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Expanding Worker Rights - Open Work Permit Program for Migrant Workers Facing Risk

I. Background

These submissions by Migrant Workers Alliance for Change are endorsed by (in alphabetical order):

- Association for the Rights of Household Workers (ARHW) - Montreal
- Butterfly
- Calgary Catholic Immigration Society - Alberta
- Caregiver Connections Education and Support Organization (CCESO) - Ontario
- Caregivers Action Centre
- Cooper Institute - PEI
- Durham Migrant Worker Solidarity Network
- FCJ Refugee Centre - Toronto
- Injured Workers' Consultants Community Legal Clinic - Ontario
- Migrant Worker Solidarity Network - Manitoba
- Migrant Workers Dignity Association - British Columbia
- Migrante Ontario
- MigrantWorkersRights-Canada
- No One Is Illegal - Toronto
- OCASI - Ontario Council of Agencies Serving Immigrants
- Parkdale Community Legal Services - Toronto
- PEI Action Team for Migrant Worker Rights
- PINAY Quebec
- UFCW Canada
- Union Paysanne - Quebec
- YMCA Community Programs, Wood Buffalo Region, Alberta

Migrant workers in agriculture, caregiving work and other low-waged industries often are denied labour and human rights, and face or fear reprisals when asserting their rights. Unpaid wages for overtime and denial of access to breaks, days-off and vacation days are the norm. Working in dangerous conditions without adequate health and safety protections, or facing verbal or physical abuse, is part of the lived reality for most, if not all, migrant workers.

Where protections exist, migrant workers must file complaints to access them. Filing a complaint risks reprisals from employers up to and including losing one's job. While life-changing for all workers, migrant workers are particularly vulnerable because their immigration work permits are tied to specific employers and workplaces. If they complain and lose their jobs, they are no longer able to work anywhere in the country until such time as they are re-hired by an employer who is approved for an LMIA, and they themselves receive a new work permit. Most migrant workers and their families back home are surviving from paycheque to paycheque. The consequences of losing a job could range from an inability to fix the roof in the rainy season, having to pull children out of schools at exam time, or even the death of a sick parent. For agricultural workers, complaining risks not being invited back to work the next season or even being permanently blacklisted. For caregivers, losing a job means waiting six to nine months to start the next one because of the processing times for the required permits, which translates into a year's delay in reuniting with their families. Migrant workers' dependency extends to living in their employers' households or on their property. This dependency takes place in a context of deeply entrenched social relations where citizen, usually white, employers might view complaints by racialized migrant workers as "disloyal" or ungrateful.

In the last two years, the Federal government has begun to take enforcement action against employers through Employment Social Development Canada (ESDC) and Canada Border Services Agency (CBSA). Where details of such actions have been publicized, they have mostly resulted in those employers being restricted from retaining migrant workers. Such enforcement actions mean that workers are often out of a job and have no ability to access the wages and other monetary amounts stolen from them.

Earlier this year, Immigration, Refugees and Citizenship Canada (IRCC) and British Columbia (B.C.) agreed to work together to ensure that a mechanism is in place to provide immediate assistance to foreign workers who face risks of abuse as a result of an employer not complying with applicable federal laws (e.g., Immigration and Refugee Protection Act and Regulations) or provincial laws (e.g., Employment Standards Act). More specifically, open work permits, which are exempt from the Labour Market Impact Assessment (LMIA) process, may be issued to migrant workers upon recommendation from B.C. These open permits are restricted to cases where employers have not complied with relevant federal or provincial laws pertaining to the treatment of migrant workers or where the worker is otherwise at risk of abuse to the serious detriment of the worker. This process requires both that a complaint be filed by the migrant worker and that a provincial settlement agency provide a detailed written recommendation to support these demands.

On November 24, 2017, the Canada-Ontario Immigration Agreement (COIA) was announced which sets out a program in similar terms as in British Columbia. Section 9.5 and 9.6 of COIA reads"

9.5. If Canada or Ontario determines that there is a real and substantial risk to a Foreign Worker as a result of an employer not complying with federal or provincial laws, Canada and Ontario will jointly undertake actions to mitigate such risk, including, where appropriate, issuing a new LMIA through the priority LMIA process, or issuing a new work permit without the need for a LMIA provided that the Foreign Worker meets all other requirements of the IRPR.

9.6. 9.6 Canada and Ontario will establish clear and transparent criteria and procedures to assist in meeting the obligations outlined in section 9.5 of this Annex.

