

ppi 201502ZU4645

Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185 Depósito legal pp
197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela



Vol.39 N° 68

Enero
Junio
2021



Objective conditions for improving the protection of the rights of labour migrants in Ukraine

DOI: <https://doi.org/10.46398/cuestpol.3968.10>

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Abstract

The research analyses objective preconditions for improving the protection of the rights of migrant workers in Ukraine. The research methodology included the dialectical combination of tools such as documentary observation and legal hermeneutics. Among the main results is that: sand analyzed the statistical materials and standards of current Ukrainian legislation governing the rights of migrant workers. Problems related to the implementation of the rights of migrant workers in Ukraine were determined. Objective prerequisites for improving the protection of the rights of migrant workers in Ukraine were identified. It was noted that the implementation of rights by migrant workers in the country depends on several conditions and, above all, it was the specificity of the legal regulation of this issue. It is concluded that Ukrainian law provides general guarantees to prevent discrimination against immigrants in terms of exercising their right to work. At the same time, the application of the rights of immigrants in our country depends on a number of objective and subjective conditions that should be discussed.

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Keywords: human rights; migrant workers; migration policies; guarantees for the protection of rights; legal reality of Ukraine.

Condiciones objetivas para mejorar la protección de los derechos de los trabajadores migrantes en Ucrania

Resumen

La investigación analiza las condiciones previas objetivas para mejorar la protección de los derechos de los trabajadores migrantes en Ucrania. La metodología de investigación incluyó la combinación dialéctica de herramientas como la observación documental y la hermenéutica jurídica. Entre los principales resultados destaca que: se analizaron los materiales estadísticos y las normas de la legislación vigente de Ucrania que rige los derechos de los trabajadores migrantes. Se determinaron los problemas relacionados con la implementación de los derechos de los trabajadores migrantes en Ucrania. Se identificaron los requisitos previos objetivos para mejorar la protección de los derechos de los trabajadores migrantes en Ucrania. Se señaló que la implementación de los derechos por parte de los trabajadores migrantes en el país depende de una serie de condiciones y, sobre todo, se trata de la especificidad de la regulación legal de este tema. Se concluye que la legislación ucraniana, ofrece garantías generales para prevenir la discriminación contra los inmigrantes en términos de ejercer su derecho al trabajo. Al mismo tiempo, la aplicación de los derechos de los inmigrantes en nuestro el país depende de una serie de condiciones objetivas y subjetivas que conviene debatir.

Palabras clave: derechos humanos; trabajadores migrantes; políticas migratorias; garantías para la protección de derechos; realidad jurídica de Ucrania.

Introduction

Modern life is characterized by a number of integration and globalization processes, the feature of which is a significant and rapid increase in population migration. Labour migration occupies a special place in migration processes. In an effort to realize their full potential and receive a decent reward for their work, people try to find employment in countries with high economic development and high social standards, in particular, in terms of protecting the rights and legitimate interests of workers. At the same time, Ukraine, represented by its authorities, striving to quickly and

effectively solve the most acute problems in the main spheres of public life, is interested in attracting leading world experts to work in our country. This situation determines the expediency and necessity of introducing effective mechanisms for managing migration processes and ensuring the protection of the rights, freedoms and legitimate interests of labour migrants (Kozin, 2020).

However, the analysis of statistical materials and norms of the current legislation allows to state the fact that today the mechanism for the protection of the rights of labour migrants in Ukraine can hardly be considered flawless. Researchers have repeatedly stressed the need to improve the State policy on immigrants, in terms of ensuring their labor rights, emphasizing that this is a necessary step towards the proper implementation of relevant international legal requirements and standards by our State.

For example, Dyka and Yushko (2019), analyzing the problems of realization of labor rights of foreigners in Ukraine, note that today there are a number of regulations governing the legal status of foreigners and stateless persons in our country, including features of their participation in the domestic labor. At first glance, it seems that such regulation should not cause any problems for foreign citizens willing to find employment in Ukraine, nor for the State, which has provided a clear mechanism for the exercise of labor rights by foreigners and stateless persons. However, having studied national legislation, as well as the practice of its application, one can see that some problems exist. Therefore, the question arises as how to improve the employment system of foreigners in order to attract foreign investments into the economy of Ukraine and improve the conditions for the realization of their right to work.

