

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

**PETITION NO. P-1481-07
DOMESTIC WORKERS EMPLOYED BY DIPLOMATS**

**OBSERVATIONS IN RESPONSE TO
THE UNITED STATES OF AMERICA**

By the undersigned, appearing as Representatives for the Individual and Organizational Petitioners under the provisions of Article 23 of the Commission's Rules of Procedures:

Claudia Flores, Director
Nino Guruli, Fellow
Josia Klein, Student
Lauren NuDelman, Student
International Human Rights Clinic
University of Chicago Law School

Anjana Samant, Senior Staff Attorney
Women's Rights Project
American Civil Liberties Union

Steven M. Watt, Senior Staff Attorney
Human Rights Program
American Civil Liberties Union

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I. INTRODUCTION

Through its design and implementation of the A-3 and G-5 visa programs, the United States has made possible the exploitation of domestic workers trafficked into the country by diplomats and other foreign representatives working for international organizations. Lured by promises of fair pay and good working conditions in the homes of ostensibly reputable and high-powered individuals, these migrant workers arrive only to find themselves trapped in conditions of domestic servitude. Survivors' accounts of their living and work conditions reflect similar patterns of abuses: employers who confiscate passport and identification documents, isolate them from the outside world, subject them to degrading work and home environments, including back-breaking labor for long hours, low or withheld wages or compensation at illegal and substandard rates, and emotional, physical, and/or sexual abuse. Because of the United States' long-standing exclusion of domestic workers from its most significant employment protections, obtaining justice for these abuses is an uphill battle for any such employee. For A-3/G-5 domestic workers, this systemic legal marginalization is exacerbated by vulnerabilities created by their special visa program, the United States' lack of oversight, and the United State's recognition of diplomatic and other immunities. Since at least 1981, the United States has been aware that the A-3/G-5 visa programs have facilitated the trafficking of these domestic workers, the vast majority of whom are women, ethnic minorities, and from marginalized communities in their home countries. But it has failed to take reasonable measures to protect them by preventing their exploitation once they are in the United States or by providing them meaningful redress for their injuries.

In 2007, the Women's Rights Project and Human Rights Program of the American Civil Liberties Union ("ACLU") submitted a petition to the Inter-American Commission on Human Rights ("Commission") on behalf of organizations engaged in advocacy for A-3/G-5 domestic

workers and six women formerly employed in such positions (together, “Petitioners”). In their petition, Petitioners seek accountability for the United States’ failure to act with “due diligence” to protect them from their employers’ misconduct. Petition (“Pet.”) at 5. In 2009, the United States began amending its A-3/G-5 visa application process and, in 2016, citing these reforms, responded to the Petition requesting that the Commission find it inadmissible or without merit because (1) the American Declaration on the Rights and Duties of Man (“American Declaration”) does not impose binding international obligations on the United States, let alone create any affirmative obligation to protect the rights set forth therein, and (2) the United States has taken reasonable measures to protect domestic workers from their employers.

In these Observations to the United States’ response, the ACLU and co-counsel, the International Human Rights Clinic at the University of Chicago Law School, refute these arguments. The American Declaration imposes binding international obligations on the United States to protect, among other rights guaranteed therein, the rights to life, liberty, equal protection of the law, and non-discriminatory treatment set forth in Articles I, II, and XVI of the Declaration. The Declaration also imposes a related duty on the State to take “reasonable measures” to protect against third-party violations of these rights by private actors. The United States is responsible for the violations of Petitioners’ rights as detailed in the Petition because it directly violated rights guaranteed by Articles I and XVI, and because it failed to act with ‘due diligence’ to protect these rights and Petitioner’s rights to be free from gender-based discrimination under Article II.

The United States’ post-2009 reforms of the A-3/G-5 visa application process do not satisfy the government’s ‘due diligence’ obligation to protect domestic workers from exploitation and abuse by their employers because these measures have done little or nothing to

protect domestic workers. The inadequacy of these reforms to the A-3/G-5 visa application process is evident in the experiences of domestic workers brought to this country by diplomats and other foreign officials during this period, which reflect the same exploitation and abuse suffered by domestic workers more than a decade before.

Accordingly, Petitioners request that the Commission find the Petition admissible and grant them a hearing on the merits during the next session of the Commission.¹

II. ADDITIONAL FACTS SINCE THE PETITION WAS FILED IN 2007

Petitioners incorporate by reference the facts and law set forth in Section II of the Petition, Pet. at 5–49, and supplement those facts in these Observations.

A. The United States’ Failure to Protect Domestic Workers Against Pervasive and Recurring Patterns of Abuse Persists Through the Present Day.

Domestic workers who come to the United States under the A-3/G-5 visa program² join the more than 2 million health aides, nannies, housekeepers, cooks, and other domestic or “care” professionals who work behind closed doors, dispersed in unconnected and unregulated workplaces because of their express and de facto exclusion from labor and employment laws.³ Contrary to the United States’ suggestion that Petitioners’ evidence of exploitative work conditions is limited to an outdated, one-time report, U.S. Resp. at 34-35, the actual experiences

¹ To the extent the U.S. has prematurely raised arguments concerning the merits of the Petition, the Observations only briefly address those arguments here, and will address them in detail in their Observations on the Merits.

² A-3 visas are available to domestic workers employed by ambassadors, public ministers, diplomats, or consular officers and their families. *See* INA § 101(a)(15)(A)(iii); 8 U.S.C. § 1101(a)(15)(A)(iii) (2013). Workers on G-5 visas are employed by officers and other representatives of foreign governments or international organizations. *See* INA § 101(a)(15)(G)(v); 8 U.S.C. § 1101(a)(15)(G)(v) (2013).

³ *See, e.g.*, National Domestic Workers Alliance (“NDWA”) Decl. ¶¶ 3-5; Pet. at 7-10.

of domestic workers – both generally and those trafficked by foreign diplomats/officials – since the Petition’s filing demonstrate the prevalence and persistence of workplace abuse.

Domestic workers do not carry out their duties in the public eye, but in private homes, where the intimacy of their work, physical isolation from similarly situated workers, and lack of traditional workplace regulation makes them uniquely vulnerable to abuse by employers.⁴ In one of the most expansive documentation projects of its kind, groups including Petitioner Domestic Workers United conducted research and interviews of over 2000 domestic workers across the United States in 2012. They found one of the distinctive, recurring features of domestic labor to be that workers, by virtue of working within the home and engaging in care-giving activities, “often develop bonds of trust, mutual dependence, affection, and even love with those for whom they work,” which can make self-advocacy or accusations of mistreatment more difficult to raise than in employment relationships not predicated on such close physical or emotional intimacy.⁵ While employees who work outside the home and with others can turn to human resources personnel, an employment manual, or a grievance procedure, the vast majority of domestic workers do not have access to such formal structures or even third-party intermediaries, partly because they are excluded from federal labor and employment protections.

