JUSTICE at WORK

Formerly known as Friends of Farmworkers

# Comment on Proposed FY2023 Department of Homeland Security and Department of Labor Regulations Extending H-2B Cap

The H-2B visa program permits the Department of Homeland Security (DHS) to grant U.S. employers temporary visas to import foreign workers "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). To implement that statutory requirement, DHS requires employers seeking H-2B visas to obtain a "temporary labor certification" from the Secretary of Labor (DOL) stating that (i) U.S. workers are not available to fill the employer's job positions and (ii) the work terms offered will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(6)(iv)(A); see also 8 U.S.C. § 1182(a)(5)(A)(i)(II).

Expansion of the H-2B program *without* effective provisions to enforce these statutory requirements violates the statutory duties of both DHS and DOL.

On October 12, 2022 the Secretary of Homeland Security announced an intent to issue a regulation pursuant to authority granted by DHS Congressional appropriation rider to "…make available to employers an additional 64,716 H-2B temporary nonagricultural worker visas for fiscal year (FY) 2023, on top of the 66,000 H-2B visas that are normally available each fiscal year." The announcement further stated that "…[t]he H-2B supplemental includes an allocation of 20,000 visas to workers from Haiti and the Central American countries of Honduras, Guatemala, and El Salvador." The announcement further stated:

> In addition to the 20,000 visas reserved for nationals of Haiti and the Northern Central American countries, the remaining 44,716 supplemental visas will be available to returning workers who received an H-2B visa, or were otherwise granted H-2B status, during one of the last three fiscal years. The regulation will allocate these remaining supplemental visas for returning workers between the first half and second half of the fiscal year to account for the need for additional seasonal workers over the course of the year, with a portion of the second half allocation reserved to meet the demand for workers during the peak summer season.

See: https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023.

The October 12, 2022 announcement further stated:

> At the same time, DHS and DOL are working together to institute robust protections for U.S. and foreign workers alike, including *by ensuring that employers first seek out and recruit American workers for the jobs to be filled, as the visa program requires*, and that *foreign workers hired are not exploited by unscrupulous employers*.

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> To address these issues more broadly, the departments announce the creation of the *H-2B Worker Protection Taskforce* ("Taskforce"). Convened by the White House, the Taskforce will focus on (1) threats to H-2B program integrity, (2) H-2B workers' fundamental vulnerabilities, including their limited ability to leave abusive employment without jeopardizing their immigration status, and (3) the impermissible use of the program to avoid hiring U.S. workers. The departments will assess a variety of policy options to address these issues and will provide an opportunity for relevant stakeholders to offer input. The work of the Taskforce will build on ongoing efforts in both departments to reform the H-2 temporary visa programs. In the coming months, DHS also plans to issue a notice of proposed rulemaking relating to the H-2 programs, which will incorporate policies that strengthen protections for H-2 workers.

The purpose of this comment is not to address the merits of an increase in the cap on the number of H-2B workers, but to:

- Highlight deficiencies in the promulgation of temporary regulations in past fiscal years implementing the authority pursuant to Congressional Appropriation Riders authorizing the Secretary of Homeland Security to exceed the statutory cap on H-2B workers
- Highlighting the regulatory changes immediately appropriate to ensure that "*…employers first seek out and recruit American workers for the jobs to be filled."*
- Address regulatory changes immediately appropriate to reduce the opportunities for exploitation of temporary foreign workers

**Compliance with the Administrative Procedure Act**

Past rulemaking implementing discretionary authority of the Secretary of Homeland Security has failed to comply with requirements of the Administrative Procedure Act (APA) relating to notice and comment in rulemaking proceedings.

Whether or not the past or current rules need to be promulgated on an emergency basis *without* an abbreviated *prior* notice and comment process, the failure at a minimum to promulgate these rules as *Interim Final Rules* with an immediate subsequent comment process is a violation of the notice and comment requirements under the APA. This is particularly true where the process for authorizing a supplemental cap has become a predicable annual procedure. *See: Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2384–85 (2020) *Levesque v. Block*, 723 F.2d 175, 187–89 (1st Cir. 1983), *Universal Health Servs. of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 708 (D.D.C. 1991), *aff'd*, 978 F.2d 745 (D.C. Cir. 1992).

