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The Elusive Promise of Equal Opportunity and Women's Empowerment through Temporary Labor Migration Programs: Lessons of Systemic Discrimination from the United States

BY SARAH PAOLETTI* **

1. Introduction

Women comprise approximately half of all migrants across the world, and similarly account for nearly half of all of labor migration. But equality in numbers belies the systemic discrimination women confront in accessing employment opportunities through labor migration programs, as well as the experiences of women within those programs. Migration – and specifically labor migration – is not a gender-neutral phenomenon. The International Labor Organization (ILO) has expressed concern that as feminization of migration increases, women migrants will be increasingly vulnerable to “discrimination, exploitation and abuse... because of hardened attitudes towards migrants in general and because gender-based attitudes and perceptions continue to be slow in changing.” Underlying the ILO's concern is its recognition that “[g]ender inequalities persist and labour markets remain highly segmented and segregated in both origin and destination countries.”¹ When labor migration programs fail to adequately account for the unique social, economic and political realities of women, and when governments fail to adequately monitor recruitment and employment abuses and to ensure meaningful access to justice, systemic gender-based discrimination, exploitation and abuse of persists with impunity throughout the global labor market.

In the United States, hundreds of thousands of women seek to participate in and are recruited to work through one of a multitude of temporary and long-term labor migration programs. In order to better understand the systemic factors contributing to discrimination and fostering persistent inequality, Centro de los Derechos del Migrante, Inc. (CDM or Center for

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** This article draws heavily from *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs*, (Centro de los Derechos del Migrante, Inc., and Transnational Legal Clinic, University of Pennsylvania School of Law 2017). The author is indebted to Julia Coburn, Elizabeth Mauldin and Rachel Micah-Jones, and the rest of the CDM team, as well as Justin Hamano and Amanda Nasinyama, law student representatives in the Transnational Legal Clinic (2016-2017) for their work on the underlying study, and the resulting policy brief, as well as to members of CDM Women's Committee and other participants in the study who bravely raised their voices in the pursuit of equality and non-discrimination. This article is dedicated to Justin Hamano, whose commitment to his clients and to seeing justice done was felt by all with whom he worked. His departure from this world is a great loss not only for all who knew him, but also for those clients and colleagues who will not benefit from his empathic listening skills, his thoughtful insights, his good humor, and his dogged determination to advance social justice through excellence.

¹ Gender Promotion Programme-ILO (2003). “Introduction: Why the focus on women international migrant workers,” in *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide*, Booklet 1. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/instructionalmaterial/wcms_116360.pdf.

Migrants' Rights)², a bilateral migrant rights organization operating in Mexico and the United States, together with the Transnational Legal Clinic of the University of Pennsylvania School of Law (TLC-Penn Law),³ has undertaken a comprehensive cross-visa, cross-sector study of women seeking access to and ultimately employed through labor migration programs in the United States. This is the first such study to examine the experiences of women at all stages of labor migration to the United States – from recruitment and job placement, in employment, and through the termination of employment. The ongoing study reveals discrimination during recruitment through which employers and their recruiters regularly deny women equal access to job and income-earning opportunities, and subsequently in the workplace where women are frequently subjected to exploitative and abusive workplace conditions, including gender discrimination and gender-based violence. These rights violations and the subsequent denial of access to justice are endemic to the labor migration programs themselves, and persist due to inadequate government oversight and monitoring, and the denial of access to judicially enforceable remedies. Furthermore, labor migration programs within the United States fail to properly address the gendered-roles that women play as the primary care-giver for their children and families, and the unique needs presented by those roles. While the CDM/TLC study is limited to an examination of labor migration programs in the United States, both the study and the findings can inform the development of gender-sensitive labor migration programs globally.⁴

This article highlights the initial findings of the CDM and TLC study, set forth in greater detail in the policy brief *Engendering Discrimination: Gender Inequality in U.S. Labor Migration Programs*,⁵ and places those findings in the context of governments' commitments set forth in the New York Declaration for Refugees and Migrants,⁶ consistent with their obligations under international law. In doing so, it seeks to raise the voices and experiences of women migrant workers themselves in discussions around labor migration programs, in anticipation of administrative and legislative reforms at the domestic level, and the drafting of the UN Global Compact on Safe, Orderly and Regular Migration at the international level. Part 2 sets forth the initial findings from the CDM and TLC study,⁷ looking at discrimination and denial of the right to equal participation and equal rights through all stages of labor migration,