At the same time, mistreatment at the hands of an employer is a regular feature of domestic employment, regardless of individual employer or geographic location, and has not

⁴ See, e.g., Shilpa Phadke et al., *Treading Water: The Current Challenges of Women’s Work*, Ctr. for Am. Progress (Jan. 18, 2019), available at <https://www.americanprogress.org/issues/women/news/2019/01/18/465361/treading-water-current-challenges-womens-work/>.

⁵ Linda Burnham et al., Nat’l Domestic Workers All., *Home Economics: The Invisible and Unregulated World of Domestic Work* 4-5 (2012), available at http://www.idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1.

changed since the filing of the Petition. Between 2011 and 2018, 40 organizations collectively interviewed more than 2,500 domestic workers employed in and around Atlanta, Chicago, Durham, New York City, Seattle, Washington DC, and along the Texas-Mexico border.⁶ From these interviews, certain recurring labor abuses and patterns of gender-based harassment were identified, including denial of minimum hourly wage rates or overtime;⁷ mandatory 12-, 14-, and even up to 20-hour work days;⁸ failure to pay or irregular payment of wages;⁹ denial of sick leave or threats of termination for taking sick leave;¹⁰ services beyond the scope of written/oral agreements or job titles;¹¹ failure to provide protective gear against toxic chemicals or fumes, or in extreme weather conditions;¹² verbal harassment/abuse including racial, ethnic, or gendered slurs;¹³ infliction of physical harm or injury;¹⁴ sexual harassment, assault, and rape;¹⁵ and threats

⁶ 1 Inst. for Policy Studies, *Pay, Professionalism, & Respect: Black Domestic Workers Continue the Call for Standards in the Care Industry Vol. 1: Atlanta* (2018), available at <https://issuu.com/domesticworkers/docs/wdib-atlanta-final-web?e=9992259/64910288>; 2 Inst. for Policy Studies, *Pay, Professionalism, & Respect: Black Domestic Workers Continue the Call for Standards in the Care Industry Vol. 2: Durham* (2018), available at <https://issuu.com/domesticworkers/docs/wdib-durham-final-web?e=9992259/64910371>; Linda Burnham et al., Nat'l Domestic Workers All., *Living in the Shadows: Latina Domestic Workers in the Texas-Mexico Border Region* (2018), available at [https://actionnetwork.org/user_files/user_files/000/024/054/original/Living_in_the_Shadows_rpt_Eng_final_screen_\(1\)_1.pdf](https://actionnetwork.org/user_files/user_files/000/024/054/original/Living_in_the_Shadows_rpt_Eng_final_screen_(1)_1.pdf); Burnham et al., *Home*, *supra* note 5, at 14 (surveying domestic workers in Atlanta, Boston, Chicago, Denver, Houston, Los Angeles, Miami, New York, San Antonio, San Diego, San Francisco, San Jose, Seattle, and Washington, D.C.).

⁷ See Burnham et al., *Home*, *supra* note 5, at 18-26. “Overtime pay for domestic workers who work more than 40 hours per week is also rare. Only 3% report receiving overtime pay.” Burnham et al., *Living*, *supra* note 6, at 2.

⁸ See 2 Inst. for Policy Studies, *supra* note 6, at 21.

⁹ See Burnham et al., *Living*, *supra* note 6, at 13.

¹⁰ See Burnham et al., *Home*, *supra* note 5, at 26; *see also* Burnham et al., *Living*, *supra* note 6, at 11.

¹¹ See Burnham et al., *Home*, *supra* note 5, at 26.

¹² See *id.* at 28.

¹³ See *id.* at 33. “Domestic workers experience high rates of abuse on the job. Being yelled at or threatened is a common occurrence across occupations.” Burnham et al., *Living*, *supra* note 6, at 3.

of deportation or fabricated criminal allegations.¹⁶ *See also* National Domestic Workers Alliance (NDWA) Decl. at ¶ 7, 14.

B. A-3 and G-5 Domestic Workers Continue to Be Exploited by their Employers.

Recent reports indicate that live-in domestic workers like Individual Petitioners are far more likely to be subjected to exploitative conditions and workplace violence than domestic workers who lived in their own homes.¹⁷ For example, in a survey of over 500 domestic workers, 45 percent of live-in workers reported being injured at work and 31 percent were pushed or hurt by their employers.¹⁸ In contrast, among live-out workers, 23 percent sustained injuries on-the-job and only 7 percent reported being pushed or hurt by their employers.¹⁹ Live-in domestic workers were also more often subject to wage theft, with 45 percent stating they were paid less than what was agreed upon or not at all, in contrast to the 18 percent of live-out workers reporting such pay problems.²⁰

The situation of live-in domestic workers employed by diplomats and other foreign officials is even more rife with abuse because of linguistic differences, extreme cultural/social isolation, and A-3/G-5 visa limitations. Language differences have been exploited to hide from domestic workers legal or contractual protections owed to them. Contrary to State Department rules adopted since the filing of the Petition, the Polaris Project has reported that trafficking

¹⁴ *See* Burnham et al., *Living*, *supra* note 6, at 11.

¹⁵ *See id.* at 14; *see also* Burnham et al., *Home*, *supra* note 5, at 33.

¹⁶ *See* Burnham et al., *Living*, *supra* note 6, at 15.

¹⁷ *See id.* at 3, 12.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 12. As explained in the report, domestic workers' workplace injuries result not just from accidents, but from job-related conditions ranging from "prolonged exposure to harsh household chemicals, long working hours, lack of rest breaks and the physical demands" of being on their feet for the majority of their work hours and frequent requirement to bend, lift, carry, and move heavy objects.

²⁰ *Id.* at 12.

survivors are often given contracts in languages they cannot read.²¹ In other instances, language differences add to the social and cultural isolation of A-3/G-5 domestic workers who are often new to the United States or specific area in which they work and live. Edith Mendoza, who worked as a G-5 domestic worker for a German diplomat between 2015 and 2016, recalls how the family spoke in German in her presence even though their shared language was English: “It was almost as if they did that to pretend I was not there, so they would not have to talk to me or be aware of my presence unless they were talking to me about work.” Mendoza Decl. ¶ 12.

This alienation added to the isolation Ms. Mendoza experienced upon arriving at her employer’s home. Prior to working as a G-5 domestic worker, she had never been to the United States. In 2015, her employer picked her up from the airport and drove her directly to their home, all while Ms. Mendoza had no sense of where she was being taken. In fact, for the first three months Ms. Mendoza did not leave the house because she knew nothing about the city in which she lived, from how to contact emergency services to where she could attend church services to whether public transportation was available. Mendoza Decl. ¶ 9.

