March 23, 2023

Secretary Alejandro Mayorkas
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528

Acting Secretary Julie Su
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20010

Dear Secretary Mayorkas and Acting Secretary Su,

We write to you regarding the upcoming rulemakings that your agencies have announced governing the H-2A temporary agricultural worker visa. We recognize and appreciate that your agencies have provided the opportunity for advocates and workers to express their views in listening sessions over recent months, but such brief sessions are inadequate to address the myriad changes needed in the rapidly growing H-2A program. With this letter, we seek to provide additional context on issues that we raised in the listening sessions as well as provide our view on issues raised by other stakeholders in the session.

For more than forty years, Farmworker Justice has engaged in policy analysis, education, advocacy, and litigation to empower farmworkers—both H-2A and domestic—to improve their wages and working conditions, health, occupational safety, and access to justice. We consistently see how immigration status, in particular the vulnerability resulting from workers' widespread lack of status, plays a central role in agricultural workplaces.[1] The precarious nonimmigrant status provided by the H-2A visa has a similar effect, and the harms resulting from the H-2A visa's flawed structure have proliferated as the program quadrupled in size over the past decade.[2]

When Congress created the modern H-2A program, it gave your agencies broad authority and a clear mandate to ensure that the program is only used when there is not a "sufficient" workforce already available and that the program does not "adversely affect the wages and working conditions of workers in the United States similarly employed."[3] In doing so, Congress recognized that the well-being of domestic farmworkers and H-2A workers are inextricably linked. For many workers outside the U.S., employment on a U.S. farm appears to be a lucrative opportunity, with hourly wages much higher than those earned in their countries of origin. The nearly unlimited foreign demand for these jobs, combined with a flawed visa structure that

[1] The most recent data from DOL's National Agricultural Workers' Survey indicates that 44% of domestic farmworkers lack legal status. U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2019-2020: A Demographic and Employment Profile of United States Farmworkers* (2022), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf.
[2] The U.S. State Department issued 298,336 H-2A visas in fiscal year 2022, compared with just 65,345 in fiscal year 2012.
[3] 8 U.S.C. § 1188(a).

provides employers total control over a worker's legal status, creates an environment ripe for worker exploitation at every stage of the recruitment and employment process. When employers are able to hire and exploit vulnerable foreign workers, it places downward pressure on wages and working conditions for all workers, including U.S. citizens and the many other experienced immigrant farmworkers who make up the essential American agricultural workforce.

Protecting the domestic and H-2A workforce will require changes in regulations and increased resources. As the H-2A program has grown exponentially, the resources of the agencies charged with enforcement of the H-2A program have not seen commensurate increases.[4] While this letter emphasizes the need for policy changes, we encourage leadership of your agencies to prioritize resources and personnel for enforcement of the H-2A regulations.

Below, we provide a list of recommendations organized into five general themes.

1. H-2A Worker Mobility and Visa Concerns
2. Positive Recruitment and Protection of Domestic Farmworkers
3. Employer Accountability
4. Foreign Recruitment Concerns
5. Workplace and Housing Protections

These recommendations are primarily directed to DOL and DHS as the two agencies currently engaged in rulemaking, but effective enforcement in the H-2A program will also require effective coordination between the various other government actors that play a role in the program, including the Department of State, individual state workforce agencies (SWAs), the Social Security Administration (SSA), state and local housing authorities, and others. To advance this coordination, DOL should comply with its existing—but unfulfilled—obligation to convene regular coordinated enforcement meetings and issue regular reports required under the regulations.[5]

1. H-2A Worker Mobility and Visa Concerns

The flaws of the H-2A program begin with the structure of the visa itself: a worker's legal presence in the United States is entirely dependent on an employer's visa petition.[6] By tying workers to their petitioning employer, the H-2A visa fundamentally distorts ordinary labor relations, leaving workers unable to quickly move to another job to escape abuse or seek better wages or working conditions. This captive dynamic is not limited to a few unscrupulous employers; it is widespread and inherent in the H-2A process. Indeed, one recent survey of Mexican temporary visa workers found that more than half of those recruited to the United States

[4] In fact, the responsible agencies at DOL were shrinking as the program expanded. Between 2010 and 2019, the Wage and Hour Division lost 12 percent of its staff because it was nearly flat-funded. The Employment and Training Administration also reduced staff during this period due to static funding and inflationary costs.

[5] *See* 29 C.F.R. § 42.

[6] 8 C.F.R. § 214.2(h)(5)(viii)(B).

did not feel free to leave their employment even if they felt unsafe or if the terms and conditions of their contract were not being met.[7]

The inability of H-2A workers to "vote with their feet" by leaving a job means that H-2A employers face little to no pressure to improve wages or working conditions. The restrictive structure of the visa gives employers certainty that their workers will not leave for another employer, while the H-2A workers "work scared," facing a choice between enduring poor conditions and unsustainable productivity demands or losing their job and legal status. In other words, the H-2A program creates a captive workforce that allows employers to evade local labor market demands. This is in clear violation of the Congressional mandate to avoid adverse effect to similarly employed workers in the United States. As a remedy for this harm, DHS and DOL must undertake the following reforms to improve workers' mobility and provide status protections while in the United States.

- **Recommendation 1: DHS should extend the admission grace period for H-2A visa holders to at least 120 days.** Workers who wish to leave a bad job should not have to fear that they will immediately face deportation and accrual of unlawful presence. Current regulations provide that H-2A workers maintain admission for "a 30-day period following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment."[8] However, this period is often too short for workers to find new employment, particularly given the geographic and social isolation of H-2A workers.
    - A grace period of at least 120 days would provide greater peace of mind to workers that they will maintain status while seeking new employment.
    - The current regulation is also unclear on whether the existing grace period applies to workers who voluntarily leave their employment. DHS should clarify that workers who depart their employment early will maintain legal status through the end of the original petition validity period and any subsequent grace period.
    - DHS should provide automatic unrestricted employment authorization during the visa grace period. The current DHS regulations do not authorize H-2A workers to work during their visa grace period.[9] As noted previously, it takes time for workers to connect with new employers and for those employers to file a new I-129 petition. Workers should be able to support themselves during that period, and short-term employment authorization would allow them to do so.
- **Recommendation 2: DHS and DOL should improve the ability of admitted H-2A workers to connect with other potential H-2A employers.** H-2A workers face tremendous geographic and social isolation, relying on their petitioning employer for housing and transportation, often in remote rural areas. For the vast majority of these workers, independently connecting with another employer who will submit a transfer

[7] Equitable Food Initiative et al., *The IRÉ Project: How Mexican Workers Define Ideal Recruitment and Recruitment Priorities* (2021), https://equitablefood.org/wp-content/uploads/THE-IRE-PROJECT-report_FINAL_compressed.pdf.
[8] 8 C.F.R. § 214.2(h)(5)(viii)(B).
[9] *Id.*

petition on their behalf is challenging, if not altogether impossible. A small minority—including many South African workers—are able to find new employers through well-organized community channels both in the U.S. and their country of origin, but most other workers lack the resources necessary to connect with new employers. DOL and DHS can work together to ensure that H-2A workers already admitted to the U.S. and seeking employment with other H-2A employers are connected with new jobs in two primary ways.

