

**GENDER SENSITIVE LABOUR MIGRATION POLICIES**

**Submission to the Organization for Security and Cooperation in Europe**

**Brdo, 16-17 February 2009**

**Prof. Sarah H. Paoletti, Esq.**

**Clinical Supervisor and Lecturer**

**Transnational Legal Clinic**

**University of Pennsylvania School of Law**

Thank you for the invitation to participate, and to our hosts for this important seminar. I want to commend the OSCE for its work on a Guide on Gender-Sensitive Labour Migration Policies, and for recognizing that developing gender-sensitive policies in labour migration requires looking beyond the scourge of sex trafficking, but also must include the full scope of gender-based discrimination and exploitation that occurs in the course of migration from recruitment, migration, treatment in the host country, to reintegration.

Before I begin – I want to provide a short introduction so you understand the perspective from which I am speaking today. I am a member of the faculty the University of Pennsylvania Law School, where I founded and direct the Transnational Legal Clinic. In the clinic law students learn the practice of law through direct client representation and advocacy work in direct representation of individuals seeking legal status in the United States, as well as a range of international human rights advocacy, in which migration always plays a key role. Interestingly, the overwhelming majority of our individual clients are women. We have clients who have sought (and been granted) asylum based on past persecution in the form of domestic violence, female genital cutting, and HIV/AIDS. In addition, we are currently representing women seeking legal status through the U visa – which provides for legal status on the basis of having been a victim of serious crime, and suffering extreme hardship as a result. While the legal forms of relief available to these women are not directly related to labor and they may not be identified as part of the labor migration stream, in today's globalized economies, it is impossible to say that labor and the related search for economic security is not implicated in the migration of all of the women. More directly related to labor migration, though, we are also involved in a large labor trafficking case. Prior to entering academia, I was a former legal services attorney for migrant farmworkers in the United States

The main challenge to integrating a gender perspective into labour migration policies arises out of the multiplicities of discrimination experienced by migrants, who face xenophobia, racism, sexism and discrimination based on socio-economic status, and the shortcomings in domestic

law to address those multiplicities of discrimination. My presentation today seeks to recognize those multiplicities of discrimination and the full complexity of the issues before us. Specifically, I'm going to address policies and practices in the United States as a country of destination and a new program undertaken in Mexico as a country of origin. I also want to call your attention to regional efforts to address migration through the Organization of American States.

### Overview of Gender and Migration in the United States

While the United States has a near even gender balance in the male to female ratio of migrants, there are significant differentials in the male to female ratios of foreign-born in the United States from particular countries. Specifically, in 2002, there were 138 men for every 100 women from India, and 124 men for every 100 women from Mexico. At the same time, statistics of foreign born from Germany, South Korea, the Dominican Republic, the Philippines and Japan indicate a much higher rate of females than males. As noted in a report from the Migration Policy Institute documenting the gender breakdown of the foreign-born based on the 2002 U.S. Census count: "The preponderance of either sex often reflects the reasons driving the migration flow itself" - immigration of high-skilled male laborers such as computer programmers or engineers from India, and of female nurses and medical technicians from the Philippines.<sup>1</sup>

The statistical breakdown by gender and employment provides a starting point for understanding the role of gender in migration policies. A review of salaries and benefits associated with those professions reveals a wage gap that clearly raises questions about global gender-based discrimination in education and job training opportunities in the sending countries, and gender-based discrimination in the recruitment of foreign-born labor and in the employment opportunities in the receiving country, in this case, in the United States. According to U.S. Census statistics, while the majority of foreign-born women in the United States have a high school degree or higher (66.4% of foreign-born women over the age of 25 have their high school degree or higher, as compared to 67.6% of men), foreign-born men are much more likely to have a bachelor's or advanced degree (23.1% of women have a bachelors degree, as compared to 28.6% of foreign-born men, and just 6.8% of foreign-born women have an advanced degree as compared to 12.6% of foreign born men).<sup>2</sup>

---

<sup>1</sup> See Elizabeth Grieco, "Sex Ratios of the Foreign Born in the United States," Migration Policy Institute (March 1, 2003), available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=100>.