Annex B also sets outs the following shared principle:
3.1.7. Increased protection of Foreign Workers is essential to their successful participation in workplaces and communities and to maintaining the integrity of TFW Program and the IMP

To assist Ontario and Canada, as well as other provinces and territories in creating clear and transparent criteria and procedures to mitigate risk, this document outlines:

1. Principles that must guide the development of policy
2. Structure of an effective Open Permit that mitigates risk
3. Key considerations on information sharing between federal and provincial bodies

II. Principles of Foreign Workers Protection

1. The federal and provincial governments must ensure that laws and policies protect fundamental freedoms, human rights, well-recognized labour standards and principles of fairness.
2. Migrant workers must be treated as whole human persons, who have a social context and who are members who contribute to both the communities in which they work and from which they have migrated. Under a rights-based framework for analysis, migrant workers' protections should be measured with reference to their access to and experience of: (a) fundamental human rights, (b) rights at work, (c) unionization, (d) social inclusion, (e) social security, and (f) effective rights enforcement.

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III. Open Worker Permit

Migrant workers and their support organizations across Canada call on the Federal Government to ensure **permanent resident status upon arrival for all migrant workers**. The current system of temporary, employer specific work permits leaves labour and human rights beyond the reach of migrant workers in Canada. As an interim step to permanent resident status, we are calling on the Federal Government to create open work permits for all workers[1].

In the interim, an open work permit program for workers facing risk should be based on the following process:

Proposed outline of the process from a worker's standpoint

Step 1: Communication

Once the program has been finalized, a dedicated and effective communications campaign must take place to inform migrant workers, their support organizations, their employers, and different federal and provincial ministries and agencies about the existence of the program.

Step 2: Self-Identification

A current or former migrant worker self-identifies as facing risk of violation of federal and provincial law. There should be no requirement to lodge a complaint in order to apply for an open work permit.

Step 3: Support organizations

The migrant worker seeks assistance on their own or from any community organization, settlement agency, lawyer, faith leader, or group of workers. Any requirements from such support organizations should be simple without onerous requirements that would discourage organizations from providing assistance.

Step 4: Streamlined application process

The migrant worker and third party access a mobile-friendly application available in paper and online formats on which they outline the risk in simple terms. Migrant workers must be protected from reprisals by their employers or recruiter, including from repatriation before the open work permit application has been determined.

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[1] The federal government's Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities released a report in September 2016 with recommendations aimed at improving the Temporary Foreign Worker (TFW) Program. The recommendations acknowledge that that the TFW Program, as it currently exists, allows for the abuse of TFWs by recruiters and employers. Specifically, the Committee recommended that "Employment and Social Development Canada take immediate steps to eliminate the requirement for an employer-specific work permit." See Recommendation 14 in the Temporary Foreign Worker Program: Report of the Standing Committee on Human Resources, Skills, and Social Development and the Status of Persons with Disabilities at page 31.

Step 5: Identification of risk

Relevant federal bodies must assess if the migrant worker is facing risk through a transparent and accountable process.

Step 6: Specifics of permit

If the worker is deemed to be facing risk, IRCC shall:

- Issue a 12 month renewable work permit to the migrant worker without the requirement for an LMIA and on an urgent basis (turnaround of 48 hours).
- The open work permit should not be limited to a particular sector or region.
- Ensures access to health services, employment services and other social support programs to the migrant worker
- Migrant workers in streams with a pathway to permanent residence (such as the caregiver program, or any workers eligible for provincial nominee/Express Entry programs, must not be disadvantaged). Work they undertake must count towards the requirements for permanent residence. If the migrant worker is in the Agricultural program (any stream), the government must make specific efforts to ensure blacklisting does not take place, or that workers can obtain permanent residency where they have been blacklisted.

If the worker is deemed to not be facing risk:

- IRCC / MCI / Relevant body supports the migrant worker to access justice and resources through other appropriate processes.
- There must be a fast and accessible appeal process when applications are denied. One model would provide for a “reconsideration” by a different decision maker who would speak with the worker, with interpretation if required, to explain why the application was denied and provide an opportunity to respond.

Step 7: Investigating the employer

IRCC / ESDC work with Ministry of Labour / WSIB and other appropriate provincial agencies (not federal departments) to investigate the employer and communicate with the migrant worker about their options to access unpaid wages, or other monies owed to them.

- If the investigation results in identifying a particularly egregious employer, this investigation shall result in regularizing the immigration status of the migrant worker (permanent resident status).
- Confidentiality of the worker’s identity is essential, particularly in the Seasonal Agricultural Worker Program, in order to ensure that workers are not blacklisted. The government should commit to negotiating such protections and provisions into agreements at an intergovernmental level with sending states.