If the proposed regulation is intended to take effect immediately, it should at a minimum allow for a brief public opportunity to submit comments before becoming final.

Equally importantly DHS and DOL have publicly committed to a broader rule making process for the H-2B program and the request for comments on any Interim Final Rule could include a broader series of questions from the agency on issues on which it would appreciate public suggestions to the agencies and their H-2B Worker Protection Taskforce.

**Substantive Deficiencies in Past Rulemaking as to Recruitment of U.S. Workers**

On November 15, 2019 the Department of Homeland Security (DHS) and the Department of Labor (DOL) jointly published regulations effective December 15, 2019 amending prior procedures for recruiting U.S. workers for the H-2B program with a new system relying upon a Department of Labor operated website at https://seasonaljobs.dol.gov/ as the primary mechanism for nationwide employer recruitment of U.S. workers for temporary non-agricultural jobs through the H-2B program. *See* 84 Fed. Reg, 62,435 (Nov. 19, 2019).

There are serious practical deficiencies with this reliance upon a government website as the sole required routine recruit mechanism for employment authorized workers in the U.S. Significantly, seasonaljobs.dol.gov treats as "inactive" for U.S. worker recruitment any application for H-2B labor certification after the 21st day before the stated date of need for H-2B workers.[1] This has occurred under circumstances where the bulk processing of H-2B applications for labor certification nominally for work to begin on the first day of a calendar quarter has resulted in labor certification applications for which there is no "active" recruitment period or an extraordinarily brief period of "active" recruitment.

The USCIS H-2B cap count website[2] indicates that USCIS determined that it had reached that the 33,000-worker statutory cap for the first six months of FY2023 jobs by Monday September 12, 2022. A review of DOL quarterly disclosure data indicates that more than 34,000 H-2B applications for FY2023 visas had been granted DOL labor certification by August 30, 2022. A review of seasonaljobs.dol.gov postings indicates that as of December 2, 2022 an additional 1,593 applications for DOL labor certification for FY2023 have been received covering 39,954 workers. By December 15, 2022 1,275 H-2B cases covering 31,102 H-2B workers will be "inactive" for U.S. worker recruitment. Employers who sought H-2B workers for employment beginning on October 1, 2022 had U.S. worker recruitment cutoff by September 10, 2022 for 5,096 positions on 208 job orders even though those employers did not have positions approved by USCIS for H-2B employment because of the cap.

Moreover, unlike the detailed requirements for Agricultural Clearance Orders for the H-2A program the practical requirements for the amount of detail about contractual terms and conditions of H-2B employment required by DOL to be listed in H-2B job orders fails to adequately disclose critical terms and conditions of employment.[3] The practical deficiencies of DOL's failure to require employers to post H-2B job orders in Spanish or other prevalent languages of low wage worker populations further undermines the effectiveness of the

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[1] DOL relies upon the requirements of 20 C.F.R. §§ 655.20(t) and 655.40(c). DOL's application of this rule to seafood employers authorized to utilize the staggered crossings rule is particularly absurd in practice since the first stated date of need is often long before most of the seafood H-2B workers will be brought into the country.

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

[3] Compare the detailed H-2A ETA Form 790 and 790A Agricultural Clearance Order (available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA_Form_790.pdf) with the H-2B Job requirements of 20 C.F.R. § 655.18(b)

seasonaljobs.dol.gov web platform for active recruitment of U.S. workers.[4]

The instruction forms for submission to USCIS of an I-129 form for authorization to obtain foreign H-2B workers has long included the following (and continuing) requirement:

> **H-2B Start Date**
>
> A petition for H-2B workers must request an employment start date that *matches the start date approved by the Department of Labor on the temporary labor certification*. Petitions without matching start dates may be denied.

