

**Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania**  
September 2, 2011

“We believe that the experiences they have, while not always easy, will help to shape their views of the world and the U.S. Most certainly they will have improved their English and their understanding of America.” Rick Anaya, Chief Executive for Council for Educational Travel, USA (CETUSA).<sup>1</sup>

“We are supposed to be here for cultural exchange and education, but we are just cheap laborers.” Harika Duygu Ozer, 19, a second-year medical student from Turkey.<sup>2</sup>

“These students’ experience of coercion and retaliation by layers of subcontractors and recruiters is an emblematic guestworker story.” Saket Soni, Executive Director, National Guestworker Alliance.

“The thing I’m going to say is that my hope is, and I say it to my kids, that this is corporate American at its worst. I do not care whether it’s in China, Bangladesh, or United States, workers deserve to be treated with dignity and fairness.” Diane Carroll, Financial Secretary-Treasurer, Bakery Confectionary Tobacco and Grainmillers, Chocolate Workers Local 464.

## **EXECUTIVE SUMMARY**

Between May and June 2011, approximately 400 foreign students from countries such as China, Turkey, Ukraine, Moldova, Mongolia, Romania, Ghana, Thailand, and others, arrived in Pennsylvania through the United States’ Summer Student Travel/Work Program. The students all contracted through agencies in their home countries with the Council for Educational Travel, USA (CETUSA) to work for The Hershey Company packing chocolates at Hershey’s Eastern Distribution Center, III, in Palmyra, PA. The students came eager to participate in the educational and cultural exchange promised. The program that brought them to the United States is often referred to as the J-1 program, named for the visa issued by the U.S. Department of State that allows students to travel to the United States and to obtain short-term employment that will both expose them to the daily life of individuals living in the United States, and allow them to earn income to travel and see the country.

According to these J-1 students, the living and working conditions that they faced in Hershey fell far short of the program’s promise. The students described being employed in a packing factory, working at punishing speeds under abusive supervision in physically grueling work, that – after deductions were taken for housing and other employment-related costs – netted them a first week’s salary as low as \$20 for the week. Students described the distress they experienced as the

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<sup>1</sup> See Julia Preston, *Companies Point Fingers as Students Protest Conditions at Chocolate Plant*, N.Y. TIMES, Aug. 19, 2011, at A12, available at <http://www.nytimes.com/2011/08/19/us/19students.htm>.

<sup>2</sup> See Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES, Aug. 18, 2011, at A11, available at <http://www.nytimes.com/2011/08/18/us/18immig.htm>.

weeks went by and they realized their income would clearly be inadequate to cover the costs of the program much less fund the travel and cultural exchange activity that had drawn most of them to the program in the first place. Further, the students told of finding themselves encased in a confusing web of contractual relationships set up among a group of corporations whose interwoven roles were difficult to unravel and where accountability seemed elusive at best. As students explained it, they worked packing products made by one company, inside a warehouse run by another, while technically employed by yet another company that withheld their rent money and funneled it to their “cultural exchange sponsoring agency” which in turn paid it over to private landlords.

Students related that they made individual attempts to voice concerns about their working and living conditions, to win changes in practices and policies, or simply to find an individual way out of the trap into which they had fallen. Virtually to a person, the students reported that these individual efforts had been in vain. Students reported that when they ultimately began voicing their grievances collectively, rather than achieving positive change, they were told that their conduct would get them into trouble and were advised to cease their efforts or face serious consequences for themselves, their families, and their futures. In an extraordinary leap of faith and display of courage, many students at the Hershey’s warehouse responded by joining together in solidarity, making contact with people in the larger community who could provide information and support, and then taking their story to the American public.

On August 17, 2011, approximately 200 of the J-1 students employed at the Hershey Company’s Eastern Distribution Center III staged a sit-in in protest of their working and living conditions, conditions that differed dramatically from what they had been led to expect from communications with individuals with prior J-1 experiences, their own prior experiences, and the promises and assurances of their home agencies and CETUSA at the point of recruit.<sup>3</sup> The following day, on August 18, 2011, the students marched in protest in Hershey, PA.<sup>4</sup> This action by the student workers quickly garnered significant media attention and support from the labor movement, local residents, and others across the country.<sup>5</sup>

On August 19, 2011, a human rights delegation comprised of professors and practitioners with expertise in labor and employment law, and international human rights (hereinafter, “Delegation”) met with many of these students in Hershey, PA.<sup>6</sup> The Delegation came at the

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<sup>3</sup>See e.g., Eileen Godin, *A Protest with a Bitter Taste*, TIMES LEADER, August 31, 2011, available at <http://www.guestworkeralliance.org/2011/08/a-protest-with-a-bitter-taste-times-leader-wilkes-barre-pa-83111>; Amy Goodman, *Foreign Students in Exchange Program Walk Out of American Jobs amid Claims of Labor Exploitation*, Democracy Now, August 28, 2011, available at <http://www.guestworkeralliance.org/2011/08/foreign-students-walk-out-of-jobs-democracy-now-8192011/>; Jennifer Gordon, *America’s Sweatshop Diplomacy*, *New York Times*, August 24, 2011; <http://www.nytimes.com/2009/03/10/opinion/10gordon.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* For additional media sources, see Jobs with Justice blog at <http://www.jwjb.org>.

<sup>6</sup> The Delegation was composed of the following individuals with expertise in domestic and international labor and employment laws: Colleen P. Breslin (Reuschlein Clinical Teaching Fellow, Villanova University School of Law, Pennsylvania), Tsedeye Gebreselassie (Staff Attorney, National Employment Law Center), Stephanie Luce (Associate Professor of Labor Studies Murphy Institute, City University of New York, New York), Beth Lyon (Professor of Law, Villanova University School of Law, Pennsylvania), Sarah Paoletti (Practice Associate Professor and Director of the Transnational Legal Clinic, University of Pennsylvania Law School, Pennsylvania).

invitation of the National Guestworker Alliance.<sup>7</sup> The Delegation visited the students in Hershey to conduct a preliminary investigation into their situation and their perspectives on it, with the goal of hearing directly from the students about their experiences and concerns. Without the authority or the resources to carry out a complete investigation, the Delegation did not attempt to contact or interview representatives of Hershey's, CETUSA, SHS or Exel, although members of the Delegation did review public statements made by these companies in response to the student protest. Although the Delegation's work was restricted in its focus, it revealed numerous credible accounts of a program gone seriously wrong, convincing the authors of this report that additional investigation, conducted with official authority and involving all relevant parties, should be an urgent priority for responsible agencies.

This report sets forth the preliminary findings resulting from the August 19, 2011 visit with students in Hershey, PA. It identifies areas of particular concern framed in light of the United States' international human rights obligations, as well as potential violations of both federal and state labor and employment laws committed by the various entities engaged in the recruitment, contracting, employment, and oversight of the students. The report identifies a series of recommendations regarding further actions we believe are needed to ensure the protection and promotion of the students' human rights moving forward, and to provide redress where violations of state and federal labor and employment laws are found.

In the week subsequent to the Delegation's meetings with the students in Hershey, the U.S. Department of State, the U.S. Department of Labor's Wage and Hour Division, and its Occupational Health and Safety Administration (both OSHA Compliance and OSHA Whistleblower) have initiated investigations. These initiatives were a welcome response to an alarming situation, and they were suitably prompt. However, we are concerned that they also need to be thorough, and need to address the full scope of potential violations from the moment of recruitment and contracting, through all aspects of the employment relationship. Perhaps most importantly, investigations in cases such as this one need to be carried out in a way that appropriately protects workers whose position makes them particularly vulnerable to reprisals and to threats of reprisals. Otherwise, workers who are brave enough to come forward with concerns will not be adequately protected, many others will be deterred, and all the needed facts and perspectives will not be brought to light. There is much we do not know about the process and status of the current investigations. However, based on accounts in the media and from the J-1 students in Hershey, it appears that the scope of official inquiry by the State Department has been too narrowly defined at least until now, and that the methodology employed does not adequately account for the students' collective and individual circumstances.

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<sup>7</sup> The National Guestworker Alliance (NGA) is a membership organization made up of guestworkers from a range of sectors and industries who entered the United States through the various U.S. guestworker programs. The NGA was founded as a project of the New Orleans Workers' Center for Racial Justice when thousands of guestworkers were brought to the United States to work on the Gulf Coast in the aftermath of Hurricane Katrina. Today the NGA is a national worker organization. The NGA has provided support to the J-1 students at the Hershey warehouse in their campaign. The organization's website is [www.guestworkeralliance.org](http://www.guestworkeralliance.org). The NGA invited the Human Rights Delegation to Hershey, but is not an author or editor of this report.