1. Methodology

To achieve the goal of the Article, the following methods of scientific knowledge were used.

Normative and dogmatic method, as well as the method of hermeneutics, were applied when analyzing legal acts regulating the rights of labor migrants in Ukraine.

Monographic method helped in the analyses of scientific works of different scholars who studied the issue under consideration.

The methods of analysis and synthesis made it possible to determine the problems related to the implementation of the rights of labor migrants in Ukraine.

The method of induction and deduction allowed to specify areas for improving legal regulation of the rights of labor migrants in Ukraine.

Statistical method was useful when considering the data concerning the number of labor immigrants in Ukraine.

The method of generalization was used to formulate the relevant conclusions and suggestions.

2. Literature Review

The issue of protection of the rights of labor migrants were the topic of research in the scientific works of a number of foreign and domestic scholars.

For example, Bohning (1988) studied international labor standards in protecting migrant workers and the members of their families.

Massimo Merlino and Joanna Parkin (2010) emphasize that the problem of labor migration is extremely acute for the EU. Tens of thousands of migrants work overtime in unsuitable conditions to meet their basic needs for food, housing, education, health care, etc. The author examines regulations designed to ensure the rights of migrant workers at three levels: within the EU, at the international level, and at the regional level.

The rights of migrant workers were also investigated within a specific country; for example, Salve (2009) (India), Sönmez *et al.* (2011) (UAE), Kozin *et al.* (2020), Sakharuk *et al.* (2020) (Ukraine).

This issue was also the topic of research of such Ukrainian scientists as Barehamian (2015), Blynova *et al.* (2020), Kelman (2012), Spitsyna (2013), Yatskevych (2015) and others.

However, it is fair to say that the scholars have pointed to the need to improve one or another aspect of protection of the rights of labour migrants in Ukraine, but there was not a comprehensive study on the objective conditions for improving the protection of rights of labour migrants in Ukraine.

That is why the purpose of the article is to clarify the objective conditions for improving the protection of the rights of labour immigrants in Ukraine.

3. Results and Discussion

As of mid-2018, according to the State Statistics Service of Ukraine, the number of immigrants (according to the criteria of Ukrainian legislation) in the country was 273 000 people, which is 0.65% of the average population of the country in January – June 2018. The majority of these are representatives of the former Soviet republics, primarily of the Russian Federation (55.4%). Other numerical groups are

citizens of Moldova (6.6%), Azerbaijan (4.5%), Armenia (4.3%), Georgia (3.9%), Belarus (3.3%), Vietnam and Uzbekistan (0.9% each). In fact, in 2017–2018 the number of foreigners in the country returned to the level of 2014. In 2016–2017, the volume of issued immigration permits in Ukraine decreased by an average of 30% of 2014 when it amounted to 21574 permits against 15068 permits in 2016 and 15213 permits in 2017.

The number of foreigners and stateless persons residing in Ukraine was about 95 000 people in the first half of 2018, which is equal to 0.22% of the average population of the country in January – June 2018. Absolute growth of this immigrant population between 2014 and the first half of 2018 are almost 20 thousand people. The majority of these are representatives are foreign students and labor migrants. Immigrant workers are mainly executives and managers (62.5% in 2015), employed in the wholesale and retail trade (23.1%) and processing industry (16.7%). The largest group among them are thr citizens of Russia (18.8%), Turkey (11.4%), Poland (5.5%), Belarus (5%) and Germany (4%). Before the crisis, the number of foreign students in Ukraine grew steadily and in 2013 reached almost 70 000. The most popular is medical and pharmacological education. Almost half of foreign students are citizens of the CIS countries. However, as a result of the war in the East of the country, the arrival of educational migrants began to decline (International Organization for Migration, 2016).

The results of scientific research show that there is discrimination against immigrants in Ukraine. Although Ukraine has developed and implemented regulations governing foreigners' access to employment, education, health care, and housing, this access remains limited due to the ignorance and low level of language proficiency of migrants, as well as the actions of civil servants, employees of health care system, etc.

The main problems in foreigners' access to employment, according to a survey conducted, are the low level of official employment, difficulties in obtaining a business permit and low awareness of services provided by the State employment service.

Preschool and school education for migrant children is generally available (as confirmed by foreigners and leaders of migrant communities, as well as government officials). Difficulties in placing children in kindergarten and schools are usually not related to citizenship or ethnic origin but are typical for Ukraine's educational system as a whole.