<sup>2</sup> See Elizabeth Grieco, "Immigrant Women," Migration Policy Institute (May 22, 2002), available at: <http://www.migrationinformation.org/USfocus/display.cfm?ID=2>. Additional statistics that breakdown for gender,

---

The disparities in education and employment translate into notable disparities in the income of foreign-born women: foreign born women with year-round full-time employment earn just \$22,106 per year, while native born women earn \$26,640, which is still less than that of foreign-born men who earn \$27,143 (earning nearly 23% higher than foreign born women) per year. Native born men earn \$37,419 (nearly 70% more than foreign-born women). The result: 31% of family households headed by foreign-born women live below the poverty level, more than double the rate of households headed by foreign-born men with no spouse present who live below the poverty level.<sup>3</sup>

In order to understand these statistics and craft solutions to redress them, we need to put them into context. Among the native born populations, the ratio of single-woman headed households versus single-men headed households living in poverty is only slightly less stark (27.4% to 10.9%, respectively).<sup>4</sup> Therefore, a closer examination of gender-based discrimination in the United States as a host country and the development of policies and strategies to redress that discrimination cannot be divorced from the discussion of gender in labor-migration policies.<sup>5</sup>

It is important, too, when looking at statistics based on Census data, to be aware of the populations that would not be counted in the Census – the underground or otherwise invisible communities of migrants, such as women in an irregular status who are employed as domestic workers and sex workers. If we captured those statistics, I am certain the disparities would be even greater.

#### Policies and Practices in the United States, as a County of Destination

Having provided statistics – I also want to share with you the reality of migrant workers in the United States, so we have an understanding of the laws and practices in relationship to the context in which they are applied.

---

such as percentage of foreign-born men vs. women who are citizens, who are married, and who are employed may be reflections of migration laws of the United States, which prioritize employment-based immigration and family reunification, but also allows for victims of domestic violence married to U.S. citizen spouses or legal permanent residents to self-petition for immigration status independent of the abusive spouse (discussed further infra).

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> The United States has just taken an important step in redressing disparities in earnings of women as compared to men through the passage of the Lilly Ledbetter Fair Pay Act of 2009, providing that the 180-day statute of limitations for filing a pay-discrimination lawsuit restarts with each paycheck. It was passed following the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) in which the Court held the statute of limitations for filing an equal pay claim began the date the pay was first agreed upon, barring Ms. Ledbetter from proceeding with her suit after learning that she was getting paid much less than the men employed in the same position.

---

The pervasiveness and power of fear cannot be underestimated, and understanding what lies at the heart of that fear – and how that fear differs in the context of labor migration and how it is experienced by different populations – is essential to the development of gender-sensitive approaches to migration policies and practices and to the enforcement of labor and employment rights for individuals once they are engaged in employment.

To illustrate the role of fear, particularly in the context of sexual harassment and assault in the workplace, two cases – as presented by federal Equal Employment Opportunity Commission (EEOC) employees, who ultimately prosecuted the cases – are illustrative. The first is the case of DeCoster Farms, a poultry operation with multiple plants in Iowa. According to William Tamayo, Regional Attorney for the EEOC San Francisco District Office:

We got a call in 2000 from a domestic violence coalition in Iowa. She called me and the attorney there says, “there are women being raped at DeCoster Farms.” “Can you help us out?” So, I called my counterpart in Milwaukee, ... and I said, “Gene you have to jump on this right away; these women are being raped at the plants.” So Gene sends a team down to investigate. What’s the company’s response? They threaten to terminate or have the women deported who cooperate with the federal investigation. They also threaten them with further rape.... We had to run to federal court to get an injunction to stop any further harassment, retaliatory activity just so the women would talk to us – and then the company finally backed down.<sup>6</sup>

Another case, also arising in the agricultural industry, is that of Ms. T., who worked for Harris Farms. According to Evangelina Hernandez, who worked on the team litigating the case on behalf of the EEOC:

Ms. T. was born in Mexico, and she had a third grade education. She was married at 15, came to this country, and started working at Harris Farms as a temporary worker in 1985. Her husband worked there, her husband’s family worked there. Eventually, she became a permanent worker. In the meantime, she’s had children. ... In 1993, she became an assistant supervisor, under the direction of a man named Rodriguez. Rodriguez used to show up at her house to talk to her husband. Mr. T. considered Rodriguez a friend. There was no reason for her to think that he would do anything to harm her. Unfortunately, that wasn’t the case, because in 1993, he lured her to an empty field and raped her,

---

<sup>6</sup> William Tamayo, Gender & Migration Symposium, Panel Two – Women in the Global Economy, 22 Berkeley J. Gender L. & Just. 325 (2007).

