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The Pursuit Of Justice Is Without Borders: Binational Strategies For Defending Migrants' Rights

by Victoria Gavito*

INTRODUCTION: THE FERVOR OVER IMMIGRATION REFORM

On May 1, 2006, immigrants in the U.S. made history by marching in the millions to demand progressive immigration reform. This dramatic crescendo of public protest was a response to the House passing and the Senate considering one of the most draconian immigration reforms in decades. Ultimately, Congress failed to pass any immigration reform during the last session. However, the fervor surrounding immigration reform has far from dissipated. The newly elected Democratic majority in Congress is considering several immigration reform bills and President George W. Bush announced his intention to pass such legislation in his State of the Union address on January 23, 2007. Guestworker programs are central to five of the six major immigration reform bills currently being deliberated by Congress.¹ Thus, guestworker programs are set to play a growing role in U.S. immigration policy while Mexico will be the leading source of labor for these programs.²

After 20 years of neoliberal economic programs, Mexico's domestic economy is devastated. In the cities and countrysides, millions of workers have been downsized or uprooted. Overall, real wages for Mexican workers have declined by half over this period, exacerbating the gap between wages earned in the U.S. versus Mexico. Neoliberal programs have produced a large reserve of the unemployed in Mexico.³ Meanwhile, in the U.S., an ever-growing number of industries and agribusinesses depend heavily on low-wage (im)migrant labor; therefore, the demand for low-skilled Mexican workers remains high. Therein lies a contradiction: as the far right espouses anti-immigrant xenophobia, U.S. businesses demand access to the cheap labor supply in Mexico.

Guestworker programs are an attempt to resolve political demands for stricter immigration law enforcement with conflicting economic demands for access to the Mexican labor supply. The Bush Administration escalated immigration enforcement with a series of Immigration and Customs Enforcement (ICE) raids at workplaces across the U.S. Thus, many U.S. employers who normally employ undocumented workers instead have sought, in unprecedented numbers, guestworkers through the H-2 program. In Florida, for instance, the number of guestworkers this year increased 500 percent.

An H-2A or H-2B guestworker is defined by statute as an immigrant "having residence in a foreign country, which he has no intention of abandoning, and who is coming temporarily to the U.S."⁴ An H-2A worker performs "agricultural labor or services ... of a temporary or seasonal nature," whereas an H-2B worker performs non-agricultural labor and "other temporary service[s] or labor." H-2 visas, issued by the U.S. Citizenship and Immigration Services (CIS), are contingent upon the labor certification process.

Employers certify to the Department of Labor that there are insufficient numbers of U.S. workers "able, willing, and qualified" to meet the employer's needs. Additionally, the employer is required to certify that the employment of workers under the H-2 program will not "adversely affect" workplace conditions or salaries for U.S. workers.⁵ In 2005, approximately 121,000 Mexican workers came to the U.S. under H-2A and H-2B visas. Despite their legal, documented status, guestworkers confront unique barriers to enforcing their labor and employment rights: (1) fear factors; (2) transnational logistical problems; and (3) transnational legal barriers.



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CDM outreach workers educate potential clients about an ongoing case against a Florida orange grower for failing to pay the minimum wage.

FEAR FACTORS AS A BARRIER TO JUSTICE

The vast majority of guestworkers are recruited from rural Mexican communities. Recruiters frequently charge potential workers thousands of dollars for travel, visa, and recruitment costs. To cover the exorbitant fees charged by recruiters, guestworkers incur debts often financed through loan sharks or by deeding their homes to recruiters.⁶ Guestworker programs regularly operate as a modern form of debt servitude. Once they arrive, guestworkers regularly confront circumstances much like the infamous company towns of the 19th century. They pay excessive rent to live in housing owned by the employer, seek medical attention from clinics run by the employer, and are policed by the employer's private police forces.

Additionally, many guestworkers live in dilapidated, rat-infested housing, work with toxic pesticides and chemicals, and suffer from dangerous work conditions. According to a 2004 investigative report by the Associated Press, Mexican workers in the U.S. are 80 percent more likely to die in the workplace than U.S.-born workers, and nearly twice as likely to die than the rest of the immigrant population. This is a dramatic increase: 10 years ago Mexican workers in the U.S. were 30 percent more likely to die on the job than U.S.-born workers, and about the same rate as other immigrants.⁷ Mexican workers are increasingly consigned to the most dangerous jobs.

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Guestworker programs concentrate power in the hands of the employers by binding the workers' immigration status to their labor for a specific employer. Living under the thumb of their employers and bound by their work visas, guestworkers fear persecution by immigration and law enforcement and/or employer retaliation and blacklisting if they challenge maltreatment. Guestworkers are too afraid to seek justice.