Proposed details of the process

Step 1: Communication

While such a program is in place in British Columbia, there is no dedicated website or communication taken up by the relevant Ministries. Migrant workers, and their support organizations, across the province have identified difficulty in finding appropriate information, as a key reason for not accessing the program. Expansion of this program in Ontario, and other provinces, must be accompanied by clear communication, including a dedicated multilingual mobile-friendly website, cross-linked between all the different relevant federal and provincial agencies. Immigration Canada website can be very difficult to navigate and access to this information must be simple and obvious.

This information must be made available directly to all migrant workers prior to, and after, their arrival. Links to the application process for this open work permit and/or the application itself should be provided with the original work permit or when the Social Insurance Number is picked up.

Effective communication with employers is also essential, which serves to encourage them to ensure that their workers' rights are fully respected.

Step 2: Self-Identification

Migrant workers are aware if they are working overtime, are being underpaid, working without appropriate training, or are in a situation where they are being exploited. They continue to work in these situations because of negative impacts of leaving the job or speaking out. Caregivers, for example, will continue to stay in situations of risk so as to quickly finish the 24 months required for their PR application. Agricultural workers, particularly women workers in a male dominated industry, are aware that even if they have an open work permit, most employers will not hire women, and non male-identified workers, particularly those that have left an employer mid-contract. As such, when workers do self-identify as needing to leave their employer, it is in situations of grave risk, where all other mechanisms for ensuring their safety have been exhausted.

In British Columbia's case, migrant workers must also have filed a complaint with law enforcement or other provincial body. According to research done by the Workers Action Centre in Ontario, the vast majority of employees only make complaints after leaving their employment. In Ontario, labour laws allow employees 2 years from the date of violation to file a complaint, 3.5 years in the case of violations under EPFNA (Employment Protections for Foreign Nationals Act). Requiring a complaint to be filed *before* an open work permit is issued will serve as a disincentive to most workers to leave conditions for risk, in effect continuing the current system for most workers. Therefore, the filing of a complaint should not be a prerequisite to applying for this Open Permit.

Step 3: Support organizations

In the case of British Columbia, only provincially funded settlement agencies are eligible to write support letters - this is so onerous that in many cases, other organizations are writing support letters and they are being sent in by these provincial agencies on their letterhead. Few settlement agencies work with migrant workers. In fact, the vast majority of migrant workers across Canada, according to our data analysis, do not receive assistance from federal or provincially funded agencies. Particularly those in the agriculture sector are utilizing unfunded networks including dedicated volunteer collectives, fellow church goers, local shop owners, and community volunteers.

As such any community organization, legal workers, workers themselves, faith leaders, and health professionals should be eligible to write these support letters. Where appropriate, effective financial and other supports should be provided for these supporting individuals and organizations.

Step 4: Streamlined application process

Most migrant workers and their support organizations are not aware of the specific section of laws, policies, regulations or Code that an employer is violating. Placing the burden of this on the migrant worker, who are low-waged workers, for whom English is often not a first language will serve to make this an inaccessible path to escape risk.

As outlined above, in the case of BC, the complaints process and the onerous letter requirement has resulted in few workers utilizing the program. These lower numbers conflict with workers' knowledge and experience of the structural and individual problems raised by these programs. The application process must be as narrative based, and as accessible to lay people, as possible to allow maximum effectiveness.

Step 5: Identification of risk

Any potential violation of federal or provincial laws including labour, employment, human rights, terms of the contract, recruitment protections, health and safety, workplace safety etc should be considered risk and grounds for issuance of open permits. It is critical that these protections extend to abuse where policy protections currently do not exist - such as protections from recruiter abuse.

The test for risk should be based on *reasonable grounds to believe* assessment of the narrative application by the migrant worker. Once this standard has been established, the decision-maker must be required to issue the permit with no room for discretion (for example, use of the word "shall issue" rather than "may issue" the work permit).

If the worker is deemed to not be facing risk:

- IRCC / MCI / Relevant body supports the migrant worker to access justice and resources through other appropriate processes.
- There must be a fast and accessible appeal process when applications are denied. One model would provide for a "reconsideration" by a different decision maker who would speak with the worker, with interpretation if required, to explain why the application was denied and provide an opportunity to respond.

Step 6: Specifics of permit

It is critical that Open Permits are issued on an expedited basis, as the point of application can be a point of great risk for worker that can be repatriated. The open permit should be issued without the requirement for an LMIA and on an urgent basis. The open work permit should also not be limited to a particular sector or region.