## **Preliminary Findings and Call for Further In-Depth Inquiry and Investigation**

We believe that further investigation is needed into the actions of all of the private actors implicated by the students' complaints. These actors are a complex and interconnected set, and our understanding may be incomplete, but we believe the following entities should be included: the home country agencies that facilitated the contact with Council for Educational Travel, USA (CETUSA), the sponsoring organization authorized by the U.S. Department of State to oversee the Summer Work/Travel program and the supervision of the students on the J-1 visas; CETUSA itself; The Hershey Company, at whose packing plant the students were employed; Exel North American Logistics, Inc., contracted by Hershey to run operations at the Hershey packing plant; and SHS Onsite Solutions, Inc., the employment agency that contracted with CETUSA to provide the J-1 student workers to Exel for employment at Hershey's Eastern Distribution Center III. Part of the investigation must include a thorough inquiry into the relationship among all of the actors with each other, and with the students to better understand the level of responsibility for each actor involved in the recruitment, contracting (and subcontracting), employment, and supervision of the student workers. We are particularly concerned with ensuring the student workers' rights are protected throughout the investigative process, and that they are provided redress for the full scope of rights violations that may be implicated, specifically with regard to the following:

- Fraud and coercion in recruitment and contracting;
- Failure to pay fair remuneration and unlawful pay deductions, including deductions for housing and charges for recruitment, visa, and travel costs that reduced the students' wages to significantly below minimum wage;
- Failure to provide safe and decent working conditions, free from abusive, exploitative and discriminatory treatment;
- Interference with the right to freely choose one's place of work;
- Interference with workers' right to organize and to freedom of association;
- Threats, intimidation, coercion and retaliation against those seeking to exercise their rights, particularly those seeking to exercise their rights to freedom of association and collective bargaining.

In addition, we are extremely concerned about the lack of government oversight in the J-1 Summer Work Exchange Program, and the apparent failure of the U.S. government to fulfill its obligations under international human rights law to protect and promote the rights of all workers, regardless of their national origin or migration status. The U.S. Department of State does not have adequate monitoring mechanisms in place to ensure that the employment and housing conditions of the student workers meet basic human rights standards under international law, as well as under U.S. federal and state law. As noted above, while the U.S. Department of State and the U.S. Department of Labor have initiated investigations in the week subsequent to the students' demonstration, we are concerned that the scope of the inquiry is too narrowly defined by the regulations of the J-1 Visa program, which, as is set forth in greater detail below, do not fully account for the scope of potential violations and level of coercion and intimidation to which the program is susceptible.

## I. BACKGROUND: UNDERLYING LEGAL FRAMEWORK

### a. J-1 Summer Work Travel Program

The J-1 Visa is available to individuals participating in one of a number of opportunities provided through the Exchange Visitor Program, which has as its purpose “to provide foreign nationals with opportunities to participate in educational and cultural programs in the United States and return home to share their experiences.”<sup>8</sup> Exchange Visitor Program sponsors are required to “Offer or make available to exchange visitors a variety of appropriate cross-cultural activities... determined by the needs and interests of the particular category of exchange visitor.... The Department of State encourages sponsors to give their exchange visitors the broadest exposure to American society, culture and institutions.”<sup>9</sup> Furthermore, sponsors are required to “[e]ncourage exchange visitors to voluntarily participate in activities which are for the purpose of sharing the language, culture, or history of their home country with Americans.”<sup>10</sup>

The Summer Student Travel/Work Program is included among the exchange visitor programs, and is “designed to achieve the education objectives of international exchange by involving students during their summer vacations directly in the daily life of the host country through temporary employment opportunities.”<sup>11</sup> The Student Travel/Work Program explicitly recognizes that students may need the ability to work to support their travel to and within the United States, and preference is given to those students for whom the ability to work is essential. Yet, the J-1 program fails to put into place protection mechanisms to account for the financially vulnerable situation of those students that can then contribute to their ultimate exploitation.

The students’ protest in Hershey and their complaints against CETUSA as their J-1 sponsor, and the other entities with direct oversight over their contracting and employment, come at a time when the J-1 Visa program has come under increased scrutiny. The AP released its investigative report into the J-1 Summer Work Travel program on December 6, 2010, calling attention to the ways in which students have been exploited.<sup>12</sup> And the Economic Policy Institute released a report on the J-1 program, titled *Guestworker Diplomacy: J Visas receive minimal oversight despite significant implications for the U.S. labor market*, in July 2011.<sup>13</sup> Among the common critiques of the program is the lack of monitoring and oversight. Whereas other guestworker visa programs are regulated by both the U.S. Department of Labor and the U.S. Department of Homeland Security, the J-1 visa program is operated and overseen exclusively by the U.S.

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<sup>8</sup> 22 C.F.R. § 62.1 (2011), implementing the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87-256, 22 U.S.C. 2451, et seq. (1988).

<sup>9</sup> 22 C.F.R. § 62.8(d)(1) (2011).

<sup>10</sup> 22 C.F.R. § 62.8(d)(2) (2011).

<sup>11</sup> 22 C.F.R. § 62.8(a) (2011)

<sup>12</sup> See Holbrook Mohr, Mike Baker and Mitch Weiss, *US Fails to Tackle Student Visa Abuses*, ASSOCIATED PRESS, Dec. 6, 2010, available at <http://abcnews.go.com/Business/wireStory?id=12320099&singlePage=true>.

<sup>13</sup> See Daniel Costa, *Guestworker Diplomacy: J Visas Receive Minimal Oversight Despite Significant Implications for the U.S. Labor Market*, ECONOMIC POLICY INSTITUTE, BRIEFING PAPER # 317, 3 (July 14, 2011), <http://www.epi.org/page/-/BriefingPaper317.pdf?nocdn=1>.

Department of State. As Daniel Costa, author of this Economic Policy Institute report, concluded:

The State Department has outsourced the monitoring of compliance with program rules and oversight of program performance to the program sponsors and employers, who have a vested interest in optimizing their returns from the program. Sponsors and employers cannot be expected to report violations, which would jeopardize their financial gains. This amounts to an obvious conflict of interest.<sup>14</sup>

This lack of oversight and monitoring is particularly problematic in a program where “participants incur significant debt to participate in the Exchange Visitor Program and to travel to the United States, and ... they are unable to easily switch between employers.” This, according to Costa, leaves them “virtually indentured to their employer” when they arrive.<sup>15</sup>

### **b. Labor, Employment and Human Rights in the United States**

The students’ complaints mirror a national narrative in which employers are increasingly relying on layers of contracting and subcontracting in an effort to shield themselves from their moral and legal obligations to their workforce, resulting in a rapid decline in terms and conditions of work for the average worker.<sup>16</sup> As the domestic legal regime has failed to ensure adequate protections and remedies for U.S. and immigrant workers alike, advocates across the United States are calling upon international human rights norms to reframe their issues as human rights issues, seeking to reclaim humanity and dignity in the workplace, and reclaim workers’ fundamental rights as human beings, rather than as mere labor commodities. For these reasons, this report seeks to frame the students’ complaints within the human rights framework, placing them in the broader context of the domestic labor and human rights movement within the United States and globally, while at the same time examining the federal and state labor and employment laws implicated by the student narratives.

On November 5, 2010, the United States went through the Universal Periodic Review (UPR), a process by which all UN Member Countries are assessed on their human rights record before the UN Human Rights Council, based on a universal set of standards that include not just the human rights treaties ratified, but also the UN Charter and the Universal Declaration of Human Rights (UDHR). The UDHR enumerates an inclusive set of rights built on the premise that “All human

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<sup>14</sup> Costa, *Guestworker Diplomacy*, supra n. 13.