There are problems with the recognition of the foreigners' diplomas of education. In particular, the recognition of refugee diplomas often becomes impossible due to the impossibility of applying to their countries of origin.

The language problem is also acute for migrants. According to the survey, only one tenth of foreigners are fluent in Ukrainian, and slightly less than half – in Russian. Today, the network of institutions based on

which Ukrainian language courses operate is insufficient. As for the courses of history and culture of Ukraine, they do not actually exist. No more than a quarter of those who applied to the health authorities reported problems with treatment. In general, the situation with access to health care facilities is assessed by respondents as much better than with access to other facilities.

Almost half of foreigners need support in providing housing. Most tenants are deprived of the opportunity to register at the place of residence due to the reluctance of landlords to register foreigners in their homes. Lack of registration makes it much more difficult for foreigners to access education, health care and administrative services. The survey showed that foreigners often pay more for housing than Ukrainians; half of the respondents said that Ukrainians prefer their citizens in the provision of rental services (International Organization for Migration, 2014).

In the light of the foregoing, it is worth paying attention to the views of scientists on the need to improve the protection of the rights of labour migrants in Ukraine. For example, Barehamian (2015) emphasizes that a number of issues need to be addressed in order to properly ensure the rights of migrants in Ukraine. In particular, in connection with the implementation of the European Social Charter (Council of Europe, 1996) (revised) the following issues still remain unresolved in Ukraine: 1) our State has not acceded to the fundamental paragraph 1 of Art. 4 of the this Charter, which recognizes the right of employees to remuneration that provides them and their families with a sufficient standard of living; 2) the norms on poverty and extreme poverty, their establishing criteria, in order to strengthen the effectiveness of the entire system of social and legal measures in this area; 3) to increase the impact of standard indicators such as the minimum wage and the minimum pension all provisions on the subsistence level should be removed from the law; 4) the government's right to use this tool in preparing the State budget and practical application of this indicator in the measurement of social assistance should be limited; 5) it is expedient to amend the laws of Ukraine by removing the indicator "subsistence level" as one that does not comply with the Constitution of Ukraine; 6) it is expedient to audit the regulatory framework for occupational safety and health and bring it in line with international standards.

Kelman (2012), having investigated the issue of ensuring the right to work of foreigners in Ukraine, note that the problem of improving the legal mechanisms for ensuring the rights and freedoms of citizens, including their right to work, which is recognized as the most important of all socio-economic rights and the prerequisite for the existence of the latter, remains current topic in many studies.

It is worth to note that the right to work is of basic, fundamental nature; other labour rights derive therefrom. Therefore, the issues that arise in the area of employment deserve special attention, because all competent

persons of any country may be subject to the labour relations of our State. Today, the labor market is open to foreigners despite job deficit and unemployment; the number of immigrants is significantly increasing due to the government's desire to raise Ukraine to interstate status and the European level, which significantly affects the socio-economic development of the country as a whole. The established demographic norms and traditions of the population are destroyed to some extent under the influence of such processes, which contributes to the growth of crisis in the social status of the country. The inadequacy of national legislation in terms of restrictions on the work of foreigners, the existence of contradictory norms, adopted depending on the political situation, significantly reduce the effectiveness of their application, the rule of law and legality.

At the same time, there are more and more people willing to work in Ukraine, both legally and illegally. All this justifies the need for proper legislative consolidation of the mechanism for the implementation of labor rights of foreigners and regulation of labor relations with foreigners in Ukraine. The task of the legislation should be to predict and take into account all possible negative factors in the exercise of the right to work by foreigners.

Levenets (2014), having studied the constitutional rights of foreigners in Ukraine, pays special attention to the need to ensure their right to work. According to the lawyer, the foundation for the constitutional and legal status of any person is his / her rights and obligations enshrined in the Constitution and current legislation. Emphasizing the equality of people in the exercise of their rights and freedoms, some of the articles of the Constitution of Ukraine of the second section (which is devoted to human rights and freedoms) assign them to every person, regardless of whether they are citizens of Ukraine. However, the constitutional and legal status of foreigners still differs significantly from the status of citizens of Ukraine, primarily in relation to restrictions on rights in the political, socio-economic, and labor spheres. The urgency of the research is explained firstly by the extent to which such restrictions are justified in the development of a sovereign, independent, and democratic State, and secondly by the extent to which they meet global trends and international standards in constitutional status of foreigners. Thus, labor, socio-economic, and political rights are the most important and problematic rights of foreigners in Ukraine, which should be discussed in more detail.

