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ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV

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

Brian D. Pasternak
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

RE: Comments on Temporary Rule: Docket No. ETA-2024-0002-0001 – Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers (RIN 1205-AC20/1615-AC95)

Dear Messrs. Nimick and Pasternak:

On behalf of the National Association of Home Builders of the United States (NAHB), I am pleased to submit these comments in response to the Department of Homeland Security (DHS) and Department of Labor (DOL) (collectively referred to as the “Departments”) temporary rule to Increase the Numerical Limitation for Fiscal Year (FY) 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers that was published in the Federal Register on Dec. 2, 2024 (89 Fed. Reg. 95,626). As interested stakeholders in this regulatory activity, NAHB urges the Departments to consider the following recommendations as it proceeds with this and subsequent rulemakings.

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Residential construction has faced a persistent labor shortage over the past several years, which has resulted in higher costs and longer construction times. Currently, in any given month, there is a shortage of roughly 200,000 to 400,000 construction workers and home builders will need to add 2.2 million new workers over the next three years just to keep up with demand. Supporting funding for building and construction trades education, providing more placement services to job seekers and adopting immigration policies that preserve and expand existing temporary work visa programs while also creating new market-based visa programs to match demand with available labor will go a long way toward easing the ongoing labor shortage in the home building industry.

I. The Need for Access to Nonimmigrant Workers to Complement the Nation’s Skilled Workforce

Home builders rely on askilled and capable workforce to meet the nation’s housing demand. Although NAHB and its members take efforts to recruit and retain U.S. workers for the residential construction sector, noncitizens have historically played, and will continue to play, a vital role in supplementing the much-needed workforce to address the industry demand. In fact, the U.S. Bureau of Labor Statistics found there were 276,000

open construction positions as of November 2024,¹ and although H-2B visa workers satisfy only a small percentage of workers needed to meet that demand,² the program has allowed some employers with peak, seasonal labor needs to secure additional workers to supplement their regular employees.

As the administration works to address the critical worker shortage across construction and other industries, it must consider modernizing its approach to the temporary worker visa programs to help fill the gaps in the workforce. For instance, under the Immigration and Nationality Act (INA), Congress set a statutory numerical limit on the total number of H-2B visas at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (Oct. 1 - March 31) and 33,000 for workers who begin employment in the second half of the fiscal year (April 1 – Sept. 30).³ However, this arbitrarily set number does not adequately address the demand for these workers. Even with the 66,000 visas available annually, in addition to the 64,714 visas allocated under this temporary final rule for FY 2025,⁴ this allotment fulfills less than half of the total demand for these workers according to FY 2024 numbers.⁵ NAHB has advocated for Congressional action on the creation of a new temporary worker visa program with its limits driven by market demand and believes the H-2B program should adopt the same approach. In addition, NAHB strongly urges the administration to engage in outreach efforts to Congress to revise the statutory cap under the INA with a market-based approach for determining visa allocation.

II. NAHB's Response to the Temporary Final Rule

In accordance with the passage of the Continuing Appropriations and Extensions Act of 2025 (Public Law 118-83),⁶ DHS and DOL published a temporary final rule authorizing the issuance of no more than 64,716 additional visas for the entirety of FY 2025.⁷ This rulemaking included additional requirements for employers filing an H-2B petition that have been included in past rulemakings concerning H-2B visa limit increases from the previous administration, such as the completion of a new attestation form and written notification of the job opportunity to the AFL-CIO from employers in certain industries.⁸ Although NAHB supports the issuance of additional visas to address critical worker shortages within construction and other industries, NAHB is disappointed to see the inclusion of these same provisions in this latest rulemaking. NAHB urges the Departments to issue a revised rulemaking that removes the shortcomings identified below and maintain a policy to exclude these additional administrative burdens in subsequent rulemakings.

¹ U.S. Bureau of Labor Statistics, *Job Openings and Labor Turnover – November 2024*, <https://www.bls.gov/news.release/jolts.t01.htm> (Accessed Jan. 22, 2025).

² 89 Fed. Reg. at 95,638. According to the temporary rule, approximately 90% of H-2B filings were for positions within five sectors in FY 2024. Of those five sectors, NAICS code 23 (construction) accounted for less than 12% of those filings.

³ <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants>.

⁴ 89 Fed. Reg. at 95,626.

⁵ Program data from the Office of Foreign Labor Certification found employers requested for more than 250,000 workers who are subject to the H-2B visa cap during FY 2024. This does not include the additional 30,000 requested workers who are exempt from the numerical limit. See <https://www.dol.gov/agencies/eta/foreign-labor/performance> (Accessed Jan. 28, 2025).

⁶ <https://www.govinfo.gov/content/pkg/PLAW-118publ83/pdf/PLAW-118publ83.pdf>.

⁷ 89 Fed. Reg. at 95,626.