<sup>15</sup> *Id.*

<sup>16</sup> See Catherine K. Ruckelshaus and Bruce Goldstein, *From Orchards to the Internet: Confronting Contingent Work Abuse* (National Employment Law Project and Farmworker Justice Fund, Inc. 2002) available at [http://nelp.3cdn.net/8af16441e7427cce36\\_83m6ibx75.pdf](http://nelp.3cdn.net/8af16441e7427cce36_83m6ibx75.pdf); Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 *Fordham Urban L. J.* 373 (2008); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 *UCLA L. Rev.* 983 (1999); David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>; Steven Greenhouse, *Among Janitors, Labor Violations Go With The Job*, *N.Y. Times*, July 13, 2005 at A2, available at <http://www.nytimes.com/2005/07/13/national/13janitor.htm>, (profile of the janitorial industry, explaining that the industry “has undergone a metamorphosis in the past two decades, creating a marriage of convenience in which building owners have increasingly hired outside contractors to cut labor costs.”).

beings are born free and equal in dignity and rights,”<sup>17</sup> and incorporates the full range of economic, social, and cultural rights central to the realization of the fundamental right to human dignity that shall apply to all persons without discrimination of any kind.

During and the UPR process, advocates from across the country highlighted the multitude of ways in which employers are bending to labor market forces and increasingly treat workers as disposable labor commodities and less as human beings who, as such, are possessors of fundamental human rights. In doing so, these participants built on earlier advocacy undertaken before the UN Human Rights Committee and the UN Committee on the Elimination of All Forms of Racial Discrimination, as well as before the International Labor Organization.<sup>18</sup> Replicating the voices of civil society, representatives from the international community called upon the United States to take affirmative steps to ensure the realization of right to dignity through and in work, including the right to workers’ freedom of association, the right to be free from abusive and exploitative working conditions, the right to choice of employment, and the right to earn a living wage.<sup>19</sup> Throughout the UPR process, the United States explicitly recognized the need to do more to combat discrimination, and to ensure that the rights of all workers were protected. The situation with the J-1 Students in Hershey comes at a time when advocates are pushing the United States to demonstrate its commitment to human rights at home through deeds, by establishing transparent mechanisms of accountability that protect and promote the human rights of all persons, and that provide redress and remedies when those rights are violated.

## II. METHODOLOGY

The Delegation visited Hershey, Pennsylvania on August 19, 2011 at the invitation of the National Guestworker Alliance, to hear from the student workers about their conditions. Before arriving, the Delegation reviewed the media coverage on the student strike and the conditions leading up to their strike, and had conversations with staff at the National Guestworkers Alliance (NGA).

Two members of the Delegation conducted a site visit of an apartment building where some of the students were placed in Harrisburg and, while there, interviewed three students in their apartment.

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<sup>17</sup> Universal Declaration of Human Rights [hereinafter UDHR], G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Art. 1 (Dec. 10, 1948).

<sup>18</sup> See *Right to Decent Work*, U.S. HUMAN RIGHTS NETWORK, UNIVERSAL PERIODIC REVIEW JOINT REPORTS, 193 (2010), [http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report\\_0.pdf](http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report_0.pdf); see *Labor Rights*, U.S. HUMAN RIGHTS NETWORK, UNIVERSAL PERIODIC REVIEW JOINT REPORTS, 207 (2010), [http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report\\_0.pdf](http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report_0.pdf); see *Migrant Labor Rights*, U.S. HUMAN RIGHTS NETWORK, UNIVERSAL PERIODIC REVIEW JOINT REPORTS, 193 (2010), [http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report\\_0.pdf](http://www.ushrnetwork.org/sites/default/files/USHRN%20Human%20Rights%20Report_0.pdf).

<sup>19</sup> *Report of the Working Group on the Universal Periodic Review: United States of America*, submitted to the U.N. High Commissioner for Human Rights, In Conjunction with the Universal Periodic Review, A/HRC/16/11, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>.

The full Delegation convened mid-day at the office of the Bakery Confectionary Tobacco and Grainmillers, Chocolate Workers Local 464 inn Hershey, PA.<sup>20</sup> There, they met with fifteen students for several hours, interviewing at least one student from each of the following countries: China, Kazakhstan, Moldova, Mongolia, Poland, Romania, Turkey and the Ukraine. NGA staff were not present during the in-depth small group interviews. Informal conversations were also held with several other students. In this report, we keep the identity of individual students anonymous and confidential to protect against possible retaliation or other negative consequences.

In addition, the Delegation conducted a telephone interview with Neil Bisno, president of the Service Employees International Union Healthcare Pennsylvania.<sup>21</sup> Bisno was present for the collective action on August 17, 2011, and was one of three labor union members arrested in front of the Palmyra Plant, the worksite where the students packed Hershey's products.<sup>22</sup>

Prior to and subsequent to the meetings in Hershey, PA, the Delegation has reviewed the following documents:

#### Communications with the U.S. Department of State

- Complaint Letter written on behalf of twelve (12) students by their counsel, Jennifer Rosenbaum, National Guestworker Alliance Legal Director, to Ann Stock, Under Secretary of Public Diplomacy and Public Affairs, U.S. Department of State, "Request for Revocation of Sponsorship of Council for Educational Travel, USA (CETUSA)," August 17, 2011, outlining their complaints and concerns
- Response letter from CETUSA to Ann Stock, Under Secretary of Public Diplomacy and Public Affairs, U.S. Department of State, August 21, 2011

#### Communications between the Student Workers, CETUSA, The Hershey Company and the Other Entities

- A petition from students asking for a meeting with The Hershey Company regarding their complaints and concerns about their terms and conditions and employment and housing signed by 222 students
- Email communications from CETUSA, SHS Onsite Solutions, and home agencies indicating participation in a strike or other activity at the worksite would result in termination from the program
- Transcript from meeting conducted by Reggie, a Manager of SHS Onsite Solutions and Malagorzata, CETUSA representatives student workers

#### Student Documents

- Photocopies of three student passports and J-1 visas

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<sup>20</sup> Local 464's website is <[www.chocolateworkerslocal.464](http://www.chocolateworkerslocal.464)>

<sup>21</sup> SEIU Healthcare Pennsylvania's website is at <[www.seiuhealthcarepa.org/about/Default.aspx](http://www.seiuhealthcarepa.org/about/Default.aspx)>

<sup>22</sup> Also arrested at that time were Rick Bloomingdale, president of the Pennsylvania State Federation of the A.F.L.-C.I.O, and Kathy Jellison, President of SEIU Local 668. See Kathy Jellison, *Hershey: Home of the Chocolate Kiss and Corporate Greed*, PATRIOT NEWS, August 25, 2011, available at [www.pennlive.com/editorials/index.ssf/2011/08/hershey\\_home\\_of\\_chocoalte\\_kiss.html](http://www.pennlive.com/editorials/index.ssf/2011/08/hershey_home_of_chocoalte_kiss.html).

- Photo of student’s arms, with bruises
- Photocopy of weekly paystubs
- Copy of a work contract entered into with CETUSA
- Copy of a letter sent to students about arrival in Harrisburg, PA informing students to find their way to the CETUSA Welcome Center upon arrival
- Copy of “Addendum to Sub Lease: Voluntary Payroll Deduction Authorization Form,” which authorizes CETUSA to deduct \$395 per month from the student paycheck for housing costs
- Copy of an advertisement for local apartments, demonstrating the availability of 1 bedroom apartments for \$620 per month, and 2 bedroom apartments for \$720 per month
- Photos of student apartments

### Background Documents

- J-1 Visa Regulations
- “Action Alert” from the National Guestworkers Alliance regarding the August 17, 2011 action
- Websites of The Hershey Company, CETUSA, SHS Onsite Solutions, and Exel
- Media coverage of the student workers and the actions taken, and the response of The Hershey Company and the other entities.

For our investigation we examined potential violations of both international law binding the United States and domestic law. Legal sources referenced include:<sup>23</sup>

- Universal Declaration of Human Rights (UDHR)
- International Covenant on Civil and Political Rights (ICCPR)

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<sup>23</sup> See, UDHR, *supra* note 17, Art.1 (“All human beings are born free and equal in dignity and rights.”); UDHR, Art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); UDHR, Art. 6 (“Everyone has the right to recognition everywhere as a person before the law.”); UDHR, Art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); *see also* International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] Art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, Art. 2(3) (“Each State Party to the Present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”); ICCPR, Art. 14 (“All persons shall be equal before the courts and tribunals.”); *see also* International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD], G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965), available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm). ICERD, Art. 5 (“States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice.”).

- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
- International Labour Organization Conventions and Declaration on the Fundamental Principles and Rights at Work
- National Labor Relations Act (NLRA) and the Pennsylvania Labor Relations Act (PLRA)
- Fair Labor Standards Act (FLSA), the Pennsylvania Minimum Wage Act (PaMWA), and the Pennsylvania Wage Payment and Collection Law PaWPCL)
- Occupational Safety and Health Act (OSHA)

This report is based on conversations with the student workers, with union leaders already mentioned, and on the materials listed above. The Delegation did not observe the factory or working conditions, and did not speak with the contractors, employers or U.S. State Department. The Delegation has, however, reviewed all public statements issued by CETUSA, Hershey, and Exel regarding the J-1 Student Workers that are the subject of this report. Our initial investigation suggests all factual and legal claims arising out of the students' participation in the J-1 program at Hershey merit further investigation into potential violations of international human rights law, and the federal, and state laws governing the visa program and all terms and conditions of employment.

### **III. AREAS OF CONCERN/POTENTIAL RIGHTS VIOLATIONS**

This Section frames the students' factual claims in light of international human rights law, and then examines the relevant federal and state labor and employment laws implicated by those claims.

The Universal Declaration of Human Rights (UDHR) was established “as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”<sup>24</sup> The U.S. J-1 Exchange Visitor Program holds out the promise of furthering the concept of universal human rights standards through teaching and education, and shares as its purpose “to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges.”<sup>25</sup> Unfortunately, the shared experiences of the J-1 students at Hershey fell far short of the rights and freedoms set forth in the UDHR.

#### **a. Right to Non-Discrimination and Equality before the Law**

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<sup>24</sup> See, UDHR, supra n. 17, Preamble.

<sup>25</sup> 22 CFR § 62.1(a).

Central to the UDHR, and reiterated in both 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 are international human rights treaties signed and ratified by the United States, is the requirement that all persons are equal under the law, and before courts and tribunals. The United States is obligated to ensure that full rights and remedies are available without discrimination to all persons, regardless of race, language, national or social origin, or other status.<sup>26</sup> The ILO has further set forth in its Declaration on the Fundamental Principles and Rights at Work, that among the four core labor rights all countries are bound to “respect, to promote and to realize” by virtue of their participation in the International Labour Conference, regardless of the Conventions ratified, is “the elimination of discrimination in respect of employment and occupation.”<sup>27</sup>

### **b. Just and Favorable Conditions of Work**

The UDHR clearly establishes the right of everyone to “just and favourable conditions of work,”<sup>28</sup> to “rest and leisure, including reasonable limitation on working hours,”<sup>29</sup> and to “a standard of living adequate for the health and well-being of himself and his family.”<sup>30</sup> U.S. federal and state employment laws set forth minimum wage and overtime laws, domestic legal standards that embody and express this country’s commitment to ensure that all workers are provided with just and favorable conditions of work, and are ensured an adequate standard of living, as called for by the UDHR.

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<sup>26</sup> See, UDHR, supra n. 17, Art. 1 (“All human beings are born free and equal in dignity and rights.”); UDHR, Art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); UDHR, Art. 6 (“Everyone has the right to recognition everywhere as a person before the law.”); UDHR, Art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); ICCPR, Art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); ICCPR, supra n. 23, Art. 2(3) (“Each State Party to the Present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”); ICCPR, Art. 14 (“All persons shall be equal before the courts and tribunals.”); ICERD, supra n. 23, Art. 5 (“States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice.”)

<sup>27</sup> The International Labour Conference is an annual tripartite meeting convened by the International Labour Organization that brings together ILO delegates from governments, workers, and employers of the ILO member States. See also ILO Declaration on Fundamental Principles and Rights at Work, June 1998, 37 I.L.M. 1237 (1998), Art. 2(d), available at <http://www.ilo.org/public/english/standards/decl/declaration/index.htm>.

<sup>28</sup> UDHR, supra n. 17, Arts. 23(1), 23(3) (providing, “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”)

<sup>29</sup> UDHR, supra n. 17, Art. 24.

<sup>30</sup> UDHR, supra n. 17, Art. 25(1).

Under Article 5 of ICERD, the U.S. is obligated to ensure the right to just and favorable conditions of work without discrimination, and to take affirmative measures to ensure both the elimination of discrimination not just under color of law, but in fact. Specifically ICERD requires signatories to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (e)(i) The rights to work, the free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.”

As is discussed in greater detail below, the right to freedom of association, and the right to participate in collective action without threat of reprisal or other retaliatory action, is critical to making other workplace rights a reality that workers can both enjoy and defend. This undergirding role of the right to freedom of association and the right to participate in collective action, is recognized in the ILO Conventions, as well as in Article 22 of the International Covenant on Civil and Political Rights. As such, the right to freedom of association is a fundamental human right. Furthermore, the right to freedom of association applies to all workers, nationals and non-nationals alike.<sup>31</sup>

### **1. Potential Wage and Hour Violations at the Hershey Plant**

The purpose of the Fair Labor Standards Act, (FLSA), enacted in 1938, was to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” by “ensuring to all of our able-bodied working men and women a fair day’s pay for a fair day’s work.”<sup>32</sup> The FLSA sets minimum wage, overtime pay, recordkeeping and child labor standards, and regulates allowable employer deductions under the Act. Covered non-exempt workers are entitled to a minimum wage of \$7.25 per hour. Pennsylvania’s minimum wage is currently the same as the \$7.25 federal minimum wage.<sup>33</sup>

The students shared with the Delegation stories indicating that further investigation is warranted to determine if various provisions of the Act were violated. In particular:

#### **i. Minimum wage paid must be “free and clear” of any improper deductions or expense requirement**

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<sup>31</sup> See *Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments*, in 332nd Report of the Committee on Freedom of Association, 154, GB.288/7 (Part II), 288th Session (November 2003) [hereinafter *ILO Case 2227 on Complaints Against the United States*], available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf> (concluding that the right to freedom of association requires that the United States reverse its policies that limit labor rights remedies for unauthorized immigrant workers).

<sup>32</sup> *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934). See also 29 U.S.C. § 202(a).

<sup>33</sup> 43 P. S. §§ 260.1–260.12 (Wage Payment and Collection Law); 43 P. S. §§333.101 - 333.115 (Minimum Wage Act).

FLSA regulations require that the minimum wage mandated by the Act be paid unconditionally, or “free and clear.”<sup>34</sup> The wage requirements of the Act are not met where an employee “kicks-back”, directly or indirectly to the employer or to another person for the employer’s benefit, the whole or part of the wage delivered to the employee.<sup>35</sup> This prohibition includes *de facto* deductions, where an employer requires an employee to incur job-related expenses and does not reimburse the employee.

There is a limited exception to this requirement – the FLSA’s definition of “wage” allows an employer to credit toward its minimum wage obligation the reasonable cost of furnishing an employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees.<sup>36</sup> Notably, the cost of furnishing “facilities” cannot be deducted (or required to be paid by the employee) if the facilities are primarily for the benefit or convenience of the employer.<sup>37</sup> “Facilities” are things like uniforms and tools of the trade and other materials and services incidental to carrying on the employer’s business.<sup>38</sup> Housing is typically considered to be for the benefit of the employee, unless the employer requires an employee to live on its premises or when the employee must reside away from home because the employer requires it.

The term “reasonable cost” as used in the Act is not more than the actual cost to the employer of the board, lodging, or other facilities that are customarily furnished by the employer to its employees.<sup>39</sup> “Reasonable cost” does not include a profit to the employer or to any affiliated person.<sup>40</sup>

Similarly, Pennsylvania wage laws and regulations allow employers to credit toward their state minimum wage obligation the reasonable cost of board, lodging and other facilities if the board, lodging or other facilities are customarily furnished by the employer to the employee.<sup>41</sup> Pennsylvania requires that employees authorize all deductions in writing, and “in no event shall the cost of the deductions and allowances exceed their actual cost, exclusive of profit, to the employer.”<sup>42</sup> Housing deductions are permitted as part payment of the minimum wage “only when the facility affords the employee reasonable space, privacy, sanitation, heat, light and ventilation.”<sup>43</sup>

## ii. Improper Housing and Other Deductions

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<sup>34</sup> 29 C.F.R. § 531.35 (2011).

<sup>35</sup> *Id.*

<sup>36</sup> 29 U.S.C. § 203(m) (2011).

<sup>37</sup> 29 C.F.R. § 531(d)(1) (2011).

<sup>38</sup> 29 C.F.R. § 531(d)(2) (2011).

<sup>39</sup> 29 C.F.R. § 531.3(a) (2011).

<sup>40</sup> 29 C.F.R. § 531.3(b) (2011).