- First, DOL should update the SeasonalJobs website on a running basis with information on DHS petition approval and State Department visa issuance associated with particular job orders so that workers know in real time when an employer is actively hiring or positions have been filled—in addition to the data already available showing which labor certifications are active or inactive.
- Second, DHS should create a process by which H-2A workers already in the United States can notify USCIS that they are seeking employment.[10] These workers could be added to a database accessible by prospective H-2A employers for the duration of the worker's visa validity and grace period. The list should not include any information that may be used to retaliate or discriminate against workers (e.g., name, age, or gender). Such a process could also allow workers to rebut fraudulent abscondment or termination reports filed by their employers, as described below in Recommendation 6. The involvement of bona fide labor unions in the H-2A hiring and recruitment process, as described in Recommendation 20, would also improve workers' ability to find new employment without relying on unscrupulous employers or recruiters.

- **<u>Recommendation 3</u>: DHS should expedite deferred action requests from H-2A workers, automatically backdate the validity of a deferred action grant, and grant parole for H-2A workers who have returned to their home country.** In January, DHS announced process enhancements to improve access to forms of immigration relief for noncitizen workers involved in federal, state, or local labor investigations. We welcome the improvements to this process, but further enhancements must be made to ensure that the process works for H-2A workers. Because of the relatively short duration of their visas, H-2A workers risk falling out of status while waiting for relief, leading them to accrue unlawful presence that could threaten their ability to return to the U.S. in the future. DHS should adjudicate requests from H-2A workers on an expedited basis to ensure workers do not fall out of status, and it should consider backdating grants of deferred action to the date the request was submitted. Those H-2A workers who have decided to return to their home countries and are seeking parole to re-enter the U.S. should also have access to this enhanced relief process.
- **<u>Recommendation 4</u>: DHS should provide H-2A workers with information about the status of visa petitions that include them as beneficiaries.** The threat of immigration consequences for H-2A workers is compounded by U.S. government policies regarding workers' visa status. H-2A workers and their advocates face a major lack of transparency from the U.S. government. U.S. Citizenship and Immigration Services does not recognize a visa beneficiary's independent interests in an employer's visa petition, and the agency

[10] H-2A workers are not eligible for the employment referral services provided by SWAs.

therefore refuses to provide information directly to H-2A workers about the visas that they hold. Both Congress and the USCIS Ombudsman have asked USCIS to change this policy, recognizing that this lack of information poses a threat to workers, such as labor trafficking, and can leave them subject to immigration enforcement due solely to actions and omissions of their employers.[11]

- **Recommendation 5: DHS should provide protection and assistance to H-2A workers who report blacklisting.** Widespread employer threats of blacklisting play a huge role in preventing workers from coming forward. Many H-2A workers return to the same employer year after year, in part because of the challenges that foreign workers encounter in attempting to find and connect with U.S. farm employers. For example, recruitment in many towns and regions of origin countries like Mexico runs through a single recruiter. This makes the fear of blacklisting particularly potent, as many workers understand that they will have enormous difficulty obtaining future H-2A positions. One recent survey posed the following question to Mexican H-2A workers: "Workers have told us that sometimes employers can threaten them if they don't do this or do that, and that they could be sent home early, could get less pay or not be invited back next season. Do you think this happens often?" 70% of the workers responded yes.[12] To give effect to DOL's current regulatory prohibition on blacklisting,[13] workers must feel confident that coming forward will not lead to loss of job opportunities. DHS should provide work authorization and parole to any worker who brings a credible report of blacklisting to a labor agency. In addition, DHS should add these workers to the database suggested in Recommendation 2 to assist them in connecting with other prospective H-2A employers.

- **Recommendation 6: DHS should eliminate the requirement and use of abscondment and termination reports.** Current H-2A regulations require that H-2A employers report a worker to DHS if he or she "absconds from the worksite" or is terminated prior to completion of the work contract.[14] The notification requirement functions as yet another avenue of exploitation for abusive employers, who can rely on the threat of an abscondment report to retaliate against workers seeking to leave. The coercive effect of this threat is intensified by current policy that bars absconded workers from the H-2A program for five years.[15] Reviewing hundreds of these reports is a waste of agency resources. USCIS has no way to verify the accuracy of the reports—employers are not obliged to provide any information about what occurred or why—and even valid reports do little to advance the agency's enforcement priorities. DHS already knows when H-2A workers will be out of status and gathers entry and exit data through CBP. If DHS chooses to maintain this ill-advised requirement, the report process at a minimum should be revised to include avenues for worker notification and opportunity for workers to

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[11] USCIS Ombudsman, *CIS Ombudsman's Recommendations to U.S. Citizenship and Immigration Services 2022*, https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN_I-129_BENEFICIARY_RECOMMENDATION_fnl_03-2022_508.pdf; H.R. REP. JOINT EXPLANATORY STATEMENT – SECTION F, CONSOLIDATED APPROPRIATIONS ACT, 2022, at 77 (2022), https://docs.house.gov/billsthisweek/20220307/BILLS 117RCP35-JES-DIVISION-F.pdf.

[12] *The IRÉ Project*, *supra* note 5, at 20.

[13] 29 C.F.R. § 501.4.

[14] 8 C.F.R. § 214.2(h)(5)(vi)(B)(1).

[15] 8 C.F.R. § 214.2(h)(5)(viii)(A).

respond. Including workers will minimize the chances that H-2A employment-related reports will be used to retaliate against workers who have exercised their rights or to coerce them into remaining in an abusive or exploitative working environment.

- **<u>Recommendation 7</u>: DHS should allow for an automatic extension of H-2A visa status for workers who are pursuing workers' compensation claims and treatment.** We routinely hear from workers and worker advocates that the loss of H-2A visa status presents major obstacles to workers who are injured on the job. It is unrealistic for most H-2A workers—particularly given their relative isolation and lack of access to resources—to find an immigration attorney and pursue a change of visa status while suffering from an injury or illness they experienced at work. DHS already has emergency extension provisions for the H-2A visa in place to respond to unanticipated needs of employers.[16] The same consideration should be given to workers facing emergent circumstances that stem from the employment authorized by their visa. DHS should allow for an automatic extension of status while workers pursue workers compensation claims and any related treatment.

