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Via email to ETA.OFLC.Forms@dol.gov

Brian Pasternak
Administrator
Office of Foreign Labor Certification
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: RIN 1205-AC09, Exercise of Time-Limited Authority to Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers and the new information collection Form ETA-9142B-CAA-5

Dear Mr. Pasternak:

Thank you for the opportunity to provide comments on the ETA form associated with the above-captioned temporary final rule. The AFL-CIO is a federation of 56 unions that represents 12.5 million working people. We strive to ensure that everyone who works in this country receives decent pay, good benefits, safe working conditions, and fair treatment on the job. Our members work in every state in the union and in every sector of the economy, including industries in which the H-2B visa program has been misused for decades to drive down labor standards and violate workers' rights. We represent workers with all types of immigration status, including undocumented workers, nonimmigrant visa beneficiaries, legal permanent residents, refugees and citizens. In addition, we work with trade union partners around the world, including in the countries specified in this rule. These are the interests that inform our comments.

The AFL-CIO has long called for reform, rather than expansion, of our nation's exploitative work visa programs. Our unions are therefore frustrated to see yet another temporary rule that pursues the opposite approach by increasing the number of H-2B visas without adequate safeguards in place to protect basic worker rights and labor standards. The failure to enhance worker protections in the program is particularly troubling as the rule seeks to encourage H-2B recruitment out of destabilized countries in which migrant populations are acutely vulnerable due to pressing humanitarian concerns. We urge the administration to resist further calls for expansion and instead take immediate steps to interrupt the

well-documented patterns of abuse that pervade the H-2B program. Our comments outline concrete recommendations to ensure the program promotes ***good jobs, worker empowerment, employer accountability, fair recruitment, and racial and gender equity***. The scope of these comments make clear that we need far more than an information collection form to protect workers in H-2B industries.

Background

The pandemic has exposed the systemic undervaluing of work now understood to be essential, and the need for new approaches that reject entrenched patterns of discrimination and promote opportunity and rights for all. After decades of experience with the abusive model of guestworker programs that degrade labor standards and constrain the rights of migrant and U.S. workers alike, change is long overdue. The need for more robust worker protections in the H-2B program is clear, as is the obligation to break cycles of exploitation by holding employers accountable for high standards in their recruitment and employment practices.

We are alarmed to see the repeated expansion of programs that fuel occupational segregation, particularly in this economy where women, immigrants and workers of color have already suffered disproportionately. Any policy that creates tiered rights in our labor market is unjust and bad for workers. As currently structured, our work visa programs serve to create an on-demand, captive and disposable workforce that is entirely disenfranchised. The Biden administration is committed to empowering working people, but these programs are designed to do quite the opposite—keep us divided and poor.

Rather than offering desperate people from Haiti and Central American nations temporary work visas, we urge the administration to continue to improve asylum processing and make much needed TPS country designations as it undertakes fundamental reform of the H-2 visa programs. Current efforts to misdirect forced migrants into work visa programs rife with abuse[1] is both bad policy and bad politics. Temporary work visas are not what vulnerable migrants need or deserve, and they legally empower employers to pit workers against each other to drive down standards. We cannot allay U.S. worker fears of displacement or replacement while programs that legitimize those fears persist and expand.

While statutory reforms to these programs are urgently needed, administrative changes can make important progress that will enable union organizing and prevent workers from being treated like disposable commodities in our increasingly precarious global labor market. Our comprehensive reform recommendations are outlined in more detail below.

Good Jobs

Our unions believe that seasonal jobs should be safe, good jobs, where everyone is treated fairly. That is why we insist that the H-2B program must ensure fair pay, safe working conditions, and just treatment of all workers in affected industries.

DOL should require that employers offer and pay the higher of the local or national prevailing wage for the relevant occupation. Strong wage provisions are needed to make nationwide

[1] https://migrationthatworks.org/reports/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse/

recruitment efforts viable and help to ensure family sustaining wages for work that our country deemed essential throughout the pandemic. Prolonged flaws in the H-2B wage rates have allowed artificial suppression of wages and conditions, discouraging local workers from seeking positions in seasonal industries. This fosters low road business models that cannot survive without access to H-2B visas for migrant workers whose contributions have been systematically devalued. The Office of Foreign Labor Certification should use its authority under the statute to make changes under 20 CFR Part 655, to raise the wage floor to the average or median national or regional prevailing wage, whichever is higher. In addition, they should stop certifying weekly wages and review the BLS Occupational Employment Wage Survey methodology in order to more accurately reflect dynamic labor market changes in wages, and end the use of employer-provided private wage surveys, which only serve to lower wages even beyond the Occupational Employment and Wage Statistics (OEWS) rates.