See I-129 Instructions at page 13 available at:
https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf

However, visas issued pursuant to the supplemental cap authority regulations in FY2021 and FY2022 employers were authorized to obtain H-2B workers with a "date of need" later than the original DOL approved later certification were relieved of the requirement to engage in ***national*** recruitment to determine "if unemployed persons capable of performing such service or labor cannot be found in this *country*." Even where there had been little or no active recruitment for such positions.

Although the joint DHS and DOL regulations published at 87 Fed. Reg. 30,334 (May 18, 2022) authorizing supplemental H-2B visas for the second half of FY2022 acknowledged that outdated DOL labor certifications did not appropriately determine that unemployed persons capable of performing service or labor could not be found in the country, those regulations failed to require remand to DOL for a current labor certification determination after renewed ***national*** recruitment through the seasonaljobs.dol.gov recruitment platform.

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[4] DOL has adopted machine translation in Spanish through Microsoft Translate of the seasonaljobs.dol.gov summary of H-2B (and H-2A) job orders despite demonstrated inadequacy upon exclusive reliance on machine translation. *See* https://seasonaljobs.dol.gov/es and https://scholar.google.com/scholar?hl=en&as_sdt=0%2C39&q=inadequacy+of+machine+language+translation&btnG= . However, DOL does **not** require the actual employer prepared Job Orders to be posted in Spanish or any other language.

The failure to require employers to post job orders on the seasonaljobs.dol.gov portal in the language of workers is particularly inexcusable since 20 C.F.R. § 655.20(i) requires that "[t]he employer must provide to an H-2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications." That regulation further provides that "[t]he disclosure of all documents required by this paragraph (l) **must be provided in a language understood by the worker**, as necessary or reasonable."

Under these circumstances there is no incremental cost to the employer for requiring the posting of the job order in the language of prospective workers on the seasonaljobs.dol.gov portal where it can be readily accessed by workers and their representatives.

**Recommendation**:

- Upon application by an employer seeking a supplemental visa, DOL should reopen each application for labor certification which has been *inactive* for U.S. worker recruitment *at any time* since the initial issuance of DOL labor certification. DOL should promptly post the revised job order including the current anticipated date of need on seasonaljobs.dol.gov in English and in Spanish and the language understood by H-2B workers that the employer intends to recruit. The employer should also be required to post the Job Order in each language with the SWA's (State Workforce Agency) of **each** state in which an employer seeks to use an H-2B worker.[5] The Job Order should remain in active circulation for at least 21 days.
- The employer must hire any qualified worker who applies or is referred for the job opportunity until the date on which the last H–2B worker departs for the place of employment, or 30 days after the last date on which the SWA job order is posted, whichever is later. Consistent with 20 C.F.R. § 655.40(a), applicants can be rejected only for lawful job-related reasons.[6]

**Overcoming Barriers to Recruitment of Workers in the U.S.**

There are significant practical barriers to the active nationwide recruitment of workers for positions for which employers seek to utilize H-2B workers.

One of the significant barriers is the usage of prior experience requirements for jobs classified by the DOL O*Net system as Job Zone One[7] jobs requiring little prior training or experience. In 2010 rulemaking for the H-2B program DOL found that the largest proportion of H-2B jobs at

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[5] On November 30, 2022 the commenter shared with DOL and DHS representatives by email a detailed analysis of FY2022 DOL disclosure data indicating that 1,195 Job Orders covering 40,553 workers involved employment in more than one state. That analysis found that some H-2B job orders involved employment in as many as 45 different states.

[6] This provision is consistent with the May 2022 rulemaking at 87 Fed. Reg. 30,378.

[7] See https://www.onetonline.org/help/online/zones: .

**Job Zone One**: Little or No Preparation Needed

**Experience:** Little or no previous work-related skill, knowledge, or experience is needed for these occupations. For example, a person can become a waiter or waitress even if he/she has never worked before.

**Education**: Some of these occupations may require a high school diploma or GED certificate.

**Job Training**: Employees in these occupations need anywhere from a few days to a few months of training. *Usually, an experienced worker could show you how to do the job.*

*Examples*: These occupations involve following instructions and helping others. Examples include counter and rental clerks, dishwashers, sewing machine operators, landscaping and groundskeeping workers, logging equipment operators, and baristas.