- **<u>Recommendation 8</u>: DHS should work with the Social Security Administration to issue H-2A workers Social Security Numbers through the Enumeration at Entry program.** H-2 workers are entitled to SSNs as lawfully present, authorized workers.[17] Yet H-2A workers consistently face challenges in obtaining an SSN before their contract ends and they must return to their home countries. These barriers make it difficult for H-2A workers to file taxes to report their earnings to the government, comply with their legal obligations, and access tax credits like the stimulus payments and refunds. Difficulty obtaining vital documents like Social Security cards can also make H-2A workers more vulnerable to abuse by unscrupulous employers and impede their access to other identification documents, such as a driver's license. DHS should work with SSA to expand the SSA's existing Enumeration at Entry (EAE) program to include H-2A nonimmigrant visa holders.

- **<u>Recommendation 9</u>: DHS should provide employment authorization to H-4 spouses accompanying H-2A workers.** H-2A workers are often forced to leave their families behind while they come to work in the United States for months at a time. Because most H-2A workers come from economically disadvantaged communities, they lack the resources to pay for an H-4 visa application without any potential for that spouse to earn an income. Extending eligibility for employment authorization to H-4 spouses would advance basic humanitarian aims of family unity, but it would also provide greater security to H-2A workers who seek to leave a bad job, as they could rely temporarily on spousal income while seeking new employment. DHS already extends employment authorization to H-4 spouses of H-1B visa holders, recognizing that lack of employment authorization "often gives rise to personal and economic hardships for the families of H-

[16] 8 C.F.R. § 214.2(h)(5)(x).
[17] 42 U.S.C. § 405(c)(2)(B).

1B nonimmigrants."[18] The same is true of H-2A nonimmigrant families, and they should be afforded the same opportunity.

2. Positive Recruitment and Protection of Domestic Farmworkers

As the H-2A program has expanded, so has its impact on domestic farmworkers. In some geographic areas and agricultural activities, our partners have reported that H-2A workers have in fact become the majority of the workforce. Current protections against displacement of domestic farmworkers are insufficient, and rely on a limited concept of displacement. Many of the requirements in place only come into effect if a domestic farmworker actually applies for a H-2A job opportunity. The protections are designed to ensure that the domestic farmworker is not turned down, and they often require the domestic farmworker to go through a complex process run by the State Workforce Agency (SWA) rather than the normal word-of-mouth process relied on by many domestic farmworkers.

The displacement that we see occurring today in agriculture functions differently: employers are discouraging domestic farmworkers from applying in the first instance. Sometimes this occurs through the use of unwarranted job requirements, through manipulation of job start dates, or through offering wages and working conditions that are below those normally accepted in the local labor market. And domestic farmworkers are well aware of the effect that a captive H-2A workforce has on a workplace. Many farmworkers we speak to report that they avoid workplaces with a large number of H-2A workers because they know they will face inhumane working conditions, including long hours and unreasonable productivity requirements. Many others report that they know H-2A employers do not want domestic workers and will create justifications for not hiring them or firing them.

Because of the rampant discrimination that occurs in H-2A recruitment abroad, women and older workers in the U.S. are particularly affected by displacement in the H-2A program. In addition to including unwarranted job requirements, employers use tactics like refusing to offer family housing or stretching job orders into the school year to discourage U.S. workers who may have children and family obligations—disproportionately women and older workers—from applying for jobs. Those employers then turn to the H-2A program, where recruitment discrimination has resulted in a workforce that is overwhelmingly male and significantly younger than the domestic workforce. The resulting differences in physical ability and endurance contribute to the long hours and unreasonable productivity requirements in H-2A dominated workplaces.

Your agencies can combat the harmful displacement of domestic farmworkers by adopting the following recommendations:

- **Recommendation 10: DOL should require all employers to provide evidence supporting any job qualifications set forth in a job order.** U.S. workers are only required to be "minimally qualified" to perform jobs for which H-2A workers are requested.[19] However, many employers now include experience requirements, lifting

[18] 80 Fed. Reg. 10284 (Feb. 25, 2015).

[19] *Bernett v. Hepburn Orchards, Inc.*, 1987 WL 16939 (D. Md. 1987).

requirements, and productivity standards in job orders that are not common in the domestic labor market.[20] They also include other vague, overreaching requirements that, if violated, may result in termination.[21] Existing regulations state that the burden is on the employer to provide evidence and justification to demonstrate job qualifications are "bona fide and consistent with the normal and accepted qualifications" required by non-H-2A employers, per 20 C.F.R. § 655.122(b), and "prevailing," per 20 C.F.R. § 653.501(c)(2)(i). However, we see that ETA and SWAs regularly certify job orders without any such showing. For example, more than half of all job orders approved in FY2022 required three or more months of experience.[22] DOL should amend these regulations to clarify that employers must provide evidence showing that *any* job requirement set forth in a job order is normal and accepted in the region and crop activity. This evidentiary requirement could be waived if there is a valid prevailing practice survey that supports the inclusion of the requirement.

- **Recommendation 11: DOL should require SWAs to engage in prevailing practice surveys and ensure adequate funding for their implementation.** Despite its own regulatory obligations, the DOL is failing to ensure that SWAs are conducting prevailing practice surveys, enabling the proliferation of unwarranted job requirements described above. Prevailing practice surveys—once common in the H-2A program—provide standard qualifications for a position in an area to ensure that employers are not using inappropriate requirements to discriminate against US workers. They also function to reduce exploitation of vulnerable workers by setting maximum productivity standards that protect the health and safety of workers and by preventing employers from increasing productivity requirements without improving wage rates.

- **Recommendation 12: DOL should subject job orders to higher scrutiny if they do not clearly fall within the H-2A definition of agriculture.**[23] Many employers have been submitting job orders and petitions for H-2A workers to fill jobs that are not agricultural in nature and should therefore fall within the H-2B program. DOL's OFLC continues to certify many of these applications, allowing employers to evade the H-2B visa numerical

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[20] The requirements can be simultaneously specific and broad. We have seen requirements such as: lifting ability of 75 pounds, the ability to operate agricultural equipment 'with or without direction', understanding and operating GPS systems, holding a valid driver's license and the ability to obtain a CDL license, the ability to drive a manual-gear semi-truck, the ability to work on holidays, the ability to work in 100+ degree temperatures 'with or without reasonable accommodations.'

[21] *See, e.g.*, ETA-790A, H-2A Case Number: H-300-22031-866773, Certification Determination Date: March 1, 2022 (including requirements such as "Workers assigned to bunk beds in employer-provided housing may not separate bunk beds" and "Workers may not leave paper, cans, bottles and other trash in fields, work areas, or on housing premises.").