---

threatening to kill her husband if she reported it, and kept a gun on a dashboard to get her to submit.... She was so scared, but she decided not to report it, in part because of her cultural and religious background, and she was very Catholic. This was a sin. She didn't know how her husband was going to react....

So she kept quiet, and Mr. Rodriguez raped her two other times – one time in another empty field and another time in her home. The whole time he also intimidated her verbally. He would say, “I want you never to talk to another man. You are mine, you are mine,” and continually followed her around. There were never any witnesses to the rapes, and she kept quiet for years on end. In 1999, Mr. Rodriguez's verbal intimidation started increasing and increasing and increasing, and she started to fear for her life.

As described by Ms. Hernandez, after being physically assaulted by Mr. Rodriguez, Ms. T. finally complained to human resources, who temporarily suspended Mr. Rodriguez, conducted a sham investigation before returning him to work alongside her husband, to whom Ms. T. finally revealed what had happened. Mr. Rodriguez then engaged in spreading rumors about Ms. T. before he ultimately retired. But even after he left, the situation for Ms. T. remained unbearable.

Instead of Harris Farms doing something to protect her, the instead conducted a sham investigation, which resulted in Ms. T. being suspended as a disciplinary action because of her participation in the gossip (which consisted of hearing it and reporting it) and told her that if she further engaged in malicious gossip, she would be terminated.

In discussing what she took away from having litigated the case in federal court against Mr. Harris and Harris Farms, Ms. Hernandez highlighted three issues:

The first one was: what difficulty we're going to have ever pursuing these cases. Women don't report it – religious reasons, cultural reasons, family reasons, it's a humiliating, demeaning, embarrassing [experience] – they're not going to tell us....

Another thing we realize is that immigration is always going to be an issue. Harris Farms was continually asking where people were born. Right before the trial, we had to file motions *in limine* to make sure that all the immigration issues – all questions related to, “Where are [you] born?” – were kept out. ...

---

Another aspect, the third aspect that I noticed that was new to me, was the tolerance level that these workers have. I asked Ms. T., “Ms. T., why didn’t you go to another job?” Well, first, how was she going to explain that to her husband, and, second of all – and this was equally as important – Harris Farms guaranteed her 10 hours a day and paid 25 cents more an hour. That made a huge difference to her, and she didn’t want to lose that job. All she wanted was R. Rodriguez to leave her alone.<sup>7</sup>

The stories of these two cases – both resulting in large monetary awards – are important in several respects. They highlight the gender-specific abuses that immigrant women face in the workplace. And they highlight the important role the government enforcement agencies can play in seeking to remedy those violations. As William Tamayo with the EEOC has discussed, being able to approach an employer as the U.S. government has a very different impact on an employer than an individual woman seeking to find legal help and take on that litigation herself, and can provide a level of protection for the women. For example, when cases are brought by the EEOC against an employer in federal court, they are done so in the name of the EEOC – and steps can be taken to protect the identity of the individuals.

The stories also bring into sharp focus how employers are able to use immigration status and societal gender discrimination to create an environment in which abuse and exploitation are viewed as the acceptable status quo. And, finally, they highlight the need for States to engage in employer-focused law enforcement, rather than victim-focused law enforcement that tends to re-victimize the women who seek nothing more than dignity through work for themselves and their employers. Ultimately, in both of these cases, the tireless work of particular EEOC attorneys and investigators resulted in large monetary awards – one from a settlement and the other following a jury verdict, sending an important message to employers across the board.

A key feature of the EEOC enforcement in this work was the creation of a “firewall” between immigration enforcement and labor enforcement, that is to say the workers’ immigration status was kept out of the litigation brought on behalf of the women. In an attempt to ensure that the “firewall” is in place, the United States has developed a number of tools within the court and administrative systems. The Department of Labor and the Equal Employment Opportunity Commission both have Policy Memorandum in place clearly stating they will not inquire into

---

<sup>7</sup> Evangelina Hernandez, Gender & Migration Symposium, Panel Two – Women in the Global Economy, 22 Berkeley J. Gender L. & Just. 325 (2007).

