November 14, 2023

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528

Charles L. Nimick
Chief
Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: **DHS Docket No. USCIS-2023-0012: Modernizing H-2 Program Requirements, Oversight, and Worker Protections**

Dear Secretary Mayorkas and Mr. Nimick:

Western Growers respectfully submits the following comments in response to the U.S. Department of Homeland Security proposed rule referenced above.

Western Growers is an agricultural trade association headquartered in Irvine, California with members that grow, pack, and ship fruits, vegetables, and tree nuts from California, Arizona, New Mexico, and Colorado. Beyond our home states, Western Growers members produce in and directly contribute to the economies of more than 30 states and 25 countries. In total, Western Growers' members account for roughly half of the annual fresh produce and tree nuts grown in the United States, providing American families with healthy, nutritious food. In addition, Western Growers serves as an H-2A filing agent on behalf of its members, and as such, Western Growers staff is intimately familiar with the technical aspects of the H-2A application process and associated challenges and costs.

GENERAL COMMENTS

We thank the Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") for the opportunity to provide public comment on the Notice of Proposed Rulemaking ("NPRM") entitled Modernizing H-2 Program Requirements, Oversight, and Worker Protections published in the Federal Register on September 20, 2023.[1] We appreciate the provisions of this NPRM that would streamline the process of applying for H-2 workers and "harmonize the grace periods afforded" to both H-2A and H-2B workers before and after H-2

[1] 88 Fed. Reg. 65040, Modernizing H-2 Program Requirements, Oversight, and Worker Protections (Sept. 20, 2023).

contracts. This should provide H-2 workers and employers with a sufficient amount of time to allow workers to transfer employment upon the completion of a contract.[2] We do have concerns, however with some of the "due diligence" provisions necessary to ensure an employer is not debarred from the H-2 programs for the actions of unknown third parties.[3] We ask for clarity and further justification in this "due diligence" requirement.

WORKER FLEXIBILITIES

As noted above, providing parity in the grace periods to both H-2 programs is helpful to H-2 workers and employers in navigating the logistical challenges of ensuring everyone arrives with enough time to prepare for the contract. Further, this allows additional time for successive petitions to be processed by USCIS prior to the next contract start date. Another concern is that H-2 workers who work on three successive contracts will be left with no time to prepare to leave the country to return home after their third contract expires. As a potential solution, DHS should consider providing a minimum grace period for such situations to ensure H-2 workers do not inadvertently overstay. Many employers book and prepare outbound travel for the whole H-2 workforce; workers who do not have enough of a grace period might accidentally overstay while waiting for the employer scheduled transportation. Ongoing airline challenges including flight delays and cancellations should be considered when contemplating a grace period.

Harmonizing the grace periods is a welcomed change, but the 60-day cessation of work grace period as described raises concern. Employers and H-2A workers enter a mutually beneficial contract. Employers put forth capital and investment to meet the requirements of the program including transportation and free housing, acting with an expectation of work for the duration of a specified period. H-2A workers, for their part, agree to work for a term in exchange for agreed upon wages and other benefits that come with the program. We are concerned that a 60-day grace period after an employer has spent considerable time and expense for the H-2A worker to travel to the U.S. could lend itself to H-2 workers arriving then immediately quitting to spend 60 days without risk to look for another H-2 job elsewhere.

Our members who utilize the H-2A program enjoy good relationships with workers who choose to return year after year. In fact, most H-2A employers across the country maintain good practices to allow for the continued use of these programs. There are over 17,688 unique H-2 employers that filed for H-2 workers in Fiscal Year 2023 and currently only 99 H-2 employers are debarred from the programs.[4] Meaning a mere 0.0056% of H-2 employers have violated the H-2 programs and been removed from the ability to use the programs. While the 60-day grace period might be warranted if the Department revokes an H-2 employer's petition, it is not necessary or justified for the majority of H-2 employers and the associated uncertainty would have a detrimental impact on labor intensive American agriculture.

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[2] *Id*. at 65063.
[3] *Id*. at 65055.
[4] *See* U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Program Debarments, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf (last visited October 31, 2023). *See also* U.S. Citizenship and Immigration Service, H-2A Employer Data Hub, https://www.uscis.gov/tools/reports-and-studies/h-2a-employer-data-hub (last visited October 31, 2023) and U.S. Citizenship and Immigration Service, H-2B Employer Data Hub, https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub (last visited October 31, 2023).

Relatedly, we understand the Department's proposal to remove the requirement to participate in E-Verify in order to employ H-2A workers immediately upon receipt of a non-frivolous petition, which will open up the use of transfer petitions within the H-2A program. We welcome this proposal. However, in considering the Department's other ongoing rulemaking, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, if the increased fee schedule is implemented it will likely chill the use of this proposal as the cost of filing a named petition is proposed to go up by at least $1,220.[5] We oppose the proposed fee increase for a number of reasons, including the ability to take advantage of in country transfers.

We support the proposal to allow an H-2 worker to have a "dual intent" of being both a non-immigrant and an immigrant for purposes of obtaining a green card. We ask the Department to clarify that employers can sponsor H-2 workers for permanent positions within the employer's business even if those positions are the same the employer is petitioning for as this could help employers sponsor H-2 workers more frequently.

Interrupted Stay Calculation and 3-Year Clock

We welcome the proposed common-sense simplification of the interrupted stay calculation and resetting of the 3-year clock with remaining outside the U.S. for 60 days. This should work well when H-2 workers leave via an airport, however land border crossing is not tracked. Given the great number of H-2 workers that cross the land border with Mexico, the Department should implement a method of tracking when an H-2 worker leaves the country. This clarification would prevent issues when the H-2 workers try to return to the U.S. and could be accomplished by simply including a function in the CBP One application that allows the H-2 worker to log their location when returning to Mexico.

Beneficiary Notification

Regarding notification of beneficiary's immigrant status, the Department could implement an electronic notification of both beneficiaries' and employers' status in the process. Further, we recommend the Department seek to make the entire filing process electronic, like the Department of Labor's FLAG system, which will reduce the cost and time to employers and the Department. Such a change would also allow for information to be shared with named beneficiaries through electronic means.

Prohibition on Fees

The Department's proposal that employers perform "due diligence" or have some "extraordinary circumstance" beyond the employer's control is ill-defined. The Department fails to fully develop "due diligence" and therefore we cannot meaningfully comment on this proposed provision. The Department also fails to explain what "extraordinary circumstances" would allow an employer to avoid liability for prohibited fees charged by a third-party during the recruitment process. Further, the Department should explain "similar employment services," given the

[5] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 88 Fed. Reg. 402 (Jan. 4, 2023).

Department's push for employers to recruit from the Northern Central American countries through the ministries of labor. The Department should define these terms and republish the NPRM, allowing for meaningful participation in the notice and comment process.

Denials For Certain Labor Law Violations

The Department's proposal to use discretionary authority to deny a petition when an employer has been subject to administrative action by Wage and Hour Division ("WHD") that resulted in a finding not requiring debarment is troubling. If WHD has investigated and made a finding, but determined that debarment is not necessary, the Department should not then seek to deny an employer's petition, effectively debarring the employer from the H-2 programs. Existing remedies remain sufficient, as was mentioned previously there are only 99 debarred employers and agents in the H-2 programs representing 0.0056%

CONCLUSION

We thank you for the opportunity to comment on this proposed regulation. We disagree with the Department on several aspects of this proposed regulation but find it important to share our perspective on this important program. We look forward to your responses to these comments and to continuing the conversation toward a better H-2A program for all.

Respectfully submitted,

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Western Growers