretariat of Labor and Social Welfare alone to authorize and register their operation.

From the positive elements established in the new regulation, we might mention the information campaigns regarding the rights and obligations of worker placement services.[20] To this end, the

14 It refers to groups such as women and indigenous people

15 Regulation of Worker Placement Agencies, Art. 9, Paragraph VI. To adopt the necessary measures so that the transportation, housing, and food for the transfer of workers going to work in sites located more than 100 kilometers from their habitual residence be provided to them at no cost.

16 Art. 9, Paragraph VI Bis of the RACT.

17 The reforms to RACT-2006, create Article 9 Bis containing the aforementioned obligations.. See http://www.dof.gob.mx/nota_detalle.php?codigo=5345536&fecha=21/05/2014

18 With the reforms, government plays a minor role on making sure all these rights are respected leaving the agencies to just make sure to comply with it

19 Art. 10,Paragraphs II Bis y II Ter of the RACT

20 Chapter II, Art. 18 of the RACT.

STPS may form agreements with the governments of the various states and with the Federal District. It also introduces the concept of a model contract that must be presented by recruiting agencies to obtain authorizations for operation, and the protection of workers' personal information.[21] Official inspections by the Secretariat of Labor and Social Welfare and the possibility of reporting complaints to the Attorney General are also introduced.

SPECIAL AGREEMENTS

Seasonal Agricultural Workers Program between Mexico and Canada (Spanish Acronym: PTAT)
This program was born out of the signing of a memorandum of understanding between the two governments in 1974, with the goal of making agricultural workers from Mexico available for work in Canada.[22]

The program is coordinated by STPS, the Secretary of Foreign Relations (Spanish acronym: SRE), and their Canadian counterparts, Employment and Social Development Canada, formerly known as the Human Resources and Skills Development Canada (HRSDC). In Mexico, STPS, through the National Employment Service in each federal entity, is responsible for recruiting and selecting workers.

Although this report's goal is not to analyze the effectiveness of this program, it is important to point out that review of the program is required to determine if the agreement contains exceptions to the current legal framework on recruitment.

INTERNATIONAL CONVENTIONS AND TREATIES

From the relevant International Labour Organization conventions, Mexico has accepted the provisions from Part III of Convention 96[23] regarding fee-charging placement agencies and has not yet ratified Convention 181 regarding private employment agencies.

OBSERVATIONS

As can be seen, basic rights, such as access to information, access to justice in the country of employment, and various employment benefits, are relegated in the regulatory framework on recruiting.[24] This is because Article 28 of the LFT, in its current form, creates many gray areas and leaves the employer and, sometimes, the recruiter without any direct responsibility in the protection of workers' labor rights.

Rights that should be protected, based on international standards, such as salary protection, access to justice, and access to other employment benefits suffer setbacks with the reforms made to the LFT, particularly Article 28.

The reforms made to RACT advance the regulation of placement agencies' activities, as it broadens the criteria of discrimination, introduces new concepts such as the model contract, and ensures the right to privacy for workers' personal information. However, by leaving placement agencies to confirm that basic rights, such as verification of the veracity of job offers, work conditions, transportation costs and other employment benefits, are protected, the scope of these regulations is called into question and the protection of workers' labor rights is put at risk.

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21 Art. 20. Paragraph VI of the RACT

22 Mexico and Guatemala signed an agreement in 2014 that set the general basis for dealing with the theme of labor migration between both countriesSee the Guatemala section of this document. Regarding the PTAT see http://www.globalworkers.org/country-data-countries/mexico/temporary-worker-programs-canada and Verma, Veena (2003) The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program Under Unionization.

23 On March 1, 1991, Mexico accepted the provisions of Part III of this convention, which refers to the regulation of fee-charging placement agencies. See http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312241

24 Comparing to the law before the reforms, these rights now are weak

Furthermore, it does not offer special protections to vulnerable groups such as women and indigenous populations.

To meet the challenges posed by current labor movement and because of the strategic position of Mexico in the region, as a country of origin and of employment for migrant workers, it is necessary that the Mexican government ratify Convention 181 of the ILO regarding private employment agencies. The Mexican government must also adopt Convention 96, dealing with fee-charging placement agencies, in its entirety; especially part II, which refers to the progressive abolishment of profit-driven, fee-charging placement agencies. Having done this, Mexico would have the internationally recognized legal context and standards regarding recruiting and labor mobility when regulating these activities.

GUATEMALA

LAWS

By law, the Ministry of Labor and Social Welfare (Spanish acronym: MINTRAB) and the Ministry of Foreign Affairs (Spanish acronym: MINEX) handle the regulation of recruitment activities and of the institutionalization of temporary work programs for Guatemalans abroad. The former deals with subjects related to labor and the latter is charged with binational relations with the governments of countries of employment.