---

immigration status when a complaint has been brought.<sup>8</sup> These policies are important in that they delineate the distinct responsibilities of the federal agency charged with enforcement of immigration laws, and those agencies charged with enforcement of labor and employment laws, including health and safety laws.

Maintaining this firewall is important not just in the initial litigation but in subsequent litigation, as highlighted by the examples above. When formal legal claims are filed in court in the United States, both parties are allowed to ask a broad range of questions, and ask for a broad range of documents, from the other party through the “discovery” process. The subject matter of discovery covers anything relevant to a claim or defense, or anything that might become relevant. Attorneys representing employers in claims brought by migrants have sought to use the discovery process to inquire into a plaintiff’s immigration status, ostensibly to obtain information is allegedly relevant to the damages claimed. These measures clearly serve to intimidate the plaintiff into dropping the charges altogether, due to fear of retaliation and potential immigration consequences. They also have a chilling effect on workers who are forced to endure a range of abusive workplace conditions, because they fear that if they complain, they and/or their family members will be deported. For foreign-born women of U.S. citizen children, they may face the impossible choice of leaving their children in the United States or bringing them back to their home country where their ability to provide their children with the opportunities and security that brought them to the United States in the first place do not exist. The result is that in a legal system that relies on individuals to step forward as the enforcer of

---

<sup>8</sup> The U.S. Department of Labor’s Memorandum of Understanding with the then Immigration and Naturalization Service (now part of the Department of Homeland Security) is available at: <http://www.dol.gov/esa/whd/whatsnew/mou/nov98mou.htm>. The Equal Employment Opportunity Commission’s policy guidance on immigration status and anti-discrimination protections is available at: <http://www.eeoc.gov/policy/docs/undoc.html>. This was rescinded (June 27, 2002) after the U.S. Supreme Court decision in *Hoffman*, but in the rescission they still acknowledge the rights of undocumented migrants and their recognition as employees under the different anti-discrimination statutes enforced by the EEOC. See: <http://www.eeoc.gov/policy/docs/undoc-rescind.html>. While not addressing gender specifically, and again in recognition of the multiplicities of discrimination, the EEOC issued Guidance on National Origin Discrimination: <http://www.eeoc.gov/policy/docs/national-origin.html>.

---

labor and employment law violations, unscrupulous employers can wield their workers' fear as a shield towards liability, and result in further victimization of the female migrants.

Unfortunately, recent events on the enforcement side of immigration and the U.S. Supreme Court decision in Hoffman Plastic Compounds, Inc. v. NLRB<sup>9</sup> and its progeny in state courts have poked holes in these firewalls. In *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, the United States Supreme Court denied the remedy of back pay to undocumented workers whose right to participate in lawful organized labor activities protected by the National Labor Relations Act<sup>10</sup> is violated. The elimination of this remedy has had the practical effect of eliminating the enforceability of this right and limiting undocumented workers' right to freedom of association.<sup>11</sup> The impact of a denial of back pay as a remedy for immigrant workers has been to severely undermine labor protections, increase labor exploitation, and create a two tiered workforce in the United States.

Following the Hoffman decision, New Jersey Superior Court in *Crespo v. Evergo Corp.*,<sup>12</sup> held that an undocumented worker who is discriminatorily discharged in violation of NJLAD may not be entitled to assert a claim or collect any damages caused by the discriminatory constructive or actual termination. Subsequently, New Jersey's highest court, the New Jersey Supreme Court, refused to review the Superior Court decision, thereby making the Superior Court's decision the law of the state of New Jersey.<sup>13</sup> In *Crespo*, the New Jersey Court held that an undocumented woman who had been discriminated against on the basis of her gender by her employer, when the employer refused to allow her to return to work following her maternity leave, was without remedy. The court said that the immigration statute requiring an employer to verify an employee's legal status prior to employment was a statutory bar that preempted the state labor protections.<sup>14</sup> Citing to *Hoffman*, the New Jersey court explained that where the "governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker's illegal alien status will bar relief hereunder."<sup>15</sup> Analyzing federal

---

<sup>9</sup> 535 U.S. 137 (2002).

<sup>10</sup> 29 U.S.C. § 151 et seq.

<sup>11</sup> Back pay is pay for work that would have been performed but for the unlawful termination, and is the only remedy available to the individual whose rights under the NLRA have been violated by the employer. The other substantive remedy available to an individual was reinstatement to the worker's former position, but that remedy was earlier foreclosed for undocumented workers by the Immigration Reform and Control Act of 1986 (IRCA), the law that prohibits the knowing employment of undocumented workers, and is not at issue here. See, *Sure-Tan, Inc.*, 467 U.S. at 903-904.

