H-2B WORKFORCE COALITION

Protecting American Workers Through a Stable and Reliable Seasonal Workforce

www.h2bworkforcecoalition.com

Re: DHS Docket No. USCIS-2022-0015; Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor: RIN 1205-AC14: Form ETA-9142B-CAA-7

Comments of the H-2B Workforce Coalition

The H-2B Workforce Coalition ("Coalition") is comprised of small and seasonal businesses across the country owned and operated by thousands of employers and their representatives from industries such as lodging, landscaping, seafood, restaurants, tourism, equine, forestry, mobile outdoor amusement, golf courses, and others. Our members are seasonal businesses that rely on the H-2B visa program to supplement their U.S. workforce during seasonal surge and peak business needs.

One Rule Provides an Amount of Certainty

The Coalition would like to thank the Departments of Homeland Security and Labor for promptly announcing the release of all available supplemental H-2B visas authorized by Congress. The certainty of knowing that these visas would be available to those employers who had early winter start dates, as well as to those employers who would be filing for various start dates in the spring and summer months, is extremely helpful in planning for business activities that support full-time U.S. workers. Not only do these visa positions help employers that use the H-2B visa, but they help employers and U.S. workers throughout the economy through downstream effects on the economy. Every H-2B

worker supports 4.64 U.S. jobs.[1] Furthermore, a 2020 General Accountability Office report concluded that "counties with H-2B employers generally had lower unemployment rates and higher average weekly wages than counties that do not have any H-2B employers."[2] These H-2B visas are critical to ensuring our economy rebounds and flourishes after the COVID-19 Pandemic.

Over the years, we have seen utilization of the H-2B visas increase as the U.S. had record low unemployment pre-pandemic. We have once again achieved record low unemployment post-pandemic. In Fiscal Year ("FY") 2022 the Department of Homeland Security ("DHS") announced the first half cap had been reached at the earliest time on record, September 30, 2021. The following year, the cap was announced even earlier in the season on September 12, 2022. The early announcement of supplemental cap relief allows H-2B employers to plan better. Although H-2B employers are thankful for the early announcement of additional H-2B visas for the remainder of the FY, we need legislative action to permanently increase the H-2B visa cap so H-2B employers can be certain that they will have the needed workforce to support their U.S. workers and the local economies in which they work.

Irreparable Harm Clarity

H-2B employers require further clarification regarding the requirements for requesting supplemental H-2B visas. Each year that the Departments have exercised the authority to release additional visas, they have required employers to attest that they are or will suffer irreparable harm. In the temporary final rule ("TFR") subject to this comment, the Departments attempted to clarify what they deemed irreparable harm to be and we thank you for these additional clarifications. Unfortunately, many employers are needlessly struggling with the agencies in providing requested information on the question of irreparable harm. These issues could be avoided if the Departments determined what evidence they are looking for, created consistent standards with regard to these information requests, and applied those standards both at DHS and DOL. Over the past couple of years, employers have been repeatedly audited by both USCIS and DOL and the agencies employ conflicting standards in evaluating employers' audit responses. Information acceptable to USCIS is deemed insufficient by DOL. In other cases, information provided in response to an audit is deemed sufficient by one auditor at USCIS or DOL, but when the same type of information is provided by another employer, it is deemed insufficient by another auditor at USCIS or DOL.

For instance, we have seen the Departments question employers that check the financial records box who have submitted several years of monthly profit and loss statements that show not only significant losses in months that they were unable to hire the requested H-2B workers, but also significant year over year increases in profit when they were able to hire the requested H-2B workers. Many employers are questioning whether the Departments are looking for something different regarding their financial records, and if so, what is the specific information

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[1] Zavodny, Madeline. *Immigration and American Jobs*. American Enterprise Institute, 15 Dec. 2011, www.aei.org/research-products/working-paper/immigration-and-american-jobs/seek.

[2] United States, Congress, "H-2B VISAS: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers." *H-2B VISAS: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers*, GAO-20-230:, U.S. Government Accountability Office, 2020, pp. 13–14.

that the federal government wants. H-2B employers are business people and they are going to do whatever it takes to stay in business. Forgone profits that cannot be recovered because of a lack of a workforce in one month over the other constitutes a permanent financial loss that cannot be recuperated. Historical records that illustrate this phenomena when an H-2B employer lacked the workers to operate their business should be sufficient evidence of irreparable harm. The Departments routinely question this evidence and these additional compliance burdens are becoming very disruptive to the operations of many companies across the country.

Similarly, the Departments routinely question H-2B employers who check the executed work contracts requiring the labor or services in the job opportunity certified by DOL to commence in the FY. This is common in the landscape industry where many employers have roll over contracts in which a client signs a contract in one year, but it rolls over year after year and all that is provided to the client are invoices for services rendered. Under contract law, this is typically referred to as an Account Stated, meaning the parties to a contract have an ongoing relationship and the invoice is the contract. The Departments have responded to H-2B employers who provide this evidence during audit claiming they did not submit a contract showing the number of workers needed for each job. However, that is not the reality of the landscape industry, or any other industry where this practice is common. In any industry when a person or a company enters into a contract for a service, it is incredibly rare that the client instructs the service provider on the number of workers that the service provider must use to perform a job. The number of workers on a service contract is almost exclusively determined by the employer. Employers need more clarification as to the documentation the Departments are looking for in these situations. The questioning by the Departments in these instances are similar to the issues faced when employers check the client or customer work orders, reservations, or other business arrangements requiring the services or labor in the job opportunity certified by DOL to commence during the FY.