² CDM's mission is to secure, protect and promote workplace justice and the civil rights of migrants who work in the United States. Operating on the ground as a non-profit in Zacatecas and Oaxaca, Mexico and the Washington D.C. metro-area, CDM employs four complementary strategies to win improvements in working conditions for migrants, and to remove the border as a barrier to justice: worker outreach and education; intake, evaluation, and referral; policy advocacy; and litigation support. For more information on CDM, see www.cdmigrante.org.

³ The Transnational Legal Clinic at Penn Law engages students in the direct representation of individuals in immigration proceedings, and in a range of international human rights advocacy in the United States and across the globe. For more information on the Transnational Legal Clinic at Penn Law, see: <https://www.law.upenn.edu/clinic/transnational/>.

⁴ Gender-sensitive labor migration programs are those that account for “the differences in socio-cultural roles, needs, opportunities, constraints and vulnerabilities of women and men.” Gender Promotion Programme-ILO, “Preventing Discrimination,” 50 (Box 1.15).

⁵ Centro de los Derechos del Migrante, Inc. (CDM), Transnational Legal Clinic, University of Pennsylvania Law School (TLC-Penn Law), *Engendering Discrimination: Gender Inequality in U.S. Labor Migration Programs* (2017), <http://www.cdmigrante.org/engendering-exploitation-gender-inequality-in-u-s-labor-migration-programs/>.

⁶ UN Doc. A/RES/71/1 (2016).

⁷ These initial findings are set forth in greater detail in *Engendering Discrimination*, *supra* n. 5.

beginning with recruitment and job placement. Part 3 outlines proposed best practices for promoting equality and non-discrimination for all women migrant workers, highlighting the recommendations set forth in *Engendering Exploitation*, which mirror recommendations and proposed best practices issued by the UN Committee on the Elimination of Discrimination Against Women,⁸ and other intergovernmental and advocacy organizations and stakeholders. The article concludes by urging the international community, regional and state actors, and all other stakeholders to recognize the importance of incorporating migrant worker women's voices and experiences in labor migration policy initiatives, to ensure the promise of labor migration as a means towards achieving substantive equality for women and sustainable development for all becomes more of a reality.

2. Engendering Exploitation: Gender Inequality in US Labor Migration Programs

2.1 Study Background and Overview

For more than a decade, women migrant workers have shared with CDM their stories of discrimination, exploitation and abuse through the temporary labor migration programs.⁹ The women's stories are often very similar in nature – whether the woman worked as an “au pair” caring for a family's children, as a food processor in the agricultural industry, as a line-worker in a factory, as a house-keeper in a hotel, or as a “skilled” professional in the fields of medicine or business. Their experiences are replicated not just across the United States, but in labor migration programs globally. In the Fall of 2016, CDM, together with TLC-Penn Law, initiated a comprehensive study and gender-analysis of women's experiences and available justice mechanisms at all stages of the labor migration programs.¹⁰ The study consists of detailed interviews with women who have sought to participate, are participating or have participated in one of five labor migration programs, including those targeted for seasonal work in agriculture, other low-skilled work of a seasonal nature, and work purportedly carried out as part of a cultural exchange program, in addition to employment for “skilled”

⁸ CEDAW Committee (2009). General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R. Available at: http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf.

⁹ See, e.g., Centro de los Derechos del Migrante, Inc., International Human Rights Law Clinic, American University-Washington College of Law (2011). “Picked Apart: The Hidden Struggles of Migrant Worker Women In The Maryland Crab Industry.” Available at: <http://www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf> (detailing the experiences and rights violations of women working under the H-2B visa program in the crab-picking industry); see also *Petition regarding the failure of the U.S. government to effectively enforce its domestic labor laws, promote the elimination of employment discrimination, and promote equal pay for men and women*, submitted to the National Administrative Office of Mexico under the North American Agreement on Labor Cooperation (July 15, 2016) (“CDM NAALC Complaint”), <http://www.cdmigrante.org/wp-content/uploads/2012/01/NAALC-Petition-2016-English.pdf> (addressing gender-based discrimination in access to and employment in the H-2A and H-2B visa programs).

