Washington, D.C.
June 15, 2004

The Honorable Taïb Fassi Fihri
Minister Delegate for Foreign Affairs and Cooperation
Kingdom of Morocco

Dear Minister Fassi Fihri:

During the course of negotiations of the Free Trade Agreement between our Governments, our delegations discussed the rights and protections that each Government provides under its labor laws to persons who are not its nationals ("non-nationals"). I have attached to this letter a description of the principal United States labor laws that accord rights and protections to non-nationals. For greater clarity, the term "labor laws" in this letter and in the description has the same meaning as in Article 16.7 of the Free Trade Agreement.

As the description makes clear, U.S. labor laws provide non-nationals who are legally present and legally employed in the United States rights and protections that are no less favorable than the rights and protections it provides to United States nationals.

Sincerely,

Robert B. Zoellick

Labor Protections
in the
United States of America

March 2004

This paper describes the protections currently afforded to workers in the United States, without regard to migratory status, with respect to laws related to the following internationally recognized labor rights:

- The right of association
- The right to organize and bargain collectively
- A prohibition on the use of any form of forced or compulsory labor
- A minimum age for employment of children and the prohibition and elimination of the worst forms of child labor
- Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health

The laws relating to the rights listed above are different from the laws relating to authorization to enter, reside, and take up employment in the United States. Such types of authorization are governed by immigration laws, including the Immigration and Nationality Act (INA), and immigration laws are outside the scope of labor laws. Nothing contained in this paper, nor any inference drawn from this paper, shall limit in any manner the United States' sovereign right to determine and enforce its own laws, including immigration laws.

The term "non-national" as used in this paper is intended to include both those persons who are not citizens of the United States but who are legally authorized to work in the United States ("documented workers") and those who are not legally authorized to work in this country ("undocumented workers"), without regard to whether such persons entered the country legally or not.

Freedom of Association and the Right to Organize and Bargain Collectively

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment freedom of association language provides national and non-national workers with a constitutionally protected right to freely associate and form voluntary organizations. This right applies to all persons in the United States, without regard to legal status.

The National Labor Relations Act (NLRA) provides employees of covered employers a statutory right to "full freedom of association, self-organization, and designation of representatives of their own choosing ...." The NLRA further provides the right to organize and to engage in concerted activities and protects against discrimination for exercising those rights.

The NLRA does not expressly refer to non-national workers. However, the NLRA defines the term "employee" to include "any employee," subject only to certain specified exceptions. Accordingly, both the National Labor Relations Board (NLRB) and the U.S. Supreme Court have held that the NLRA applies to non-national workers, including those who are undocumented. Thus, for example, it is an unfair labor practice under the NLRA for an employer to discharge any worker, including a non-national worker (documented or undocumented) for engaging in union activity. In addition, non-national workers (documented or undocumented) are eligible to vote in Board-conducted elections to determine if an employer's employees desire union representation. Official NLRB Notices in representation (election) and unfair labor practice cases are provided to employers and labor organizations for posting in languages other than English when a significant number of employees in a workplace do not possess proficiency in English.

However, because of their immigration status, undocumented workers may not be entitled to the same remedies in the event they are unlawfully discharged for their union activity. For example, an undocumented worker will not be entitled to reinstatement to his former job unless he or she provides the appropriate documentation to allow the employer to verify his or her eligibility for continued employment in the U.S. under the immigration laws. In addition, the U.S. Supreme Court recently held in *Hoffman Plastic Compounds, Inc.*, that the immigration laws preclude the Board from awarding back pay for time not actually worked to a non-national worker who was not legally authorized to work in the U.S. during the period the employee would have been working had he not been fired illegally. The Board, however, may impose other remedies that are available under the NLRA.

Regional personnel of the NLRB meet with individuals, including non-national workers, under its "Public Information Program" and respond to questions and complaints regarding workplace concerns. Agents will, if invited, address community and private interest groups, including those of the immigrant community, regarding the NLRA and NLRB procedures. Bi-lingual agents are employed in most NLRB offices and translation assistance is available if an agent having facility in a particular language is not available in the office to respond to an inquiry.

The NLRB has published and made available on its Website materials explaining the rights of workers under the NLRA and NLRB procedures. Efforts are underway to translate these documents into other languages and make them available to the public.

In conclusion, all non-national workers, whether documented or undocumented, have the right to form, join or participate in the trade unions of their choosing without restriction.

Forced Labor

The Thirteenth Amendment to the United States Constitution prohibits all forms of forced labor except as punishment for a crime. It provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

The Thirteenth Amendment applies to nationals and non-nationals alike, regardless of whether documented or undocumented. The Supreme Court has defined involuntary servitude to mean the control of the labor and services of one person for the benefit of another and the absence of the legitimate right to dispose of one's person, property, or services. Further, the Thirteenth Amendment's prohibition of involuntary servitude has been determined by the Supreme Court to ban the practice of peonage, which is broadly defined as compulsory service in the payment of debt.

Involuntary servitude and peonage are also prohibited by statute. Congress enacted Section 1584 of Title 18 of the United States Code pursuant to its authority to enforce the Thirteenth Amendment. This section proscribes involuntary servitude. Similarly, Section 1581 of Title 18 proscribes the crime of peonage. Section 241 of Title 18 provides a fine or imprisonment up to ten years for those who conspire to violate a person's Thirteenth Amendment's right to be free from involuntary servitude.