[22] *See* Farmworker Justice, *INTERACTIVE: Analysis of FY2022 H-2A Jobs* (2023), https://www.farmworkerjustice.org/h2afy2022map. The approval of these 3-month requirements is likely related to DOL's O*Net category 1, which states that jobs in this lowest category require 0-3 months of experience. By allowing three-month experience requirements, ETA is allowing the maximum of a descriptive range to become a minimum required standard, and excluding a huge swath of domestic farmworkers in the process.

[23] Job orders in year-round agricultural industries, such as dairies and mushroom farms, should also face heightened scrutiny as to whether they meet the "temporary or seasonal" requirement. Although a recent DOL FAQ did provide more guidance on this issue, we continue to see a number of dairy and mushroom job orders approved that are not clearly for temporary or seasonal work.

caps as well as other responsibilities under the H-2B program, such as the payment of OEWS-based prevailing wages. We frequently see this misclassification with truck drivers[24], construction workers, and pine straw workers[25], as well as others. One simple way to identify jobs that merit greater scrutiny as to their agricultural nature is to examine the NAICS code for the position. The NAICS codes for agricultural work generally fall within Sector 11 (although a NAICS code within Sector 11 does not by itself render a job eligible for the H-2A program). In FY22, more than 18,000 H-2A positions were certified for jobs that fell outside of Sector 11. These employers should be required to provide explanations and/or evidence to show that the positions they seek to fill are actually agricultural.

- **<u>Recommendation 13</u>: DOL should go further to protect prevailing wage rates by incorporating worker data, requiring hourly estimates of prevailing piece rates, and providing adequate funding.** The impact of DOL's changes to the prevailing wage survey methodology in the 2022 H-2A Rule are yet to be determined, but the rule failed to address several key flaws of the current broken prevailing wage regime.
    - First, the rule maintains the failed methodology that relies on voluntary employer participation, which gives employers the ability to prevent the finding of a prevailing wage by refusing to participate. DOL and state agencies should take new approaches to gathering employer data, potentially through payroll records as a condition of participation in the H-2A program, and should reinstate the use of data collection from workers to verify the employer-collected data. DOL should use worker data worker data to set prevailing wages where employers have declined to participate in wage surveys.
    - Second, the rule did not address the application of the prevailing wage protection when a prevailing piece rate is in place. In some areas, like Washington state, workers earn much more at the prevailing piece rate than they would at an hourly wage rate. For more than a decade, DOL has approved clearance orders that offer the AEWR only even when OFLC has published a prevailing wage rate, in violation of the regulatory requirement that the highest wage rate be offered. This allows employers to pay lower wages to H-2A workers than U.S. workers, violating the statutory requirement against adverse effect. DOL should clarify that, where a prevailing piece rate exists, employers must provide, and SWAs must verify, estimates of what workers paid that piece rate would earn per hour.

[24] In many situations, labor contractor employees engaged as truck drivers are not engaged in "agriculture" within the meaning of the Fair Labor Standards Act (FLSA). If occurring away from the farm, these transportation jobs are only able to qualify as agriculture under FLSA if performed by the direct employees of the farm's owner. Similarly, in these instances, the H-2ALC employees are not involved in agriculture under the Internal Revenue Code definition when they are operating off farm property. *See Everglades Harvesting & Hauling, Inc. v. Scalia*, 427 F.Supp.3d 101, 113 (D.D.C. 2019).

[25] Last fall's H-2A final rule reaffirmed the exclusion of pine straw jobs from the H-2A definition of agriculture. (87 FR 61682.) Yet we continue to see OFLC approving H-2A job orders for pine straw. For example, two approved job orders (for nearly 70 workers) from last year explicitly sought "straw balers" and listed pine straw bales as the unit for their piece rate. (ETA job orders H-300-21347-761112 & H-300-21354-776886.) Several other approved orders were submitted by companies whose names clearly indicate that pine straw is their primary activity. These jobs should not be approved as H-2A and instead should be subject to the cap and requirements of the H-2B program.

This will enable DOL and the employer to compare with the AEWR and determine the highest wage rate, as required by existing regulations.

- **<u>Recommendation 14</u>: DOL should clarify and enforce existing regulatory requirements that employers spend at least equal resources on recruitment of domestic farmworkers.** Too often, we have seen employers making only cursory efforts to recruit and hire U.S. workers before moving quickly to hire H-2A workers instead. Recent regulatory changes relaxing requirements to advertise in different media have exacerbated the problem. Current regulatory requirements at 20 C.F.R. § 655.154(b) requiring employers to spend the same amount of resources on additional domestic recruitment as they do on H-2A worker recruitment are rarely enforced. The DOL should improve its enforcement of existing rules and require employers to provide additional information on resources spent on recruitment in certification forms to ensure that employers make genuine efforts to comply with the positive recruitment protections.

- **<u>Recommendation 15</u>: DOL should address employer misrepresentation of work dates by requiring stipends for workers in weeks when work is not available and by implementing the ¾ guarantee on at least a monthly basis.** We are increasingly hearing from H-2A workers and their advocates around the country that they are having to wait for weeks at a time for work to begin once arriving in the U.S. In these cases, employers have listed start dates on job orders that are before the date of actual need, often to have labor on hand to meet needs as soon as they arise. This harms positive recruitment efforts, as local workers accustomed to certain work timelines may not yet be looking for jobs. But it also harms the H-2A workers themselves, who are forced to cover meals and other expenses without any compensation, often leading to further debt. DOL should address this by requiring employers to pay workers a stipend for meals and other household expenses in any weeks when work is not available. DOL should also apply the ¾ guarantee on at least a monthly basis—similar to the 12- and 6-week periods required under the H-2B regulations[26]—to ensure that workers do not face extended periods without work or pay.

- **<u>Recommendation 16</u>: DOL should require SWAs to ensure that clearance orders are translated to Spanish and other major languages in the area**. To ensure that all workers are aware of their rights—and to effectuate the positive recruitment of U.S. workers that is required under the H-2A program—DOL must ensure that Spanish-speaking workers are able to access and review clearance orders in their native language. We know that English-only clearance orders have presented particular barriers for U.S. farmworkers in Puerto Rico, where some local SWA officials have limited English ability and, without translations, are unable to refer workers to available positions elsewhere in the United States. This would align with the practices of certain SWAs that already translate or require submission of translated clearance orders and help to fulfill the Department's language access obligations.[27] It would also bolster compliance with the existing regulatory requirement that all H-2A workers and workers in corresponding

[26] 20 C.F.R. 655.20(f).
[27] Executive Order No. 13,166, *Improving Access to Services for Persons With Limited English Proficiency* (2000).

employment receive a copy of the work contract "in a language understood by the worker."[28]