<sup>12</sup> *Crespo v. Evergo Corp.*, 366 N.J. Super. at 399.

<sup>13</sup> See *Crespo*, 180 N.J. 151.

<sup>14</sup> *Crespo*, 366 N.J. Super at 394.

<sup>15</sup> *Id.* at 399 (citing to a 1978 case, *Bastas v. Board of Review in Dept. of Labor & Industry*, 155 N.J. Super 312 (N.J. Super. A.D. 1978), decided before the IRCA made employment of undocumented workers illegal).

---



immigration policy, the court stated that strong enforcement policies served by the immigration laws require such a result. Furthermore, the New Jersey court stated that it saw "no basis for distinguishing [the plaintiff's] related non-economic damages [from her economic damages] and conclude[s] they, too, are barred."<sup>16</sup> The court suggested that in order for an undocumented worker to be protected by state discrimination law, she or he would have to show "aggravated sexual harassment" or other severe condition during the course of her employment, above and beyond the usual discrimination protected by law.<sup>17</sup>

As a result, advocates believe that we need legislation incorporated into our immigration laws which specific that regardless of immigration status, migrant workers are entitled to equal rights and remedies should their rights be violated as are citizen workers. In doing so, it robs the employer of the ability to use immigration status as a shield to liability.

### **Trafficking**

Over the past decade, the United States has put tremendous resources towards combating human trafficking in the United States and enforcement of the Trafficking Victims Protection Act ("TVPA"). The TVPA defines severe forms of trafficking in persons as:

- 1) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- 2) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>18</sup>

Important to this definition is that "force, fraud, or coercion," involves not just physical restraint or threat of physical violence, but also abuse or threatened abuse of legal process. Similarly, the definition of "Involuntary Servitude" includes "a condition of servitude induced by means of – (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process." This abuse or threatened abuse of the legal process could include threatened deportation, threatened criminal action, and the retention or destruction of passports.

---

<sup>16</sup> *Id.* at 394.

<sup>17</sup> *Id.* at 400.

<sup>18</sup> 22 U.S.C. 78, §§ 7101-7112.

---

From a protection perspective, a key aspect of the TVPA is that victims of severe forms of trafficking may be eligible for a legal visa for themselves and their immediate family members which come with work authorization for three years, at which time they will be eligible to adjust their status to that of legal permanent residence. In addition, having been certified by the Department of Health and Human Services, in cooperation with the Department of Justice, victims of trafficking may also be eligible for a range of public benefits and services, including medical care, crisis counseling, job training, transportation services, and short-term shelter or housing assistance.<sup>19</sup>

Critiques of the TVPA since its inception have been twofold. The first critique is focused on the statutes requirement of demonstrating “force, fraud, or coercion” at the inception of migration to demonstrate trafficking. As advocates argue, this requirement that the force, fraud or coercion exist at the inception ignores the large number of women who may exercise choice in their initial decision to migrate, those who voluntarily enter into the migration stream, but who then find themselves in situations of labor trafficking. Further critiques have been placed on the past Administration’s enforcement focus, which heavily emphasized prosecution of prostitution. Anti-trafficking policies that focus on prosecution of prostitution as a criminal act may have the impact of re-victimizing women, leaving them afraid to step forward and cooperate with law enforcement for fear that they may be prosecuted and subsequently deported for having engaged in sex work, whether voluntarily at the outset or by force. Furthermore, this focus on prostitution as the locus of sex-trafficking specifically and labor trafficking more generally, ignores the large numbers of women in the industries such as the domestic worker, health care, garment manufacturing and agricultural industries who are subjected abuse and exploitation that are also human trafficking cases.<sup>20</sup> In addition, advocates believe the requirement of cooperation with law enforcement needs to further account for the legitimate concerns survivors of trafficking have for themselves and their family members should they participate in such prosecution.