In other cases, the diplomat-employer goes to great lengths to affirmatively ensure the domestic worker is cut off from the outside world. Faith Sakala, who came to the U.S. in 2014 on a G-5 visa based on her employer’s promise of providing paid employment and supporting her education, was soon made to work 18-hour days and never sent to school. When she finally asked her employer about the broken agreement, her employer began scrutinizing her communications with the outside world: “Although Mrs. Milunga gave me a cell phone when I arrived to stay in touch with my family in Zambia, after I raised questions about my pay and

²¹ Polaris Project, *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas* 1, 3 (2015), available at https://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf.

education, she became more domineering and would not let me use the phone freely.” Faith Sakala Decl. ¶ 25. Her employers’ intimidation tactics stretched even further, with the diplomat-official couple tell her that it was dangerous outside their Silver Spring, Maryland home and that she could be killed outside. Sakala Decl. ¶ 15. Such subtle and overt efforts at isolating domestic workers is hardly atypical. A 2017 report by the National Domestic Workers Alliance found that, like Sakala, 75% of domestic workers they interviewed had experienced isolation from the outside world, with employers cutting off access to communication.²²

Finally, one of the most substantial vulnerabilities to abuse result from the non-portability of the A-3/G-5 visa, such that its validity turns on continued employment with the named diplomat-employer. Ms. Mendoza, who took a leave from work for health and personal reasons against her employer’s wishes, stated, “Soon after this event, the Koehlers claimed they had told immigration authorities I was no longer working for them. I was scared that I might be in trouble or my visa might be in jeopardy, and tried to make the Koehlers happy with my work.” Mendoza Decl. ¶ 41; *see also* NDWA Decl. ¶¶ 10, 16-17. Even if an employer does not make an open threat to the domestic workers’ immigration status, the fear that the employer can trigger deportation, whether on a whim or in retaliation, has a powerful chilling effect. Damayan Migrant Workers Association, which assists low-wage Filipino workers and trafficking survivors, found that none of the individuals they assisted ever called the State Department-endorsed National Human Trafficking Hotline because of immigration-related fears. Damayan Decl. ¶¶ 13-15.

²² The Nat’l Domestic Workers All. & Inst. for Policy Studies, *The Human Trafficking of Domestic Workers in the United States: Findings from the Beyond Survival Campaign 1*, 6 (2017), available at https://ips-dc.org/wp-content/uploads/2017/03/Beyond-Survival-2017-Report_FINAL_PROOF-1-1.pdf

C. The United States Knows or Should Know that A-3/G-5 Visa Domestic Workers Continue to Be Exploited and Abused by their Employers.

The United States has been aware of the trafficking and systemic abuse of domestic workers by diplomat and other foreign official-employers for decades but has failed to protect them from that abuse. Damayan Decl. ¶ 7.²³ In its response, the United States claims to have made changes to the A-3/G-5 visa approval, oversight, and documentation process that are sufficient to meet its obligations under the American Declaration. hold them accountable. U.S. Resp. at 34. However, as discussed below, these measures have not proven adequate or effective at preventing the trafficking or exploitation of domestic workers by diplomats and other foreign officials, protecting them during employment, holding employers accountable for rights’ violations, or providing remedies to survivors. According to one estimate, between 2003 and 2016 at least twenty-eight domestic workers attempted to pursue civil cases against foreign diplomats and officials in U.S. federal courts on the grounds that work and living conditions

²³ See also U.S. Dep’t of State, *Letter from Gilda Brancato, Office of the Legal Adviser, Diplomatic Law & Litig. Div.* (Oct. 23, 1990) (citing diplomatic note of 1981, which expressed “deep concern” over evidence that diplomatic mission members had abused and exploited their “household servants”); Ariel Ramchandani, *Diplomats Are Getting Away with Abusing Their Children’s Nannies*, *The Atlantic* (May 21, 2018), available at <https://www.theatlantic.com/business/archive/2018/05/diplomats-abuse-domestic-workers/559739/>; Erik Ortiz, *Bangladeshi Diplomat Arrested in ‘Disturbing’ Abuse Case of Domestic Worker*, *NBC News* (June 13, 2017), available at <https://www.nbcnews.com/news/us-news/bangladeshi-diplomat-arrested-disturbing-abuse-case-domestic-worker-n771466>; Sarah Birnbaum, *This woman says she was trafficked by a diplomat. And it happens all the time. Diplomats may be using their immunity to abuse domestic workers*, *Public Radio Int’l* (July 24, 2017), available at https://www.pri.org/stories/2017-07-24/woman-says-she-was-trafficked-diplomat-and-it-happens-all-time?utm_source=theweek&utm_medium=referral&utm_campaign=partnership; Tracy O’Conner, *Diplomats’ exploitation of workers ‘a plague,’ activists say*, *NBC News* (Dec. 19, 2013), available at <https://www.nbcnews.com/news/us-news/diplomats-exploitation-domestic-workers-plague-activists-say-flna2D11775010>.

violated their rights.²⁴ In 2015, a survey conducted by a national anti-trafficking organization identified 16 potential victims in just a single one-year period between 2014 and 2015 on the G-5 or A-3 visas.²⁵ The deprivations described in these cases mirror the allegations of abuse levied by similarly trafficked domestic workers over the preceding two decades in lawsuits and public complaints.²⁶

Despite the changes to the A-3/G-5 system described by the United States, U.S. Resp. at 34-35, the reality remains that diplomats and foreign representatives from international organizations continue to exploit and abuse their domestic workers with impunity, and the United States continues to be responsible for the violations of Petitioners' rights because of its failure to act with due diligence to protect them by holding their employers accountable. To the extent the United States claims the Petition is moot in light of these changes to its laws, policies and practices, the ineffectiveness of those measures is addressed in Section III.C. below.

III. ADMISSIBILITY

The Petition easily satisfies the admissibility requirements of the Commission's rules of procedure. Petitioners are exempt from exhausting domestic remedies because no adequate or effective remedies exist in the U.S. legal system or are attainable through a negotiated settlement. The Petition was also timely filed in that it was filed within a reasonable time of the underlying events and as soon as Petitioners had the ability to pursue such recourse. And the

²⁴ See Martina E. Vandenberg & Sarah Bessell, *Diplomatic Immunity and the Abuse of Domestic Workers: Criminal and Civil Remedies in the United States*, 26 *Duke J. Comp. & Int'l L.* 595, 598 (2016).

²⁵ See Ramchandani, *supra* note 23.

²⁶ Compare Ramchandani, *supra* note 23 with Pet. at 10-24.

claims in the Petition are not moot through the passage of time or any intervening events because, even today, the rights-violations are ongoing.

A. There Are No Domestic Remedies Available to Petitioners.

Exhaustion of domestic remedies is not “obligatory on all petitioners.” A petitioner need not pursue every theoretical possibility for relief at the domestic level, but only those “legal remedies that are available, appropriate, and effective for solving the presumed violation of [their] human rights.”²⁷ Ignoring these well-established exhaustion-requirement principles, the United States argues that the Petition is inadmissible because Petitioners did not pursue civil claims against their employers and failed to challenge their exclusion from labor laws under the U.S. Constitution. U.S. Resp. at 7–9.

But Petitioners are exempted from exhausting domestic remedies where it is “apparent from the record ... that [the] claim would have no reasonable prospect of success in light of prevailing jurisprudence of the state’s highest courts.”²⁸ A claim has no “reasonable prospect of success” where “the consistent case law of the United States courts, including the Supreme Court” has rejected the relief requested.²⁹

As discussed at length in the Petition, any civil suit brought by a domestic worker against their employer in U.S. courts would have had no prospect of success because of judicial and U.S.