As for the real provision of labor rights and freedoms of an individual and a citizen, as well as the guarantees of their observance, it is necessary to study theoretical and practical problems of observance of constitutional guarantees of labor rights of foreign workers in Ukraine; to create really effective mechanisms that would ensure the implementation of constitutional and legal guarantees of labor rights of foreigners and stateless

persons in Ukraine; to improve the current labor legislation and bring it in line with the Constitution of Ukraine and international legal acts (Spitsyna, 2013).

Yatskevych (2015) notes that the strengthening of Ukraine's integration processes with the European Union involves intensification of not only public but also private law relations. This applies to the scope of employment of foreigners in Ukraine, as well as citizens of Ukraine abroad. Efficiency, transparency, and simplification of employment of foreign nationals under an employment contract with an employer of Ukrainian jurisdiction should be ensured taking into account national interests of Ukraine and should promote the creation of new jobs, the modernization of production, foreign investment inflows and strengthening the rule of law, in particular through effective legal guarantees of realization of the right to work by both residents and non-residents.

The scientist correctly states that under the conditions of growing investment activity and low unemployment in the country, attracting foreign labor (both skilled and unskilled workers) may result in the expansion of production, and thus in economic growth. Therefore, providing transparent and understandable conditions for legal employment of foreigners will only increase investment in Ukraine's economy. Adherence to the principles of non-discrimination, the rule of law and the protection of the national interests in the employment of foreigners will testify to the establishment of democratic principles in Ukraine, approximation to the European standards in the social sphere. After all, foreigners in Ukraine have the same rights and obligations as the citizens of Ukraine, except for the restrictions established by law. Transparent and motivated legal regulation of these restrictions is one of the important legal guarantees of ensuring the right of foreigners to work. The realization of such right by non-residents of Ukraine through concluding an employment contract in cases specified by law provides for the issuance of work permission for the foreigners, which is part of the legal fact along with the conclusion of an employment contract. Further progress of Ukraine on the path of reforming labor relations provides for the legislative enshrinement of a clear procedure for employment of foreigners in the territory of our State in the future Labor Code of Ukraine.

Kovalenko (2018) emphasize that the strengthening of Ukraine's integration processes with the European Union involves the intensification of not only public but also private law relations and provides greater transparency of Ukraine's labor market to foreign labor, which leads to increased competition between the employees in this market. In turn, this necessitates the implementation of a consistent and balanced State policy in the labor market, which would ensure the necessary balance between the interests of the State, employers and the national economy and the interests of employees. One of the tools for implementing such a policy,

creating the necessary conditions to protect the national labor market is the introduction of mechanisms of State influence in this market and elements of control over the use of foreign labor in Ukraine while fully respecting the interests and equality of Ukrainian citizens and foreigners as employees.

The positions of the indicated authors and several other researchers eloquently demonstrate that the current state of legal regulation of the legal status of immigrants, in terms of exercising their labor rights in Ukraine and their protection, needs improvement, due to the need for proper implementation legal requirements and the needs of economic development of our country.

According to Article 26 of the Constitution of Ukraine (LU 254k/96-VR/1996, June 28), foreigners and stateless persons legally staying in Ukraine enjoy the same rights and freedoms, as well as bear the same obligations as the citizens of Ukraine with exceptions provided by the Constitution, laws or international treaties of Ukraine. This constitutional provision also applies to the right to work guaranteed by Article 43 of the Constitution of Ukraine. According to this article, everyone has the right to work, which includes the opportunity to gain a living by work, which he (she) freely chooses or freely agrees to. The use of forced labor is prohibited. Military or alternative (non-military) service, as well as work or service performed by a person under a sentence or other court decision or in accordance with the laws on martial law and the state of emergency, shall not be considered forced labor. Everyone has the right to adequate, safe and healthy working conditions, to wages not lower than those specified by law. It is prohibited to employ women and minors in jobs that are hazardous to their health. The right to timely remuneration for work is protected by law.