- **<u>Recommendation 17</u>: DOL's positive recruitment protections should take into consideration the role of labor contractors.** Below are two ways that employers evade U.S. worker recruitment protections through the use (or termination of use) of labor contractors. DOL should address both.
    - DOL should once again require employers seeking H-2A certification to state whether the use of domestic farm labor contractors is a prevailing practice in their area. We have seen employers who have long relied on FLCs (or other staffing agencies) to supply domestic workers decide to stop working with those agencies and then claim a lack of available workers. If the workers in the area are accustomed to working with third parties like FLCs, the employer should be required to advertise the job opportunities first with those FLCs.
    - The current regulations require employers to contact all U.S. workers who worked for them in the previous year.[29] Fixed-site employers seeking to evade this requirement sometimes hire an H-2A labor contractor instead. Because the H-2ALC is the party applying for the workers, the regulatory protection does not extend to the U.S. workers previously employed by the fixed-site employer unless they are joint employers. If DOL continues to allow H-2ALCs to apply independently (see Recommendation 19), it should require H-2ALCs to contact former U.S. employees of the fixed-site employers to whom they provide labor.

- **<u>Recommendation 18</u>: DOL should allow for third-party intervention by farmworker organizations in ALJ hearings appealing certification denials.** When OFLC denies an employer's certification application, the employer can appeal that denial to DOL's Office of Administrative Law Judges. Farmworkers and farmworker organizations often have the best information about whether domestic farmworkers are "able, willing, qualified, and available" for the positions at issue. DOL should provide a process for third parties to intervene in OALJ hearings to provide the domestic farmworker perspective and ensure that the mandate against adverse effect is fulfilled. This will also require improvements to the OALJ docket page to make it more accessible for third parties. For example, the docket page currently does not provide the actual pleadings for the appeal, so there is no way to know the subject matter of the cases being scheduled.

3. <u>Employer Accountability</u>

The recent trafficking cases that we have seen in Georgia, Florida, South Carolina, and other states are deeply disturbing, and they are far from the only violations that workers and their advocates encounter. H-2A workers routinely face violations of their limited rights, such as wage theft, unsafe housing, and dangerous working conditions. For example, a group of H-2A workers in Louisiana recorded the farmer they worked for threatening them at gunpoint after they

[28] 20 C.F.R. § 655.122(q).

[29] 20 C.F.R. § 655.153. DOL should also consider extending this contact requirement to the prior three years.

requested access to adequate drinking water in the field.[30] On one Georgia farm, 19 H-2A workers were forced to live in dilapidated housing that was infested with roaches and had no heat, hot water, or working toilets.[31] In several states, H-2A workers have reported to our partners that their employers have failed to reimburse them for their travel and visa fees, as required by the H-2A regulations. And countless stories never come to light because workers determine that the risks of pursuing a claim—potential loss of employment and future blacklisting—outweigh the potential benefits.

Workers who do want to raise complaints face significant barriers. Many lack opportunities to learn about their workplace rights or communicate with advocates who can assist them. When they come to the United States, H-2A workers usually find themselves isolated in rural locations, unable to access resources and assistance due to both distance and language ability. Most do not speak English, and there are many who have difficulty communicating even in Spanish. One survey of 100 recently returned H-2A workers in Mexico found that nearly 20% of them spoke an indigenous language, and none had ever received workplace information in that language.[32] Limited availability of legal aid and other social services in these locations and employer efforts to stop outreach workers from accessing worker housing further exacerbate the problem. And H-2A workers have fewer avenues to bring legal claims because they are categorically excluded from the Migrant and Seasonal Agricultural Workers Protection Act, the primary federal protection for farmworkers.[33]

Another barrier to seeking accountability is the growing role of farm labor contractors in the H-2A program. Unlike in the H-2B program, DOL and DHS permit H-2A labor contractors (H-2ALCs) to apply for H-2A workers without any underlying fixed site employer. The increase in farm labor contracting in the H-2A program is a cause for concern given the long history of abuses associated with growers' use of labor contractors. A recent EPI study analyzing data from the DOL's Wage and Hour Division determined that farmworkers who are employed through labor contractors are more likely to suffer wage and hour violations than those who are hired directly by farms.[34] The fixed-site employers that utilize the services of these H-2ALCs often are able to avoid any responsibility for violations that occur on their farms. Some unscrupulous fixed-site employers use H-2ALCs to avoid corresponding employment obligations, hiring their H-2A workers through the H-2ALC while simultaneously hiring domestic farmworkers directly or through a different entity at wage rates below the AEWR. The division between fixed-site employees and H-2ALC employees can create confusion for workers seeking to identify parties responsible for violations. Even when workers win lawsuits against H-2ALCs, they are often unable to recover any lost wages or obtain damages because the H-2ALCs are poorly capitalized.

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[30] Ariel Salk and Jacque Porter, *VIDEO: Louisiana farmer shouts profanities, points guns at employees*, WJHL (Dec. 20, 2021), https://www.wjhl.com/news/crime/video-louisiana-farmer-shouts-profanities-points-guns-at-employees.

[31] Suzy Khimm and Daniella Silva, *Lured to America – then trapped*, NBC NEWS (July 29, 2020), https://www.nbcnews.com/specials/h2a-visa-program-for-farmworkers-surging-under-trump-and-labor-violations.

[32] *Ripe for Reform*, *supra* note 2, at 31.

[33] 29 U.S.C. § 1802(10)(B)(iii).

[34] Daniel Costa et al., *Federal labor standards enforcement in agriculture*, ECONOMIC POLICY INSTITUTE (2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers.

Finally, the agencies responsible for implementing the H-2A regulations lack adequate resources and staffing to effectively monitor the program. On the front end, OFLC and state workforce agencies are responsible for ensuring that certification applications comply with regulatory standards on issues including housing inspections, wage rates, and job qualifications listed in job orders. Yet OFLC approves more than 95% of certification applications each year, and advocates regularly identify noncompliant provisions in certified job orders. On the back end, DOL's Wage and Hour Division is responsible for enforcement of the H-2A regulations. However, there is a very low probability—just 1.1%—that any farm employer will be investigated by WHD in any given year, and the number of agricultural investigations has decreased significantly over the last decade.[35]

DOL and DHS can improve employer compliance and bolster workers' ability to hold unscrupulous employers accountable by adopting the following recommendations:

- **<u>Recommendation 19</u>: DOL should not grant labor certification applications submitted by labor contractors, or at the very least, should require labor contractors to file jointly with fixed-site employers.** As noted previously, the higher rates of violations committed by H-2A labor contractors are reason for significant concern as H-2ALCs become the majority of employers in the program. Moreover, it is unclear how DOL and DHS can properly assess the seasonal or temporary nature of an H-2ALC's labor needs when those needs are only created when the H-2ALC enters into agreements with fixed-site employers. DOL could avoid this problem altogether and provide clarity to workers, both H-2A and domestic, by requiring labor certification applications to be submitted by the underlying fixed-site employer. Alternatively, the agency could require all H-2A labor contractors to file as joint employers with the fixed-site employers, as it does in the H-2B program. This would eliminate any ambiguity that remains under the new definition of "joint employer" promulgated in the October 2022 Final Rule, and would ensure that fixed-site employers do their due diligence in choosing which labor contractors to hire for their labor needs.