As for the existing regulations, we refer to Article 34 of the Labor Code,[25] which provides the context for the regulation of recruiting activities and establishes principles for the institutionalization of temporary work programs.

Article 34 of the Labor Code, in the Second Title: Contracts and Labor Agreements, General Provisions and Individual Labor Contracts, establishes the State of Guatemala's authority for the protection of the rights of Guatemalan workers abroad.

The article in question clearly and specifically establishes MINTRAB's power to authorize the recruiting and departure of workers for jobs abroad, and explicitly prohibits the execution of contracts without MINTRAB's authorization.

In paragraph a), the recruiting company is required to maintain a permanent office in the capital of the republic for the length of the contract. This is important with regard to the responsibility of the recruiting agency, in cases of breach of contract that might be brought before the appropriate authorities.

Paragraph b) establishes the clear and specific requirement[26] of recruiters or agencies[27] to cover the costs of transportation abroad for the worker, from his/her habitual home to the place of work, as well as those costs originating from the crossing of borders and costs for his/her family, when permitted. The costs related to the worker's family are to guarantee the union of the family unit, not to imply that family members must also work. It follows, then, that the worker should not incur expenses of any kind related to the provisions of paragraph b) being discussed.

25 Labor Code, Decree No. 1441, July 2011. Available online:
http://www.mintrabajo.gob.gt/images/organizacion/leyesconveniosyacuerdos/Leyes_Ordinarias/Codigodetrabajodeguatemala2011.pdf

26 Article 4 of the Labor Code indicates that dealings between employers' representatives and workers are binding upon the employer. In this case, therefore,, the recruiters are the companies' representatives in Guatemala.

27 In this paragraph, the Labor Code uses the term "company" when referring to recruiting and placement agencies.

This assignation is of utmost importance, since, as civil organizations have reported, most abuses are committed during the recruiting process, owing to workers' lack of knowledge and recruiters' bad faith actions.[28]

Paragraph c) establishes a bond for recruiters or businesses to guarantee the worker's repatriation costs and for the payment of claims that may be formulated. It also opens the possibility that the worker may decide to stay and not return to his/her country of origin or place of residence. This would be formalized before a consular body of his/her country located in the country of employment.

Paragraph d) of the Article under discussion establishes that work contracts be executed with the written permission and authorization of MINTRAB. The contract must explicitly establish that all expenses be covered by the recruiter; that is to say, transportation, board, bonds, and border crossing expenses. The conditions of lodging, transportation, and repatriation also must be specifically included. It follows, then, that the worker should not incur any expenses for the placement services offered by the recruiting agency.

The existence of the work contract presupposes a more effective access to justice for the worker in case that contract is breached. The legal power conferred to MINTRAB includes the following: authorize the contract, monitor the recruiting process, and even prohibit the departure of temporary workers if their rights are violated or if any of the requirements discussed here are breached. It suggests that the state is able to meet its obligation to safeguard the rights of its citizens who go abroad for temporary work.

Article 35 of the same Code ratifies MINTRAB's power to deny authorization of contracts that do not both ensure that Guatemalan workers enjoy rights equal to those of the country of employment's workers and match Guatemalan legislation to that of the country of employment when the latter offers greater privilege to the country of employment's nationals.

This provision should be remembered when executing binational conventions with other countries, in order to ensure that said conventions specify clearly and precisely the unrestricted protection of Guatemalan workers' rights within the context of national laws in the countries of employment.

REGULATIONS

Guatemala is on the verge of regulating recruiting agencies and the recruiting process itself. On MINTRAB's initiative, a draft of a regulation was prepared in 2014 with the participation of all interested parties: recruitment agencies, the federal government, and civil society, represented by organizations that work on the issue. It would represent a great advancement in the protection of the rights of Guatemalan workers who participate in temporary work programs.

SPECIAL AGREEMENTS

Through a collaboration agreement with the Guatemalan government, the International Organization for Migration (IOM) took on the task of recruiting Guatemalan workers for work in Canada in 2005, as it had a contract with the *Fondation des Entreprises en Recrutement de Main-d'œuvre agricole Étrangère* (FERME), an organization of Canadian businesses. Around 2013, the IOM stopped recruiting workers, causing a vacuum in the recruiting market that was filled by private agents who continued the practice of recruiting Guatemalans to work in Canada.

28 Palacios, Aroldo (2013) Confiscation of Property TItles in Guatemala by Recruiters for Temporary Work Programs with H-2B visas.

With respect to relations with Mexico, no registry of recruiters or placement agents for Guatemalan workers travelling to work in Mexico exists. Interested workers have to apply for *Trabajador Fronterizo* (Border Worker) Visas. [29]

On August 7, 2014, Mexico and Guatemala signed a bilateral cooperation agreement regarding assistance for temporary workers[30] in both countries, demonstrating both states' concern regarding the protection of temporary workers' rights.