**SVP Range:** Up to 3 months of preparation (Below 4.0)

**Special Vocational Preparation** is defined at https://www.onetonline.org/help/online/svp with some jobs requiring short demonstration only.

that time were such Job Zone One jobs. OFLC has routinely allowed H-2 employers to require up to three months prior experience for such jobs even where they are the kind of jobs that an experience worker could teach to another worker. Absent employers documenting that they do not have the capacity to train workers on the job for these positions, DOL should discontinue allowing employers to set experience requirements for jobs that actually require little prior training or experience. This is particularly significant for new workers in the U.S. entering the job market.

As a practical matter, employer who anticipate that they will be able to receive foreign H-2B workers for their employment needs may set prior experience requirements as a mechanism to avoid employing workers present in the U.S.

There are other barriers to employment of workers in the U.S. which have been documented to disproportionately impact on minority communities. These include criminal background check requirements and drug testing requirements for positions for which there is not an employment related need for such requirements. Both of these categories of requirements are used by some H-2B employers to discourage applications and employment of U.S workers.

Although H-2B employers seeking to employ workers who have not previously been employed by them frequently recognize the need to help H-2B workers find housing and transportation to work, similar efforts are not routinely taken where employers anticipate that they will be able to obtain H-2B workers.

Some of these barriers may not be effectively overcome in the short-term format of a regulation authorizing an increase in the cap on the number of H-2B workers, but DOL should actively develop requirements to overcome these barriers.

DOL should also be reconsidering prevailing wage requirements that permit payment of wage rates far below the national average wage rate for occupations in which workers are employed. Sadly, in some cases, DOL approved wage rates for H-2B workers are below the wage rates required for H-2A workers (who also are entitled to employer provided housing). This is particularly true in cases where DOL accepts employer provided wage surveys for specific jobs rather than for the general SOC code occupational classifications.

DOL should also re-examine prevailing wage rates below Service Contract Act and Davis Bacon Wage rates for occupations in the area of employment so that wage rates are below the actual wages required to not adversely impact on the employment of workers in the U.S.

**Recommendation**:

- DOL should refuse to accept prior experience requirements for Job Zone One occupations without a specific demonstration by an employer that they do not have the capacity to train workers on the job for these positions.
- DOL should require active nationwide recruitment for positions especially in high unemployment areas such as the Commonwealth of Puerto Rico and require employers to post Job Orders in Spanish and other languages of workers that the employer intends to target for H-2B recruitment.
- DOL should develop requirements for Job Orders consistent with the detail required for Agricultural Clearance Orders so that all material terms and conditions of employment

are disclosed to workers. In the interim, DOL should resume the public posting of the substance of ETA 9142B applications for H-2B labor certification and their attachments containing all of the substantive information disclosed to DOL concerning terms and conditions of employment.[8]

- Employers should be required to offer workers in the U.S. assistance in locating housing and arranging transportation to the place(s) of employment.

**Address regulatory changes immediately appropriate to reduce the opportunities for exploitation of temporary foreign workers**

One of the aspects of DOL's failure to require employers to resubmit applications for labor certification is that DOL is failing to require employers to update initially supplied information as to the foreign labor recruiters utilized by them. DOL regulations at 20 C.F.R. § 655.9 require that employer disclose foreign labor recruiters utilized by them and to make this information publicly available. DOL has stated that it does not require employers to update this information after an application for labor certification has been approved.

In addition to DOL, USCIS is now requiring petitioners to disclose this information on I-129 forms. Despite the availability of up to 11,500 FY2022 H-2B visas limited to workers in Haiti, El Salvador, Guatemala, or Honduras, DOL FY2022 annual data fails to disclose significant information as to the usage of foreign labor recruiters in those countries.