Article 24 of the Constitution of Ukraine should be mentioned in this context as well. It provides that there should be no privileges or restrictions on the grounds of race, color, political, religious or other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other features. Equality of the rights of women and men is ensured: by providing women with opportunities equal to those of men, in public and political, and cultural activity, in obtaining education and in professional training, in work and its remuneration; by special measures for the protection of work and health of women; by establishing pension privileges, by creating conditions that allow women to combine work and motherhood; by legal protection, material and moral support of motherhood and childhood, including the provision of paid leaves and other privileges to pregnant women and mothers.

These constitutional provisions are translated in the Labor Code of Ukraine (LU 322-VIII/1971, December 10) and the Law of Ukraine "On Employment". Thus, Article 2 of the Labor Code of Ukraine provides that the State creates conditions for effective employment, promotes employment,

training and retraining, and if necessary, provides retraining of persons released as a result of the transition to a market economy. Employees exercise the right to work by concluding an employment contract with an enterprise, institution, organization or an individual. Employees have the right to rest in accordance with the laws on the restriction of working days and working weeks and on annual paid leave, the right to healthy and safe working conditions, to unite in trade unions and to resolve collective labor disputes in the manner prescribed by law, to participate in the management of the enterprise, institution, organization, to material provision in old age or in the event of illness, full or partial disablement, to financial assistance in case of unemployment, the right to appeal to court to resolve labor disputes, regardless of the nature of the work performed or position held, except as provided by law, as well as other rights established by law.

Besides, Article 2-2 of this Code stipulates that any discrimination in the area of labor is prohibited, including violation of the principle of equality of rights and opportunities, direct or indirect restriction of workers' rights depending on race, color, political, religious and other beliefs, sex, gender identity, sexual orientation, ethnic, social and foreign origin, age, health status, disability, suspected or present of HIV / AIDS, marital and property status, family responsibilities, place of residence, membership in a trade union or other association of citizens, participation in a strike, appeal or intention to appeal to court or other agencies to protect their rights or provide support to other employees in defending their rights, notification of corruption or corruption-related offenses, other violations of the Law of Ukraine "On Corruption Prevention" as well as assisting a person in making such a report, on linguistic or other grounds not related with the nature of the work or the conditions under which it is performed.

As for the Law "On Employment" (LU 5067-VI/2012, July 05), it enshrines that everyone has the right to freely chosen employment. Forced labor in any form is prohibited. Voluntary unemployment of a person cannot be the ground for bringing him (her) to justice. Employment is provided by establishing relations governed by employment agreements (contracts), conducting business and other activities not prohibited by law. Foreigners and stateless persons permanently residing in Ukraine, or recognized as refugees in Ukraine, or granted asylum in Ukraine, or recognized as persons in need of additional protection, or granted temporary protection, as well as those who have obtained immigration authorization, have the right to employment on the grounds and in the manner prescribed for the citizens of Ukraine. Foreigners and stateless persons who arrived in Ukraine for employment for a definite period are hired by employers on the basis of a work permission for foreigners and stateless persons issued in the manner prescribed by this Law, unless otherwise provided by international treaties of Ukraine recognized by the Verkhovna Rada of Ukraine.

The Law of Ukraine “On International Labour Migration” (LU 761-VIII/2015, November 05) enshrines the rights and social guarantees of labor migrants and members of their families. In particular, the Law provides for the rights of migrant workers to appropriate working conditions, remuneration, recreation and social protection, participation in the system of compulsory State social insurance, pensions, receiving education in Ukraine in accordance with the law, participation in public associations, addressing their national, cultural, educational, spiritual, and linguistic needs.

Despite the positive novelties, some issues important for migrant workers mentioned in the Law are very vague, some are missed altogether. Therefore, the Law “On International Labour Migration” is important, but only the first step towards settling legal relations arising from labor migration. Harmonization of current legislation, as well as the development of new regulations necessary for its implementation is ahead.

In April 2017, the Government approved an Action Plan to ensure the reintegration into society of migrant workers and their families (Order of the Cabinet of Ministers of Ukraine. 2017(1), April 12), developed to implement the abovementioned Law. Unfortunately, it did not specify to the declared norms, as it mostly contained provisions such as promoting the employment of foreigners, studying foreign experience, providing consultations, etc.