- **<u>Recommendation 20</u>: DOL should require H-2A employers to enter into an agreement with a bona fide labor union, or at the very least, commit to labor neutrality.** Labor unions have long served an important role in identifying and remedying workplace violations. It is clear that the federal government's resources are too limited to address the wide range of violations that are occurring in the agricultural sector and H-2A program in particular. Bona fide labor unions can help to fill the monitoring gap. They can provide critical rights education to workers and resolve grievances with employers, as well as advance H-2A worker mobility by connecting them with jobs at other worksites with union representation. In North Carolina, for example, FLOC has successfully represented thousands of H-2A workers in a CBA with the North Carolina Growers Association and has tackled recruitment abuses and workplace violations. FLOC's H-2A members can now rely on FLOC to assert their rights and guarantee their ability to return in future years, if desired. Such a requirement

[35] *Id.*

would not be entirely novel: The federal government already recognizes the advantages of union involvement in many federally funded construction projects by requiring all contractors to enter into Project Labor Agreements. An H-2A programmatic requirement would be a similarly legitimate use of executive authority. Even if such a programmatic requirement is not implemented, H-2A employers should at least commit to labor neutrality to ensure that H-2A workers seeking to organize do not face retaliation from their employers.

- **Recommendation 21: DOL and DHS should establish standards and procedures for an immediate freeze of an employer's certification applications and I-129 petitions if there has been a death or serious injury at the worksite.** The investigation that became Operation Blooming Onion began years before indictments were handed down. During the course of the investigation, DOL and DHS continued to approve the defendants' requests for *thousands* of additional H-2A workers. These approvals apparently continued even after workers died of heat stress. When the government has knowledge that workers' lives are in danger as a result of their employer's malfeasance, the continued approval of H-2A petitions for that employer is unconscionable. DOL and DHS should both establish processes to ensure that employer's applications do not move forward if there are indications of workplace abuse or negligence, such as a death or serious injury at the worksite. These employers should then bear the burden of showing that the approval of their pending applications and petitions will not put workers in danger.

- **Recommendation 22: DOL should prohibit employers from requiring workers to agree to arbitration of disputes as a condition of employment.** For years, DOL administrative law judges have recognized that mandatory arbitration agreements are not normal and accepted job requirements and therefore cannot be included in the job contract.[36] However, advocates continue to encounter employers who require workers to sign separate arbitration agreements upon their arrival at the worksite. Not only does this violate the requirement that all relevant terms and conditions be included in the job order, but workers often lack the opportunity, resources, and information to fully assess the agreement they are signing. DOL regulations should clarify that mandatory arbitration agreements are not allowed in the H-2A program.

- **Recommendation 23: DOL should expand the list of violations that can result in debarment, provide for a pause of certifications while investigations are underway, and more vigorously pursue debarment of employers who violate worker rights.** While we welcome the recent expansion of OFLC and WHD's debarment authority to cover employers' agents and attorneys[37], we remain concerned that the DOL's infrequent use of debarment has failed to deter serial violators.[38] DOL should update the regulations to clarify that any misrepresentation in a job order is grounds for debarment, as it is for

[36] *See, e.g.*, De Eugenio & Sons #2, No. 2011-TLC-00410, slip op. at 2 (Dep't of Labor June 13, 2011).

[37] *See* 20 C.F.R. § 655.182; 29 C.F.R. § 501.20.

[38] Effective debarment is also another reason to prohibit labor contractors from serving as the sole H-2A employer. We often see violators who, once caught, begin operating under a different business name to evade accountability. This is harder for fixed-site employers, whose addresses cannot change as easily.

discontinuation of services under the Wagner-Peyser regulations.[39] The regulations should also include a provision for a temporary pause on further certifications while investigations are underway, to prevent future occurrences like the certification approvals for the Blooming Onion defendants.

4. **Foreign Recruitment**

The violations of H-2A workers' rights often begin before they have even left their home country. Many workers seeking H-2A jobs live in rural areas where employment opportunities are limited. H-2A jobs are attractive to workers because the pay rate is typically significantly higher than what they could earn in their home country. These workers are especially vulnerable to exploitation because they often have limited resources and low levels of education, leading them to rely entirely on recruiters and agents who work for U.S. employers. These recruiters and agents often take advantage of their power to become gatekeepers, limiting access to job opportunities. It is incredibly challenging for workers to identify H-2A opportunities, connect with employers, and get hired without these intermediaries.

As numerous reports and news stories have demonstrated, the recruitment process is rife with abuse. Recruiters often charge workers illegal recruitment fees or otherwise require them to provide some sort of collateral. One survey of recently returned H-2A workers in Mexico found that 58% of workers interviewed reported paying recruitment fees.[40] Another investigative report uncovered a Honduran recruiter who admitted charging fees as high as US$10,000 to connect workers with H-2 job opportunities.[41] Many workers go into debt to pay these fees, which in turn decreases their willingness to raise workplace complaints for fear of losing their job and the ability to pay back their debts. Other workers are disincentivized from vindicating their rights because they face breach fees or other threats from recruiters—such as blacklisting or even physical harm to them or their families—if they leave their U.S. employment before the scheduled end of the contract. And the COVID-19 pandemic led to cancellation of visa interviews at many consulates, which meant that workers are not receiving critical rights information, such as the Wilberforce pamphlet, that is typically delivered at the interview.

The federal agencies responsible for the H-2A program have done woefully little to address the unregulated recruitment process. Indeed, the current regulations regarding recruitment fees arguably do more harm than good: the fee prohibition effectively insulates employers from liability when recruitment fees are charged and disincentivizes workers from reporting fees due to the likely loss of their visas if they do. Adoption of the following recommendations would represent a major step forward for recruitment protections:

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[39] 20 C.F.R. § 658.501.

[40] Centro de los Derechos del Migrante, Inc. *Recruitment revealed: Fundamental flaws in the H-2 temporary worker program and recommendations for change* (2018), http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

[41] El Heraldo, *Visas de trabajo en Estados Unidos por L 250 mil ofrece red clandestina* (Jan. 18, 2022), https://www.elheraldo.hn/elheraldoplus/investigaciones/visas-trabajo-estados-unidos-red-clandestina-honduras-facebook-JYEH1509617.