²⁷ *Elias Gattass Sahih v. Ecuador*, Case 1/03, Report No. 9/05, Inter-Am. Comm’n on Human Rights, OEA/Ser.L/V/II.124 Doc. 5 (2005).

²⁸ Admissibility Report No. 16/04, Petition 129/02, *Tracy Lee Housel*, United States, February 27, 2004, ¶ 36; *see also* Inter-Am. Comm’n on Human Rights, Report No. 18/12, Petition 161-06, Admissibility, *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, United States, Mar. 20, 2012, paras. 47, 54-57, available at <http://www.oas.org/en/iachr/decisions/2012/USAD161-06EN.DOC>; Inter-Am. Comm’n on Human Rights, Report No. 134/11, Petition 1190-06, Admissibility, *Undocumented Workers*, United States, Oct. 20, 2011, ¶ 28, available at <http://www.oas.org/en/iachr/decisions/2011/USAD1190-06EN.doc>.

²⁹ Inter-Am. Comm’n on Human Rights, *Juvenile*, *supra* note 28, at ¶ 67.

State Department interpretation and application of diplomatic and other immunities. Pet. at 52–53, 101–106. Any claim based on the United States’ failure to act with ‘due diligence’ to protect Petitioners against human rights deprivations by their employers would likewise fail given clear U.S. Supreme Court precedent holding that the U.S. Constitution does not impose liability on government entities or their agents for failing to take affirmative measures to prevent unlawful conduct by private actors. Pet. at 53-54. Finally, a claim of gender, race/ethnic, or national origin discrimination claim based on Petitioners’ express or de facto exclusion from key U.S. labor and employment laws would have met a similar fate. Pet. at 54–55.³⁰

Thus, there are no adequate or effective remedies available to Petitioners in the United States to vindicate their rights because established U.S. law has rejected them. Accordingly, the Commission should find that Petitioners are exempted from pursuing domestic remedies otherwise be available to them.

B. Petitioners Were Not Required to Pursue Litigation After Their Employers’ Immunity Ended.

The United States also argues that Petitioners have not exhausted domestic remedies because they could have pursued civil suits against their employers after their employers had left office and their immunity ended. U.S. Resp. at 5. But this argument also ignores the rule of

³⁰ As discussed in the Petition, official action including federal legislation that has a discriminatory impact is only unlawful if it was enacted with discriminatory *intent*. *Orr v. Orr*, 440 U.S. 268, 283 (1979), which the United States cites as an example of the U.S. Supreme Court striking down a discriminatory law, is not to the contrary. U.S. Resp. at 9. *Orr* is factually and legally distinguishable from Petitioners’ situations. In *Orr*, the law in question made an explicit distinction (classification) on the basis of gender. *Orr*, 440 U.S. at 276. Whereas, the law excluding domestic workers from the protections of U.S. law applies gender-neutral language that has a disparate impact on women. In the U.S. legal system, even in the face of evidence of mixed neutral and gender- or race-based motives, plaintiffs bear the burden of proving that the discriminatory intent was the “substantial” factor. Thus, attempting to challenge the exclusion of domestic workers from U.S. labor laws based on adverse gendered impact would have been futile.

exhaustion that Petitioners need only pursue those remedies that are available, appropriate, and effective for solving the presumed violation of their rights since such lawsuits may also be futile due to diplomatic and other immunities, and extremely difficult and expensive litigation.

At the end of their terms, most diplomats leave the United States to serve in another country or to return to their home country.³¹ In any new diplomatic post, diplomats are immune from legal processes in their host country for abuses they may have committed in the United States. And, even if a diplomat returns to their home country, it is extremely difficult to serve them and to compel them to participate in U.S. court proceedings.³² Even where domestic workers like Petitioners have surmounted these odds and obtained a monetary judgment in their favor, U.S. courts are unable to enforce a judgment against a foreign party. The Commission has recognized that an otherwise available and effective remedy may be deemed ineffective if, in certain circumstances, the State is powerless to enforce the remedy.³³ Thus, although a successful plaintiff can use U.S. courts to compel compliance with a judgment in the United States, enforcement of that judgment against a defendant residing outside a U.S. court's jurisdiction is extremely difficult. In its response, the United States fails to mention that numerous judgements against former diplomats found responsible by U.S. courts for abusing and exploiting their domestic workers remain unenforced, years after judgment.³⁴

³¹ See Vandenberg et al., *supra* note 24, at 602 (noting that diplomats are shielded by immunity while at their posts, and often escape criminal prosecution by simply leaving their posts).

³² See e.g., *Gurung v. Malhotra*, 851 F. Supp. 2d 583 (S.D.N.Y. 2010); *Butigan v. Al-Malki*, No. 13-CV-00514, 2017 WL 3097772 (E.D.VA. 2013); *Carazani v. Zegarra*, 972 F. Supp. 2d 1 (D.D.C. 2012); *Ballesteros v. Al-Ali*, No. 11-CV-00152, 2012 WL 13047582 (D.R.I. 2011).

³³ Inter-Am. Comm'n on Human Rights, Merits Report No. 20/99, Case 11.317, *Rodolfo Robles Espinoza and Sons (Peru)*, Feb. 23, 1999, ¶ 66.

³⁴ See, e.g., *Gurung*, *supra* note 32; *Butigan* *supra* note 32; *Carazani*, *supra* note 32; *Ballesteros*, *supra* note 32; see also Vandenberg et al., *supra* note 22, at 598.

The two cases cited by the United States in support of its argument that civil suits brought by domestic workers against their former employers are effective remedies, are exceptional, and in fact demonstrate why post-service suits are *not* effective remedies. U.S. Resp. at 5. In *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010), Ms. Swarna survived years of abuse, multiple rapes, isolation, and denial of wages, at the hands of her Kuwait consular official employer, Mr. Al-Awadi, before she filed suit against him and Kuwait for that abuse.³⁵ After fifteen years of protracted litigation Ms. Swarna, Mr. Al-Awadi and Kuwait agreed to an out-of-court settlement. Ms. Swarna was only able to pursue the litigation because her legal counsel acted on a pro bono basis, a resource most domestic workers cannot access.

Employers often fail to pay their domestic workers lawful wages and overtime. Therefore, it is unreasonable to expect them to afford legal fees, other court costs, and expenses incurred during litigation, and to find counsel who will act on a pro bono basis is difficult, especially outside of the major U.S. cities.

C. Private Settlements are Inadequate and Ineffective Remedies.

The United States argues that because Petitioners did not seek a “negotiated settlement” of lawsuits against their employers they have failed to exhaust a domestic remedy available to them. U.S. Resp. at 6. But such a settlement is not an adequate and effective remedy that Petitioners were required to pursue to satisfy exhaustion requirements. In *Undocumented Workers*, the Commission has found that a private settlement signed under unfavorable circumstances to one of the parties is not a remedy that a petitioner must pursue. Inter-Am. Comm’n on Human Rights, *Undocumented*, *supra* note 26, at paras. 14, 28; Inter-Am. Comm’n on Human Rights, Merits Report No. 50/16, Case 12.834, *Undocumented Workers*, United

³⁵ *Swarna v. Al-Awadi*, 622 F.3d 123, 128-31 (2d Cir. 2010).