On August 14, 2014, Guatemala signed a letter of understanding with El Salvador and Honduras[31] in which the basis for institutional collaboration on labor mobility assistance was established.

INTERNATIONAL CONVENTIONS AND TREATIES

Although Guatemala has accepted the provisions of part II of Convention 96 of the International Labour Organization, regarding fee-charging placement agencies, [32] it has not yet ratified Convention 181, dealing with private employment agencies.

OBSERVATIONS

Guatemala does not have a specific regulation for temporary employment programs abroad, and neither MINTRAB nor MINEX has institutional control over the activities of recruiting agencies within the country. Although the contents of Article 34 of the Labor Code set a strong foundation for the rights and obligations related to recruiting, establishing specific regulations would further strengthen the framework for the protection of workers' rights.

A series of irregularities have been detected in recruiting by both agencies and individuals. These range from excessive charges for common administrative procedures to the confiscation of property titles by recruiters. This process has been legitimized by the intervention of the state's representative, in the figure of the Notary Public. [33]

To adequately respond to this problem, it is necessary that the Guatemalan government put more emphasis on the process of regulating recruiting and placement agencies.

EL SALVADOR

LAWS

The Ministry of Labor and Social Welfare (Spanish acronym: MTPS) must observe, at all times, the provisions of the Constitution of El Salvador, the Labor Code, and the Law of Organization and Functions of Labor and Social Welfare, which are the sources of their domestic obligations.

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29 See requirements in INM http://www.inm.gob.mx/index.php/page/TVTF

30 The agreements' objectives are: 1. To establish a basis for cooperation and labor exchange in order to have quantitative and qualitative information regarding temporary migrant workers that would allow for the design of active labor policies; 2. To create a labor observatory that can analyze the conditions temporary migrant workers face, such as the monitoring of labor flow between Mexico and Guatemala; 3. The design of active policies to create legal mechanisms for temporary migrant workers.

31 Esta carta de entendimiento se firma para "abordar el tema sobre trabajadores migrantes" y dentro de las clausulas sobresalientes están: establecer un observatorio interinstitucional, fortalecimiento del servicio publico de empleo, trabajar una plataforma común de los sistemas nacionales de empleo, establecimiento de la seguridad social y seguro temporal para los trabajadores migrantes, sistema de contratación temporal unificada, entre otros. Carta de entendimiento entre titulares de trabajo y previsión social de Guatemala, El Salvador y Honduras, sobre trabajadores migrantes. MINTRAB, 14 de agosto de 2014.

32 Guatemala adoptó las disposiciones de la parte II del Convenio el 3 de enero de 1953, el cual se refiere a la supresión progresiva de las agencias retribuidas de colocación con fines lucrativos y la reglamentación de las demás agencias de colocación.

33 Names have been omitted for security reasons and upon request by workers who are parties in the cases, . However, in "Palacios, 2013" photocopies of documents exemplifying some cases are available..

Thus, the governmental entity charged with directing labor matters and labor relations between workers and employers is the Ministry of Labor and Social Welfare (MTPS). In the general functions discussed in Article 7 of the Law of Organization and Functions of Labor and Social Welfare[34], the MTSP is called upon "to execute and supervise the policies of labor relations; work inspections; occupational safety and hygiene; work environment; social welfare; labor migrations; as well as to promote, coordinate, and participate in the design of employment policies, social security, vocational training, and the formation of cooperatives." Similarly, to encourage and sustain the process of social dialogue and tripartite participation."

This same law, in Article 67, addresses private placement agencies, determining that control over these agencies will be the responsibility of MTPS.

From this assignation it can be inferred that recruiting processes enjoy protections that the government is required to provide.

On the other hand, Article 74 of the same law establishes the following:
Article 74. Contracts with Salvadoran workers for services abroad may be executed with permission from the Ministry of Labor and Social Welfare, who must grant that permission when the interests of those workers are guaranteed or when said contracts do not seriously harm the national economy. When the permission is granted, executed contracts should be submitted to the Ministry of Labor and Social Welfare for approval, which may be granted when the following requirements are met:

a) *That workers be 18 years of age or older;*
b) *That the workers' transportation, the place of work, and return costs are covered by the employer; and*
c) *That the employer deposit a bond that is sufficient, in the Ministry of Labor and Social Welfare's judgement, to guarantee the repatriation costs of the workers.*

Migration authorities will not permit the departure of the contracted workers if the corresponding contracts have not been approved by the Ministry of Labor and Social Welfare.

As can be seen, the fulfillment of the contract, protections for minors, and the duty of the employer to cover workers' transportation costs to the place of work and when returning are all established here.