In a labor market where employers utilize work visa programs to realize labor cost savings, paying H-2B workers below median wages not only harms wage and labor standards, but it also harms union organizing and union density. Employers that depend on paying guestworkers below-median wages can make those industries and occupations less desirable to workers in the U.S. and discourage local and national recruitment for those jobs. These design flaws in the H-2B program contribute to the erosion and fissuring of work at unionized firms by creating perverse financial incentives for employers to outsource to H-B contractors or replace U.S. workers with lower-paid guestworkers. In the absence of effective regulation and enforcement that conform to the statute's prevailing wage requirements, misuse of the H-2B program proliferates, with far-reaching consequences.

USCIS should allocate visas to employers who pay the highest wages and treat their workers well. When demand for H-2B visas exceeds supply, visas should be given first to those employers who are maintaining high standards by paying above average wages, or at the 75th percentile for occupation in the location according to the OEWS. This will create a more virtuous incentive system and reduce the pattern of the program being used to erode pay and conditions. Wage prioritization is a permissible exercise of discretion that Congress granted USCIS through the INA and warrants judicial deference under the *Skidmore* framework and thereby also under *Chevron*.

DOL must insist on robust health and safety standards at H-2B workplaces. Workers in seasonal industries have been on the frontlines amidst the pandemic and escalating severe weather events. Consequently, DOL should require that H-2B employers maintain conditions that are in line with the highest standards of evolving public health laws. This includes ensuring that any group housing, transportation and lodging meets health and safety standards and Centers for Disease Control (CDC) guidelines.

H-2B employers should be required to have a plan for preventing and responding to COVID-19, heat stress, and other exposure risks, and OSHA must investigate complaints and carry out worksite inspections to ensure migrant workers are working in safe environments. H-2B workers must have access to free vaccines, testing, prompt medical care and workers' compensation protections if they experience COVID-19 symptoms or test positive for the virus. Seasonal and

migrant workers support our critical infrastructure and our country is obliged to take active steps to protect their lives and health.

Employers should be required to comply fully with the provisions of job contracts, including all hours promised. Workers do not get to pick and choose the provisions of job contracts with which they comply, and neither should employers. H-2B workers make decisions to leave their homes and families for work opportunities in the United States based on the terms they are offered, and employers should be held accountable for all the promises they made to those workers in the recruitment process.

Worker Empowerment

Immigrant and nonimmigrant workers face real and practical barriers to organizing and ensuring that their workplaces are safe and fair. Fear of immigration enforcement and employers' threats of status-based retaliation chills the enforcement of workplace rights, adversely affecting all workers. Concrete measures such as the following are needed to address these realities that enable rampant worker abuse and retaliation against worker organizing.

DHS should establish a streamlined process for undocumented workers and guestworkers who are engaged in labor disputes and/or enforcement of their workplace rights to request and obtain temporary immigration status and work authorization so that they can engage in protected activity and vindicate their rights without fear of immigration-related retaliation. To prevent the chilling effect on worker organizing and ensure workers access to full remedies, immigration benefits must be extended in a timely fashion and for a duration of not less than two years. Petitions for relief should be filed with USCIS, and should include documentation from a relevant federal, state or local labor agency explaining the government interest in protecting the workers involved in a particular labor dispute. USCIS should establish an internal unit with sufficient staffing and expertise to evaluate and act on such requests expeditiously.

Across the country, there is very real fear in our worksites – our organizers see it every day. And that fear is entirely justified, given the way immigration enforcement has been weaponized over time. Whatever happens in Congress, it is critical that we create processes to protect workers who take action to keep our workplaces safe and fair. Providing immigrant and nonimmigrant workers with concrete protections against deportation when they cooperate with labor enforcement agencies will directly empower them to assert their rights without fear, including their right to form or join a union. It will also help to lift the floor for wages and conditions so that unionized employers face less competition from low-road abusive employers that currently violate the rights of immigrant and nonimmigrant workers with impunity.