Therefore, under United States law and practice, no person including non-nationals may be forced to work, and any person may always leave the employ of an employer.

Child Labor

The laws prohibiting child slavery, child prostitution, child pornography, and the procurement of children for illegal activities are such that the United States was able to ratify the Worst Forms of Child Labor Convention, 1999 (No. 182).

The Fair Labor Standards Act (FLSA), as amended, sets standards for child labor in both agricultural and nonagricultural jobs. The child labor provisions are designed to protect the educational opportunities of youths and to prohibit their employment in jobs and under conditions detrimental to their health and well-being. These protections are applied regardless of whether a youth is a national or non-national or whether a youth is a documented or undocumented worker. Where both state and federal child labor laws are applicable to employment situations, the more protective of the two applies.

In nonagricultural employment, the child labor provisions apply to enterprises with employees engaged in interstate commerce, or who handle, sell or work on goods or materials that have been moved in or produced for interstate commerce. Workers under the age of 16 are generally prohibited from working in manufacturing or processing occupations; workers under the age of 18 are generally prohibited from working in certain settings or using certain machinery that the Department of Labor has found to be too hazardous for anyone under that age. Young workers under the age of 18 cannot work, for example, in mines, establishments that manufacture or store explosives or fireworks, or roofing or excavation operations; further they cannot operate certain dangerous machinery such as power-driven baking machines, meat processing machines, and paper products machinery. Workers in the 14-to-16 age group are generally permitted to work only under limited conditions and hours in certain retail and service industry occupations. Children under the age of 14 are not permitted to work in non-farm employment at all, unless it is work for their parents other than in manufacturing, mining, or hazardous occupations; as newspaper deliverers; or as actors or performers.

In agriculture, the FLSA covers employees whose work involves production of agricultural goods that will leave the state (directly or indirectly) and become part of interstate commerce. Agricultural employees under the age of 16 cannot perform certain work that the Department has declared too hazardous for that age group. For example, children under the age of 16 cannot operate an array of farm machinery such as hay mowers, forklifts, and most tractors; also, they are not permitted to handle or apply certain agricultural chemicals, and cannot work in manure pits or in certain agricultural product storage areas.

To summarize, the United States' child labor protections cover both nationals and non-nationals, whether documented or undocumented.

Acceptable Conditions of Work

The law covering minimum wages, hours of work, and conditions of work for workers is found primarily in the Fair Labor Standards Act (FLSA), which is enforced by the U.S. Department of Labor. The FLSA requires employers to pay covered employees a minimum wage. The FLSA does not limit the number of hours an employee may work, but, in general, it requires employers to pay one and one-half times an employee’s regular rate of pay for hours worked beyond 40 hours in a week. The FLSA applies to nationals and non-nationals alike. Further, these laws are enforced without regard to whether a non-national is documented or undocumented.

The laws relating to occupational safety and health are found primarily in two main statutes, the Occupational Safety and Health Act (OSH Act) and the Federal Mine Safety and Health Act (Mine Act). The OSH Act applies to all sectors except mining, which is covered by the Mine Act. These Acts, which apply to nationals and non-nationals alike, whether documented or undocumented, assure workers as far as possible a safe and healthy working environment.

It is the Department of Labor's policy to fully and vigorously enforce these laws without regard to whether an employee is a national or non-national or is documented or undocumented. This policy gives voice to the United States' commitment to enforce vigorously laws protecting workers, particularly low income and non-national workers who are among the most vulnerable.

By ensuring that the wage laws, the hours of work laws, and the occupational safety and health laws are enforced without regard to nationality or whether a worker is documented or undocumented, the United States strives to remove any economic incentive for employers to hire or exploit undocumented workers.

In addition, the Department of Labor administers a number of programs that specifically protect certain non-national workers, often providing rights and protections beyond those afforded U.S. workers. For instance, H-1B workers in certain professional and specialty occupations are to receive: (1) at least the local prevailing wage or the employer's actual wage, whichever is higher; (2) pay for non-productive time in certain circumstances; and (3) benefits, or to be eligible for benefits, on the same basis as U.S. workers. Similarly, H-2A agricultural workers must receive, for example: (1) no less than the highest of three possible wage rates (the wage rate calculated by the Department of Agriculture at which no adverse wage effects would occur to U.S. workers, local prevailing wage, or applicable federal, state or local minimum wage); (2) workers' compensation insurance; (3) housing; and (4) three meals a day.

The Wage and Hour Division of the Department of Labor has a toll-free help line so that employees may call to discuss alleged violations. Trained personnel screen all calls and refer employees to the nearest Wage and Hour office. The center receiving the toll-free calls has the ability to communicate with most non-English speakers. In addition, Wage and Hour offices have a number of compliance assistance materials, fact sheets, industry-specific employee rights cards in other languages. These materials are distributed to foreign consulates and community and faith-based organizations that regularly communicate with workers. Many of these consulates and organizations have been trained in the basics of laws enforced by the Wage and Hour Division. Similarly, the Occupational Safety and Health Administration and the Mine Safety and Health Administration provide helpful outreach services to employees who need information and assistance with questions regarding compliance with these laws.