States, Nov. 30, 2016, paras. 21, 105, 112.³⁶ Petitioners here are also vulnerable during any settlement negotiation process due to their immigrant status and lack of available alternative remedies against their employers because of diplomatic and other immunities. Therefore, settlements are the product of a grossly imbalanced negotiation process leaving the diplomat with the upper hand.

D. The Petition Was Timely Filed.

Where a petitioner is exempted from the exhaustion requirement, “the petition shall be presented within a reasonable period of time, as determined by the Commission,” considering the date on which the alleged violations were committed and “the circumstances of each case.”³⁷ In its response, the United States argues that Petitioners waited too long after the violations of their rights to petition the Commission. U.S. Resp. at 9–10. But, because Petitioners are exempted from the exhaustion requirement, timeliness must be evaluated under Article 32(2).

All but one of the cases cited by the United States were decided under Art. 46 (1) (b) of the American Convention; the Convention equivalent to Article 32(1) of the Commission’s Rules of Procedure. U.S. Resp. at 10. In the one case involving the application of Art. 32(2), the petitioner had failed to pursue a domestic remedy for the violation of their rights for seven years. But all the Petitioners initiated their claims against their employers with the United States and were waiting for it to take action against them while at the same time seeking civil redress against their employers in U.S. courts. Although two Petitioners—Ms. Aisah and Ms. Begum—

³⁶ The Commission noted that the petitioners’ vulnerability to deportation and other complications related to their immigration status could be exploited by their former employers-defendants during settlement negotiations over unpaid wages and other benefits. This power imbalance limited the ability to obtain a complete recovery, thereby leaving the possibility of settlement an inadequate and ineffective remedy, one that petitioners were not required to pursue for exhaustion purposes.

³⁷ Commission’s Rule of Procedure, Art. 32(2).

did seek remedies in U.S. courts and have a final judgment date older than 6 months before filing this Petition, this does not preclude them from proceeding before the Commission on timeliness grounds. Based on prior caselaw, the relief they sought before domestic courts was futile and whether they filed the Petition in a timely fashion must be evaluated under Article 32(2). None of the seven cases cited by the United States is to the contrary.

1. Petitioners submitted the Petition within a reasonable time of underlying events and at the first available opportunity.

Timeliness must be considered in light of Petitioners' circumstances and the lack of alternative options. The Commission has found petitions timely when filed ten or eleven years after rights violations were committed, based on a petitioner's vulnerable situation.³⁸

Individual Petitioners are among a uniquely vulnerable population of foreign workers in the United States. *See* discussion *supra* Section I.A.-C. While it is true that many immigration units process visas for domestic workers, the United States specifically created the A-3 and G-5 system to allow diplomats and consular officers—individuals the United States knows to be protected by diplomatic immunity—to bring individuals to the United States to work as domestic servants. Virtually no other immigrant worker's entry into and ability to stay in the United States is conditioned on employment with a person or entity wholly immune from legal process while here. Additionally, the United States chose to make the visa status of the domestic worker contingent on their continued employment with the specific person who sponsors them for the A-3/G-5 visa, i.e., the same person who may be the perpetrator of abuse and harassment, giving employers the power to threaten deportation on anyone who dares challenge their work or living

³⁸ Tatiana Marisa Barría Mardones and B.B.A.B., Petition 871-08, Report No. 59/18, Admissibility, May 5, 2018 (11 years); *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, Petition 161-06, Report No. 18/12, Admissibility, Mar. 20, 2012 (7 years).

conditions. The Commission's assessment of whether the Petition is timely should consider the role that United States laws and policies, as well as its chosen means of implementing the visa program, plays in rendering Petitioners uniquely vulnerable to abuse and particularly reluctant to complain or file charges against their employers.

The case of Petitioner Otilia Luz Huayta, who, along with her then-twelve-year-old daughter, was forbidden from leaving the home of her diplomat employer, illustrates the vulnerabilities faced by other Petitioners and other domestic workers. Pet. at 18–24. Ms. Huayta and her daughter faced threats and intimidation, and they were banned from talking on the telephone and from making or receiving phone calls. Pet. at 22. After escaping her abusive diplomat employers, Ms. Huayta did not have disposable financial resources and her immediate priorities were finding basic services for subsistence and immigration relief. Next, she sought legal advice from CASA of Maryland, but was directly advised against bringing claims in U.S. courts because of Ms. Huayta's employer's diplomatic immunity. Pet. at 22–23. It took years before Petitioners became aware of the domestic legal options available to them and this Commission as a forum. Ms. Huayta's situation echoes that of her fellow Petitioners and other domestic workers like Petitioners – namely, forced isolation, inability to communicate with the outside world, lack of familiarity with the United States and its legal system, financial insecurity, and unstable housing and employment.³⁹ Given the reality of domestic workers' lives, the Commission should consider the Petition as timely filed.

2. The United States' Violations of Petitioners' Rights are Ongoing.

In its response the United States argues that a six-month limitations period begins from the date on which the domestic worker was subjected to abuse by their employer. U.S. Resp. at

³⁹ NDWA Decl. ¶ 14.

9–11. But that date is irrelevant because the Petition seeks redress against the United States for its failure to take reasonable steps to prevent, punish, and provide effective remedies to domestic workers abused by their employers. Pet. at 84–100. Those violations are ongoing and Article 32 timeliness requirements are therefore inapplicable.⁴⁰

Furthermore, when Petitioners filed their Petition, the United States had not implemented any of the measures to protect domestic workers from abusive diplomat employers listed in its response. Pet. at 92. Moreover, none of these measures have effectively protected domestic workers from being exploited and abused by their employers, *see infra* Section III.C. Accordingly, the United States’ violations of the American Declaration are ongoing violations, and the Petition seeking to address these rights-violations is timely.

IV. THE UNITED STATES HAS VIOLATED PETITIONERS’ RIGHTS UNDER THE AMERICAN DECLARATION.

A. The American Declaration Creates Binding Obligations on the United States.

The United States argues that the American Declaration does not impose binding international obligations on it and that the Vienna Convention, which the Commission has no authority to interpret, not the American Declaration, imposes obligations on the United States, and takes precedence here. U.S. Resp. at 11-12. But the Petition has already addressed those same arguments. Pet. at 57–63. The American Declaration imposes binding international obligations on the United States, and the Commission has the competence and authority to consider and adjudicate alleged violations of the Declaration. And, as part of that process, the Commission routinely looks to other human rights treaties, including the Vienna Convention, to

⁴⁰ Inter-Am. Comm’n on Human Rights, Report No. 51/03, Petition 11.819, Admissibility, *Christian Daniel Domínguez Domenichetti*, Argentina, Oct. 24, 2003, ¶ 48.

assess those violations, to ensure that its decisions comport with current day human rights protections.