DHS and DOL should afford H-2B workers enhanced job portability. Employer control of guestworkers' visa status is at the core of the power imbalance that enables exploitation within our work visa programs. DHS should grant H-2B workers a 60-day grace period of unemployment without losing status or work permits. This would make it more realistic for them to walk away from abusive employers and apply for alternative employment within their visa category. Currently, other visas such H-1B, L-1 and TN visas have a 60-day grace period which affords visa holders autonomy and options. Without time to search for and secure new employment, visa portability will not be practically accessible for H-2B workers.

Unions organize all workers in our industries, regardless of their immigration status, including tens of thousands of member members authorized to work in the U.S. on H-2A, H-2B, H-1B and other nonimmigrant visas. These workers are more vulnerable to employer retaliation, including deportation, than other workers because of the indentured nature of their visa programs. Not only do those vulnerabilities deny guestworkers protections that workers permanently in the U.S. enjoy, they can also hamper union organizing and collective bargaining. Updating regulations to allow guestworkers protection from retaliation will have a positive impact on the likelihood and ability of these workers to participate in union organizing and other union activities.

To begin to make portability provisions more real, workers also need to be informed about the process and be able to determine which H-2B positions are actually available. The DOL's seasonaljobs.dol.gov site would be the logical place for workers to go to find information about open positions. Currently the website is searchable in Spanish for active and inactive certifications and their job orders, but it does not provide insight as to which certifications have been filled. This is severely limits the utility of the site as a job searching tool because it requires workers to contact employers individually to determine whether positions are still available. Workers need support to understand and navigate the complexities of changing employers, and union and civil society organizations have a key role to play.

USCIS should grant workers access to their own information regarding I-129 forms. Currently, if a worker applies for H-2B employment or attempts to change employers, the Department of Homeland Security does not inform them of their petition status, nor does DHS share petition status information with workers who reach out for a status update. Only employers are able to access information on whether I-129s are approved or not. While employers are required to share this information with workers, the lack of an independent means to verify that a petition was submitted or approved means workers must rely entirely on their employers for current information regarding their own employment and visa statuses. Bad-faith employers can and do exploit this information gap to take advantage of H-2B workers, who become especially vulnerable to trafficking and deportation as a result.

DHS should exempt members of unions affiliated with U.S.-based unions from the H-2B cap. Unions aspire to be helpful in connecting qualified workers to available positions in seasonal industries. Exempting members of unions affiliated with US-based unions from the cap would benefit reputable employers, ensure H-2B workers have representation, and protect unions' wage and training standards, which are harmonized across borders.

DHS and DOL should ensure workers have access to real-time data on H-2B employers and recruiters. Transparency of information is a core principle of open government and also a key form of worker empowerment. Agencies should post, within 5 days of receipt, information about any employers seeking to hire through the H-2B program. Information posted should include the employer name, recruiter name(s), job title, worksite location, wages and working conditions, and date of need in any and all languages relevant to the likely workforce.

Asymmetries in power and information make workers vulnerable to abuse and exploitation. One simple yet important way to level the playing field and ensure that workers can make informed

choices and build effective organizing campaigns is to provide accessible, timely information. Knowing which employers are seeking to use work visa programs and under what conditions also helps ensure full compliance with relevant labor provisions, including prevailing wage and workplace safety requirements.

H-2B workers should receive training on their rights before they depart from their origin countries and within one week of arrival at U.S. worksites. These workers' rights trainings should be developed and conducted with input from DOL, the International Labor Organization, unions, worker centers and other civil society organizations. Any U.S. government funding to support rights training for H-2B workers in the U.S. or abroad must involve parties outside the recruitment chain with expertise in workers' rights.

USCIS should grant work authorization to H-4 spouses, as long as they do not work for the same employer as their H-2B spouse. Denying H-4 spouses the opportunity to seek employment creates gender disparities and conditions that push people into the shadow economy. H-4 spousal work authorization would not be tied to an employer, so H-4 workers would have agency in the labor market – freedom to leave a job they don't like, form a union, or file a claim against a bad employer without jeopardizing their visa status. However, these benefits could not be realized if H-4 workers had the same employers as their H-2B spouses. H-2B employers already have coercive levels of control over the fate of H-2B workers that curtail the exercise of basic workplace rights. Those power imbalances would only be worsened if both spouses were permitted to work for the same employer. Imagine these likely scenarios:

- An H-4 worker complains of sexual harassment, but is told that she better keep quiet, or her H-2B spouse could lose his job (thus also losing visa status for the entire family)
- A seasonal employer decides that it will no longer hire single H-2B workers, since it can now secure two captive workers for each H-2B visa by hiring married couples, since there is no cap on H-4 visas (thus increasing profits, as well as incentives to bypass qualified local workers)
- A foreign labor recruiter who already collects high fees from H-2B job seekers will further inflate those fees by dangling the promise of two positions to desperate families (thus deepening the debt workers must incur for the privilege of securing a temporary work visa)

The simplest solution to avoid these coercive dynamics is to ensure that H-2B workers and their spouses do not share the same employer. The goal of extending H-4 work authorization should be to uplift and empower working families, not to give companies more control over the lives and fates of working families.