<sup>41</sup> 34 Pa. Code § 231.22(a) (2011).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; 34 Pa. Code § 9.102. *See also* 34 Pa. Code § 9.102 (2011); 43 P. S. §§ 260.1–260.12 (2011) (Wage Payment and Collection Law); 43 P. S. §§333.101 - 333.115 (2011) (Minimum Wage Act).

The cost of housing directly deducted from the students' wages was approximately \$400 a month, or \$98.75 per weekly pay period.<sup>44</sup> The student workers were paid from \$7.85 to \$8.35 per hour for working no more than 40 hours a week.<sup>45</sup> The cost of housing directly deducted from the student workers' wages brought their wages below the federal minimum of \$7.25 per hour.<sup>46</sup>

First, the students allege that CETUSA required them to live in certain housing, and refused student requests to find housing on their own. For example, when students complained to CETUSA about the cost of their housing, they were told that they would not be allowed to find other housing.<sup>47</sup> Some students found cheaper housing options but were told that if they moved, they would lose their housing deposit.<sup>48</sup> Other students were just told that they were not allowed to move.<sup>49</sup> More investigation is needed into whether the required housing was provided primarily for the benefit of the employers, in which case, any housing deduction would violate the Act.

Even assuming that the housing provided to the students was primarily for the benefit of the employees, from our investigation, there is a question that this \$400 monthly housing deduction may exceed the actual cost of the housing on the open rental market in the areas of Pennsylvania where the students were housed. For example, two delegates visited a one-bedroom apartment in Harrisburg, Pennsylvania, which housed four students each paying \$400, or \$2000 a month total for this one bedroom apartment. The delegates spoke to three of the women who lived in the apartment. They reported that every student has \$400 a month deducted from their paychecks for housing, regardless of where they live, how many students are in the apartment, or how big the apartment is.<sup>50</sup> The delegates were told by these three students that upon talking to some of their neighbors, they discovered that their neighbors were paying \$600 a month for a one bedroom apartment in the same building.<sup>51</sup> Another student reported that he was living with five other students, each paying \$400 a month (or \$2400 total), in a building where a neighbor with a comparable apartment is paying \$1000 total.<sup>52</sup> Four other students reported that to their knowledge, most of the students are living in one bedroom apartments with 4-8 people in each apartment.<sup>53</sup> One student reported that when she complained about the amount of the housing deduction:

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<sup>44</sup> Interview with J-1 students; Weekly Pay Stub for Aysegul Onsoy for week ending June 17, 2011 (\$98.75 deduction for "housing")

<sup>45</sup> See, e.g. CETUSA Job Offer J-1 Exchange Visitor Visa/Evidence of Support for Kurkbassova Ainur (stating that job pay rate would be \$7.85 per hour for 32-40 hours of work per week).

<sup>46</sup> See, e.g. Weekly Pay Stub for Ayesug Onsoy for week ending June 17, 2011 (showing 26 hours of work for the week for a net pay of \$44.56). One student reported working only one day her first week of work because she was sick, and that her total net pay for that week was 6 cents. Interview with J-1 student 8.

<sup>47</sup> Interview with J-1 students 16.

<sup>48</sup> Interview with J-1 students 16.

<sup>49</sup> Interview with J-1 students 15, 16,

<sup>50</sup> Interview with J-1 student group 16. This was a common complaint raised by the J-1 students.

<sup>51</sup> Interview with J-1 student group 16.

<sup>52</sup> Interview with J-1 student 13.

<sup>53</sup> Interview with J-1 student group 17.

*I was told this was all average – the wage was average, the housing cost was average. I was shocked when I learned that I was paying so much more than the others for housing. I don't believe their excuses. They say I have to pay more because I am student.*<sup>54</sup>

In addition to the deductions taken out by their employer for CETUSA-arranged housing, students reported that their employer took deductions for gloves and hairnets, and for security cards<sup>55</sup> and one paystub reviewed by members of the Delegation shows a \$15 deduction for a “badge”.<sup>56</sup> As previously noted, the cost of tools or equipment furnished to employees may not be deducted from wages when the deduction reduces the employee’s pay to below the minimum wage, since provision of such tools and equipment is typically of primary benefit to the employer rather than the employee.<sup>57</sup>

### **iii. Pre-Employment Expenses as *De-Facto* Improper Wage Deductions**

The students paid anywhere between \$2,000 to \$6,000 to take part in the J-1 program. The students with whom the Delegation met indicated they paid the fees through their home agency, and the experiences vary by country and by home agency. While some fees went to pay visa fees and other costs directly attributable to travel to the United States, there appears to be a significant lack of transparency and monitoring as to how the fees are paid, to whom, and for what purpose.

As previously noted, the cost of furnishing “facilities” which are primarily for the benefit or convenience of the employer cannot be deducted from a worker’s wages if they bring the worker’s wage below the legal minimum.<sup>58</sup> In the instant case, there may be violations of the Fair Labor Standards Act under the *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228 (11th Cir. 2002) line of cases, which hold that guestworker visa costs, visa application fees, transportation fees and immigration fees are costs primarily for the benefit or convenience of the employer and are thus reimbursable to the worker in the first week of employment to the extent that the employees’ wages, once these costs are subtracted, are below the minimum wage.

## **2. Right to Health and Safety**

By virtue of international labor standards and U.S. law, all workers have the right to work in an environment reasonably free from predictable or serious accidents and injuries to their health. The UDHR calls for “just and favourable conditions of work.”<sup>59</sup> ICERD calls on the U.S. to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... the rights ... to just and favourable conditions of work, ... the right to public health, medical care, social security and

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<sup>54</sup> Interview with J-1 student 9.

<sup>55</sup> Interview with J-1 student groups 16, 17. *See, e.g.* Weekly Pay Stub for Aysegul Onsoy for week ending June 17, 2011 (\$15 deduction for “badge”).

<sup>56</sup> Interview with J-1 student group 17. *See, e.g.,* Weekly Pay Stub for Aysegul Onsoy for week ending June 17, 2011 (\$15 deduction for “badge”).

<sup>57</sup> 29 C.F.R. § 531(d).

<sup>58</sup> 29 C.F.R. § 531.3(d)(1).

<sup>59</sup> UDHR, Art. 23(1), *supra* n. 17.

social services<sup>60</sup>.” These human rights standards declare that every worker, regardless of citizenship, has the right to work in an environment reasonably free from predictable, preventable, serious risk, and to leave her workplace at the end of every day with life and limb intact.

The Occupational Safety and Health Act of 1970 (OSH Act), passed by Congress in response to a broad-based worker health and safety movement, addresses the same concerns as these international human rights standards. The OSH Act requires every employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause serious death or serious physical harm.”<sup>61</sup> In addition to empowering the Occupational Safety and Health Administration (OSHA), an agency of the U.S. Department of Labor, to set and enforce national standards governing workplace safety, the Act allows states to adopt “state plans” by which states commit to enforce national standards.<sup>62</sup> Pennsylvania is not one of the twenty-seven states who have adopted “state plans.”<sup>63</sup> Therefore, the federal standard is the only possible source of health and safety protections. The students shared with the Delegation stories of a workplace lying far outside national and international health and safety standards. Surrounded by physical hazards, students are required to work at a dangerously rapid pace and engage in repetitive heavy lifting. In the students’ view, supervisors’ pecuniary interests and unreasonably demanding production goals set by the employer supersede workplace safety.

*We knew we had to lift 27 kilos [approximately 60 pounds] but we didn’t expect to lift them every five seconds. I had to lift a big box, run with it, then run back and get another one. I came home every night and felt like I was dying.*<sup>64</sup>

*The guilty ones are our supervisors, they are the ones who push us. They are always yelling at us. It is especially for the girls because they shouldn’t be doing this work. It is also hard to work when other workers go off on a break, don’t have time and [supervisors] don’t replace them.*<sup>65</sup>

*The conveyer belt doesn’t stop, it is covered in boxes, you have to just go go and go. Every time our machine operator recorded that we got a new record, like that was an accomplishment, supervisors get bonuses for these records.*<sup>66</sup>

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<sup>60</sup> ICERD, Art. 5(e)(i) and (iv), supra n. 17..

<sup>61</sup> See 29 U.S.C. § 651-678, Sec. 5.