There is no specific indication as to costs workers must incur for recruiting and placement services, and thus it may be inferred that these services are completely free of charge.

In that sense, this protection mechanism should be effective in preventing people from falling victim to misleading agreements during the recruitment process and in requiring that said agreements be formalized in work contracts, MTPS serves as the filter for validation and for implementation abroad.

REGULATIONS

In spite of the Salvadoran government's willingness to formalize agreements and continue sending workers abroad, the lack of specific regulations regarding recruitment and placement limits the reach of these initiatives. The existing regulations are limited to the content of the two aforementioned articles, leaving feeble protection for the rights of temporary migrant workers.

34 Law of Organization and Functions of Labor and Social Welfare, Decree No. 268 Available online: http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-organizacion-y-funciones-del-sector-trabajo-y-prevision-social

SPECIAL AGREEMENTS

In August 2014, El Salvador signed a letter of understanding with Honduras and Guatemala (on the Guatemalan government's initiative) that established general guidelines for the treatment of the subject of labor mobility.[35] Nevertheless, El Salvador does not have labor mobility agreements with other destination countries for temporary workers.

However, the Temporary Salvadoran Workers Abroad program (Spanish acronym: PROSALTEX) was initiated in 2002. This program allows the Salvadoran government to enter in bilateral agreements with other countries or foreign businesses, with the goal of establishing temporary labor migration schemes. In 2006, the importance of a cooperation framework agreement to coordinate the actions of the different institutions involved in labor migration processes became clear. In 2009, the second cooperation convention between the Ministry of Labor and Social Welfare, the Ministry of Foreign Affairs, and the International Organization for Migration (IOM) was signed and later ratified with the signature of another convention in 2011. The goal was to further develop the temporary work abroad program with technical consultation from the IOM. In 2011, the Management Model for Temporary Labor Migration in El Salvador was created with the same goal in mind.[36] All this requires the delineation of the participating entities' responsibilities, a transparent process, and an efficient program.

INTERNATIONAL CONVENTIONS AND TREATIES

As is the case with the other countries in the region, El Salvador has not signed the International Labor Organization's conventions 96, regarding fee-charging placement agencies, or 181, regarding private employment agencies.

OBSERVATIONS

Although the Salvadoran government has promoted a more ordered system of labor migration for workers in recent years, and the Management Model for Temporary Labor Migration in El Salvador is a promising program, there is still no normative framework regulating the recruiting and hiring of Salvadoran workers.

Both PROSALTEX and the Management Model for Temporary Labor Migration in El Salvador are in response to the Salvadoran government's desire to place temporary workers in Canada. However, the responsibility of creating the conditions and ensuring the protection of temporary workers' labor rights is still unilateral. The framework requires the Salvadoran government to ensure the conditions for its workers before they leave the country, without any shared responsibility on the part of the government of the country of employment (in this case Canada). The creation of specific recruitment regulations is therefore necessary not only to strengthen these existing programs, but also to assign responsibility to businesses and governments in the countries of employment. Furthermore, to broaden and ensure the protection of workers' rights abroad, it is essential that Conventions 96 and 181 of the International Labour Organization be signed and ratified.

HONDURAS

LAWS

Honduran law considers the defense and protection of the rights and duties of Hondurans and foreign nationals in the country and includes the regulations and policies relating to national and international migration with respect to labor.

35 Letter of understanding between labor and social welfare stakeholders from Guatemala, El Salvador and Honduras, about migrant workers. MINTRAB, 14 August 2014.

36 See: http://www.crmsv.org/Eventos/Otros/Mayo2012/Presentaciones/Modelo%20de%20gestion%20FINAL%20FEBRERO%202011.pdf

Honduras's Labor Code dates back to 1959[37]. The creation of a new labor code within the framework of a tripartite commission – government, private sector, labor organizations – has been ongoing since 2008. However, it does already contain some reforms, through Legislative Decrees, that seek to adapt to the changing situation of labor migration.

The Legislative Decree 32-2003 (Diario Oficial La Gaceta, 16 April 2003)[38] reformed Articles 43, 44, and 45 of the Labor Code relating to private placement agencies. These reforms deal with the regulation, supervision, and control of the recruiting and hiring of Hondurans for work abroad.

These reforms define the concept of an intermediary by establishing that any person or legal entity, private or public, that contracts in its own name the services of one or more workers for the benefit of an employer may be defined as such. This leaves the employer joint and severally liable for any paperwork with Honduran workers. All this can be considered an advance for domestic hiring and the intervention of Honduran nationals in foreign companies' hiring.

Articles 43 and 44 of the Labor Code stipulate that the Secretary of State shall have competency in the offices of labor and social security, regarding the regulation, supervision, and control of the recruiting and hiring of Honduran workers for services and works abroad. This guarantees the rights established by the labor laws of the worker's country of employment, as well as all legislation adopted by the International Labour Organization (ILO).