⁸ 89 Fed. Reg. at 95,627.

i. Job Notification to AFL-CIO

As part of the temporary rule, employers filing a petition must now provide a copy of the job notice to the AFL-CIO, and NAHB is concerned this additional step places an unnecessary burden on businesses that are in critical need of workers. First, there is no statutory language in either Public Law 118-83 or the Further Consolidated Appropriations Act of 2024 (Public Law 118-47) that directs the Departments to implement this provision. Instead, the laws only state the DHS secretary, after consultation with the DOL secretary, may increase the total number of aliens who may receive a visa without reference to the aforementioned condition.⁹

Second, the Departments are implementing this provision on the assumption that it will increase outreach to qualified U.S. workers. However, NAHB believes this requirement is purely duplicative of the steps already required of petitioners to recruit U.S. workers. Prior to implementation of this new requirement, and consistent with past rulemakings increasing the H-2B visa limit under the previous administration, employers must already take the following steps before receiving a temporary labor certification from DOL:

1. No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;
2. Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;
3. Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning during a certain amount of time, and until the date the H-2B petition is filed, disclose the terms of the job order and solicit their return to the job; and
4. Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative.

As part of these requirements – particularly, sending a job notice to the SWA – the rulemaking explicitly states DOL's encouragement of union(s) or hiring halls representing workers in occupations typically used in the H-2B program to proactively contact and establish partnerships with SWAs in order to obtain timely information on available temporary job opportunities.¹⁰ While this relationship is not a requirement on any of the parties involved, NAHB believes it is the responsibility of union organizations to establish these connections with SWAs and not rely on government mandates to determine their involvement.

Further, NAHB believes the requirement to file the job notice with the AFL-CIO fails to acknowledge the rate in which workers are even represented by unions, which has decreased within the construction industry from 11.4 percent in 2023 to 11.2 percent in 2024.¹¹ Considering the overwhelming majority of private-sector construction workers choosing not to join a union, coupled with the consistent decrease of union activity over the past five decades, NAHB questions the Departments' reference to unions as an "essential conduit" for connecting workers with hiring employers and listing construction as an industry with "traditionally or customarily unionized" occupations.¹²

⁹ 89 Fed. Reg. at 95,630.

¹⁰ 89 Fed. Reg. at 95,655.

¹¹ U.S. Bureau of Labor Statistics, Union Members – 2024, Jan. 28, 2025, <https://www.bls.gov/news.release/union2.t03.htm> (Accessed Jan. 28, 2025).

¹² 89 Fed. Reg. at 95,656.

Finally, since the Departments are requiring efforts that supposedly complement the efforts of the SWA, NAHB believes the AFL-CIO should not be the only organization capable of performing these additional recruitment efforts. In fact, given the rate of union membership across various industries, many of the areas in which employers will recruit U.S. workers may be places where alternative organizations would be more helpful in conducting recruitment efforts in tandem with the efforts of the SWAs. State and local trade associations or workforce boards, for example, may be better equipped to connect U.S. workers with employers through their respective networks of union-affiliated or unaffiliated workers.

For the reasons set forth above, NAHB urges the Departments not only to remove the union notification requirement within this rulemaking, but to refrain from implementing this requirement in future temporary rules that increase the numerical limit of H-2B visas, among other things, as authorized by Congress. Absent the removal of this requirement in subsequent rulemakings, NAHB urges the Departments to engage in a separate rulemaking that specifically addresses the requirement for employers to file a job notice with the AFL-CIO and consider similar organizations that meet certain criteria and can perform the same recruitment duties as the AFL-CIO.

ii. Attestation Form

Another problematic requirement within the temporary rule directs employers to fill out a new attestation form, Form ETA-9142-B-CAA-9,¹³ to demonstrate current or impending irreparable harm. NAHB contends this form is overly burdensome and may discourage employer participation even when noncitizen workers are needed to address labor shortages. NAHB believes that, in addition to filling out the three-page Form ETA-9142-B-CAA-9 and the 38-page Form I-129 (note the page counts do not include additional paperwork that may be needed to accurately complete these forms), the DHS's new attestation form is duplicative and unnecessary. If petitioners invest resources into seeking a temporary labor certification from DOL and submitting Form I-129 and other documentation, the Departments should recognize within these efforts the implied need for H-2B workers. Therefore, we urge the Departments to remove this requirement as part of this notice and exclude the attestation form from subsequent rulemakings.

III. Conclusion

NAHB is pleased the Departments are taking action to address the current labor challenges through expanding the number of available H-2B visas. Thank you for your consideration of these comments and NAHB welcomes the opportunity to work with your respective agencies to find workable solutions for the critical labor shortages faced by many in the construction industry. Additionally, NAHB supports the implementation of common-sense policies that promote the recruitment of U.S. workers and streamline the process for nonimmigrant worker access to fill the gaps in our nation's workforce so our members can continue to provide for the American dream of homeownership.

¹³ https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form%20ETA%209142-B-CAA-9_Attestation%2012.2.24%20Final.pdf.

National Association of Home Builders (NAHB)

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Please contact me at (202) 266-8265 or via email at bmannon@nahb.org if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'B Mannion', with a stylized, cursive script.

Brad Mannion
Director, Labor, Safety & Health
National Association of Home Builders
of the United States