

September 21, 2020

The Honorable Mark A. Morgan
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

Re: Follow up from August 28th Forced Labor NGO/CSO Working Group Meeting

Dear Mr. Morgan,

Thank you for holding the meeting with non-governmental organization leaders to discuss enforcement of Section 307 of the Tariff Act. The undersigned human rights and labor rights organizations – The Human Trafficking Legal Center, Global Labor Justice-International Labor Rights Forum (GLJ-ILRF), Solidarity Center, Verité, and Humanity United – participated in the meeting. We urge CBP to hold these consultations quarterly to increase dialogue between the agency and civil society advocates.

One of the issues raised during the August 28th meeting was remediation and reimbursement of recruitment fees. The International Labor Organization (ILO) Governing Body has adopted the most authoritative global definition of recruitment fees and related costs. This definition encompasses a range of illegitimate, unreasonable, and undisclosed costs in relation to recruitment. The ILO definitions of recruitment fees and related costs, read alongside the *ILO General Principles and Operational Guidelines on Fair Recruitment*¹, should guide CBP as the agency grapples with these issues of remediation and workers' rights.

The undersigned organizations seek to ensure just, equitable, and complete reimbursement of recruitment costs. Based on our expertise, a successful remediation process preceding revocation of a Withhold Release Order (WRO) issued under 19 C.F.R §12.42 should go beyond mere repayment of fees. Simple reimbursement of recruitment fees alone will not cover the harm caused to workers subjected to forced labor. Any reimbursement amount finalized between CBP and the company targeted by a WRO must also account for usurious interest rates on loans taken to finance recruitment fees, inflation, exchange rate costs, withheld or reduced wages or wage deductions to pay recruitment fees, and related costs. Reimbursement of the recruitment fee alone, without acknowledgement of these additional costs to workers, is inadequate, placing workers in a vulnerable position for re-victimization.

Recently, your agency issued a Withhold Release Order (WRO) against two subsidiaries of Top Glove (Malaysia) over reasonable suspicion of forced labor in the production of disposable rubber gloves imported into the United States. It is our understanding that CBP is currently in negotiations

¹ General principles and Operational Guidelines for Fair recruitment and Definition of Recruitment Fees and Related Costs, ILO (Mar. 2019), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf

with Top Glove (Malaysia) to ensure that all indicators of forced labor found by the agency are adequately remediated, including debt bondage, substandard living and working conditions, and withholding of wages. Proper remediation should encompass all of these abuses.

It is our position that in order to achieve true remediation for forced labor, affected workers and worker representatives must be involved in the decision-making process, before any remediation package is finalized and implemented.

For purposes of this letter, our focus is on best practices for reimbursement of recruitment fees.

Essential Principles in Any Formula for Calculating Reimbursement of Recruitment Fees

We recommend that companies be required to pay liquidated damages at 100% of the recruitment fee to cover the costs of interest, inflation, and exchange rate fluctuations. As you have documented in your investigations, recruitment agencies and employers charge migrant workers exorbitant recruitment fees. In order to pay these fees, workers are forced to take out loans in their countries of origin at usurious rates of interest. [Effective interest rates of 40% or more are common](#)². Inflation and exchange rate fluctuations only add to these costs. At times, workers' wages are deducted to pay recruitment fees even after they start the job. The total amount expended by workers to obtain a job far exceeds the principal amount of the initial recruitment fees. This compounding of costs and interest keeps workers in [debt bondage](#).³

To address the harm inflicted by the recruitment fees and achieve real remediation, CBP should consider the true cost of recruitment. Before revoking any WRO, CBP should require companies to reimburse workers based on a formula that takes these additional costs into account.

Because of the difficulty in ascertaining the precise costs of recruitment for each worker, the undersigned organizations suggest that CBP adopt the Fair Labor Standards Act approach on liquidated damages as a guide. It is our position that companies should be required to pay the recruitment fee, plus liquidated damages at 100% of the recruitment fee to cover the costs of interest, inflation, and exchange rate fluctuations. We point to the standard for payment of back wages under Section 216 (b) of the U.S. Fair Labor Standards Act (FLSA)⁴ as a model:

*“Any employer who violates the provisions of section 206 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and **in an additional equal amount as liquidated damages.**”* 29 U.S.C. §216

²Responsible Recruitment: Remediating Worker-Paid Recruitment Fees, Institute for Human Rights and Business (Nov. 2017), https://www.ihrb.org/uploads/reports/IHRB_Remediating_Worker-Paid_Recruitment_Fees_Nov_2017.pdf at 13.

