November 20, 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:

On behalf of the National Council of Farmer Cooperatives ("NCFC"), please accept the following comments on the Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services' ("USCIS") Notice of Proposed Rulemaking regarding the Modernizing H-2 Program Requirements, Oversight, and Worker Protections, 88 FR 65040 (Sept. 20, 2023) ("Proposed Rule").

Since 1929, NCFC has been the voice of America's farmer cooperatives. NCFC members include regional and national farmer cooperatives, which are in turn composed of over 2,500 local farmer cooperatives across the country. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives—businesses owned, governed, and controlled by farmers and ranchers—are an important part of the success of America's agricultural supply chain that includes suppliers of goods and services to the country's working lands, the farmers and ranchers responsible for the abundance that comes from those lands, and the processing, manufacturing, packaging, marketing, and sale of that abundance to agriculture's customers.

GENERAL COMMENTS

There are some 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 contracts which will provide H-2 workers and employers with sufficient

time to ensure workers can transfer to new employment upon the completion of a previous contract.[1] However, the regulated community is very concerned with some of the provisions surrounding the "due diligence" that is needed to ensure an employer is not debarred from the H-2 programs for the actions of unknown third parties.[2] This "due diligence" requirement is not well described and comes across more as an idea than a proposal from the Department.

WORKER FLEXIBILITIES

As mentioned, harmonizing the grace periods in the H-2 programs is helpful to H-2 workers but also employers in allowing for the logistical challenges of ensuring everyone arrives with enough time to prepare for the contract, but also allows sufficient time for successive petitions that are timely filed to be processed by USCIS prior to the next contract start date. There is a concern though that H-2 workers that continue three successive contracts will be left with no time to prepare to leave the country after their third contract expires. DHS should consider providing a minimum grace period, such as five days, in those situations to ensure H-2 workers do not inadvertently overstay. Many employers book and prepare their outbound travel for the whole H-2 workforce and one worker who does not get any grace period could overstay unknowingly while waiting for the employer scheduled transportation. Or, their flight could get delayed or canceled and must move to a later flight on another day. Adding a minimum grace period would benefit H-2 workers and allow them to return to the U.S. without any unauthorized stay.

Although harmonizing the grace periods is a welcomed change, as described the 60-day cessation of work grace period has employers concerned that it can be abused. While it may be true that some H-2 employers may take advantage of their H-2 workforce, that certainly is not true for the majority of H-2 employers. 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.[3] Meaning 0.0056% of H-2 employers have violated the H-2 programs and been removed from the ability to use the programs. The 60-day grace period is completely reasonable when the Department revokes an H-2 employer's petition, this is the exact type of employer that we should all be protecting H-2 workers and U.S. workers against, the 0.0056% of H-2 employers.

However, employers are concerned that providing a 60-day grace period after an employer has spent considerable time and expense for the H-2 worker to arrive in the U.S. could lead to H-2 workers arriving and quitting to spend 60-days to search for a higher paying H-2 job somewhere else. Should there be an affirmative duty of the H-2 worker to attempt to resolve workplace claims or concerns with the employer prior to quitting, since the employer has committed time and expense in exchange for the workers ability to enter and work in the U.S.? The H-2 worker, if they end up ceasing employment, will ultimately have a 60-day grace period

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[1] *Id*. at 65063.
[2] *Id*. at 65055.
[3] *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).

so there should be less concern about reprisal as the H-2 worker will have the ability to seek other H-2 employment if they are unable to resolve the dispute with their sponsoring employer. Should there be a presumption of intent to defraud an employer if the H-2 worker arrives and leaves within a short period of time without trying to resolve any workplace dispute?

The proposal by the Department of removing the requirement to participate in E-Verify in order to employ H-2A workers immediately upon receipt of a non-frivolous petition will open up the use of transfer petitions within the H-2A program. However, the Department's other ongoing rulemaking U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements if implemented as proposed will likely chill the use of this proposal as the cost of filing a named petition is proposed to go up by $1,220.[4] Employers welcome this change, but oppose the proposed increase in fee to take advantage of in country transfers.

In the NPRM the Department is proposing to allow an H-2 worker to have "dual intent" of being an immigrant and a non-immigrant for purposes of obtaining a green card. The employer community welcomes this change. However, the Department in the final proposal should further clarify its belief 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. Although employers' have seasonal and temporary positions, their permanent staff often work in the same seasonal or temporary position year-round as well, their need for such staff is just reduced in their off season. If the Department could clarify this intention, it would help employers sponsor H-2 workers more frequently.

Interrupted Stay Calculation and 3-Year Clock

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

Preliminary Public Input Related to Beneficiary Notification

The Department requested preliminary input regarding notification of beneficiary's immigrant status. The Department could implement, through the current technology the Department possesses, an electronic notification of not just beneficiaries but employers' status in the process. The Department should seek to make the entire filing process electronic, which will reduce the cost and time to employers and the Department. This would additionally allow for information to be shared with named beneficiaries through electronic means as well. Given the already broad amount of information the Department stores electronically, it is inconceivable that

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

employers still must file their petitions in paper, only to be transcribed and entered into the Department's electronic system.

Prohibition on Fees

The Department's proposal that employers must perform "due diligence" or have something "extraordinary circumstances" beyond the employer's control is ill defined. The Department fails to explain what "due diligence" entails and therefore regulated community cannot meaningfully comment on this proposed provision. In addition, the Department fails to explain what "extraordinary circumstances" would allow an employer to avoid liability for prohibited fees charged by some third-party within the recruitment pipeline. Further the Department fails to explain what it means by "similar employment services," which is problematic given the Department's push for employers to recruit from the Northern Central American countries through the ministries of labor. Do the ministries of labor count as "similar employment services"? Given the recent events where a ministry of labor employee in one of the Northern Central American countries was arrested for charging illegal fees, this vague provision has employers concerned about using their services. Even more troubling is reports that a Georgia State Workforce Agency employee was charged with participating in the trafficking in the Operation Blooming Onion case, is that a "similar employment service"? Because of these ill-defined terms in each of these provisions the regulated community has not had a meaningful opportunity to comment. The Department should endeavor to define these terms and republish the NPRM, allowing the regulated community to meaningfully participate 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. As 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. It is important for the purposes of the Administrative Procedure Act protections afforded the regulated community that this opportunity to comment was presented and we hope the Department takes meaningful and due consideration of these comments.

Sincerely,

Charles F. Conner
President & CEO