¹⁰ For a comprehensive review and analysis of labor migration programs in the United States and the rights violations that commence with recruitment, see, International Labor Recruitment Working Group (2013), *American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment*.

professionals, such as work in the health care industry, and other professional work.¹¹ These surveys, together with extensive desk research, and information collected through CDM's worker-facing platform for collecting and sharing information on recruiters and employers through the H-2 system in the United States *Contratados.org*, dubbed the Yelp for migrant workers, serve as the basis for the findings and recommendations set forth herein.

2.2 *Discrimination in Recruitment*

Employers and recruiters routinely track women into gendered-workplaces and roles, and exclude women from opportunities in fields they deem better suited to male labor, in the United States and globally. As the Gender Programme at the ILO has noted, “the global labour market reproduces traditional gendered divisions of labour,” wherein “[w]omen are much more dependent than men for employment in the informal unregulated sectors, not covered by labour law or social protection and not unionised – so that they have little or no representation and voice.”¹² Women migrant workers are concentrated in occupations that match traditional female roles and sex stereotypes, that are low-paid, with poor working conditions, “decent work deficits,” health and safety risks, with conditions that increase women's vulnerability to exploitation and human trafficking.¹³

Engendering Exploitation found that gender bias, the lack of government oversight over recruitment, and the United States' failure to extend and enforce anti-discrimination laws beyond its territorial boundaries, all contribute to the tracking of women into visa categories and job sectors with lower earning opportunities, greater incidence of sexual harassment and abuse, and fewer rights protections than men. Over half of the workers participating in the study reported that employers and their recruiters discriminated against them by denying them access to particular labor migration visas, placing them in gendered-employment within particular visa categories, and assigning women to gendered workplace roles in mixed-sex worksites. This gendered-tracking is met with unequal incoming earning and advancement opportunities, often in positions of greater isolation with higher rates of gender- and sex-based rights violations.

Tracking within the H-2 visa program is illustrative of the pervasive discrimination women confront in accessing employment opportunities in the United States.¹⁴ The H-2 visa program is designed to fill unmet labor needs of a seasonal nature in jobs that are deemed “unskilled.” The program is divided between the H-2A program for work in agriculture, which – though still a severely flawed program – provides guaranteed free housing, has set minimum wage and contract requirements, and other regulatory protections. Importantly,

¹¹ To date, the study has included detailed surveys of more than 30 women who have participated in one of five labor visa programs: the H-2A visa program, for temporary agricultural workers; the H-2B visa program, for temporary non-agricultural “low-skilled” workers in industries deemed seasonal in nature; the J-1 Exchange Visitor Program, operated out of the Department of State, with the purported intent of creating increased cultural exchange opportunities, and through which both the Au Pair program and the Summer Work Travel Program are operated; the H-1B, deemed a “skilled” visa for individuals in a specialty occupation, such as nursing; and the TN visa, created under NAFTA, which grants qualified Canadian and Mexican citizens entry into the United States to engage in professional-level business activities.

¹² Gender Promotion Programme, ILO, “Preventing Discrimination, Exploitation and abuse of Women Migrant Workers: An Information Guide,” Booklet 1, p. 29.

¹³ *Ibid.*

¹⁴ See CDM NAALC Complaint, *supra* n. 9.

workers on an H-2A visa are entitled to receive free legal services from federally-funding legal services organizations. Workers under the H-2B visa program for work categorized as non-agricultural are not entitled to free housing, have fewer wage protections, and are not entitled to receive federally-funded legal services, effectively denying them access to justice in places around the country where there are no other options for legal representation. Employers and their agents regularly deny women access to the H-2A program, and instead track them into the H-2B visa program. Within the H-2B program, men are hired to work in jobs such as landscaping, while women are placed in housekeeping or domestic service jobs, jobs which often require more hours of work for lower rates of pay. Within those job sectors and worksites where both men and women are employed, migrant women are routinely forced into gendered-roles. Migrant women hired under the H-2B program for work in the crab-industry, for example, are assigned jobs picking crab for which they are paid a piece where, whereas men hired to work at the same worksite under the H-2B program are assigned to haul and cook the crabs in jobs and are paid at an hourly rate.