B. The Petition States Facts to Establish that the United States Has Violated Petitioner’s Rights to Equality under Article II

In its response, the United States argues that the Petition should be found inadmissible because the exclusion of domestic workers from its federal labor and employment laws does not constitute a violation of the right to equality protected by Article II of the American Declaration. U.S. Resp. at 60. However, the United States misunderstands its obligations under Article II in arguing that these de facto or express exclusions are “objective and reasonable,” *id.*, and do not therefore violate Petitioners’ Article II rights. While the logic behind a particular government police or practice may be relevant to U.S. domestic courts in reviewing a claim of unlawful discrimination by the State, it has little, if any, bearing on the Commission’s evaluation of such a claim under Article II.

Article II guarantees “[a]ll persons are equal before the law and have the rights and duties established in this Declaration without distinction as to race, sex, language, creed or any other factor.” By excluding domestic workers from statutory legal protections against and remedies for minimum wage and overtime pay violations, hazardous work environments, workplace violence and harassment, and retaliation for collective negotiations, the United States denies domestic workers, as a class, the equal protection of its laws. Pet. at 76-80.⁴¹ Furthermore, since the

⁴¹ While the vast majority of professions are covered by federal statutes governing employment conditions, domestic workers are excluded in some manner from the four most prominent of these: the Fair Labor Standards Act (FLSA), the National Labor and Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), and Title VII of the Civil Rights Act. Under FLSA, live-in domestic workers are one of the few categories of employees not entitled to maximum hour requirements or overtime wages, and their employers are exempt from the statute’s recordkeeping requirements concerning hours worked and wages paid. The NLRA,

overwhelming majority of domestic workers – whether or not employed by diplomats or representatives of international organizations – are immigrant women and racial or ethnic minorities in the United States, the denial of these statutorily-created protections and of access to corresponding remedies has the effect of discriminating on the basis of gender, race, ethnicity, and national origin. Pet. at 76. Through these exclusions, the United States creates the conditions that allow private actors to violate rights protected by the American Declaration. Pet. at 91.⁴² Finally, because the original rationale for these exclusions revolved around the lesser financial and social value placed on what was traditionally domestic slave labor and women’s work, the United States’ failure to remove or otherwise remedy these exclusions has legally institutionalized differential and less favorable treatment of workers based on racial and gendered notions of inferiority and social roles. *See* Pet. at 8-9.⁴³

which protects workers against employer retaliation for gathering collectively or petitioning employers to remedy labor violations or agree on minimum employment standards, does not include “any individual employed... in the domestic service of any family or person at home.” Similarly, OSHA regulations state that, “[a]s a matter of policy, individuals who, in their own residences, privately employ persons for ... what are commonly regarded as ordinary domestic household tasks ... shall not be subject to the requirements of the Act with respect to such employment.” Finally, because Title VII’s prohibition against gender discrimination and harassment is limited to employers with fifteen or more employees, virtually all domestic workers are not protected. *See* Pet. at 5-8.

⁴² *See, e.g.*, The Nat’l Domestic Workers All. & Inst. for Policy Studies, *supra* note 22, at 19–20, 24 (Noting that the vast majority of domestic workers are women of color whose exclusion from federal laws has left them vulnerable to abusive working and living conditions, including being given a “roach-infested shipping container to live in” and forced to “collect food from trash cans to eat”).

⁴³ *See also* Int’l Labour Office, *Women, Gender and Work: Vol. 2 Social Choices and Inequalities* (ILO Book Series, 2017), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_488475.pdf; Jenna Hennebry et al., *Women Working Worldwide: A Situational Analysis of Women Migrant Workers*, UN Women Research Paper (2016), available at <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2017/women-working-worldwide.pdf?la=en&vs=5704>.

C. The United States Violated Petitioners' Rights by Failing to Act with 'Due Diligence' to Protect Them.

The American Declaration imposes an obligation on the United States to act with 'due diligence' to protect rights guaranteed therein.⁴⁴ In its *Lenahan* decision, the Commission found the United States responsible for the violations of Ms. Lenahan's and her three daughters' rights because it had failed to act with 'due diligence' to protect her and her daughters by taking "reasonable measures" to prevent, investigate or remedy the rights-violations at issue in her Petition.⁴⁵ Applying this framework, the United States may also be found responsible for the rights-violations at issue in this case because it failed to take reasonable measures to protect domestic workers from abuse and exploitation by their employers by failing to: (i) effectively monitor domestic workers conditions of employment and employers' compliance with their employment agreement and U.S. law; (ii) hold domestic workers' employers accountable; and (iii) provide survivors with adequate and effective redress for their exploitation and abuse. Pet. at 90–94.

In its response the United States argues that to the extent the American Declaration imposes a due diligence obligation on it to protect Petitioners' rights, it has complied with that obligation by taking "numerous steps to regulate the visa process." U.S. Resp. at 46–47. But as the Petition has already discussed, Pet. at 83–100, none of the regulatory steps taken before the Petition were filed adequately or effectively addressed the violations of Petitioners' rights. And, none of the steps taken by the United States since then have either, as discussed below and

⁴⁴ *Lenahan (Gonzales) v. United States*, Case No. 12.626, Report No. 80/11, Nov. 1, 2012 ¶¶ 172-173, 178.

⁴⁵ *Id.* at ¶¶ 172-173, 178.

evidenced by ongoing reports of exploitation and abuse of A-3/G-5 domestic workers by their employers, even after the United States revised the A-3/G-5 visa program..

1. The State Department’s document and procedural prerequisites for approving A-3/G-5 visas do not effectively prevent domestic worker abuse.

In its response, the United States claims to have made some changes to the A-3/G-5 program aimed at preventing abuse and exploitation of domestic workers by their employers . However, none of these measures – the pre-notification system, written contract requirement, employee bank account verification – are reasonable as they do not adequately or effectively prevent employers from continuing to abuse and exploit their domestic workers.

i. Pre-notification System

The United States introduced the pre-notification system some time after 2009. Its most substantive portions entail (a) obtaining a written verification from the diplomat-employer’s mission that she or he has the ability to pay the wages required by law and has not violated the A-3/G-5 program in the past, and (b) providing prospective domestic workers a pamphlet informing them of their rights under U.S. laws. U.S. Resp. at 38–39.⁴⁶ At best, the verification may confirm ability to pay legal wages, but absent an enforceable oversight mechanism, this ability does not translate into actual payment. At worst, without independent verification of finances or even the sending mission’s method for confirming and recording A-3/G-5 participation, the verification may be meaningless.⁴⁷ Similarly, knowledge by the domestic worker of their rights under U.S. law is inadequate if there is no effective mechanism to enforce those rights when an employer violates them. While the pamphlet is a positive step undertaken

⁴⁶ See also Office of the Chief of Protocol, *Employment of Domestic Workers: Requirements and Procedures*, U.S. Dep’t of State (Sept. 16, 2009), available at <https://2009-2017.state.gov/s/cpr/248459.htm>.