³Top Glove, Malaysian Rubber Gloves Supplier to Ansell, Accused of Abusing Workers' Rights, ABC News (Dec. 2018), <https://www.abc.net.au/news/2018-12-08/rubber-gloves-supplier-to-ansell-accused-abusing-worker-rights/10595996>

⁴ 29 U.S.C. § 216. Penalties, <https://www.law.cornell.edu/uscode/text/29/216>

Liquidated damages under the FLSA are intended to be compensatory in nature, not punitive. Several court decisions affirm the rationale behind liquidated damages under FLSA: retention of a worker's pay could result in indirect and obscure losses too difficult to ascertain with precision. Indeed, the difficulty in discerning the precise amount of money owed to workers in the FLSA context gave rise to the liquidated damages approach. "The purpose for the award of liquidated damages is 'the reality that the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *Renfro v. City of Emporia*, 948 F.2d 5 1529, 1540 (10th Cir. 1991) (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 463 (D.C. Cir. 1976)). Calculation of recruiting fees suffers from this same difficulty.

Although this provision of the Fair Labor Standards Act relates to back wages, the policy rationale for mandating liquidated damages holds true here for similar reasons.

The concept of liquidated damages in reimbursement of recruitment fees is by no means novel. In a recent report⁵, Verité notes the prevalence of contractual obligations on payment of liquidated damages for breach of ethical recruitment conditions in agency agreements. These obligations are included to mitigate financial risks to the employer. According to the report:

*"Liquidated damages clauses are used to reimburse workers that have been charged recruitment costs in breach of the [recruitment agency] contract or agreement. They tend to be tied to the typical costs charged to workers. For example, Verité has seen these clauses use a typical sum of up to USD 1,500 per worker charged, depending on country of origin."*⁶

Agreement on payment of liquidated damages does not resolve the question of calculating the base amount of recruitment fees paid. CBP should mandate independent, external monitoring of the base amount calculation for the recruitment fee to be reimbursed to each worker, as corporations have pressured workers to discount the recruitment fee paid. The doubling of an accurate base amount ensures that reimbursement will be fair and equitable for the workers.

Determination of Date from which Recruitment Fees must be Calculated

Reimbursement of recruitment fees should be calculated from a date certain in the past. That date should not be arbitrary. Instead, it should be set based on the specific circumstances on the ground. Companies should not be permitted to repay fees only for current workers in place at the time the WRO issues. When CBP issues a WRO for a company's abusive labor recruitment practices, it is likely that those practices have been in place since the company started employing foreign contract labor. Without a clear start date for enforcement, companies will be incentivized to fire workers or otherwise manipulate records to limit their financial liability. The enforcement start date could be tied to the date that company records demonstrate as the start of its hiring of migrant workers, provided this date matches workers' records. Workers, worker representatives, and unions may also have records that should be taken into consideration in developing a start date for enforcement.

⁵ Financial and Contractual Approaches to Mitigating Foreign Migrant Worker Recruitments Risks, Verité (Oct. 2019)

⁶ *Id.*

Repayment of recruitment fees must be monitored. Repayment mechanisms established by companies must be investigated and validated. This is particularly true for payment methods that involve sending money to workers no longer employed by the company, or to those who have returned to their home country. Additional due diligence measures should be instituted to ensure that repaid recruitment fees are not confiscated by abusive labor recruiters or other third parties.

Conclusion

Charging recruitment fees to workers is one of the most pervasive forms of exploitation in global supply chains. These fees are a gateway to indebtedness and forced labor. CBP has the power to stamp out this practice by demanding robust reimbursement of recruitment fees in supply chains with U.S. links. Requiring companies to repay recruitment fees plus liquidated damages will bring some measure of relief to workers who have suffered at the hands of employers and agents. Such a practice would restore the economic balance, making workers whole.

Reimbursement of recruitment fees must occur in a larger context of remediation – full payment of back wages and other earned compensation, reimbursement for medical costs for injuries incurred on the job, reimbursement for forced overtime, and regularization of immigration status, among others. As noted above, it is our position that affected workers and worker representatives must be involved in the decision-making process, before a remediation package is finalized.

CBP has an opportunity to create a real remedy for exploited workers. The undersigned organizations encourage CBP to adopt this approach and establish reimbursement that is fair, equitable, and just.

Sincerely,



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Solidarity Center



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Jennifer (J.J.) Rosenbaum, GLJ-ILRF



Tim Isgitt, Humanity United



Shawn MacDonald, Verité