<sup>62</sup> *Id.*

<sup>63</sup> Similar to federal law, Pennsylvania’s General Safety law requires that “establishments shall be so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection for the life, limb, health, safety, and morals of all persons.” 43 Pa. Stat. Ann. § 25-2.

<sup>64</sup> Testimony by J-1 student group 18. See U.S. Department of Labor Fact Sheet No. OSHA 93-09 (According to the Bureau of Labor Statistics, back injuries account for one of every five workplace injuries or illnesses. Further, the BLS survey shows that four out of five of these injuries were to the lower back, and that three out of four occurred while the employee was lifting.)

<sup>65</sup> Interview with J-1 student group 18.

<sup>66</sup> Interview with J-1 student group 18.

*Supervisors don't want to stop baggers or the lines, so we can do it on time all the time. Supervisors get bonuses if they get us to work harder but we don't get anything.<sup>67</sup> We would do sixty to seventy pallets a day on the line most times. One time we made 100 pallets. Our supervisor was so happy, and was dancing around. But we were so exhausted.<sup>68</sup>*

*When I worked at the factory the supervisor, the line leader, asked me to do supply for five hours. Supply is the heaviest job. You pour the candy in a box, and the candy goes in a package. The supply box is up to forty pounds and you have to lift it to pour the candy in. They wanted me to take the place of a different worker but that wasn't my job. The schedule said I just had to do it for two hours but the supervisor said I had to do it for three more hours. I had no choice and could not say no.<sup>69</sup> I had to lift heavy boxes. I couldn't lift them. A boy tried to help me but the supervisor told him, "only one, not two, it is only her job." The supervisor said, "no helping." I said, "I can't do it." I felt very tired so I sat down. The supervisor said, "Don't sit down. Stand up, you cannot sit down."<sup>70</sup>*

*I was kneeling to make cases. I wasn't even sitting down. The supervisor gave me a warning. They gave me a yellow card, which is a warning. They said, "If you do this again you will be fired."<sup>71</sup>*

Students described working conditions so dangerous that they feared for their lives:

*The working conditions are not safe for us. The factory has two stories. The candies are delivered upstairs and they come down. Most times the pallets are not put properly, and so we have to put our in to move them. It isn't safe. At any time we could be injured. Even two days ago, I was wrapping the pallets, and all the forklift drivers were around. One driver, a woman said, "I can't look at you anymore – it is too dangerous to watch this!" The drivers are all around, and some are careful, but the situation is not set up right. You could be killed anytime. She complained to the supervisor that it was not safe but no one came.<sup>72</sup>*

Despite workplace dangers, management offered students only cursory training. At the commencement of the job, students received a thirty-minute introduction during which management showed a few photographs but no substantive explanation of the machinery or tasks required of them. What was explained to students while they were working was in Spanish, a language that most (if not all) students do not understand. If students slowed down because they did not know what to do, supervisors yelled at them, "faster, faster."

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<sup>67</sup> Interview with J-1 student group 18.

<sup>68</sup> Interview with J-1 student group 18.

<sup>69</sup> Interview with J-1 student 7.

<sup>70</sup> Interview with by J-1 student 8.

<sup>71</sup> Interview with J-1 student 7.

<sup>72</sup> Testimony by J-1 student 9.

Other students reported that the rapid, dangerous working conditions have caused them physical harm and illness. One student reported that for several weeks she has suffered severe stomach pains that she attributes to the unreasonably rapid pace of the line and to the fact that she was pushed to work for many hours without a bathroom break. On at least one occasion, these stomach pains became so painful that she could no longer work.<sup>73</sup> While students were given two twenty minute breaks during the day, supervisors prohibited them from taking more than five minutes to use their bathroom breaks during their working time:

*Supervisors threaten us with termination if we spend too much time in the bathroom. Three guys were fired, and at least one of them because he spent too much time in the bathroom.*<sup>74</sup>

Showing the Delegation bruises covering her lower legs caused by the work, one student said that she was too small and not strong enough to moving all of the boxes at the rapid speed required. “The machine doesn’t stop. We do as much as we can.” When another student tried to help her, supervisors demanded that return to his own job.

At least one other student required emergency care as a result of the pace of the line:

*When you are a bagger you move around and do all kinds of jobs. You help on everything. You are supposed to help do all the jobs for two lines. One day I was a bagger. First I was a stacker. There were heavy boxes. I couldn’t carry them anymore. I was trying to drag it or throw it. Then I was moved to supply. I had to do the whole supply. No one was there to help me. I was the supply for all the belts. The lines were going really, really quickly. The supervisor was telling me “faster, faster.” I was very tired and asked them, “why is there only one person? Why can’t other people help me?” The supervisor said they would send someone to help. Someone came to help. I got down to pick up the box with him and then I felt dizzy, and then I fainted. I have low blood sugar. I was sent to the hospital.*<sup>75</sup>

### **c. Right to Freedom of Association**

*[I was told by my agency that] if we did anything we would be put on a list, and not able to return to the US for five years.*<sup>76</sup>

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<sup>73</sup> When a friend asked for permission to accompany the sick student home, supervisors demanded that she return to work immediately.

<sup>74</sup> Testimony by J-1 student 9. While no specific guidelines govern bathroom breaks, OSHA is clear that employers must develop flexible procedures that allow all workers reasonable access to toilet facilities as needed. *See*, John Miles, *Memo to Regional Administrators*, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998) (“Medical studies show the importance of regular urination, with women generally needing to void more frequently than men. Adverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections (UTIs), which can lead to more serious infections and, in rare situations, renal damage.”)

<sup>75</sup> Testimony by J-1 student 8. Other reported injuries include a hand injured by a falling pallet and a broken forearm. In both cases, management refused medical treatment.

<sup>76</sup> Testimony by J-1 student 18.

*[My home agency told me] don't strike. The NGA [National Guestworker Alliance] is an illegal organization. The strike will affect your visa. When you want to go back you can't return to the US.*<sup>77</sup>

International and US law hold workers' freedom of association to be the foundation upon which all other democratic rights and freedoms in the workplace rest. The Universal Declaration of Human Rights declares that, "Everyone has the right to freedom of peaceful assembly and association...and the right to form and to join trade unions for the protection of his interest."<sup>78</sup> Similarly, the International Covenant on Civil and Political Rights provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."<sup>79</sup>

The ILO's convention on freedom of association elaborates, guaranteeing workers "the right to establish and to join organizations of their own choosing without previous authorization" and requiring governments "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize." The ILO declares that "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment."<sup>80</sup>

The US State Department, in its report submitted to the UN High Commissioner for Human Rights in conjunction with the 9<sup>th</sup> Universal Periodic Review, reiterated the fundamental importance of the freedom of association in the workplace:

Freedom of association also protects workers and their right to organize. The labor movement in the United States has a rich history, and the right to organize and bargain collectively under the protection of the law is the bedrock upon which workers are able to form or join a labor union. Workers regularly use legal mechanisms to address complaints such as threats, discharges, interrogations, surveillance, and wages-and-benefits cuts for supporting a union.<sup>81</sup>

In 1935, Congress passed the National Labor Relations Act (Act) to ensure the protection of the freedom of association, including its right to organize and collectively bargain. The Act grants employees "the right to self-organization, to form, join or assist labor organizations, to bargain

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<sup>77</sup> Testimony by J-1 student 18.

<sup>78</sup> UDHR, *supra* note 17, art. 20 (1). *See also* ICERD, *supra* note 23, art. 5(ii); International Covenant on Economic, Social and Cultural Rights, art. 8, entered into force Jan. 3, 1976, <http://www2.ohchr.org/english/law/cescr.htm>.

<sup>79</sup> ICCPR, *supra* n. 23, art. 22.