LEGAL AND LOGISTICAL BARRIERS TO JUSTICE

The Fair Labor Standards Act (FLSA) and other statutes protect H-2 workers by affording minimum wage and hour protections, establishing standards in housing, requiring travel expense reimbursement, guaranteeing workers' compensation, and prohibiting retaliation. Ironically, while guestworkers are among the most isolated and vulnerable workers, their rights are curtailed

typically in rural, mountainous Mexico, is extremely challenging given the lack of telephone service and unreliability of mail delivery to the countryside, one-third of which never reaches its destination. Legal and logistical barriers systematically deny guestworkers access to justice in the U.S.

SOLUTIONS: REMOVING THE BORDER AS BARRIER

Given these conditions, those pursuing justice for migrant workers should be under no illusions: the barriers are high. But through innovative legal strategies, we can start to bring down these barriers. The Centro de los Derechos del Migrante (CDM), founded by Rachel Micah-Jones in 2005, is one of several organizations employing such strategies, but using a unique binational approach. CDM is based in Zacatecas, Mexico, where workers can be reached outside the purview of their employers.¹⁰ While still in

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even further as they are specifically excluded from many vanguard protections afforded to American workers. For example, guestworkers are excluded from the Migrant and Seasonal Agricultural Worker Protection Act that establishes minimum standards in worker housing and transportation. Additionally, H-2A workers are excluded from the National Labor Relations Act, which ensures workers' rights to collective bargaining and freedom of association, which empowers workers to pressure growers for higher pay or safer conditions, or both.

Substantively, guestworkers are protected by the FLSA; however, a number of procedural barriers impede pursuit of these protections. By the nature of their visas, guestworkers must return to their country of origin after several months. However, many courts require a plaintiff's presence during the discovery period and at trial, and many administrative bodies also have a presence requirement. In cases where depositions can take place more than 100 miles from the courthouse, the party seeking to give a long-distance deposition must pay the expense of attendance and reasonable attorneys' fees for the opposing party. Given that many low-wage workers' claims are often small, costly out-of-district fees help prevent these cases from entering court.⁸

Additionally, guestworkers historically have had limited access to public interest lawyers and other advocates. The nearly 100,000 H-2B guestworkers are categorically denied eligibility for legal assistance from legal services programs funded by federal Legal Services Corporation,⁹ and many legal services are prohibited from working abroad to do the groundwork for their cases. The transnational nature of guestworker programs also poses a problem for U.S.-based employment law projects and public interest law firms. Typically, such organizations do not have the capacity to reach out to injured or unpaid workers who return to Mexico. Contacting these workers in their home communities,

its infancy, CDM launched an ambitious campaign to provide know-your-labor-and-employment-rights education to workers in rural communities across Mexico before they leave for the U.S. The trainings empower workers to confront labor abuses. Thus, when guestworkers are home, far from the fear of employer retaliation and immigration law enforcement, they are more likely to seek know-your-rights education and enforce their workplace rights.

From Mexico, CDM also facilitates the legal process for U.S. partners, thereby bringing down several of the logistical barriers to justice. For example, CDM travels throughout Mexico to complete interrogatories and other discovery requests for pending cases in the U.S. Also, CDM coordinated several video conference depositions for Mexico-based clients. As a practical matter, CDM has found it necessary for the interpreter to be physically present with the deponent. CDM's presence in Mexico lends to greater success in overcoming logistical barriers to transnational representation.

Such representation requires understanding the laws on each side of the border as a means of overcoming migrants' legal barriers. For example, CDM is co-counsel to the *Brickman* case, the first large-scale collective action against a major landscaping company, whose industry is one of the largest users of H-2B guestworkers. *Brickman* involves a number of common grievances for migrant workers, including failure to pay the minimum wage and overtime. Moreover, *Brickman* is the first case of its kind to argue Mexican law to protect migrant workers.

Employers participating in the guestworker program sign a contract with the U.S. Department of Labor (DOL) agreeing to comply with local, state, and federal laws. Employers and their agents then recruit workers in Mexico. Accordingly, *Brickman* argues that the contract with DOL requires compliance will all “local” laws, including local Mexican law. Article 28 of the

Mexican Federal Labor Law requires employers to document the following terms for services rendered “by Mexican workers outside of the Republic”:

The expenses for transportation ... and food for the worker and his family ... shall be to the exclusive charge of the employer. The worker shall receive his entire corresponding salary, without any discounts for any amount related with the referred items ... The worker shall have the right to the benefits given by the welfare institutions to foreign citizens in the country where they will render their services. In all cases they shall have to right to indemnity for work related risks ... They shall have the right to decent and clean housing at the place of work or nearby location ... For all legal effects, the employer shall designate his domicile as being inside the Republic ...