Employer Accountability

Most reasonable people assume that employers with a record of serious labor violations would be prevented from using our work visa programs – it's only common sense. However, the facts tell a different story, revealing that some of the biggest users of the H-2B visa program have egregious records on workers' rights[2]. This shameful pattern must end. The following

[2] https://d3ciwvs59ifrt8.cloudfront.net/5ad8299b-5dba-47b2-9544-bd96627e284d/067fa0a5-659f-4113-8b25-ac60c2060510.pdf
https://www.buzzfeednews.com/article/kenbensinger/the-pushovers

provisions will help to help to prevent the program from perpetuating cycles of worker exploitation and make more visas available for employers who operate with fair labor practices.

DOL should create an H-2B employer registry and prohibit employers who violate labor laws from utilizing the visa program. As a threshold issue, migrants seeking employment in the U.S. through formal labor migration pathways should be able to expect that they will not be placed with employers with a record of abusing workers' rights. Employers wishing to hire workers through the H-2B program should be required to demonstrate that they meet basic requirements for labor standards and employment practices. Establishing an H-2B employer registry overseen by the Department of Labor would allow the administration to appropriately screen the labor rights records of employers before they use the visa program, and generate public information vital to unions and worker advocates. In registering, employers would:

- Consent to a screen of labor and employment practices that looks back 5 years —only those with clean records would be approved, and any subsequent violation would lead to revocation of eligibility and any violation of the Trafficking Victims Protection Act would result in permanent debarment
- Commit to labor neutrality and access to job sites for worker advocates
- Disclose all recruiters in their supply chains
- Pay a registration fee to support rights and skills training for U.S. and migrant workers in H-2 industries
- Establish an employer bond to repay any recruitment fees illegally charged to workers

Migrant guestworkers have long faced higher risks of trafficking, forced labor, debt bondage, discrimination, and hazardous workplace conditions, among other abuses, due to the structure of these programs that tie a worker's status to a single employer. H-2B workers who face abusive conditions too often remain silent due to the risk of losing their jobs and, by extension, their immigration status. Employers that utilize this program access a public benefit, and therefore must adhere to high standards.

DOL should no longer issue H-2B labor certifications for work in labor surplus areas or occupations. The H-2B labor certification process should be responsive to labor market realities and should actually protect workers. The fact that the Department of Labor certified the same number of H-2B jobs for the first quarter of 2021 that it did for the first quarter of 2019 and 2020, despite a doubling of the unemployment rates in most H-2B industries, makes clear that corrective measures are needed. Employer demand for captive workers is not an accurate proxy for real need in our labor market. Instead, using objective labor market data, DOL stop issuing H-2B labor certifications for work in areas or occupations with a labor surplus, where unemployment is 6% or above.

USCIS should not issue H-2B visas to employers who are engaged in labor disputes. To ensure that work visas programs are not used to undermine worker organizing and labor law enforcement, USCIS should engage in deconfliction with DOL, EEOC, and NLRB to ensure that they do not bring H-2B workers into jobsites there are active labor disputes. Updated guidance should broaden the definition of what constitutes a labor dispute, allow unions to add employers to the list of employers with pending labor disputes, and include clear commitments to stand down immigration enforcement actions and the issuance of H-2B visas whenever a labor dispute

is discovered. To advance these protocols, the administration should reinstate the Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws with DOL serving as the lead agency.

The administration should significantly enhance the resources available for the enforcement of worker protections in the H-2B program, including protections against discrimination in recruitment. The drastic and long running underfunding of the DOL, NLRB, and EEOC has resulted in a lack of capacity to timely respond to complaints and near impunity for employers who violate workers' rights. Enforcement resources should reflect the importance of guaranteeing a level playing field with safe and fair conditions in seasonal industries. However, funding for WHD and OSHA have remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.[3] In addition to significant new authorizations and appropriations, the Administration should work with Congress to allow DOL to retain funding from visa fees under the H-2A program and impose new fees support effective enforcement in the H-2B program.