LENGTH

The permits should be a minimum of one year, renewable, as that is the average length of processing for most complaints. These permits should be renewable as long as an investigation is ongoing. The example of migrant workers who were involved in the Presteve Food Inc and were given a one-year open permit and TRP should be seen as the model for the length of permit[2].

RESPONSIVE TO CONCERNS IN DIFFERENT STREAMS

Permits should be responsive to the specific nature of the three different migrant worker-Low waged programs:

(a) Migrant workers in any Temporary Foreign Worker program that includes an option to apply for permanent residency after a defined period of work in Canada should be issued a permit for one year or for the length of time required to qualify for permanent residence, whichever is longer. Any work under an Open Permit should be considered equivalent to work on an LMIA when applying for permanent residency. For the sake of clarity, this protection includes any migrant workers applying for permanent residency under a provincial nominee program, Express Entry or the Caregiver program.

(b) For Agricultural workers, the permit should be accompanied by specific guarantees against blacklisting and should include a path towards permanent resident status if continued employment is not possible.

HEALTHCARE AND OTHER SOCIAL SUPPORTS

[2] See O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675. In this case, the Ontario Human Rights Tribunal found that two temporary foreign workers from Mexico has been discriminated against in their employment due to sex, sexual harassment, sexual solicitations and advances, and reprisal, which together created a sexually poisoned work environment. The workers were awarded record high damages of $150,000 and $100,000 for injury to dignity, feelings and self-respect.

While an open work permit guarantees easier labour mobility, migrant workers' access to health services is tied to their continued employment. For example, in Ontario, when migrant workers change employers, they must complete a new three-month waiting period to access medicare. Also migrant workers do not have access to provincial social benefits in between employment. As such, for the Open Permit process to be effective, comprehensive policy needs to be developed to ensure that migrant workers are able to access healthcare, social assistance and other provincial benefits when in-between jobs.

This can be done through:

1. The work permit should be accompanied by a Temporary Resident Permit (TRP) - Type 86. A TRP - Type 86 allows migrant workers to access provincial social and health benefits, which are critical to accessing interim assistance as workers seek new jobs. It is especially critical for sick or injured migrant workers.
2. Changing provincial regulations to allow access to healthcare, and other social benefits for migrant workers in provinces that are not engaged in full time employment.
3. Expanding the Interim Federal Health program federally to assist migrant workers not covered by provincial health programs.

Step 7: Investigating the employer

While workers should be encouraged to file complaints after they have received their Open Permits, filing a complaint should not be required. This streamlined process should include a mechanism by which federal and provincial authorities can investigate the employer and hold them accountable as appropriate without worker complaints.

It is imperative that this investigation not be done by the Canada Border Services Agency (CBSA), in fact no information should be shared with CBSA. CBSA prioritizes immigration enforcement. For example, where migrant workers are forced into work outside the terms of their work authorization, CBSA is known to initiate deportation proceedings. Similarly, where workers have alleged trafficking, when CBSA has deemed their experience outside of the narrows definition of trafficking, CBSA officers have initiated deportation proceedings even with other MoL and Human Rights complaints in process.

Employment standards complaints, human rights complaints, civil court complaints are bodies where migrant workers can have standing. If successful, an existing process for workers to get monies owed to them is in place. As such, the investigations should remain within provincial jurisdictions. These investigations will be facilitated by the protection provided by the federal government through open work permits and related immigration statuses.

WHISTLEBLOWER PROTECTIONS

Where migrant workers' complaints result in uncovering patterns of abuse by employers or recruiters, migrant workers should be provided permanent resident status. The government should anticipate and plan for the need to protect a number of migrant workers impacted by the uncovering of a pattern of abuse. These workers should not be subject to removal. Such a provision will greatly incentivize rights assertion, which is critical within the context of the vulnerabilities faced by migrant workers.

IV. Key considerations on information sharing between federal and provincial bodies

Currently, when workers file complaints with provincial labour authorities, no information is shared with federal authorities. It is imperative that this firewall remain in place. Such a barrier provides the minimal protections for workers with undocumented or uncertain immigration status to assert labour rights without fearing detentions or deportation. Instead a permanent coordination body of federal and provincial and territorial departments should be established which takes direction from migrant workers and migrant worker support organizations to determine the specifics of information sharing and policy alignment.

No worker or third party complaint should be referred to the CBSA. There should be no sharing of information with CBSA under any conditions, and ESDC investigation should not include CBSA. Any participation of the CBSA in this process will serve as a deterrent to worker complaints and assertion of rights.

Where ESDC or CBSA is engaged in an investigation, or is made aware of non-compliant employers, resources should be directed to inform workers of their rights, and their ability to access justice through processes where they have their own standing and are within provincial jurisdiction.