Regarding payroll and earnings statement, the Departments routinely question employers' submissions as not showing irreparable harm. The reasons range from: it is not clear on the face of the documents that there is irreparable harm; overtime payments are not evidence of irreparable harm, or; reduction in hours does not show irreparable harm. Employers that must pay increased overtime face irreparable harm in several ways. First, this is an increase in the cost of doing business and the resulting reduction in profits cannot be recovered. H-2B employers, like any employer struggling to meet its workforce needs, will do what they believe is necessary to remain in business, including working extensive hours to complete projects and satisfy their customers, but those additional measures come with additional costs to their bottom line. Secondarily, when you increase overtime hours in certain industries, you also increase the risk of employee burnout and fatigue, which leads to workplace injuries and equipment damage. Both of these phenomena lead to other types of irreparable harm, as H-2B employers are already struggling to obtain an adequate workforce and burnout and injuries leads to loss of employees. Further, in some industries, such as hospitality, employers must close some operations to maintain the remainder of their operations. Hotels routinely must take rooms out of circulation because they cannot get them all cleaned with their current workforce. Additionally, many hotel restaurants close on days they would normally be open to avoid degradation in services that would lead to lost customers. Both situations lead to lost profits that cannot be recovered. The

questioning by the Departments is similar to when employers check evidence of reliance on a certain number of workers to operate, based on the nature and size of the business.

Ultimately, in all these situations, employers need more clarity from the Departments on what they deem to be ongoing or imminent irreparable harm. The increased inquiries from the Departments are beginning to disrupt the operations of many H-2B employers and we believe these issues could be resolved with clearer rules and guidance from the Departments, as well as more consistency in their application.

Allocation of Visas

The Coalition is pleased that the announcement and publication of the TFR came earlier in the year than ever. However, the allocation of the visas into multiple caps is a cause for concern for many H-2B employers. First, DHS announced on January 30, 2023, that they received enough petitions to reach the additional 18,216 H-2B visas made available under the TFR. However, the TFR makes no mention that DHS would coordinate with the Department of State to verify that all the 18,216 H-2B visas are actually used. H-2B employers are concerned that though DHS has announced the cap has been reached, there may be a significant number of those H-2B visas that go unissued. The Coalition understands that the unused visas are not to be rolled over. However, when these H-2B visas are "used" but not issued, they should be rolled over into the second half cap if that is the case. The same goes for any H-2B visas approved in the first half of the second half cap.

Furthermore, the number of H-2B visas made available in addition to the actual second half cap is woefully insufficient to meet the demand of American business. The entire second half has 59,500 available H-2B visas (33,000 for the actual second half cap, 16,500 for the first half of the second half cap supplemental, and 10,000 for the second half of the second half cap supplemental). DOL has already received applications for over 142,796 worker positions for April 1, 2023, start dates of need. Splitting the supplemental caps into early and mid-summer caps creates additional work for the Departments at a time when the Departments are struggling to process applications in a timely fashion. Employers who are not able to receive H-2B visas under the 33,000 or the supplemental 16,500, will have to file again for a start date of May 15, 2023. This is not gaming the program, as employers have a need during that period but have been capped out, and the Departments have continually articulated to the community that this is an acceptable change in an employer's date of need so long as it is explained that it is because of the cap. This creates additional work for DOL and DHS, as it will have to constantly monitor both the multiple caps for supplemental visa availability, as well as monitor the actual issuance of the H-2B visas with the State Department.

Finally, the allocation of 20,000 visas to the Northern Central American countries and Haiti may be shortsighted, as the processing times in those countries of the visas has many employers fearful they will not be able to obtain H-2B workers from those countries efficiently. The H-2B employer community is committed to the Biden Administration's goal of increasing cyclical migration from these countries to relieve the pressures on the southern border. Members of the Coalition have taken great efforts and strides in working with the local governments to identify slow points in the process and find resolutions. However, as seen by the number of H-

2B visas issued under this fourth cap, only 3,168 visas have been issued as of January 20, 2023. Many employers worry that the 20,000 quota might be too high for H-2B employers to take full advantage of this portion of the supplemental visas. For example, in December of 2022, when the TFR was published, only 500 H-2B visas were issued from countries within this portion of the supplemental cap.[3] That is in comparison to Mexico, the leading H-2B sending country, at 1,455 H-2B visas issued.[4]

The Coalition is greatly concerned that even with all the efforts of H-2B employers to utilize this supplement cap, it will not be able to fully utilize the number of H-2B visas set aside, as the Consular processing will be unable to keep up with demand. These delays can be particularly damaging to critical and essential time-sensitive businesses, such as seafood processing.

Conclusion

We again thank the Departments for the early announcement and publication of the TFR for the entire FY. We ask that the Departments provide further clarity as to what they are desiring to see in an audit regarding evidence of irreparable harm. We further ask that the Departments consider amendments to the TFR to reallocate the multiple caps into one second half cap instead of two, further streamlining the process for both DOL and DHS of handling petitions and cap counts. Finally, we ask that the Department consider allocating a portion of the Northern Central American countries and Haiti cap to the returning worker cap so all the additional visas authorized under the supplemental will be used. Thank you for allowing the regulated community, for the first time, to provide public input on this TFR and we hope our comments are helpful in managing and making more efficient the H-2B visa program.

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[3] December 2022 - NIV Issuances by Nationality and Visa Class, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/MonthlyNIVIssuances/DECEMBER%202022%20-%20NIV%20Issuances%20by%20Nationality%20and%20Visa%20Class.pdf (Last visited February 10, 2023).

[4] *Id.*