DOL should enhance enforcement efforts and stiffen the penalties for employer violation of H-2B program requirements. Recruitment requirements will only be as effective as their enforcement, and DOL must make it a priority to sanction employers that discriminate against or mistreat workers. DOL must ensure that any recruitment of U.S. workers, whether it is through online advertisements or though other positive recruitment measures, is no less extensive than the employer's recruitment of H-2B workers.

Employers found to have violated recruitment requirements, engaged in fraud, discriminated against workers, or otherwise violated labor and employment law should be barred from using the H-2B program. The Laborers' International Union of North America has documented substantial abuses by construction and landscaping companies that together have received tens of thousands of H-2B visas over the past few years. To continue to allow such a large number of visas to be issued to employers with a demonstrated record of labor violations undermines the integrity of the program and reduces the number of visas available to legitimate and law-abiding seasonal employers.

Meaningful enforcement to bring integrity to the H-2B program and ensure adherence to statute will require resources. Employer processing fees should be increased to levels needed to fund robust enforcement efforts. Given the short-term nature of the visas, DOL should create an expedited investigation process for H-2B violations to ensure that all relevant witness testimony and evidence is collected.

Employers should be held accountable for the actions of labor contractors, recruiters, and agents of recruiters. Ultimately, employers must bear the responsibility to ensure that workers are treated fairly throughout the recruitment and employment process. There must be joint liability between labor contractors, staffing agencies, or other third party employers and the ultimate beneficiaries of the labor.

[3] https://www.epi.org/blog/worker-protection-agencies-need-more-funding-to-enforce-labor-laws-and-protect-workers/

After receiving information that a recruiter may have charged a worker fees or committed other violations, DHS should issue letters to all employers who may have used that particular recruiter. The notice should clarify the risk employers incur by working with that particular recruiter and the consequences they will face if violations continue.

In addition, USCIS should:

- ***Limit the duration of H-2B eligible job orders to 7 months*** to prevent the misuse of the program for year-round employment;
- ***Cap at 100 the number of visas that any single employer can receive*** to prevent large employers from squeezing out small businesses; and
- ***Only issue visas to direct employers***, ending the use of the program as a vehicle for outsourcing and fissuring employment dynamics.

Fair Recruitment

H-2B dynamics over recent years make clear that employers in many industries have developed a dependence on the visa program for their staffing model. H-2B visas are meant to be used only when no U.S.-based workers are available, yet there are currently no serious requirements for employers to conduct a nationwide search. More attention is needed to identify and address the barriers that keep qualified U.S. workers from accessing seasonal jobs. Moreover, foreign labor recruitment in Northern and Central America lacks effective oversight. Fraudulent labor recruiters often charge unauthorized fees that drive migrant workers into debt, making them vulnerable to abuse and exploitation before they even begin their employment. The following measures are needed to prevent recruitment abuses.

DOL should require employers to undertake both local and national recruitment efforts before looking abroad. Statute requires that H-2B visas can only be utilized when no workers are available in the U.S. Given the persistent and racially disparate pockets of unemployment or underemployment around the country and decreased levels of workforce participation, seasonal employers should be required to recruit workers at both a local and a national level before accessing H-2B visas. Workforce disruptions are also a factor. For example, workers displaced from employment by the hurricane in Puerto Rico should be readily able to learn of and apply for job opportunities in other parts of the country. Like H-2B workers, their transportation costs should be covered by the employer if they are hired to help alleviate local labor shortages for seasonal work. They should also be offered housing arrangements which comply with minimal occupancy standards.

When low local unemployment rates require recruitment in a national market, wage rates must also be responsive to that national market. Unless wages are set by a collectively bargained agreement, employers should be required to offer the local area prevailing wage or the national prevailing wage for the relevant SOC code, whichever is higher.

DOL should substantially enhance seasonaljobs.gov as a safe portal for job seekers both inside and outside the United States. Facilitation of viable national level recruitment efforts will require a highly functional national jobs database. In addition to providing notice of available positions to relevant job search sites, DOL should also use this national platform to notify unions of available positions around the country in occupations relevant to their membership.