<sup>80</sup> International Labor Organization's Convention concerning Freedom of Association and Protection of the Right to Organise, entered in to force April 7, 1950, full text available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087><http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>, accessed on August 23, 2011. *See also*, International Labor Organization's Convention concerning Freedom of Association and Protection of the Right to Organise, entered in to force April 7, 1950, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>

<sup>81</sup> Report of the United States of America, Submitted to the U.N. High Commissioner for Human Rights, In Conjunction with the Universal Periodic Review, at 7-8, available at <http://www.state.gov/documents/organization/146379.pdf>.

collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection...”<sup>82</sup> In addition to prohibiting employers from discriminating against employees who engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, the Act forbids employers from threatening reprisal, soliciting grievances and engaging surveillance or intimidation tactics to discourage employees from asserting their concerted rights Pennsylvania Labor Relations Act confers upon P.A. employees the same rights as the N.L.R.B.<sup>83</sup>

The Delegation heard evidence that suggests management engaged in a widespread coercive campaign to undermine the students’ freedom of association and right to engage in concerted activities protected by international and US law. Students reported that in response to their concerted grievances about working conditions, both CETUSA and management repeatedly threatened them with termination or deportation. Those who asked to be moved to a different job or a safer job were told that they were prohibited from changing jobs; if they tried to leave, they would be deported. Those who asked for new housing were told they would lose their security deposit. According to the students, after learning of the potential threat, CETUSA representatives and management told students that they could be terminated and therefore deported for participating in the protests, and if deported, they could be prevented from entering the United States in the future. Further undermining their right to engage in collective action, management prohibited students from communicating with one another while at work:

*We cannot talk to people to have communication. When I tried to talk to one of my friends, he screamed at me and said, “shut up, I will send you home.”...Whenever we try to communicate, they say you cannot talk.*<sup>84</sup>

In the presence of student witnesses, the Delegation heard audio recordings of required meetings held in response to strike rumors. Below is a sampling of threatening and coercive statements witnessed by students at these meetings:

Statements by Reggie, SHS Manager:

*Please understand that as an employer, SHS is required to treat everyone US and non-US workers alike and that anyone who walks off the job will be terminated from the job. It’s considered abandonment. US law is clear and we must treat everyone the same and even if you are someone out there for whatever motive they have has misled you and you now have taken action such as walking off the job based on wrong information we must terminate your employment.*

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<sup>82</sup> 29 U.S.C. § 157 (2011).

<sup>83</sup> See also Pennsylvania Labor Relations Act, 43 Pa. Stat. Ann. § 211.1-211.13 (West 2011), (“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”).

<sup>84</sup> Interview with J-1 student 9.

*No seriously, do you have any questions? Because I want you to walk away. We are trying to help you and we don't want somebody giving you bad information and you to take action to jeopardize yourself and the program because if you're terminated, you know, there's bigger repercussions that exist out there.*

Statements by Malagorzata, CETUSA representative:

*I'm here today with Reggie with some information and actually to warn you because we heard that there is an individual who is coming door to door to your apartment trying to get more information about the program and he is spreading very incorrect data about the J-1 program...Here I am speaking to you guys and tell that we do have time to speak with you and answer all your questions. The meeting here is kept short because some of you have to continue your work but we will be available at your apartments starting Thursday. There is going to be my boss coming to town, the vice president of CETUSA who is looking forward to meeting all of you guys and hear about your experience, hear about the problems, address all the issues may have arisen during the time since you guys arrived. So we will be there to answer all your questions and there's going to be another email informing you exactly what time and which apartments we are going to be coming to. You guys can arrange yourself to have the time to meet with us and speak about any issues you may have.*

*You are being advised not to engage in any kind of activities, in any meetings with this individual or this organization and this is for your own good. So if there is anybody who you have met in the past regarding the issues, CETUSA is the place that you have to come to address all your questions, all your issues and all the problems.*

Another disturbing element in reports received by the Delegation was testimony that the level of local law enforcement response was disproportionate to the action, and significantly greater than local community members had seen in labor disputes in the recent past, raising questions as whether the police presence was increased with the purpose of intimidating the students and undermining their freedom of association and right to engage in concerted activities related to their employment. On August 17, at the end of the first shift, many students decided to hold a sit-in to protest the unfair and dangerous working conditions. They were joined by some students on the second shift. Management responded quickly by calling the police. Within fifteen minutes, police from several local forces arrived and threatened to arrest students. Students then moved outside the plant to the road where they joined local labor leaders. Police surrounded the students and protesters.

Neil Bisno, President of SEIU Healthcare Pennsylvania, told the Delegation that in his experience the level of coordination between law enforcement and management was highly unusual for situations involving local labor disputes. Bisno has taken part in many labor actions in the area over the course of many years and he stated that he never saw so many police. Bisno said that at labor actions in the past, law enforcement acted primarily as public servants. Rather than taking sides in labor conflicts, he said it was his experience that Derry County law enforcement usually puts a priority on making sure everyone remains safe and the situation

remains under control. According to Bisno, in the case of the Hershey strike, police assumed a quasi-management role that appeared designed to intimidate the students and discourage them from continuing the collective action.

Other reports drew the Delegation's attention to the agencies involved in recruiting student workers into the J-1 jobs at Hershey. Several students related actions taken by their home country programs to undermine their freedom of association:

*Each Future is the agency I have in China. They knew we were going on strike, and they came from China to see me at my apartment. They came over, they told me "I am not here for CETUSA, I am here because I care about you. The organization trying to get you to go on strike is an illegal organization, and if you go with them, you might be in a lot of danger."*<sup>85</sup>

*[The Best Way, Poland] wrote me an email that warned us not to participate in any strike, it may have real problems on my visa and to come to the United States, that I should just do nothing.*<sup>86</sup>

**d. Right to Be Free from Threats and Retaliation, Right to Freely Choose Work and to Protection from Trafficking and Other Forms of Forced or Coerced Labor**

*One student has a health condition related to low blood pressure and cannot do the difficult work the job requires. At one point, her condition got so bad that she fell on the factory floor. She went to CETUSA to ask if she could quit this job, if they would help her find a new one, they told her no ... We couldn't refuse housing, this job, these working conditions. They told us that we would be deported if we did that. After two weeks, I found a second job, I went to CETUSA to ask whether I could do this because I could not work at Hershey any more. When I went to CETUSA's manager, she said that she was not going to give me permission because I signed a contract with them and had to stay there. There was really no way to go.*<sup>87</sup>

*[One of our supervisors told us] "If you walk out you will be terminated. You will be replaced." ... During the strike [a supervisor] took a few guys' cards to punch-in, so they can't return to work.*<sup>88</sup>

Both international human rights law and U.S. domestic law are clear in the prohibition of forced labor.<sup>89</sup> Continued vigilance to discern new forms of workplace coercion that emerge with

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<sup>85</sup> Testimony by J-1 student group 18.

<sup>86</sup> Testimony by J-1 student 9.

<sup>87</sup> Interview with J-1 student group 18.

<sup>88</sup> Interview with J-1 student group 18.

<sup>89</sup> See, U.S. Constitution, 13<sup>th</sup> Amendment; ICCPR, Art. 23(1) ("Everyone has the right to ... free choice of employment."); ICCPR, Art. 8(3)(a) ("No one shall be required to perform forced or compulsory labor."); ICERD, Art 5 ("States parties undertake to prohibit and to ... guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (e)(i) ... free choice of

changes in society and in the world economy, and that contribute to or facilitate conditions of forced labor is critical. As the student comments above reflect, there is cause for concern in the facts that have come to light about the J-1 program as it has been implemented in this case.

Without individual assessments of each student's circumstances regarding home-country recruitment, debt levels incurred, family resources, and interaction with the employer and other players in the U.S., it is not possible to reach conclusions about the extent to which individual students have or have not been subject to compulsory labor within the meaning of relevant standards. In the context of this preliminary report, we would like to stress that guestworker programs in general, and the J-1 program in particular, are structured and composed in a way that makes the danger of forced labor a real and constant presence. For this reason, we urge heightened awareness and appropriate precautions by all agencies responsible for administering or monitoring this program generally, and for any agency investigating the Hershey situation in particular. The same components that create a danger that forced labor practices will emerge in certain settings also create a danger that workers will be intimidated into silence during an investigation into those very practices. Fear is a powerful motivator.

Many components of the J-1 program counsel such vigilance. Highly unequal power relationships are built into a system where students are functioning away from their home countries; where the short-term nature of the employment may encourage student workers to endure coercion in silence; where students and their families are frequently required to go into debt in order to gain entrance to the program in the first place; where the employer or sponsoring agency is in a position to terminate a student's immigration status and thereby render many students' debts unpayable -- or payable only at unconscionable cost; where no reliable and protected channels have been established within the J-1 program for students to access independent sources of information and counsel about their rights, freedoms and opportunities under the program; where many of the actors in the J-1 program as it currently exists have material interests that are or can easily become adverse to the interests of the students they are supposed to serve; where repeat players such as sponsoring agencies and employers naturally develop relationships with regulators and monitors that may make it difficult for one-time players like students to get the same treatment or achieve the same levels of trust and communication when problems arise.