⁴⁷ *Id.*

by the State Department, it is also a largely symbolic gesture, since it does nothing to alter the nature of the uneven negotiating relationship and is thus of limited practical utility.

ii. Mandatory written contract

After the Petition's filing, the United States revised the A-3/G-5 visa system to require a written contract between employers and employees. U.S. Resp. at 36-37. The contract must be in a language that the domestic worker understands and establish terms including daily hours, types of work to be performed, wage rate, and compensable time definitions. The United States is required to keep a copies of contacts. *Id* at 37. While the mandatory written contract requirement may be useful in resolving disputes over its terms when they arise, without an effective oversight and enforcement mechanism it does little to effectively prevent violations of domestic workers' rights in the first instance.

Petitioners' experience with written contracts even before they were mandated demonstrates their ineffectiveness. Petitioner Lucia Mabel Gonzalez Paredes had a written contract promising wages of \$6.72 an hour, overtime compensation, and health insurance. Pet. at 19. But, when she began work, she was paid only a fraction of those wages and denied the overtime compensation and insurance benefits. *Id*.

More recent cases involving domestic workers who came to the U.S. after written contracts became mandatory show that, whatever changes resulted from this new requirement, they do not adequately or effectively prevent labor and other violations of A-3/G-5 domestic workers' rights. In *Rana v. Islam*,⁴⁸ Mashud Parves Rana, a domestic worker, was granted an visa and possessed a written employment agreement that, presumably, was reviewed by U.S.

⁴⁸ See Complaint, *Rana v. Islam*, No. 14-cv-01993 (S.D.N.Y. Mar. 21, 2014); Order Entering Default Judgment, *Rana v. Islam*, No. 14-cv-01993 (S.D.N.Y. May 12, 2016).

However, upon arrival in the U.S., he was subjected to patently unlawful working conditions, working 17 hours each day for nearly 19 months straight.. *Id.* Both Ms. Mendoza and Ms. Sakala also had written contracts that met the standards of the State Department, but that did not prevent their exploitation. Mendoza Decl. *passim*; Sakala Decl. *passim*.

In a particularly notorious case, the Deputy Counsel General of India Devyani Khobragade entered into a written employment agreement with Sangeeta Richard that passed consulate review for an A-3 visa, but then required Ms. Richard to enter into a second, undisclosed agreement.⁴⁹ The contract presented during the visa application process stated that Ms. Richard would be paid \$9.75 per hour and would work 40 hours Monday through Saturday. The second contract stated that Ms. Richard would be paid no more than 30,000 rupees per month, which, at the time, translated to a rate of \$3.31 per hour, assuming a 40-hour week.⁵⁰ The second contract was silent as to the work schedule, and in reality, Ms. Richard was forced to work more than 95 hours each week for the duration of her employment.⁵¹

2. The United States does not effectively oversee the A-3/G-5 visa program nor adequately investigate allegations of abuse and exploitation.

i. In-person Registration

Starting at some point after 2009, the United States began requiring A-3 and G-5 visa program applicants in Washington D.C. and New York to schedule in-person meetings with a U.S. consular officer within 30 days of their arrival.⁵² U.S. Resp. at 39. However, the registration

⁴⁹ See Human Trafficking Legal Center, *Letter to Secretary of State Michael Pompeo* at 4 (May 21, 2018).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See U.S. Dep't of State, *Domestic Worker Program Requirements Note to Bilateral Missions* (Sept. 19, 2018), available at <https://www.state.gov/wp-content/uploads/2018/12/September->

system applies only in these two cities, and to A-3 visa holders, not G-5 visa holders. Moreover, these requirements do little to prevent A-3 visa-holders from being exploited and abused by their employers. The registry is private, and therefore inaccessible to civil society NGOs or other support groups that can assist domestic workers abused by their employers to escape their homes and to access local transportation options, emergency services, health insurance coverage or the judicial system.

Even in the locations that hold the in-person meeting, there is no further oversight of the employer-domestic worker agreement by the United States. For example, the United States does not provide conduct check-ins on the domestic workers' well-being. That the in-person registration measure is failing to adequately prevent domestic workers from being abused by their employers is evidenced by continuing reports of abuse of A-3 workers since the measure was introduced.

ii. Anti-Trafficking Working Group

The United States claims that its creation of an internal working group tasked with tracking and responding to allegations of domestic worker abuse, and an Anti-Trafficking Unit to investigate such allegations as two measures that protect domestic workers. U.S. Response at 34-37. But the procedures and powers of the Working Group and Unit are neither effective nor adequate to prevent the abuse and exploitation they were created to end.

In its response the United States touts a new “standard procedure” the working group adopted to respond to allegations of abuse. But this procedure has no effective oversight or

[2018-Domestic-Worker-Program-Requirements-Note-to-Bilateral-Missions.pdf](#). See also U.S. Dep't of State, *Domestic Worker Program Requirements Note to International Organizations* (Sept. 19, 2018), available at <https://www.state.gov/wp-content/uploads/2018/12/September-2018-Domestic-Worker-Program-Requirements-Note-to-International-Organizations.pdf>.

enforcement mechanism and involves little more than forwarding information to representatives of a diplomat's home country and hoping that representatives there take appropriate action against the diplomat. In its response the United States also notes that the procedure involves "asking the Chief of Mission to investigate the alleged abuse, asking the Mission to make alleged abusers available for interviews with U.S. law enforcement agents, and putting on 'hold' approval of pre-notification requests for future A-3 and G-5 visas for domestic workers for the specific diplomat against whom all allegations have been lodged while the exchange is ongoing." *Id.* at 4. But this measure does not prevent domestic workers from exploitation and abuse; it merely shifts the burden of looking into the allegations to another country. The United States concedes as much, noting that the State Department "has explicitly advised in its 2009 Circular Note and on several occasions thereafter that it *would ultimately look to Chiefs of Missions* to ensure that the treatment accorded domestic workers by their employees comports with contractual and other legal requirements." U.S. Resp. at 37. None of the measures employed by the Working Group or Unit effectively or adequately prevent domestic workers from being exploited and abused by their employers, and thus fail to comport with the United States 'due diligence' obligation to protect domestic workers from such harm.

3. The United States does not hold employers accountable or provide redress to domestic workers

Invoking the Vienna Convention as a limitation, the United States argues that it has "implemented procedures to respond to and remedy domestic worker abuse by foreign diplomats to the extent its international obligations permit," U.S. Resp. at 42, and discusses several options it has to hold individuals responsible for the exploitation of domestic workers, *id.* at 42-45.