Among the regulations in Article 43 of the Labor Code, the contents of paragraph c) should be noted. Here it is specified that the hiring party must fully cover any transportation costs from the worker's habitual place of residence to the place of work abroad, including any costs stemming from crossing borders and similar concepts. This paragraph also takes into account payment for costs incurred by family members accompanying the worker, if authorized.

Likewise, it is required that a copy of the work contract, in Spanish, be delivered to the worker. This contract must be approved by the Secretariat of Labor and Social Welfare, and must specify the place of work, type of work, work hours, salary, food and medical services to be provided, and the conditions of repatriation.

REGULATIONS

The Department of Labor issues regulations pertaining to the international movement of workers, which detail the process of obtaining permission from the Ministry of Labor and Social Security (Spanish acronym: STSS) as well as the monitoring of work protections for minors.

On July 30, 2008, the Regulation for the recruiting and hiring of Honduran workers Abroad was issued.[39] Its goal is to establish the basic conditions for the recruiting and hiring of Honduran workers for work abroad, as well as to regulate, supervise, and control any person or legal entity that recruits and/or hires for work abroad.

37 Labor Code, Legislative Decree 189-59, 15 July 1959. The general objective of this decree is to regulate the relationship between capital and labor with a foundation in social justice. Its goal is to guarantee, for workers, the conditions necessary for a normal life, and, for capital, an equitable return on investment.

38 It should be mentioned that, to date, this decree has no regulation approved for implementation.

39 Secretariat of Labor and Social Welfare, Agreement number STSS-252-08, Diario Oficial La Gaceta 30.07.2008 Regulation for the recruiting and hiring of Honduran workers abroad

In Article 5, the regulation anticipates the management and economic capacity of private non-profit organizations in Honduras that sponsor the work of Hondurans abroad, to assume the costs of recruitment so they do not fall upon employers and workers.

Articles 8 and 9 of the regulation set forth the obligations of persons or legal entities dedicated to recruiting and hiring workers abroad. Among these is included the verification of current operation by way of a certificate issued by the STSS through the Department of Labor.

Two aspects of this paragraph should be highlighted: the inclusion of families travelling with the worker and the hiring party's duty to cover transportation costs for both the worker and his/her family.

These distinctions are important, but, the worker is still vulnerable due to the failure to specify the conditions of repatriation and the failure to establish the work conditions that must be met to safeguard the worker's rights.

In Chapter VII of the regulation, regarding the Contract, there is no further specification regarding the work conditions and, as such, the protection of the worker's rights. However, international legislation on the subject is referenced and the private recruiting agent is held responsible along with the employer if workers' rights are violated.

The latter is of the utmost importance, as it is ensures the contract is complied with and the worker's rights are protected. It also opens the possibility of recruiters facing prosecution in the courts.

The regulation also requires that the recruiter maintain offices, either permanently or for the length of the contract, in the Honduran capital. This is for the purpose of responding to potential claims by workers or their families. Furthermore, the recruiter is required to post a bond to guarantee repatriation costs and/or compensation, and to designate an institution with sufficient funds to be bound jointly and severally to cover the repatriation costs of the worker and his/her family members.

There are some gaps found in the regulation. These include a charge of between 10-20% of the total net salary the worker will accrue monthly for the first three months, at maximum, of the term of the employment contract. For-profit associations dedicated to recruiting and hiring workers may make these charges due to certain exceptions granted to them by the STSS, according to Article 11 of the regulation being discussed.[40]

The regulation leaves recruiting agencies to ensure equal work conditions in the country of employment, thus relegating its role in protecting the worker. Furthermore, the recruiter is also required to inform the worker of labor regulations in the country of employment and provide information about consulates. This puts the worker at risk, as the recruiter or employer has the power to control the information given to the worker, thus creating conditions under which the worker may fall victim to abuses.

40 Article 11 references Article 10, which prohibits charging for recruiting and hiring services. However, it also indicates that the Department of Labor may authorize exceptions, without specifying any further.

Minors are protected and discrimination in the recruiting and hiring processes are anticipated. This regulation also introduces the concept of family security by requiring the worker to comply with food benefits for his/her dependents.[41]

Article 18 of the regulation states that a list of persons and legal entities authorized for recruiting activities will be published annually.

Regarding the theme of coordination between the state institutions involved, such as the Department of Immigration, the Ministry of Foreign Affairs, and the Diplomatic Corps of the country of employment, we find a disorganization of work that prevents the correct operation of the regulation's stipulations. It is important to point out that the STSS, through the Department of Labor, is required to take the lead role in the coordination of work.