Gender-tracking is not limited to work within sectors deemed “unskilled.” The ILO reports on the phenomenon of “deskilling,” whereby recruiters and employers hire women in jobs below their skill-level, resulting in “brain waste,”¹⁵ and often accompanied by lower earning potential. Within the United States, employers participating in the TN visa program for skilled professionals, for example, regularly assign women gendered-roles within the workplace, with tasks such as housekeeping duties and secretarial work, that deny women’s earning and professional development opportunities. As “Rosa”¹⁶ reported, she was hired by a dairy farm for a three-year professional position as an Animal Scientist on a TN visa. The application letter her employer provided to the U.S. embassy described her duties as “sophisticated,” “professional,” and requiring “advanced theoretical and practical knowledge and skills.” But when Rosa arrived at the dairy farm, her employer assigned her to clean water troughs, unload animals, and perform other menial tasks, and paid her far below the \$30,000 minimum annual salary promised. As Rosa said, “I didn’t do anything that required a degree,” though it was the degree she had earned that qualified her for the job. Rosa’s supervisors constantly demeaned her, telling her women are slower, weaker and less skilled than men, and dismissed complaints of chronic workplace sexual harassment.

Unfortunately, debt incurred through the payment of recruitment fees often make it difficult for workers like Rosa to leave their employment once they discover that the reality of the job is not what was promised. As noted in CEDAW Gen. Comment 26, recruitment fees charged by employment agents “sometimes cause women, who generally have fewer assets than men, to suffer greater financial hardships and make them more dependent, for example, if they need to borrow from family, friends, or moneylenders at usurious rates.”¹⁷ Recruitment fees and resulting debt, combined with the threat of retaliation and lack of visa portability, discussed in greater detail below, create an environment of coercion and can contribute to forced labor and human trafficking, particularly where recruiters and employers have engaged in recruitment fraud.

¹⁵ See ILO. “Women and men migrant workers: Moving towards equal rights and opportunities.” Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_101118.pdf; see also, Gender Promotion Programme-ILO, *Preventing Discrimination*, 14.

¹⁶ Name changed to protect identity.

¹⁷ CEDAW Committee (2008). “General Recommendation No. 26 on women migrant workers.”

2.3 Discrimination in Employment

Protection gaps, lack of government oversight and rights enforcement, the lack of visa portability, as well as physical, linguistic and social isolation, combined with gender, national origin and migration status discrimination, all contribute to a deleterious work environment where employers often violate the rights of women migrant workers with impunity. Discrimination begins, as discussed above, with tracking of women into sectors of work such as childcare, housekeeping, and line-jobs within factories that are typically lower paying and offer few benefits and more limited protections than others.¹⁸

Women migrant workers are subjected to high rates of wage theft. Nearly half (48 per cent) of the women participating in the CDM-TLC study to date have reported earnings below the federal minimum wage, and a full 43 per cent reported that their employers did not pay them for their overtime hours. A full 57 per cent of the women participating in the study from across all sectors of work reported that they did not earn overtime wages for the extra hours work. One woman in the study who was employed as a J-1 Au Pair, reported that her employer paid her just \$3.09 in hourly wages, and the average Au Pair reported earnings were \$3.83 per hour.

In workplaces that were not exclusively or predominantly female, women reported wage disparities, both in terms of rates of pay and income earning opportunities. For example, Daria, who worked as an H-2B worker in the fruit and vegetable packing industry, reported that she was assigned to sort cucumbers and her employer gave her just three to five hours of work per week, whereas the men at the same job site who were hired on H-2A visas were given significantly more work. “Sandra,” who was recruited to work in housekeeping services with a J-1 Summer Work Travel visa, reported that women in her workplace were paid \$2.25 less per hour than their male counterparts.