In July 2017, the Government of Ukraine adopted the Strategy of State Migration Policy for the period up to 2025 (Order of the Cabinet of Ministers of Ukraine. 2017(2), July 12). The International Organization for Migration and the European Union provided significant assistance in developing the Strategy, advising on the adaptation of best international practices to the Ukrainian legislation. During the development of the document, the latest migration policy strategies of a number of EU countries and the Eastern Partnership (Bulgaria, Georgia, Finland, Hungary, Moldova, Poland, Slovakia) were studied and taken into account.

In contrast to previous attempts to conceptualize the State’s migration policy, the Strategy has more profound and comprehensive approach. It contains a number of new and progressive elements, which were practically not mentioned in previous political documents. In particular, the Strategy provides for the involvement of highly qualified foreign specialists in accordance with the needs of economic and social development of the State.

Particular attention is paid to the integration of immigrants into Ukrainian society as a bilateral process involving both migrants and the local population. It is proposed to introduce a mechanism and programs to regularize illegal migrants who have lived in the country for a long time, have families and jobs, have not committed serious violations of the law,

and cannot be expelled for humanitarian reasons. An important place in the Strategy is given to the improvement of accounting, information, and statistical support of migration policy, as well as coordination of the activities of various agencies, which, of course, should be considered as positive features of the document.

To increase the effectiveness of Ukraine's immigration policy for the period up to 2025, the following measures should be taken:

- to do polling of the situation of foreigners.
- to introduce an exchange of information between communities, public organizations, and governmental structures of Ukraine, in particular information on the number and composition of members of migrant organizations, the problems they face, the assistance they need.
- to develop and disseminate informational and educational materials to acquaint immigrants with the mechanisms for the protection against discrimination in their national languages.
- to create conditions for the adaptation of the educational process for migrants and stateless persons who do not have sufficient knowledge of the State language by developing and implementing methods of teaching foreigners and publishing specialized textbooks.
- to study the issues of attracting migrants to Ukraine by developing the relevant migration programs.
- to identify the categories of migrants to be regularized, etc.

Despite the advantages of the Strategy, a number of its provisions raise certain reservations. Firstly, the Strategy of State Migration Policy was approved by an Order of the Cabinet of Ministers of Ukraine, i.e. it is a document whose level hardly corresponds to the severity of migration problems that need to be addressed. The scope of the Strategy is quite large, it formulates 13 goals and numerous tasks aimed at achieving them. As a result, the text is misrepresented in some places by the activities planned by various agencies that participated in its development (Ministry of Internal Affairs, State Migration Service of Ukraine, State Border Service of Ukraine), which is detrimental to the clarity of the State goals and objectives in the area of migration.

Conclusion

The role of migration as a factor of socio-economic development increases significantly under conditions of depopulation (stable excess of the number of deaths over the number of births). Due to the exhaustion of the potential for demographic growth in Ukraine, a further decrease in the total population is inevitable, especially in working age. Maintaining stable population and an acceptable level of the ratio between different age groups in economically developed countries is possible due to the migratory influx of population from developing countries. In this regard, the problem of protection of migrant's rights is of paramount importance.

Summing up the results of the presented research, we can state that in general, Ukrainian legislation on the one hand provides general guarantees to prevent discrimination against immigrants in terms of exercising their right to work in Ukraine. At the same time, the implementation of the rights of immigrants in our country depends on a number of conditions. Firstly, we are talking about the specifics of the legal framework for the employment of such categories of workers.

Besides, the analysis of a number of scientific views and provisions of existing regulations showed that there are a number of gaps and shortcomings in the area of protection of the rights of labour migrants in Ukraine which should be addressed in such directions:

- to strengthen the guarantees of immigrants' labor rights.
- to address inconsistencies in legislation regarding remuneration of immigrant employees.
- to review the problems of social protection of this category of workers (to enshrine clear rules for the provision of pensions for immigrants, to clarify the issue of taxation of migrant workers' wages, to specify the migrants' guarantees in the area of education,).
- to address the issue of the exercise of the voting rights of the immigrants, which is extremely painful for migrants and inevitably escalates during every parliamentary or presidential elections.

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CUESTIONES POLÍTICAS

Vol.39 N° 68

*Esta revista fue editada en formato digital y publicada en enero de 2021, por el **Fondo Editorial Serbiluz**, Universidad del Zulia. Maracaibo-Venezuela*

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