SPECIAL AGREEMENTS

Apart from those previously discussed, there are also several cooperation agreements with private institutions to manage employment programs abroad.

On February 26, 2007, the Honduran government and the International Organization for Migration (IOM) signed the Technical Cooperation and Operational Agreement for Honduran Labor Abroad. Its objective was to form an Interinstitutional Commission to promote effective and functional coordination in the development of the actions contained in said agreement.[42]

This is an example of when an association or business not located in the country recruits through the Secretariat of Labor and Social Security, according to the aforementioned Regulation. An addendum was added to this agreement in August 2008.

In June 2010, a US labor association made a formal request to the National Association of Manufacturers of Honduras. The creation of a Special System of Legal Migration for Honduran workers to work in the agricultural sector in the US and other countries was ordered. [43] This order eases and speeds up the hiring of Honduran agricultural workers, reforming the Labor Code with respect to work abroad. This is another example of an exception mechanism, given that an existing regulation governs the entire recruiting system.

There are various points in the exception mechanism that expand the Recruitment Regulation. For instance, there is Article 4, regarding establishing an office in the region where workers work to provide guidance and support during their stay; Article 6, regarding the duties of migrant workers, in numeral 3, specific compliance with contributions to the Special Plan for Services agreed upon by the Honduran Social Security Institute (Spanish acronym: IHSS); Article 10 ordering that STSS and IHSS create a special services program for illness and maternity care for the worker's family or dependents.[44]

INTERNATIONAL CONVENTIONS AND TREATIES

The Honduran government has not ratified the International Labor Organization's conventions 96, regarding fee-charging placement agencies, or 181, regarding private employment agencies.

41 Art. 19 h) "Migrant worker's commitment to guarantee the provision of food to his/her economic dependents, in accordance with articles 120 and 121 of the Family Code, duly authenticated." Regulation for the recruiting and hiring of Honduran workers abroad, 2008.

42 See http://www.iom.int/cms/en/sites/iom/home/where-we-work/americas/central-and-north-america-and-th/honduras.html

43 National Congress, Decree No. 69-2010, which created a Special Regime for the Legal Migration of Honduran Workers to work in the agricultural sector in the United States of America and other countries.

44 Although called a mechanism of exception, this decree creates special regulations to be added to existing regulations, and considers other protections for workers and their families.

OBSERVATIONS

As can be seen, the Honduran government has made efforts to regulate recruiting and hiring for work abroad.

However, the creation of special regulations creates, in turn, special exceptions, relegating the recruitment and placement of workers to private companies. In practice, this is problematic, as it allows that more exceptions may be created in response to specific cases, instead of strengthening the existing legal framework and protecting workers' rights overall. Furthermore, cooperation agreements with private institutions call into question the reach, compliance, and execution of the legislation on the subject.

NICARAGUA

LAWS

The only reference made to the recruiting and hiring of Nicaraguan workers for work abroad is found in Article 15 of the Labor Code[45], which prohibits the execution of work contracts to provide services or labor abroad by Nicaraguan workers within the country, without the express prior authorization from the respective body of the Ministry of Labor (Spanish acronym: MITRAB). Article 16 of the same empowers MITRAB to regulate private agencies' services.

The Labor Code recognizes that work rights may not be waived, and subjects itself to international legislation based on relevant international treaties signed by the Nicaraguan government. However, beyond what is indicated in these Articles, there is no specific regulation regarding recruitment and placement of temporary workers.

The current Immigration[46] regulation seeks to direct and control all policies on immigration and migration that may arise within the country.

Nevertheless, this regulation does not emphatically deal with the subject of migratory movement for work purposes, through compliance with the Nicaraguan government's constitutional obligations and the different administrative and judicial authorities responsible for knowing any subject relating to this theme.

REGULATIONS

As mentioned above, no specific regulation exists that deals with recruitment.

The Labor Code, in Articles 15 and 16, empowers MITRAB to authorize contracts of Nicaraguan workers within the country for work abroad and serve as intermediary or employment agency, free of charge. This, in turn, will regulate the functioning of private recruiting companies.