DOL should aim to develop a standardized national platform for job postings that has the capacity to reach current and prospective U.S. workers with real time information in a way that is easy to navigate and language appropriate. We urge DOL to seek input on the platform development directly from unions and advocates representing workers in H-2B occupations.

Unions and advocates with localized expertise on market wage rates and workforce availability should also have opportunities to review job orders and provide input as to the appropriateness of the classification and designated wage. Allowing active scrutiny of employer classifications by knowledgeable parties is the best way to prevent the misclassification of occupations of intended employment that is such a common means of wage suppression in temporary work visa programs.

DOL should enhance Seasonaljobs.gov so it can serve as an effective, online H-2 visa employment portal where job seekers from the United States and abroad can view a full list of DOL/DHS approved employment opportunities. The portal should mobile friendly, and available in Spanish and any other languages relevant to the workforce. The portal should also provide information about worker rights and clear steps to take when those rights are violated.

DOL should establish a formal registration process for international recruiters, as well as U.S. agents. We urge DOL to require that:

- H-2 employers must disclose and can only deal with U.S. agents or agent organizations that have been authorized by DOL to represent employers;
- Each organization or individual acting an agent for U.S. employers must be authorized by DOL through a registration process. DOL shall have the right to deny authorization to any organization or individual that has violated program regulations or failed to accurately supply full required information;
- Each organization and individual acting as an employer agent must disclose to DOL each individual and organization outside of the United States with which it deals with on behalf of one or more U.S. employers, together with such additional information as DOL may require.
- Each individual and organization outside of the United States who acts an agent of an employer of H-2 workers shall be required to be register with the U.S. Department of Labor. DOL shall publicly disclose all registered actors, and shall have the right to deny authorization to any individual or organization that violates program regulations or fails to accurately supply full required information to DOL or to workers.

Unions representing workers in relevant occupations should receive notice of seasonal job openings and be able to dispatch members in response. In order to ensure that the H-2B employers do not bypass available U.S. workers, unions must be better apprised of relevant job opportunities in a systematic way and have the opportunity to notify employers when they have qualified workers available to fill positions. DOL's policies should ensure that unions are treated as vital partners in the effort to identify qualified workers for available positions by ensuring that notification happens on at least three levels:

- *Prospective H-2B employers should be required to contact a relevant union in writing to notify them about job openings.* At present, an employer is not required to contact unions

unless their employees are already unionized and there is a bargaining representative. This should change and employers should not be left to their own devices to determine whether an occupation or industry is customarily unionized. DOL should provide guidance on which jobs and industries are customarily unionized and by which unions. DOL should also require documentation of union notification in the recruitment process. Employers should then face appropriate consequences if it is revealed that appropriate notification did not occur.

- *State Workforce Agencies are required notify unions* of relevant positions under 20 CFR 655.33(b)(5) if directed by a Certifying Officer. Unfortunately, our affiliates and labor councils around the country have little indication that SWAs are being directed to do this or that any unions are in fact being notified about job opportunities by the SWAs. This is another area in which increased oversight is required.
- In addition, *DOL should create an automated function on seasonaljobs.gov whereby interested unions can sign up to be notified* when job openings in the relevant SOC code or geographic area are posted to the site.

DOL should create an Office of International Labor Recruitment Oversight. The Office should monitor international labor recruitment practices and enforce regulations across all industry sectors and visa categories, including H-2B. Housed in the Wage and Hour Division (WHD), the Office should coordinate WHD's enforcement role with the functions of the Office of Foreign Labor Certification, such as certifying visas, wage rates, and recruiters. The Office should be charged with creating and maintaining a database of all labor recruiters, and should have the power to block program violators from accessing visas. The Office should be adequately staffed and funded to achieve this critical mandate, and it's first task should be to issue guidance asserting DOL's extraterritorial scope of authority in the context of enforcing worker protections, particularly focused on the regulation of foreign labor recruiters and agents.

The administration must enforce the ban on recruitment fees in ways that do not penalize workers. Agencies must work together to correct the disincentive for H-2B workers to report recruitment fees by reversing the policy of denying visas to workers because of recruitment fee payment. Instead of penalizing workers, agencies should ensure that employers reimburse workers for any recruitment fees paid and bring enforcement actions against employers who fail to do so. If recruitment fees are not reimbursed or the worker otherwise faces retaliation, the worker should still be granted entry with work authorization. If no similar H-2B position is available, USCIS should grant humanitarian parole and work authorization for at least a year so the worker can seek employment and recoup the fees that he or she was forced to pay.