It is important to remember too that after women remove themselves or are removed from trafficking situations, they have very real social service and economic needs. While the

---

<sup>19</sup> For a comprehensive guide on the TVPA and the benefits and services available to victims of trafficking, see U.S. Department of Justice, Civil Rights Division, *TRAFFICKING IN PERSONS – A GUIDE FOR NON-GOVERNMENTAL ORGANIZATIONS*, available at: <http://www.usdoj.gov/crt/crim/wetf/trafficbrochure.php>. Additional information available at: <http://www.ojp.usdoj.gov/ovc/help/tip.htm>.

<sup>20</sup> For a thorough review and critique of sex trafficking policies at both the federal level and in the state of MN, see The Advocates for Human Rights, *Sex Trafficking Needs Assessment for the State of Minnesota* (2008), available at: [http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT\\_FINAL.10.13.08\\_2.pdf](http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT_FINAL.10.13.08_2.pdf) [http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT\\_FINAL.10.13.08\\_2.pdf](http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/REPORT_FINAL.10.13.08_2.pdf).

---

ultimate grant of legal status is important, that process takes a long time and in the interim, women can find themselves in situations vulnerable to re-trafficking or other forms of exploitation and abuse. Those who comply with criminal investigations may be granted a temporary legal status - "Continued Presence" - which entitles them to legal work authorization as well as other benefits. Without that, they must wait in a state of legal limbo until their cases are processed.

And for this, we can borrow practices and procedures in place under the Violence Against Women Act, through which individuals (most often, but not exclusively women) who are in abusive relationships and whose partners seek to use their legal status to keep them in those situations of abuse, can obtain legal status through a self-petitioning process.<sup>21</sup> Upon a finding of a "prima facie" case, USCIS issues a determination that the petitioner is a "qualified alien" and as such, is eligible to receive a range of state and federal public benefits for themselves and their children providing necessary support to allow them to gain their independence. Access to social services and medical care are critical enabling women to leave abusive and exploitative situations, and in ensuring they do not become vulnerable to re-entering trafficking or other exploitative situations because of their immediate financial needs.

### **Local Advocacy in the United States in Response to Legislative and Judicial Shortcomings**

The limitations of judicially enforced workplace rights have led migrant advocates to seek alternate strategies to advance the struggle of women striving to achieve dignity through work. And I would like to call attention to the work of two different organizations with migrants and the strategies they have developed. The first is Domestic Workers United.<sup>22</sup> Domestic Workers United was founded in 2000, and describes itself as "an organization of Caribbean, Latina and African nannies, housekeepers, and elderly caregivers in New York, organizing for power, respect, fair labor standards and to help build a movement to end exploitation and oppression for all."<sup>23</sup> Their work has been critical to raising the living and working standards of domestic workers in the United States, since domestic workers (like agricultural workers) are excluded from protections under the National Labor Relations Act (governing the right to organize) as well as from certain minimum wage and overtime laws. Domestic Workers United provides a

---

<sup>21</sup> See U.S. Citizenship and Immigration Services, "How Do I Apply for Immigration Benefits as a Battered Spouse or Child?," available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=499a6c854523d010VgnVCM10000048f3d6a1RCRD>.

<sup>22</sup> For more information on the domestic workers in New York, Domestic Workers United and DataCenter issued a comprehensive report, "Home Is Where the Work Is: Inside New York's Domestic Work Industry," (July 14, 2006) available at: <http://www.domesticworkersunited.org/media/files/9/homeiswheretheworkis.pdf>.

<sup>23</sup> See, <http://www.domesticworkersunited.org/programs.php>.

---

standard contract on its website and through its networks for employees, which requires a detailing of job duties, hours of work and rate of pay, and includes a comprehensive set of rights, including right to medical insurance, paid medical visits including OB/GYN care, paid transportation when the employer lives in the suburbs, and paid taxi fare when employees are required to work after 8 pm, to paid vacation and holiday days, right to workers compensation, use of the telephone and range of other protections, including specific provisions aimed at protecting the privacy and safety of live-in domestic workers.<sup>24</sup> Domestic Workers United has also established a pay scale that recognizes the value of the work.<sup>25</sup> In addition to arming domestic workers with the tools to negotiate safe working conditions at living wages, Domestic Workers United also succeeded in getting the New York City Council to pass a Domestic Workers Bill of Rights.<sup>26</sup>

On an even more grassroots level, the “Bandana Project,” coordinated by Esperanza: The Immigrant Women’s Legal Initiative of the Southern Poverty Law Center, which seeks to call attention to sexual exploitation of farmworker women.<sup>27</sup> The Southern Poverty Law Center and their partners are inviting members of the farmworker community and others to decorate and display bandanas “as a symbolic gesture to raise awareness of the sexual exploitation of these vulnerable women.” The bandana was chosen because women in the fields often use bandanas to cover their faces and bodies in an effort to protect themselves from unwanted sexual attention and harassment. Monica Ramirez, the project director for Esperanza, stated: “It is our goal to send the message to workplace abusers that we will fight to stop the abuse of farmworker women, because no one should be forced to give up their dignity in order to feed their family.”