- **<u>Recommendation 24</u>: DOL should create a certification process and public registry for individuals and companies engaging in international recruitment of H-2A workers:** Recent guidance from the Department of Labor and other agencies encourages governments involved in temporary labor programs to "design measures, such as public registration, licensing or certification of recruiters, and systems that permit workers and other interested parties to verify the legitimacy of recruitment agencies and placement offers."[42] Yet the United States government itself does not have any of these protections in place. Any recruiters seeking certification should be required to swear to their compliance with U.S. laws against discrimination, fraud, recruitment fees, and other applicable laws, including recruitment laws in their country of origin. Recruiters should also be required to pay a bond to ensure that workers have access to a remedy for any violations they suffer. This bond should be accessible to workers regardless of whether they are participating in a government investigation or pursuing a case as private litigants. The recruiter registry must also be made public, so that workers abroad are able to verify that recruiters they are engaged with are legitimate actors.

- **<u>Recommendation 25</u>: DOL should require employers submitting H-2A certification applications to work with registered recruiters.** H-2A employers who rely on recruiters to connect with workers in countries of origin should be required to use registered recruiters and name them in their certification applications. This information should be made public in real time so that workers are able to verify the availability of jobs that their recruiters are offering. U.S. employers should be held jointly liable for the actions of their recruiters during the recruitment process, including reimbursement of any illegally charged recruitment fees. Any employers who use non-registered recruiters should be held strictly liable.

- **<u>Recommendation 26</u>: DHS should amend its regulations to ensure that workers who report recruitment fees are not punished by losing a job opportunity.** When in-person interviews occur, State Department consular officers often ask whether the worker was forced to pay recruitment fees. Under present policy, workers are unlikely to report it because it could result in revocation of the employer's H-2A petition and therefore loss of the job opportunity.[43] DHS should amend this regulation to ensure that workers have access to a work opportunity with similar wages and work periods, whether through targeted H-2A job assistance or forms of immigration relief like parole.

- **<u>Recommendation 27</u>: DOL should require registered recruiters to share the terms and conditions of a job contract at the time of recruitment, in a language that the worker understands.** The current regulations require disclosure of the work contract at the time the worker applies for the visa.[44] By that point the worker has often already made commitments to the recruiter and employer, and they should have full information about the job offer before any commitments are made.

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[42] U.S. Department of Labor et al., *Guidance on Fair Recruitment Practices for Temporary Migrant Workers* (June 2022), https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf.

[43] 8 C.F.R. 214.2(h)(5)(v)(xi)(A).

[44] 20 C.F.R. 655.122(q).

- **Recommendation 28: DOL should require employers—or their registered recruiters—to pay directly for workers' visa application fees and transportation to the United States.** Most workers incur fees and debt to pay for visa fees and transportation to the United States. Although many of these fees are required to be reimbursed by the employer under the H-2A regulations, the upfront payment creates risks for workers. When workers are required to pay upfront fees in order to obtain their H-2A visa, they often take out loans—and are sometimes forced to pay usurious interest rates or even provide the deed to their home as collateral—to cover the costs. One recent survey of returned H-2A workers in Mexico found that 62% of workers surveyed had taken out loans to cover the costs of their visa and travel. These loans increase workers' vulnerability to abuse, coercion, and exploitation.

5. **Workplace and Housing Protections**

When H-2A workers arrive in the United States, they join an already vulnerable U.S. farm workforce. Farmworkers have long been treated as second-class workers in the United States, the product of a long history of slavery, exploitation, and racism in the agricultural industry.

For example, most farmworkers are excluded from the labor protections afforded to workers in other sectors of the economy. These exclusions resulted in large part from concessions made to Southern legislators in New Deal-era labor legislation when agricultural workers were predominantly African-Americans.[45] They continue today, when the vast majority of farmworkers are people of color and an estimated four out of every five farmworkers are Hispanic/Latino.[46] Federal law deprives farmworkers of the right to join a union free from retaliation and denies them overtime pay.[47] Occupational safety standards that exist for most other workers are denied to many farmworkers.[48] Most state laws are similarly restrictive,[49] although California, the most productive agricultural state, has extended most labor protections to agricultural workers.[50] Even when labor protections exist, there are still widespread violations of farmworkers' rights.

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[45] Sean Farhang and Ira Katznelson, "The Southern Imposition: Congress and Labor in the New Deal and Fair Deal," *Studies in American Political Development, vol. 19* (Spring 2005), p. 14 (quoting Florida Congressman James Mark Wilcox's comments in the debate over FLSA: "[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it.").

[46] U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2019-2020: A Demographic and Employment Profile of United States Farmworkers* (2022), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf.

[47] 29 U.S.C. § 213(b)(12) (FLSA exemption); 29 U.S.C. § 152(3) (NLRA exemption).

[48] *See, e.g.*, Walking-Working Surfaces and Personal Protective Equipment (Fall Protection System), 81 Fed. Reg. 82,494, at 82,504 (Nov. 18, 2016) (declining to extend walking-working surface standards to agricultural operations).

[49] Farmworker Justice, Farmworkers' Rights Under State Employment Laws: An Interactive Map, https://www.farmworkerjustice.org/general-map/.

[50] California Department of Industrial Relations, *Overtime for Agricultural Workers* (January 2019), https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers.html.

Amid this lack of labor protections, farmworkers have faced disproportionate harms from COVID-19 and climate change. Farmworkers are on the frontlines of exposure to extreme temperatures and wildfires. As smoke fills the air and temperatures increasingly exceed 100 degrees, calls from state and local officials to stay indoors stand in sharp contrast with the reality of farmworkers, who must continue their strenuous work in the field to earn a living.[51] Yet there are no national occupational safety standards requiring agricultural workplace protections against injury and death from heat or wildfires.

- **Recommendation 29: DOL should require H-2A employers to have a heat safety plan in place for workers.** The exploitative structure of the H-2A visa leads many H-2A workers to push themselves to the limit of human ability. This is especially dangerous amid rising temperatures and the increased frequency of extreme heat waves. The two H-2A workers who died at the hands of the Blooming Onion traffickers died as a result of heat stress. Multiple other H-2A workers have also died from heat stress. In addition to acclimatization, access to shade, water, rest, and any needed medical care, the agency's requirements for addressing heat stress should include providing air conditioning in H-2A housing during periods of high heat to allow workers access to the necessary cooling to avoid heat illness.