DOL should issue guidance clarifying that the Fair Labor Standards Act (FLSA) requires repayment of recruitment fees in the first work week to the extent necessary to bring wages up to the minimum. Furthermore, DOL should clarify whistleblower protections to ensure that workers who acknowledge having paid fees are not fired from their current job and that the acknowledgement does not prevent them from being hired for future work, either with the same employer or other employers.

Migrant Resource Centers in Central America should serve as places for families to receive, from trusted and independent sources, the information they need to make informed choices

about potential migration pathways. Restoring and expanding humanitarian pathways is of utmost importance, and attention of MRCs should remain first and foremost on this central task. Given the serious humanitarian concerns threatening the lives and livelihoods of Central American workers and their families, the administration's regional strategy should prioritize regularization schemes and rights-based channels. Instead of expanding temporary or circular work programs, the regular migration pathways promoted should ensure full worker rights, facilitate social and family cohesion, and provide options for permanent residence and meaningful participation in civic life. The U.S. government should not use migration policy as a substitute for meaningful development strategies that help to create decent work in origin countries.

In light of ample evidence that abuses pervade our temporary work visa programs, reform is urgently needed to protect worker rights and labor standards for migrant and U.S. workers alike. If the administration intends to actively facilitate the temporary labor recruitment of vulnerable populations from destabilized countries, the imperative to strengthen worker protections escalates substantially. This will require both robust regulatory protections and effective, worker-driven strategies to enforce those rules. Workers throughout the region must have meaningful protection of their freedom of association rights, including concrete status protections for migrants who take action to address unfair or unsafe conditions.

Government to government strategies alone, however well intentioned, will not be sufficient to prevent abuses from occurring. Until workers themselves are empowered with mechanisms to protect each other and hold employers and recruiters accountable, problems will persist. This is why the regional migration strategy must include support for robust union and civil society engagement throughout the recruitment, employment and migration process.

In line with the President's laudable objectives to support worker organizing and empowerment, we urge the administration to fund programmatic support for migrant worker rights education within the regional strategy. MRCs should serve as places for families to receive, from trusted and independent sources, the information they need to make informed choices about potential migration pathways. When it comes to labor migration pathways, prospective workers will need detailed information related to their rights, as well as about the recruitment process, job opportunities, and potential employers. Migration systems are complex, and families should not be expected to navigate them alone, which is why presence and engagement from those outside the recruitment chain is critical.

Specifically, unions and civil society organizations should be present in MRCs to:

- Provide Know Your Rights training and materials, including
    - Pre-decision toolkits in all relevant languages
    - Details on ILO's universal labor rights and fair recruitment protocols
    - Practical details on specific work visa programs
- Help verify legitimacy of recruiters, jobs and employers, using tools such as:
    - ITUC Recruitment advisor
    - Seasonaljobs.gov
    - Helpline for independent verification/guidance
- Conduct intake interviews pre-departure and upon return
- Offer membership and representation, including

    - Opportunity to join unions/worker centers
    - Legal defense
- Assist with surround services, such as
    - Financial and child care planning
    - Credential recognition
    - Re-entry employment services

The administration should create a civil society advisory group to promote decent work in the Central American regional strategy. As USCIS announces its intention to actively encourage recruitment into programs known to have a high risk of serious workers' rights violations, including human trafficking, it incurs clear due diligence obligations. The regional strategy must include explicit safeguards to protect those seeking H-2 visa employment opportunities. And as the Partnership for Central America promotes U.S. support for private investment in the region, the administration should also receive regular input from those advocating for human rights and clear labor and environmental standards. The advisory group should be composed of unions, worker centers and civil society organizations based in the U.S. and Central America. They should at least quarterly with all U.S. agencies involved in the regional strategy.

Gender and Racial Equity

U.S. anti-discrimination laws prohibit discrimination in hiring and employment on the basis of race, color, sex, religion and national origin. Yet recruiters and employers openly express preferences related to national origin, gender and age when hiring through the H-2B and other work visa programs. In this way, guest worker programs have been quietly re-segregating entire sectors of the U.S. workforce based on racialized and gendered notions of work.

DOL should establish an Equal Opportunity Advocate to expose and address discrimination in the H-2 visa programs. This position would have the charge to produce reports and recommend and implement policies to promote equity in seasonal jobs.