These efforts have created a political awareness at the local level, changes in law at the local level, and it is hoped will ultimately help in creating national political awareness and national policies that recognize the value of feminized labor and grant recognition to the largely migrant population engaged in those arenas.

### **International Engagement Regarding U.S. Policies**

At the international level, it is not secret the United States has a poor history when it comes to ratification of international human rights treaties and ILO Conventions. Important to the

---

<sup>24</sup> See, <http://www.domesticworkersunited.org/media/files/4/Standard-Contract.doc>.

<sup>25</sup> See, <http://www.domesticworkersunited.org/media/files/5/Standard-Guidelines.doc>.

<sup>26</sup> See, <http://www.domesticworkersunited.org/campaigns.php>.

<sup>27</sup> See, “‘Bandana Project’ to Spotlight Sexual Exploitation of Farmworker Women,” available at: <http://www.splcenter.org/news/item.jsp?aid=303> (19 March 2008).

---

discussions today, the United States signed the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1980, but still has not ratified CEDAW (though the City of San Francisco has adopted it in its local governance). And we stand alone as a country (with the exception of Somalia) that has failed to ratify the Convention on the Rights of the Child (although the City of Chicago has just adopted it locally). And, as with the other major receiving countries of migrants, we have not signed nor ratified on the International Convention on the Rights of All Migrant Workers and their Families.<sup>28</sup> But our failures at ratification do not obviate our obligations under international law to ensure all persons subject to the jurisdiction of the United States the right to dignity, to due process, to equal rights under customary international law, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), both of which the United States has ratified, and to non-discrimination in the rights and enforcement of those rights under U.S. law. And the United States has engaged in conversations, with active participation on the part of civil society, before the respective governing bodies of both treaties through the Periodic Review reporting process.<sup>29</sup>

The international engagement and the participation of civil society in that engagement, has created opportunities for discussing shortcomings in the U.S. anti-discrimination policies, and opportunities for civil society to contribute recommendations for redressing those shortcomings. The international framing is particularly important for U.S. advocates because it recognizes State obligations to overcome disparate impact discrimination, whereas our local laws require a demonstration of intentional discrimination, placing a much higher burden on women seeking to litigate discrimination.

---

<sup>28</sup> For a thorough analysis of the international human rights frameworks and treaties that can be leveraged to advance the rights of female migrant workers, absent ratification of the UN Convention on the Rights of All Migrant Workers and their Families, see Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE H.R. & DEV. L.J. 1, 4 (2005).

<sup>29</sup> Numerous advocates participated in the most recent periodic review of U.S. Compliance with both the ICCPR and the ICERD, with the larger U.S. based advocacy organizations submitting their own Shadow Reports, and through contributions to a comprehensive Shadow Report submitted by the U.S. Human Rights Network. See, U.S. Human Rights Network, ICERD Shadow Report 2008, available at: [http://www.ushrnetwork.org/cerd\\_shadow\\_2008](http://www.ushrnetwork.org/cerd_shadow_2008). The Chapter on Labor and Employment contains a specific section on Gender and Discrimination in the Workplace, focusing specifically on the impact on foreign-born workers. [http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/23\\_Labor%20and%20Employment.pdf](http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/23_Labor%20and%20Employment.pdf). In addition, the Chapter on Immigration contains specific section on Gender, Immigration and CERD and examines the intersection of health care, gender and ICERD, and the intersection of migration and domestic violence, as well as the limitations of the trafficking enforcement in the United States in protecting women from all forms of labor trafficking. [http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2\\_Immigrant%20Rights.pdf](http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2_Immigrant%20Rights.pdf).