The evidence gathered in this case thus far indicates that the problem goes beyond the existence of these dangerous ingredients. As described in the discussion of freedom of association above, reports received by the Delegation indicate that students were subjected to active and escalating intimidation when they showed signs of organizing to protest their treatment. In these circumstances it is urgent that investigators take adequate preventive measures to guard against reprisal and against intimidation of workers through threats of reprisal.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

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employment."); ILO Declaration on Fundamental Principles and Rights at Work (establishing as one of the four fundamental principles to which all ILO Members are bound, "The elimination of all forms of forced or compulsory labour.").

The goal of this report is to provide, early in the investigation process, a suggested legal framework to guide the short-term and long-term response to the events in Hershey. In summary, the workers' allegations implicate a number of potential legal violations, including discrimination, forced labor, substandard conditions of work, wage theft, and infringement on associational rights. We take note with appreciation that several government agencies are currently investigating these matters and, as discussed below, we urge the investigators to make public findings with regard to all of these potential violations.

The courageous and creative action by a remarkable group of hopeful J-1 student workers has provided a critical opportunity for close examination of the J-1 Student Work/Travel program and its manner of implementation, as well as the conditions of work at the Hershey packing facilities. Without their action, apparently none of the agencies responsible for regulating and monitoring this workplace or this program would have even known about the conditions in question. Without their break-through initiative, virtually no one -- not the members of the Delegation that gathered the stories that fueled this report, not the readers and listeners who have at last begun to learn about this program through discussion in the public media, not the local Pennsylvania workers and residents who have now befriended these students and invited them into their homes -- would have access to this important new window onto emergent employment practices that are redefining too many American workplaces in ways that badly need to be brought into the light of day.

Our recommendations are intended to urge that the relevant government agencies take advantage of this rare opportunity and to assist them in appropriately managing the current situation in Hershey itself. Further, we recommend a separate assessment of these organizations and companies with regard to their other operations, in order to gain a clear picture of their practices using standard monitoring techniques. We also make recommendations for assessing the J-1 program as a whole. The Hershey student workers are not the first student workers to raise allegations of this sort, and concerns raised by the allegations suggest that the government must revisit the program to ensure a transparent and regulated process. Program design is a difficult job, especially given the extreme power imbalance involved in a system that begins with recruiters in far-flung economies, cultures, and political systems acting on their own material interests, and ends in a worksite managing young, inexperienced, short term, often limited-English-proficient, workers with no independent support network and with only the thinnest, almost accidental, access to independent sources of information and good counsel. The situation in Hershey provides the United States with an important opportunity to undertake critical examination and progressive improvement of the program in order to fulfill its obligation to protect all workers on U.S. soil from abuses and legal violations. We urge all agencies involved to make good and full use of this opportunity.

Moreover, on a prudential level, the United States has an important interest in developing positive relationships with future leaders from other countries who have demonstrated an interest in, the United States, our language, and our culture. Recognition of that interest appears to have motivated the creation of the original J-1 program, and it would surely be ironic if the program ends up being administered in a way that undermines rather than reinforces the desired goal. In addition, as a society we should take seriously our responsibility to care for the students who seek to expand their education in the United States and who have responded to our invitation and

entered trustingly into the program we have designed. The following recommendations are provided in that legal, prudential and fiduciary spirit.

### 1. Recommendations on Response to Events in Hershey

- Suspension of CETUSA contracts. In the most orderly manner possible, suspend CETUSA J-1 work pending release of the results of all relevant investigations into the concerns that led to this report.

We again note with appreciation the decision of the Department of State and other agencies to investigate the situation in Hershey, and to do so promptly. We strongly urge that the investigations are tailored to the uniquely unbalanced power relationships inherent in the structure and international reach of the J-1 program, and we urge that they not be concluded until they have thoroughly looked into the students' concerns and tracked their experience with the program through a process well designed to get the facts.

- Individualized Assessments. We urge a thorough investigation that includes individual, confidential meetings in which the relevant government agencies meet with each student involved to assess his or her situation, to ensure his or her current safety and safety upon leaving the United States, as well as the safety of his or her family. At these meetings, the students should have the option of being accompanied by a representative of their choosing. Individuals, agencies or entities about which the students have made allegations should not be involved in any way in setting up, monitoring or attending such interviews.
- Group Meeting with Agency/Employers. The student workers involved in the collective action should have the opportunity to meet as a group with agency and employer representatives, accompanied by a representative of their choosing if they so desire.
- Transparency. We recognize that the vulnerability of the student workers in question may affect the transparency of the investigation to some extent, but within those bounds it is appropriate and expected that a full report of the investigations regarding both the factual and legal allegations will be made public. If home country abuses have been identified, these should be included in the annual Department of State human rights reporting process.
- Accountability. All parties should be held legally accountable for violations committed.
- Ongoing monitoring: Given the high-profile nature of the current situation and investigations, the investigating agencies have lost some important tools, namely unannounced site visits and long-term, routinized information capturing. Medium-term monitoring that is tailored to the concerns raised in Hershey should take place to ensure that rules are being followed. This should include an examination of the tax exempt status of any non-profit organizations involved.

### 2. Recommendations on Institutional Reform Process

Our initial investigation suggests that the J-1 visa program is severely flawed in several ways. There is little oversight of the J-1 program by state and federal agencies, leaving great space for abuse at multiple levels. In addition to investigations about the conditions of this particular case, we recommend a larger examination of J-1 work-and-travel programs, including how they are managed by home governments, designed and monitored by U.S. agencies, and used by employers. This process needs to involve federal and state agencies, non-governmental organizations, workers' organizations and representatives, input from the public, and comparative research on best practices. The scope of investigation and reform should include, but is not limited to:

- Adequacy of federal laws and regulations protecting the rights of workers employed through J-1 visa programs, including the right to organize, freedom of association, and the right to interact with their employers without fear of retaliation and reprisal
- Employer use of J-1 visa programs, and particularly the Summer Student/Work Travel Program, to curtail domestic freedom of association and rights to collective bargaining
- Effect of threats of immigration-related retaliation on J-1 workers' ability to exercise their rights and freedoms
- Effect of high recruitment, travel, and visa fees on J-1 workers' ability to exercise their rights and freedoms
- Employer use of the J-1 program to replace workers in the local community
- Employer use of J-1 programs to expand use of subcontractors and temporary staffing agencies in ways that undermine accountability and transparency
- Sponsoring agency use of temporary agencies and other arrangements that put middlemen between the sponsoring agency and student workers
- Difficulty in holding corporate actors accountable for actions of subcontractors and recruiters in the J-1 context
- Adequacy of federal agency enforcement of protections for J-1 visa holders, including appropriate role of the Departments of Labor, Homeland Security, and State
- Lack of regulation and oversight of home-country agencies that engage in recruitment under the J-1 program and sometimes attempt extended control of their recruits' behavior
- Potential role of workers' centers, labor unions, legal service providers, and NGOs in students' home countries and in the United States in providing independent sources of information and advice
- Access to judicial and administrative processes for workers employed through J-1 programs
- Training about best practices in the investigation of J-1 programs for all federal agencies charged with enforcing guestworker protections (coverage to include: enforcing labor standards and anti-trafficking laws as applied to J-1 visa holders, identifying forced labor and other severe forms of worker exploitation in the guestworker context, and protecting J-1 visa holders from undue influence, intimidation, and retaliation during the course of investigations)
- U.S. inclusion of J-1 programs in reporting to inter-governmental organizations on its compliance with international human rights law

In closing, the authors want to thank the students we spoke with in Hershey for being willing to share their stories with us and for their bravery in even imagining that they could take a stand. Finding themselves in trouble in a strange land and in highly stressful and intimidating circumstances, they joined together and created a way to connect to the American public. In doing so, they have made a significant contribution, helping to focus much-needed attention on a serious problem. In putting together this preliminary report, and in working hard to release it promptly enough to be of timely use, we have aimed to speak to our own officials who are taking responsibility for looking into this important situation, and also to honor the students' initiative and their infectious energy.

## **V. REPORT AUTHORS AND EDITORS**

The Human Rights Delegation that authored this report included academics and other non-governmental experts in immigrant worker law. Each member of the delegation participated in the above-described fact investigation in Hershey. Additionally, two other law professors participated in this report as contributing editors, both with expertise in workers' rights and one with long experience in human rights methodology.<sup>90</sup> All affiliations are provided for identification purposes only.

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