Equally problematic is that DOL does not required employers to include with their public Job Order disclosures on seasonaljobs.dol.gov information as to the identity of foreign labor recruiters for most of the H-2B workers from those countries so that this information could be available at the time of recruitment of workers in those countries. This failure facilities fraudulent foreign labor recruiters charging fees to recruit workers for jobs that they have no authority to recruit for.

An additional gross lapse in regulatory protection for H-2B temporary foreign workers is the absence of regulations barring discrimination against such workers. 20 C.F.R. § 655.20(r) bars discrimination against hiring U.S. workers on the basis of "race, color, national origin, age, sex, religion, disability, or citizenship" but not comparable protections are included for temporary foreign workers.

Housing arranged for H-2B workers through employers should be regulated by DOL and SWA's acting with DOL and minimum housing standards consistent with at least OSHA Temporary

[8] Prior to the discontinuance in 2019 of DOL's ICERT system for filing of H-2B applications for labor certification and the development of the Foreign Labor Application Gateway (FLAG) system, DOL routinely posted redacted copies of ETA 9142B applications for labor certification.

It would be possible for DOL to use the electronically filed FLAG applications to generate copies of ETA 9142B labor certification applications and their attachments while redacting any information required not to be publicly disclosed.

This information could be made publicly available through the DOL seasonaljobs.dol.gov portal,

Labor Camp standards should be applied to all such employer arranged housing. Similarly, Fair Labor Standards (FLSA) protections against unreasonable charges for housing including employer profits from housing should be applied to protect the required minimum prevailing wage rate for jobs.

A longer-term goal for DOL and DHS should be to develop procedures for any person previously employed on an H-2B visa to have the *priority right* to vacant H-2B positions not offered to H-2B workers previously employed by that employer as opposed to persons not previously employed as H-2B workers. "Portability" not controlled by employers could be facilitated by the issuance of longer-term multiple re-entry visas and longer periods within which H-2B workers could remain in the U.S. at the end of a period of employment to pursue other H-2 employment opportunities. Such worker directed job opportunities not directly tied to the period of employment with a single employer could further facilitate opportunities for dependents of H-2B workers to travel with them. Given the large number of H-2B jobs with employment for periods as long as nine (9) months, there is no reason why unemployed H-2B workers actively seeking additional H-2 employment could not qualify for unemployment insurance during periods in which they are unemployed.

**Recommendation**:

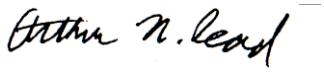
- DOL and USCIS should require all H-2B employers to publicly disclose all foreign labor recruiters authorized to recruit foreign H-2B workers through the seasonaljobs.dol.gov portal. That information should be available to all prospective workers at the time of recruitment for employment.
- The seasonaljobs.dol.gov web portal should be updated to reflect in writing full terms of employment in the language of each H-2B worker that the employer seeks to recruit. That information should remain publicly available for at least five years.
- DOL, DHS and the Department of State and its consulates should adopt requirements barring discrimination against all persons seeking employment with H-2B employers on the basis of "race, color, national origin, age, sex, religion, disability, or citizenship"
- DOL and DHS should undertake to assure that each worker employed by an H-2B employer is able to obtain legal assistance to pursue claims arising out of their employment.

**Prior Regulatory Comments and Submissions**

Both the commenter and other organizations have submitted past substantive comments that should be considered by the Departments in further framing further rulemaking proposals.

We will supplement these comments with prior submitted comments and documentation relating to these issues.

Very truly yours,



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**Comment to OMB Rule for H-2  Cap 2022-12-02.pdf**

Attach 1 - AFL-CIO H-2B Comments 2022.pdf

Attach 2 - Email_2022-10-20_H-2B_Cap.pdf

Attach 3 - JAW CATA Comments 2022-06-22.pdf

Attach 4 - Staggered_Crossings_H2B_SEAFOOD.pdf

Attach 5 - Email_2022-11-30 with attachment.pdf

Attach 6 FY2023_H2B_Cap_Bar_Seafood_Inactive.pdf

Attach 7 - FY2023_H2B_Cap_Bar_Inactive.pdf