---

In addition, the United States has been actively engaged through the Organization of American States in the development of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, and in annual meetings coordinated by the OAS Permanent Council to discuss the development of cooperative actions and best practices.<sup>30</sup> This work at the regional level has a role in advancing the rights of migrants throughout the Americas, and to the degree that the OSCE is looking at regional cooperation, understanding and evaluating the role of the Organization of American States and specifically, the Inter-American Human Rights System in addressing and advancing the rights of migrants may be most instructive.

A key participant in the Inter-American Program is the Inter-American Commission of Women (CIM),<sup>31</sup> whose role is to ensure the incorporation of a gender perspective into the development of policies and practices. Among their activities over the past years, the CIM conducted a study on female migration in El Salvador and Nicaragua, which examines the positive contributions female migrants make, but also the difficulties those women face and identified lack of legal documents as the biggest problem. The Commission is also planning a specialized course on gender and migration for OAS ambassadors and highest-level diplomats.

Also active in the Inter-American Program is the Special Rapporteurship for the Rights of Migrant Workers at the Inter-American Commission on Human Rights. The Rapporteurship is about to engage in the drafting of best practices in the area of labor migration policies, and it is my hope that the Americas will benefit from the gender-mainstreaming work of the OSCE.

#### Policies and Practices in Countries of Origin and Bi-National and Multi-Lateral Programs

The reality is that many workers whose labor and employment rights are violated in the United States, return – either by force or by will – to their countries of origin. Historically, doing so has resulted in their foregoing their right to seek any remedies for rights violations they may have endured while in their host country. For example, temporary workers brought into the United States under the H-2B visa system have endured a tremendous exploitation in the United States and abusive working and living conditions. Yet, when their legal status expires, either because the clock has run or their relationship with their employer has otherwise ended, they must return to their home country, where it becomes extremely difficult if not impossible to access lawyers and the judicial system. They also have difficulty in accessing a range of social services

---

<sup>30</sup> Information related to the OAS Program and related documents are available at:  
[http://www.oas.org/DIL/migrant\\_workers\\_inter\\_american\\_program.htm](http://www.oas.org/DIL/migrant_workers_inter_american_program.htm).

<sup>31</sup> Information on the Inter-American Commission of Women, its mission and work is available at:  
<http://portal.oas.org/Portal/Topic/Comisi3nInteramericanadeMujeres/tabid/621/language/en-US/Default.aspx>.

---

to which they might be entitled, due to physical presence requirements. We either need to remove those physical presence requirements, or facilitate entry of migrants into the U.S. who need access to the different judicial and administrative bodies.

In the meantime, in the Fall of 2005, El Centro de los Derechos del Migrante, Inc. (CDM) opened its doors in Zacatecas, MX. Rachel Micah-Jones, a U.S. trained lawyer who had been a legal services attorney for farmworkers in Florida, founded CDM in response to the recognition that 1) workers were much more willing to speak out about abusive and exploitative conditions that occurred at the hands of their employers when they were home in Mexico than they were when she would visit them in the labor camps in Florida; and 2) given the barriers migrants faced in accessing lawyers in the United States, the legal advocates needed to go to the worker, rather than expect the workers to be able to come to them. They have recently participated in important litigation involving farmworker women's exposure to pesticides while working in the field, which have had severe negative impacts on the reproductive health of the women. Unfortunately, those effects are generally not seen right away, but only over time after the women have returned to their home communities. It is then that their babies are still born, or born with severe and life-threatening birth defects. Their ability to communicate with the women in their homes, to hear what happened to them and their children, has been critical to efforts in the United States to demonstrate the dangers of the pesticide in question.

In addition, they have formed and are providing ongoing training and capacity building to a Workers Committee, recognizing that if migrants are trained about their legal rights and organized in their home communities before entering the United States, they will bring with them knowledge, skills and networks of support that can help them guard against exploitative employers. This is particularly important for women, who are often in more hidden employment, more isolated, or otherwise less able to assert their rights.

### **Conclusion**

Regional efforts to develop gender-sensitive labor migration policies will require regional collaboration and cooperation, a close examination and review of domestic policies that allow for discrimination and exploitation in both the receiving and sending countries, and also requires an examination of trade policies and other foreign policies that place a greater burden on women and girls, pushing them to enter the migration stream and leaving them more vulnerable to the exploitation. As such, I commend the OSCE for undertaking this project, and encourage the OSCE to communicate further with local advocacy organizations in the sending countries to further understand the situation in the home countries that contribute to abuse and exploitation in the migration stream.

---