In addition to income disparities and high rates of wage theft women endure within the temporary worker programs, women are often subjected to sexual harassment and sexual violence in the workplace. Women witness and directly experience sexual harassment and gendered-violence at alarming rates, particularly within those job sectors that increasingly rely on women workers employed through temporary labor migration programs. For example, a woman employed in the crab industry on an H-2B visa explained how her male supervisor would put his hands down the pants of the women workers, would grab their underwear, and then would openly brag about his exploits. Lisette described how her supervisors on a cruise ship, where she was employed through the C-/D visa program, subjected her to an intolerable hostile work environment and were known to demand sexual favors from, and sexually assault, her female colleagues.

Engendering Exploitation further details the mental, emotional and physical toll labor migration has on women migrant workers. 69 per cent of women reported that migration had a negative mental or emotional impact on them. This was compounded by women’s isolation and their inability to access basic services, such as food, medical, legal or communication. 75 per cent of women in the study reported facing obstacles to accessing one or more basic services. The lack of access to such services, when combined with other instituted policies and

¹⁸ See, ILO (2008). “Women and men migrant workers” (noting rights violations perpetrated against women often go unnoticed either because they happen at the early stages of the migration process outside the territorial jurisdiction of the country of work, or because they happen within “invisible” jobs sectors, like domestic work and home health care).

practices, such as employer-controlled housing, document retention, and threats of retaliation, left women workers feeling trapped, unable to leave their employment, and unable to report their abuses – all further contributing to an environment ripe for human trafficking.

2.4 Gender and the Denial of Access to Justice

Women migrant workers face both *de jure* and *de facto* exclusions and barriers to access to justice for the rights abuses endured at all stages of the labor migration process. For example, U.S. courts have surmounted jurisdictional barriers for rights violations that occur during recruitment in the home country, and have refused to enforce anti-discrimination laws against recruiters who routinely deny women equal access to job opportunities in the United States. And the U.S. government has failed to institute and enforce policies and laws that hold employers accountable for the recruitment abuses committed by their agents in the workers' home countries.

Physical, linguistic and cultural isolation, combined with denial of the right to access federally-funded legal services, all create additional – and often insurmountable – barriers to women's ability to seek redress and a remedy, as well as accountability, when employers violate their rights. Access to free, government-funded legal services is severely restricted, and is available only to H-2A agricultural workers and a very small category of H-2B workers in the forestry industry. The H-2A program is 96 per cent male.

Women workers are also heavily discouraged from filing complaints due to the very real risk of retaliation in the form of job termination, deportation, blacklisting and other retaliatory actions. As study-participant and member of CDM's Women's Committee Adareli noted, "I would talk to my female colleagues about our rights so that we would defend our dignity. But I realized, in that environment, fear was still preventing us from standing up for ourselves like we were meant to do; fear to lose our job, have to return to Mexico and not being able to support our families."

3. Recommendations and Best Practice for Ensuring Equality and Non-Discrimination in Labor Migration Programs

Art. 23 of the Universal Declaration of Human Rights provides:

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment;

Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worth of human dignity, and supplemented, if necessary, by other means of social protection.

Notwithstanding the gendered-language of the UDHR, Article 2 of the UDHR explicitly guarantees all rights contained therein without discrimination on the basis of sex, national origin, or other social status. The right to equality and non-discrimination is a fundamental right under international law. Governments therefore must act to respect, protect and fulfill the right to equality and non-discrimination on the basis of gender, as well as migration

status.¹⁹ As such, international law requires governments to guarantee women full and equal access to opportunity through labor migration programs, and to all rights under domestic and international law – including rights in employment, right to due process, right to petition and access the courts, without discrimination in practice or effect. To that end, and based on the initial findings and recommendations made by the study-participants themselves, *Engendering Exploitation* sets forth a series of recommendations, many of which find a parallel recommendation from CEDAW articulated in Gen. Rec. 26. Those recommendations can be generally categorized as follows:

- **Relevant governmental institutions should work with non-governmental organizations to collect and make accessible current and complete data on labor migration programs.** A publically-available interagency database should allow women to verify the existence of a job, the visa category, the industry of work, the terms of employment, the identity of the employer, the entire chain of recruiters between the employer and the worker, and lawsuits filed by previously employed workers. Access to such databases will be a major step in informing and advising migrant worker women of their rights and opportunities, especially women who find themselves isolated geographically in their hometowns or their workplaces, and mitigates the ushering of women into abusive and gendered positions.
- **National legislative, administrative, and judicial bodies must use such data to reform labor migration programs and stem abuses.** For instance, such data would catalyze legislative action prohibiting recruiters from charging workers recruitment fees, mandating visa portability, and holding employers strictly liable for discrimination.
- **Governmental agencies must engage in rigorous monitoring of labor migration programs and enforce laws and regulations relevant to all stages of the process,** including recruitment, employment, and access to justice. A coordinated response will provide more robust policing of discrimination, ameliorating the enforcement and deterrence gap that currently jeopardizes the development of safe, orderly, and regular migration for working women.
- **Governments must increase access to justice, information, and support services.** Protecting women who report abuses from retaliation in the recruitment process, including blacklisting from future recruitment, must be prioritized.

As CEDAW recognizes in Gen. Rec. 26, it is the shared responsibility of countries of origin and countries of work to ensure the formulation of gender-sensitive labor migration policies – based on equality and non-discrimination – and regulation of all aspects of migration “to facilitate access of women migrant workers to work opportunities abroad, promoting safe migration and ensuring the protection of the rights of women migrant workers.”²⁰

¹⁹ See, e.g., *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, Inter-American Court of Human Rights (IACrHR), 17 September 2003, available at: http://www.refworld.org/cases/IACRTHR_425cd8eb4.html

²⁰ CEDAW Committee (2008). “General Recommendation No. 26 on women migrant workers,” para. 23.

4. Conclusion

The Beijing + 5 Outcome Document explicitly called on States to “Promote and protect the human rights of all migrant women and implement policies to address the specific needs of documented migrant women and, where necessary, tackle the existing inequalities between men and women migrants to ensure gender equality.”²¹ In the 2016 NY Declaration on Refugees and Migrants, members of the United Nations committed to “ensure that [their] responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls.”²² In furtherance of that commitment, UN member states recognized the importance of ensuring the “full, equal and meaningful participation [of women] in the development of local solutions and opportunities.”²³ But international and national actors continue to marginalize women’s voices and experiences during discussions on formal labor migration programs that are promoted as a means towards ensuring “safe, orderly and regular migration.”

As the UN moves forward with preparatory work for the creation of a Global Compact on Safe, Orderly and Regular Migration,²⁴ those participating in the process should work towards gender-sensitive migration policies that contribute to full and equal participation, economic independence and empowerment of women, and by extension, their families. Studies such as the CDM-TLC study that seek to provide a comprehensive gender-analysis based on the lived experiences of the women workers’ themselves, reflected in *Engendering Exploitation* and the accompanying booklet of women’s stories, can inform the development of labor migration policies cognizant of and responsive to the factors that contribute to either positive or negative outcomes for women. But such studies are inherently limited by lack of comprehensive data, disaggregated by gender, sector of work, job duties assigned, rates of pay and other conditions of work, as well as reports of rights violations. Ultimately, however, studies, data and reports are no substitute for ensuring women workers’ seats at the table and recognition that their direct participation is essential in any discussions aimed at achieving labor migration policies that will contribute to sustainable development for all.

²¹ United Nations General Assembly (2000). “Further actions and initiatives to implement the Beijing Declaration and Platform for Action.” A/Res/S-23/3, Annex, para. 98(b).

²² UN Doc. A/71/L/1 (2016), para. 31.

²³ Ibid.

²⁴ UN Doc. A/RES/71/1, Annex II, para. 8(q). Available at: http://refugeesmigrants.un.org/sites/default/files/work_plan_gcm.pdf (specifically recognizing that the global compact could include, “protection of labour rights and a safe environment for migrant workers and those in precarious employment, protection of women migrant workers in all sectors and promotion of labour mobility, including circular migration.”)