SPECIAL AGREEMENTS

Nicaragua has signed some agreements with Costa Rica to regulate the entry of Nicaraguan laborers into Costa Rica for employment purposes. In 2007, an agreement was signed with the goal of establishing a protocol for labor mediation, looking to recruit and hire Nicaraguans[47] to

45 La Gaceta, 30 October 1996, Number. 205, pp. 6109-6190 Nicaragua Law No. 185, Labor Code.

46 Decree No. 31-2012, which created Regulation No. 761, General Migration Law, Gaceta-Diario Oficial 184. Available online http://www.cancilleria.gob.ni/ministerio/leyes/leyespdf/Ley-761-Migracion-y-Extranjeria.pdf

47 Bolaños Céspedes, Fernando. Legal, Social, and Labor Opinion: Binational Agreement, Costa-Rica Nicaragua, Report by Friedrich Ebert Stiftung Foundation, 2009.

work in Costa Rica. This agreement is known as the Costa Rica/Nicaragua Co-development Agreement.[48]

This effort came out of the framework of a project financed by the Spanish Agency of International Cooperation for Development (Spanish acronym: AECID) and run by the International Organization for Migration (IOM) in Costa Rica from 2008 to 2011.[49] With respect to recruiting in Nicaragua, MITRAB verifies and issues authorizations to employers to manage recruiting under MITRAB's supervision. The Agreement requires that employers draw up a work contract, manage permits, provide transportation between the place of origin and the destination and vice versa, provide housing to the worker at no cost, offer information to all institutions about the entry and exit of workers, and make security deposits.

INTERNATIONAL CONVENTIONS AND TREATIES

The Nicaraguan government has not ratified the International Labor Organization's conventions 96, regarding fee-charging placement agencies, or 181, regarding private employment agencies.

OBSERVATIONS

Nicaragua is still on the threshold of regulating the recruitment and hiring of Nicaraguan workers for work abroad. Although the government has shown its willingness to legislate the subject, there is still a large gap that leaves temporary workers abroad legally helpless.

Signed conventions with countries of employment, in spite of being a good effort towards regulating temporary labor migration, do not deal with the subject at its roots or in a systemic manner to ensure the protection of temporary workers' rights.

The failure to sign and ratify the pertinent International Labor Organization conventions only adds to the legal vacuum that currently exists.

48 For an evaluation of the agreement's impact, see Ministry of Labor and Social Security, Costa Rica (2011) Preliminary Report, Costa Rica/Nicaragua Co-Development Agreement, 2008-2010.

49 Ancheita, A. y Bonnici, G. (2013) "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" Work Document No.4 INEDIM.

Conclusion

COMPARATIVE TABLE OF TEMPORARY WORKER RECRUITING LAWS AND REGULATIONS FOR WORK ABROAD

SUBJECT	MEXICO	GUATEMALA
Regulations	Federal Labor Law, Article 28. Worker Placement Agency Regulation.	Labor Code, Articles 34 y 45.
Government agency charged with implementation of regulations \	Secretariat of Labor and Social Welfare, Commission of Conciliation and Arbitration	Ministry of Labor and Social Welfare
Worker must pay transportation costs	No, if the worker's home is farther than 100 km	No
Recruiting agency may receive fees or charge for any of its services	No	Not specified
Recruiting agency is required to post a bond or pay some type of fee to a government agency in country of recruitment	Yes, in cases where it has no physical offices in the country and for repatriation costs	Yes, for repatriation and in cases claims are brought
Requiting agency required to have an office in country of origin	Yes, with the aforementioned exception	Yes
Government agency in country of origin approves contract before departure	Yes	Yes
Worker receives a copy of contract before leaving country of origin	Implied, but not specified	Yes
Ministry of Labor, Ministry of Foreign Affairs, or similar agencies provide information about consular services and/or labor rights in the country of employment	Yes, in cases of mechanisms agreed upon by the Mexican government and foreign governments, said agreement must address this without specifying responsibility. Private placement agencies are responsible for providing this information to workers.	No, but the consular body in the country of employment is required to monitor compliance with the contract
Requirement that a public registry of registered recruitment agencies exist	Yes	Yes
Required to provide housing for worker in country of employment	Unclear, it is only indicated that it will not be in the same place of work	Unclear

EL SALVADOR	HONDURAS	NICARAGUA
Law of Organization and Functions of Labor and Social Welfare, Articles 7, 67 and 74.	Labor Code, Article 43, 44 and 45. Regulation for the recruiting and hiring of Honduran workers Abroad was decreed.	Labor Code, Article 15.
Ministry of Labor and Social Welfare	Secretariat of Labor and Social Welfare and Department of Labor	Labor Ministry
No	No	N/A
Not specified	No. Only under specified exceptions	N/A
Yes, for repatriation	Yes, for repatriation or compensation	N/A
No	Yes	N/A
Yes	No, but contract must be registered	N/A
No	Yes	N/A
No	No	N/A
Not specified	Yes	N/A
No	No	N/A

As can be seen, there is a regional disparity in the recruiting regulations regarding workers abroad. With the exceptions of Mexico and Honduras, the rest of the countries in the area do not have regulations specific to recruitment. In the case of Honduras, a special system was created to regulate labor migration for agricultural workers going to the United States. Only Guatemala and Mexico have accepted parts of ILO Convention 96, relating to fee-charging placement agencies, and no country in the region has ratified ILO Convention 181, relating to private employment agencies. However, in each case we do find that the constitutional framework to legislate the subject does exist, and in some cases the subject is legislated in Labor Codes and other secondary laws.