Agencies must affirmatively protect migrant worker women from discrimination throughout the recruitment and employment process. DOL should include a non-discrimination statement on every job posting on seasonaljobs.dol.gov, clarify complaint mechanisms and publish data that workers can use to make employment decisions. Targeted enforcement initiatives should prioritize the inspection of H-2 employers to detect sex discrimination and violations that adversely and disproportionately impact women.

Domestic recruitment should prioritize affirmative efforts in communities of color with high levels of unemployment. State Workforce Agencies with areas of high unemployment near H-2B temporary employment positions should be responsible for identifying barriers to availability of these jobs to unemployed workers. Where significant unemployed workers cannot access job opportunities because of lack of transportation employers seeking 10 or more non-local workers should be required to offer to arrange transportation to work or offer housing accessible to the work location.

DOL and DHS should prevent H-2B employers from discriminating against U.S. applicants based on their criminal backgrounds. Prospective H-2B employers should be required to

document that they have in place policies to prevent any form of discrimination in recruiting U.S. workers, including by verifying that they do not screen out applicants based on their criminal record. By virtue of the disparate impact of the criminal justice system on people of color, the use of criminal background checks in employment is inherently an issue of employment discrimination. In 2012, the Equal Employment Opportunity Commission (EEOC) issued guidelines specifically addressing the risks of racial discrimination through the overly broad application of criminal background checks in employment decisions. As described by the EEOC guidelines, the overly broad application of facially neutral criminal background check requirements to employment decisions creates a risk of unlawful employment discrimination.

U.S. workers need not only to be aware of potential job opportunities, but also to have a realistic chance of being hired when they apply. Many of the workers who been harmed by inadequate recruitment requirements in the H-2B program are those who have already been unjustly marginalized in the workforce. In order to be eligible for the H-2B program, employers should first attest that they do not discriminate on the basis of criminal backgrounds unless expressly required for the specific position. If they are later found to have imposed such barriers to employment for applicants, they should be barred from the program.

DOL and DHS should prohibit the imposition of unnecessary experience requirements for entry-level positions. The imposition of unnecessary experience requirements by H-2B employers is an effective mechanism for barring US workers from entry-level employment jobs. Experience requirements create a real barrier for young workers seeking to enter the labor market or secure seasonal employment. DOL must take steps to prevent this practice and sanction employers who impose experience requirements for Job Zone One positions. On the job training should be provided for any job requiring little or no prior experience including all O*NET Job Zone 1 jobs[4].

DOL and DHS should ensure effective language access for non-English speakers. One fundamental aspect of effective recruitment and safe employment is the need for the information to be shared in languages other than English. Given the linguistic reality of workers in many H-2B occupations, limiting information to English-language content serves as a barrier to workers of color and a potential threat to worker rights.

DOL has taken an important step forward to provide Spanish language access on seasonaljobs.gov, but the functionality is still being improved, and other languages may also be relevant in certain industries, parts of the country, or parts of the region – such as in Haiti. The SWAs could be an excellent resource for identifying locations where a primary language spoken by workers in relevant industries is a tongue other than Spanish or English.

H-2B employers almost invariably recruit from countries in which workers do not speak English. Those same employers should not be permitted to discriminate in their recruitment efforts by denying non-English-speaking U.S. workers access to information in a language they understand while recruiting in an appropriate foreign language abroad.

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

Employers seeking to recruit H-2B workers should be required to post through seasonaljobs.dol.gov full information in the native languages of workers it will seek to recruit about terms and conditions of employment. Standardized H-2B job orders should be developed (similar in scope to H-2A Form ETA-790) containing all material terms and conditions of employment. Job order form language should exist in the most commonly used languages in the U.S. and in the most commonly used languages in countries where employers recruit.

Employers should be responsible for providing translated information for each section of the job order in Spanish and any other languages relevant to the workforce. All this information should remain publicly posted in an archive for at least three years after employment ends.

Conclusion

The ETA form is well intentioned, but as these comments demonstrate, far more sweeping reforms are needed to truly protect worker rights and labor standards in the H-2B program. We call on the administration to protect all seasonal workers – both those already in the U.S. and those who seek work through the H-2B visa – instead of simply raising the cap on a flawed and exploitative program. Comprehensive reforms are needed to promote good jobs, worker empowerment, employer accountability, fair recruitment and gender and racial equity. We thank you for considering our recommendations

Sincerely,

Shannon Lederer

Shannon Lederer
Director of Immigration Policy