However, for the reasons set forth below, these possibilities neither collectively nor individually satisfy the United States' due diligence obligation.

i. Criminal Accountability

Although the United States cites the possibility of criminal prosecution as relief available to Petitioners, this avenue is hardly pursued against A-3/G-5 domestic worker employers. First, a prerequisite to bringing such prosecutions is obtaining a waiver of any applicable immunities and/or waiting until the relevant official has left their post. As discussed in the Petition, all publicly available information indicates that the United States has made such requests on only a handful of occasions. Notably the Response does not provide any additional data or information to support its claim that such requests, let alone criminal prosecutions, in the A-3/G-5 trafficking context are common, or conducted pursuant to clear guidelines or protocol. This avenue of relief is hardly sufficient for due diligence purposes given the infrequency with which it is pursued by the government and the lack of information about how such decisions are made. As for waiting until an employer has left his or her official position, as the United States is well aware, officials typically return to their home country upon completion of a post, putting them outside the jurisdiction of the United States.

ii. Suspension from the Program

In 2008, the United States introduced the Wilberforce Act which promised some measure of accountability other than by possible criminal prosecution, when diplomats or other foreign officials exploited domestic workers. Pursuant to the statute, the United States, through the U.S. Secretary of State can suspend a foreign country's mission from participating in the A-

3/G-5 visa programs when there is credible evidence of abuse.⁵³ This provision was amended in 2019 by the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, which narrowed the definition of “abuse” that could trigger suspension, limiting it to instances where its the domestic worker had obtained an unpaid default or civil judgement against its diplomat.⁵⁴

But even before the amendment, the United States had yet to suspend any mission from participating in the program despite credible evidence of abuse and unpaid default and civil judgements against diplomats.⁵⁵ For example, in a May 21, 2018 letter to Secretary of State Michael Pompeo, a coalition of community-based organizations, human rights organizations, legal services organizations, and anti-trafficking advocates detailed credible evidence of serious exploitation and other abuses of domestic workers by representatives of Bangladesh, India, and Malawi. This evidence should have triggered suspension of these missions’ participation in the visa programs.⁵⁶ Yet the State Department failed to do so. Separate from the Wilberforce Act, the State Department also has the power to declare a diplomat *persona non grata* after credible allegations by domestic workers of criminal abuse. However, it has done so in only one instance.⁵⁷

The United States’ failure to take such measures suggests that offending diplomats and other representatives of international organizations who abuse their domestic workers will not

⁵³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, Dec. 23, 2008, 122 Stat. 5044, §203.

⁵⁴ Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, PL 115-425, Jan. 8, 2019, 132 Stat 5472, *codified at* 8 USC §1375c.

⁵⁵ See Human Trafficking Legal Center, *supra* note 49, at 1 (May 21, 2018).

⁵⁶ *Id.* at 1-2.

⁵⁷ Despite the dozens of credible allegations by domestic workers of diplomats, only in the *Khobragade* case, discussed on pages 24-25, has the PNG procedure been used.

face consequences for either violating the rights of domestic workers or for flouting the terms on which the United States issued their visas.

iii. Lack of Redress for Domestic Workers

In its response, the United States claims to have provided redress to domestic workers who have been abused by their employers by negotiating out-of-court settlements. U.S. Resp. at 6. But, as the United States concedes, these negotiated private settlements do not constitute adequate or effective redress to victims because the United States has negotiated these settlements at its own discretion and does not publicize results. *Id.* The discretionary nature of the settlements does nothing to deter future abuses.

The United States also contends that its issuance of T-visas to survivors of domestic workers who are trafficked by their employers provides adequate and effective redress for their abuse and exploitation. U.S. Resp. at 45. But T-visas are only granted on a discretionary basis and only allow a trafficking survivor to remain in the United States if they have cooperate with law enforcement in the investigation or prosecution of their traffickers and if they would face “severe hardship” if denied the visa.⁵⁸ While the T-visa serves an important role in supporting a trafficking survivor, it does not provide an effective remedy for the physical, emotional, or financial harms inflicted by an employer-trafficker upon domestic workers. The availability or even grant of a T-visa does not mean that law enforcement will in fact seek civil or criminal prosecution of the trafficker. And, like other measures introduced by the United States the entire T-visa process, is subject to change by administrative discretion.

⁵⁸ U.S. Citizenship and Immigration Services, I-914, Application for T Nonimmigrant Status, available at <https://www.uscis.gov/i-914>.

Evidence that the T-visa measure is not an effective remedy can be found in the changes made to the system since the United States filed its response in 2016. *E.g.*, NDWA Decl. ¶¶ 24-27; Damayan Decl. ¶¶ 18-19. According to recent reports, the United States has cut the approval rate for immigration relief for trafficking victims in half over the last few years.⁵⁹ Even though 2017 regulations loosened the evidentiary standard for meeting the definition of an eligible trafficking survivor, the T-visa denial rate rose from a declination rate of 19 percent between October and December 2016 to 45 percent in the first quarter of FY2019.⁶⁰ Additionally, service providers report increased difficulty in obtaining waivers of the fees associated with the T-visa and ancillary immigration relief processes.⁶¹ Additionally, the T-visa process itself now poses risks of deportation, separate and apart from those that arise from the A-3/G-5 employer-contingent visa system. In November 2018, the federal government announced that it would require individuals who were denied a T-visa to thereafter appear for commencement of deportation proceedings.⁶² Thus, the T-visa is not an effective remedial measure for domestic workers who are trafficked by their employers.

V. CONCLUSION

As explained in the Observations, the Petition alleges facts sufficient to state a prima facie claim that the United States has violated rights of domestic workers protected by the American

⁵⁹ Editorial Board, *The Trump Administration's Crocodile Tears on Human Trafficking*, Wash. Post, (Mar. 17, 2019), available at https://www.washingtonpost.com/opinions/the-trump-administrations-crocodile-tears-on-human-trafficking/2019/03/17/cc269d7a-4506-11e9-aaf8-4512a6fe3439_story.html?noredirect=on&utm_term=.c0c09e781fc0.

⁶⁰ Yael Schacher, *Abused, Blamed, and Refused*, Refugees Int'l 4-5 (May 21, 2019), available at <https://www.refugeesinternational.org/reports/2019/5/21/abused-blamed-and-refused-protection-denied-to-women-and-children-trafficked-over-the-us-southern-border>.

⁶¹ *Id.* at 28-29.

⁶² *Id.* at 28.

Declaration, through the creation and implementation of the A-3/G-5 visa program. The changes made to these programs since the filing of the Petition have not mooted Petitioners' claims because they have not been effective in preventing ongoing or remedying Petitioners' harms. The experiences of domestic workers under the revised programs, as detailed above and in the attached Exhibits, demonstrate that many of the conditions to which Petitioners were subjected continue to exist. Petitioners have satisfied the Commission's exhaustion rules because no effective remedies exist in the domestic system and they filed the Petition in a timely manner, given their unique circumstances.

For the foregoing reasons, the Commission should find the Petition admissible and proceed to a hearing on the merits.

Respectfully Submitted,

Claudia Flores, Director
Nino Guruli, Fellow
Josia Klein, Student
Lauren NuDelman, Student
International Human Rights Clinic
University of Chicago Law School
cmflores@uchicago.edu

Anjana Samant, Senior Staff Attorney
Women's Rights Project
American Civil Liberties Union
asamant@aclu.org

Steven M. Watt, Senior Staff Attorney
Human Rights Program
American Civil Liberties Union
swatt@aclu.org

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