Regarding bilateral agreements, we find that Mexico has an agreement with Canada; Guatemala and Mexico recently signed an agreement for the protection of temporary workers; Nicaragua and Costa Rica have signed a joint initiative for co-development. In other cases, there are agreements or contracts signed with a third-party agency that facilitates recruiting and hiring, such as in the cases of Honduras, El Salvador, and, previously, Honduras with the IOM. Nevertheless, in no country does there exist a formally established temporary employment program that ensures the protection of temporary workers' rights, formalizes the relationship between governments on labor mobility, and establishes norms for the shared legal responsibility between businesses and governments.

Along with all this, we find that in none of the cases examined do government agencies have effective institutional control over the activities of recruitment agencies. Even in cases where specific regulations do exist, the governments have not shown the capacity to maintain a registry of agencies operating in their territories, even those that do not have the proper permits or repeat offenders.

Workers' lack of knowledge regarding their rights, the control that recruiters exercise, and the lack of regulations have led to the systematic problem of abuse and violation of workers' rights. This has, in turn, led to extreme cases like that seen in Guatemala, where property titles have been confiscated by recruiters, or the fraud committed by recruiting agencies, that in some cases have official operating permits, such as in the case of Chamba-Mexico, in Mexico.[50]

In none of the regulations in the countries in the region do we find clarity with respect to the application of existing regulations, and in some there is no mention of informational campaigns directed at the populations interested in temporary work. That is to say, there is no clarity with respect to access to justice or access to information.

There is no indication in the existing legislation of any of the countries about the relationship and co-responsibility of the governments of the country of employment, with respect to the monitoring and protection of workers' rights, nor about the role that the embassies of countries of employment in the countries of origin could play, with respect to the coordination and sharing of information.

It is also important to note that in none of the documents being consulted was there found any reference to special protections for vulnerable groups, specifically women and indigenous

50 A massive fraud case related to offers of work visas to the USA and Canada. The Company had the permits required by the STPS and SHCP. It defrauded more than 3,000 workers in 19 Mexican states. In the last quarter of 2014, two of the parties responsible were detained, thanks to the intervention of organizations grouped together in the project *Jornalero SAFE*. See http://www.globalworkers.org/sites/default/files/NOTA_ChambaMX_Jornaleros-SAFE.pdf

populations.[51] That is to say, no government in the region considers these groups specifically when regulating or establishing hiring mechanisms for temporary workers.

51 ILO, Convention on Indigenous and Tribal Communities, 1989, Co169. Part III. Hiring and Work Conditions, Art. 20 . Ratified by all governments in the region with the exception of El Salvador.

Recommendations

1. **Effective protection of workers' rights**. Every country in the region must establish regulations that effectively protect temporary workers' rights, both during the recruiting process and when in the country of employment.
2. **Strengthen existing regulations.** Any gaps in recruiting and placement regulations must be addressed with an eye towards the international regulations on the subject. Workers' **access to justice** and information must be ensured, and regulations should include implementation of information campaigns and **fraud prevention** in recruiting.
3. **Access to portable justice.** Workers' should have access to justice in the country of employment even when they have returned to their country of origin. This should be made clear in both regulations and signed agreements between governments or third parties.
4. **Differentiated recruiting and hiring schemes.** The creation of such schemes should be avoided. Far from contributing to the protection of labor rights and prevention of abuses in recruiting overall, in reality such schemes lead to greater labor flexibility, a fragmentation of labor rights, and confusion for workers.
5. **Regional standards for recruiting and placement regulations,** and protections for temporary workers' rights. This would bring several benefits: it would prevent recruiting agencies from moving to other countries with greater legal flexibility, facilitate the sharing of information between governments, ensure workers' access to justice, ensure mobile justice, as well as lead to more equitable relations between countries of employment, as regulations throughout the region would be similar, if not equal.
6. **Special protections for vulnerable groups.** In all recruiting and placement regulations, as well as labor mobility agreements between governments or private parties, vulnerable groups must receive special protections. Especially **women, minors, and indigenous populations.**
7. **Ratification of international treaties.** Regional governments must ratify ILO treaties on the subject, especially Conventions 96, regarding fee-charging placement agencies, and 181, regarding private employment agencies.
8. An analysis of the implementation and impact of existing regulations is necessary. It should examine the effectiveness and reach of the labor mobility agreements or treaties between governments and of contracts with intermediary agencies between governments or between governments and employers.

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For more information or additional copies:

Global Workers Justice Alliance
789 Washington Avenue
Brooklyn, NY 11238
+1 (646) 351 – 1160

info@globalworkers.org

www.globalworkers.org

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