Employers must submit this document and receive approval from the Board of Conciliation and Arbitrage (BCA). The BCA then determines an amount the employers must guarantee in the form of a bond to ensure fulfillment of their contract obligations.¹¹

Brickman argues that employers are bound to comply with Articles 25 (stipulating minimum work requirements) and 28 of the Mexican Federal Labor Law by virtue of their contract with the DOL, and state that they are in compliance with “local” laws. If the court accepts this argument, there will be huge ramifications for all employers and their agents recruiting guestworkers in Mexico. These employers would be required to post a bond, ensuring payment to guestworkers who have endured nonpayment of wages or workplace injuries. The disadvantages of transnational representation, then, can be turned into an advantage through such innovative legal strategies.

In order to determine new ways of employing Mexican and international law in U.S. courts, CDM and its partner organization in Mexico, PRODESC,¹² will host a Binational Labor Justice Convening in the Fall of 2007. The convention will bring together immigrant labor rights attorneys, organizers, and advocates to explore basic legal tools in the U.S. legal system, the Mexican legal system, and international law that apply to defending migrant workers’ rights. The goal of the convening is to identify new methods of representing binational workers and build a binational network to organize ongoing efforts to advocate on behalf of migrant workers.

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CDM outreach worker Lisie Montañó reviews a timeline of labor history with CDM worker leaders training to become labor and employment rights educators in their communities.

CONCLUSION

The ongoing economic realities of Mexico and the U.S. will continue to pull Mexican labor into the U.S. and will not be curbed by increased border and workplace enforcement. The guestworker program is one method of balancing the countering concerns of border security and big business needs for low-wage laborers. However, by definition, guestworkers are merely guests. Their stay depends upon the relationship with their employer, which allows scofflaw employers to abuse their employees. Additionally, guestworkers must return home after their employment, which inhibits guestworkers’ ability to seek remedies against abusive employers. The social, logistical, and legal structural barriers between migrants and just workplaces require advocates to view their practice as binational. Accordingly, advocates must conduct pre-departure outreach with migrants, partner with Mexican organizations to facilitate the logistics of lawsuits, and explore ways to expand safeguards for Mexican workers by also asserting Mexican protections so that the pursuit of justice does not end at the border.

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ENDNOTES: The Pursuit of Justice is Without Borders

1 For an overview of the legislation, see Richard D. Vogel “Transient Servitude: The U.S. Guest Worker Program for Exploiting Mexican and Central American Workers,” *Monthly Review* (January, 2007). To follow news coverage and pending legislation, see the National Immigration Forum’s website available at <http://www.immigrationforum.org/>.

2 The Pew Hispanic Center has data on the immigration flows, both documented and undocumented. See, for instance, Jeffrey S. Passel, “Unauthorized Migrants: Numbers and Characteristics” (June, 2005) available at <http://pewhispanic.org/files/reports/46.pdf>.

3 For an analysis of the impact of NAFTA on Mexico, see Jeff Faux, “NAFTA: Who Got What?” in *The Global Class War: How America’s Bipartisan Elite Lost Our Future — and What It Will Take to Win It Back* (Wiley, 2006).

4 See 8 U.S.C.A § 1101(a)(15)(H)(ii)(a).

5 See 8 U.S.C. § 1188(a)(1)(A)(2000).

6 See Southern Poverty Law Center, “Close to Slavery: Guest Worker Programs in the United States” (March 12, 2007) available at <http://www.splcenter.org/legal/guestreport/index.jsp>.

7 See Justin Pritchard, The Associated Press, “Mexican Worker Deaths Rise Sharply,” (March 14, 2004) available at http://fmmac2.mm.ap.org/polka_awards_dying_to_work_html/DyingtoWork.html.

8 See Michelle Lapointe, Comment, 12 (unpublished on file with author) (exploring the various presence requirements for depositions in several federal district courts).

9 See Bill Beardall, *Providing Full and Fair Legal Services to the New Transnational Migrant Workers in the U.S.*, available at http://migration.ucdavis.edu/cf/more.php?id=88_0_2_0.

10 See James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (arguing that oppressed groups need a physical and social space “off-stage ... outside the intimidating gaze of power” to articulate their grievances against injustices and develop a community of resistance). Especially in the case of guest workers, this takes place back home in Mexico.

11 The bond must be deposited in the Bank of Mexico or in a financial institution designated by the Mexican government. When the employer proves to the BCA compliance with contracted obligations, the liquidation of the bond or refund of the deposit shall be ordered.

12 Proyecto de Derechos Económicos, Sociales y Culturales (PRODESC) is a Mexican legal organization supporting the economic, social, and cultural rights of Mexicans based in Mexico City, Mexico.