- **Recommendation 30: DOL should require H-2A employers to certify their compliance with the Worker Protection Standard and ensure other pesticide protections are in place.** The existing H-2A regulations are silent on one of the greatest threats to farmworker health: toxic pesticides. Every year, physicians treat approximately 20,000 agricultural workers for pesticide poisoning, according to federal estimates, and as many as 300,000 suffer some form of pesticide-related injury or acute illness.[52]. The immediate aftermath of acute pesticide poisoning can result in rashes, vomiting, and even death. In the long-term, pesticide exposure has been associated with increased risk of cancers, infertility, neurological disorders, and respiratory conditions. To address the dangers posed by pesticides, DOL should require H-2A employers to certify their compliance with the EPA's Worker Protection Standard and should ensure that H-2A housing and worksites have the proper resources for workers to limit pesticide exposure, like washing machines to remove pesticide residue from clothing.

- **Recommendation 31: DOL should clarify the narrow scope of terminations "for cause" under the existing regulations and provide an avenue for workers to contest termination reports.** The existing regulations require employers to notify both OFLC and DHS when an employee is terminated "for cause" or absconds.[53] Termination "for cause" and abscondment release an employer from a number of obligations, including return transportation and the ¾ guarantee, as well as the requirement to contact former

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[51] Brian Osgood, '*What choice do we have?' US farm workers battle deadly heatwave*, ALJAZEERA (July 15, 2021), https://www.aljazeera.com/economy/2021/7/15/what-choice-do-we-have-us-farm-workers-battle-deadly-heat-wave.

[52] *See, e.g.*, Centers for Disease Control and Prevention, *NIOSH Pesticide Poisoning Monitoring Program Protects Farmworkers* (2018), https://www.cdc.gov/niosh/docs/2012-108; U.S. General Accountability Office, *Hired Farmworkers, Health and Well-Being At Risk* (1992), https://www.gao.gov/assets/hrd-92-46.pdf.

[53] 20 C.F.R. § 655.122(n).

U.S. workers in subsequent seasons.[54] In our experience, we have seen both U.S. and H-2A workers terminated for reasons that are either spurious employers claims or have nothing to do with the workplace. As noted in Recommendation 10, job contracts increasingly include unwarranted job requirements like prohibitions on separating bunk beds in housing or leaving trash in worker housing. DOL should clarify that the scope of "for cause" terminations is narrow, and it should provide workers with an avenue to contest fraudulent employer termination reports.

- **Recommendation 32: DOL should improve standards for housing inspections, including random inspections during the work contract.** In addition to ensuring pre-occupancy housing inspections, DOL and state authorities should conduct random inspections while H-2A workers are present in housing to ensure that conditions have not deteriorated and to hold employers accountable.

- **Recommendation 33: DOL should require employers to provide sick/medical leave and transportation to medical appointments.** For H-2A workers that become ill or injured during their H-2A contract, many find themselves forced to choose between working while sick or injured or being sent back to their home country because they were unable to work. Those who do wish to seek medical attention face the additional hurdle of finding transportation, a difficult task in rural areas, and too often, employers refuse to provide it.[55] Forcing people to work while sick creates serious food safety issues that can have broad societal impacts. Another problem is that many workers who request the ability to seek medical treatment are refused. Because H-2A workers lack transportation, they are often reliant on their employers for their ability to obtain medical care. To address these problems, DOL must require H-2A employers to provide transportation to medical appointments and at least 5 days of sick/medical leave.

- **Recommendation 34: DOL and DHS should require H-2A employers to agree to provide access to service providers, including legal aid, as a condition of participation in the program.** Workers in the H-2 program often live in isolated areas with little access to transportation, making it difficult for them to access healthcare and legal and other service providers except by receiving visits to their worksites or employer-owned or employer-facilitated housing. In the wake of the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, employers have denied health departments and community health workers, as well as worker organizations, access to migrant workers who would benefit from their services, including vaccination and rights information. Requiring employers to consent to visits will ensure that migrant workers' rights to access information and services are better protected. DOL could require this access agreement with employers' certification applications, or DHS could also institute this requirement by expanding the scope of its current access regulation, which only grants access to DHS officials.[56]

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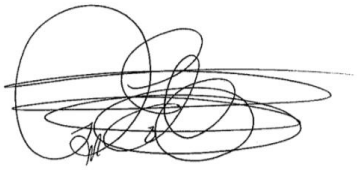
[54] 20 C.F.R. § 655.122(h), 655.122(n), and 655.153.

[55] Yemas Ly, *Sumas farmworker dies; colleagues fired after protesting working conditions*, SEATTLE GLOBALIST (Aug. 10, 2017), https://seattleglobalist.com/2017/08/10/sumas-farmworkers-protest-blueberry-picker-dies/67975.

[56] 8 C.F.R. § 214.2(h)(5)(vi)(A).

Thank you for your attention to the many concerns that have been raised about exploitation and abuse of workers in the H-2A program. We look forward to continued engagement with your agencies as you seek to make improvements to the program, and we will continue to advocate in Congress for migration pathways that provide workers with full agency and control of their own visas. If you would like to meet to discuss these recommendations further, please contact Andrew Walchuk, Senior Policy Counsel and Director of Government Relations (awalchuk@farmworkerjustice.org) and Alexis Guild, Vice President of Strategy and Programs (aguild@farmworkerjustice.org).

Sincerely,



Ron Estrada
CEO
Farmworker Justice

CC: Ur Jaddou
Jessica Looman
Seema Nanda
Raj Nayak
Brent Parton
Brian Pasternak

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
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U.S. Citizenship and Immigration Services

April 18, 2023

Ron Estrada
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connect@farmworkerjustice.org

Dear Mr. Estrada:

Thank you for your March 23, 2023 letter to the Department of Homeland Security (DHS) and the U.S. Department of Labor regarding the H-2A temporary agricultural worker program. Secretary Mayorkas asked that I respond on his behalf.

As you noted in your letter, DHS plans to issue a notice of proposed rulemaking that will modernize and reform the H-2A and H-2B programs. As noted in the publicly available DHS regulatory agenda, DHS will propose, among other things, to address current aspects of the program that may unintentionally result in exploitation or other abuse of persons seeking to come to this country as H-2A and H-2B workers; to build upon existing protections against prohibited payments or other assessment of fees or salary deductions of H-2A and H-2B workers in connection with recruitment or employment; and to otherwise add protections for workers. Additionally, in January 2023, DHS established a streamlined and expedited deferred action request process for noncitizen workers who are victims of, or witnesses to, labor rights violations. Deferred action protects noncitizen workers, including H-2A and H-2B workers, from threats of immigration-related retaliation from exploitive employers.

DHS greatly appreciated your participation in listening sessions related to our rulemaking effort, and we welcome the additional context and detail provided in your letter, which outlines valuable suggestions for reform.

Thank you again for your letter and interest in this important matter. Should you wish to discuss this matter further, please do not hesitate to contact the USCIS Office of Public Engagement by email at public.engagement@uscis.dhs.gov.

Sincerely,

Ur M. Jaddou
Director