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:

MACKINAC ISLAND BUSINESSES RELY ON THE H-2B PROGRAM TO MEET THEIR SEASONAL EMPLOYMENT NEEDS

The Mackinac Island Convention and Visitors Bureau (MICVB) members are seasonal businesses on Mackinac Island, MI, a prized tourist destination in northern Michigan. The H-2B program is essential for our small and seasonal businesses that cannot fill seasonal jobs with American workers despite extensive recruitment efforts. It is particularly important to Michigan, especially northern Michigan. For example, Mackinac Island, which in 2022 was named by Travel and Leisure Magazine as the top island tourist destination in the country and in 2023 was named the best summer travel destination by USA Today, is almost completely closed during the winter months, when it is accessible only by snowmobile or plane. From April to October, it provides Michigan citizens significant economic, educational, and cultural benefits. No cars are permitted on the Island. The economic benefit of Mackinac Island's seasonal tourist revenue is seen in its contribution, along with Cheboygan County, of nearly $54 million in tax revenues to the State. During the winter months, the population of Mackinac Island is between 400-500. During the April-October season, that number swells tremendously. The pristine island relies on a seasonal workforce of 4,000-5,000 workers. Many of these workers are Americans and some of them are temporary foreign guestworkers. Using the H-2B program is burdensome and expensive and is a last resort for business owners on Mackinac Island.

Despite extraordinary efforts to meet their seasonal needs with only U.S. workers, these businesses are unable to fully staff without some foreign guest workers. One key example is the hospitality industry on Mackinac Island. During the 2021 season, one Mackinac Island hotel had a pool of 150 potential U.S. workers, of whom 36 completed the application process and were hired; only 9 of them came to the Island to work. There is a dire shortage of seasonal labor in the

U.S. and many Michigan employers must turn to the H-2B program to meet their workforce needs to sustain their businesses and retain their American workers. The 2021 season on Mackinac Island was the worst ever for staffing shortages. Pent up demand from previous COVID-19 restrictions resulted in a record number of tourists desiring to visit the Island. Many of these visitors could not be accommodated because of an insufficient number of H-2B workers. Hotels operated at limited occupancy, some restaurants didn't open at all or had limited hours and occupancy, and shops struggled from too few workers. Lost revenue for one hotel was more than $600,000 during the July 4th weekend alone. The 2022 season brought similar challenges for Mackinac Island business owners. H-2B foreign guest workers are essential to the businesses on Mackinac Island, virtually all of which are seasonal.
The program requirements, processes, oversight, and worker protections must be reasonable and workable for both employers and workers, both American and foreign.

GENERAL COMMENTS

Generally, we would like to take this opportunity to thank the Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS") for the opportunity to provide public comment on the Notice of Proposed Rulemaking ("NPRM") entitled Modernizing H-2 Program Requirements, Oversight, and Worker Protections published in the Federal Register on September 20, 2023.[1] MICVB adopts in full the separate comments of the H-2B Workforce Coalition on the NPRM.
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.[2] 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.[3] 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. This flexibility from 10 days to 30 days for H-2B workers will also likely alleviate some of the pressure employers feel from the statutory cap. Under the current system it is difficult, if not impossible, to time the filing of subsequent petitions with the expiration of a previous contract. This will allow H-2B workers the ability to find continued subsequent employment after the expiration of the previous contract and that employer time to file the subsequent petition without fear that the worker will lose status.

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[1] 88 Fed. Reg. 65040, Modernizing H-2 Program Requirements, Oversight, and Worker Protections (Sept. 20, 2023).
[2] *Id.* at 65063.
[3] *Id.* at 65055.

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, in these trying times of airline travel, 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.[4] 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 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?

Many H-2B employers see the portability provisions of the NPRM as a benefit, but also have concerns that employers that are capped out could seek to lure away H-2B workers from an employer that sponsored and paid for the transportation of H-2B workers to the U.S. The benefit of these provisions as proposed is that it will provide meaningful cap relief in a program that is vastly oversubscribed. However, are there any safeguards that the Department could implement to ensure that an employer who bore the cost of transportation and filing fees is not left without a workforce? Potentially require subsequent employers to reimburse the previous employer?

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

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 a 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 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 some "extraordinary circumstances" beyond the employer's control is ill defined. The Department fails to explain what "due diligence" entails and therefore the 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") or other federal, state, or local administrative agency 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 in the H-2 programs representing 0.0056%, the majority of H-2 employers are trying to comply with these highly regulated programs and should not be effectively debarred from the program because of minor violations.

CONCLUSION

The NPRM includes some welcome proposals to improve the program and we are grateful for those. There are also numerous troubling provisions that we cannot properly evaluate and comment on because they lack necessary specificity. We look forward to hearing from you to address the latter provisions. We appreciate the opportunity to comment on this proposed regulation and request that you consider our views fully.

Sincerely,

Tim Hygh
President
Mackinac Island Convention and Visitors Bureau

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Camp Springs, MD 20588-0009

U.S. Citizenship and Immigration Services

December 22, 2023

Tim Hygh
President
Mackinac Island Tourism Bureau
7274 Main Street, P.O. Box 451
Mackinac Island, MI 49757

Dear Mr. Hygh:

Thank you for your November 20, 2023 letter to the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS). I am responding on behalf of the Department.

As you know, the Notice of Proposed Rulemaking titled "Modernizing H-2 Program Requirements, Oversight, and Worker Protections" (H-2 NPRM) published in the *Federal Register* on September 20, 2023, allowed members of the public to submit comments "on or before November 20, 2023." The H-2 NPRM directed the public to submit comments through the Federal eRulemaking Portal at http://www.regulations.gov, and also indicated that "[c]omments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials will not be considered comments on the proposed rule and may not receive a response from DHS." DHS also indicated in the H-2 NPRM that it is not able to receive mailed comments at this time and directed the public to contact the Chief of the Regulatory Coordination Division of USCIS if unable to submit comments through http://www.regulations.com. DHS and USCIS faithfully comply with the legal requirements set forth in the Administrative Procedure Act, 5 USC §551 et seq. (1946), within the realm of federal rulemaking to ensure that all members of the public are provided an equal opportunity to comment on proposed rulemaking. The only comments that are to be considered must be submitted according to the instructions set forth in the Notice of Proposed Rulemaking to ensure fairness and equity within the public comment process.

During the comment period, DHS received written comments from 1,944 individuals and organizations. USCIS will be considering such public comments when finalizing this NPRM.

Unfortunately, your letter was not received during the comment period, and was not submitted through http://www.regulations.com. As such it will not be considered a comment on the H-2 NPRM.

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please do not hesitate to contact me.

Sincerely,

Ur M. Jaddou
Director