June 24, 2020

The Honorable Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, D.C. 20528

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The Honorable Michael R. Pompeo
Secretary
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

RE: H-2A and H-2B Temporary Rule Changes

Dear Secretaries Wolf, Scalia, and Pompeo,

On behalf of the below labor, migration, anti-trafficking, legal rights and civil rights organizations, we write to express our concern regarding the implications of recent temporary rule changes to the H-2A and H-2B ("H-2") visa programs. Although these rules intend to protect America's food supply chain, we believe that – without clarification and modifications – they threaten to increase the exploitation and vulnerability to trafficking for the temporary guestworkers critical to the continued operation of this country's food supply chain. Below, we outline the risks associated with the rule changes and provide recommendations for ensuring the safety and wellbeing of this essential workforce.

On April 20, 2020, due to the COVID-19 national emergency, the Department of Homeland Security (DHS) published a temporary rule change to the H-2A guestworker program that removes certain limitations, intending to "benefit U.S. agricultural employers and provide stability to the U.S. food supply chain."[1] The H-2A rule is effective from April 20, 2020, through August 18, 2020. On May 14, 2020, DHS published a similar temporary rule change to the H-2B guestworker program.[2] The H-2B temporary rule is effective from May 14, 2020 through May 15, 2023.

[1] 85 Fed. Reg. 21,739 (April 20, 2020).

[2] 85 Fed. Reg. 28,843 (May 14, 2020).

The amended regulations permit H-2 employers with a valid Department of Labor (DOL) Temporary Labor Certification (TLC) and impending petition start date to acquire H-2 guestworkers from an expiring H-2 TLC (or job order). H-2A guestworkers who are physically present in the U.S. are authorized to commence employment with a new H-2A employer (petitioner) after the extension of stay petition (Form I-129) is received by USCIS.[3] Similarly, H-2B guestworkers who are physically present in the U.S. are authorized to commence employment with a new H-2B employer after the extension of stay petition (Form I-129) is received by USCIS.[4] Approval of the petition under each H-2 program is not a prerequisite for the transfer of a guestworker to a new H-2 employer.[5]

The final rules allow H-2 guestworkers to transfer their visa to immediately work for any new H-2 employer within the same visa category that has an upcoming start date on a valid TLC.[6] The rules also allow H-2 guestworkers to stay in the U.S. beyond the previous three-year maximum allowable period of stay.

For reasons outlined below, these rules have the potential to exacerbate problems inherent in the H-2 visa programs that encourage employer abuse of workers. The rules and fee requirements in place only authorize H-2 visa holders to work for a particular employer for the length of the contract tied to the visa, which emboldens abusive employers and depresses the market for

[3] To be approved under this final rule, an H–2A petition for an extension of stay with a new employer must have been received on or after March 1, 2020 and remain pending as of the effective date of this rule, or received on or after the effective date of this rule and no later than the last day that this final rule is in effect (i.e. August 18, 2020). 8 C.F.R. § 214.2 (h)(21)(i).

[4] To be approved under this final rule, an H–2B petition for an extension of stay with a new employer must have been received on or after May 14,2020 and until September 11, 2020. 8 C.F.R. § 214.2 (h)(23)(v)(C)(2). USCIS will also apply this rule to any petition that was filed with USCIS on or after March 1, 2020 and remained pending as of May 14, 2020. 8 C.F.R. § 214.2 (h)(23)(v)(C)(1).

[5] An H–2A petition must be received no later than August 18, 2020. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the temporary agricultural labor certification. 8 C.F.R. § 214.2 (h)(21)(i). An H-2B petition must be received no later than September 11, 2020. 8 C.F.R. § 214.2 (h)(23)(v)(C)(2). If the new petition is approved, the extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the temporary agricultural labor certification. 8 C.F.R. § 214.2 (h)(23)(ii).

[6] It is unclear if in practice if DHS and DOL will require an employer with a prior approved labor certification with a start date before the submission of the I-129 petition to reapply for an updated labor certification and to provide U.S. workers with an opportunity to apply for that position.

competitive wages and decent working conditions.[7] If the worker quits his or her job, the visa is null and void—and the worker becomes unauthorized. This system leaves the workers open to two of the most powerful tools of trafficking and exploitation: the threat that leaving a trafficking situation will result in a change in immigration status or the targeting of the worker by immigration authorities; and the threat of retaliation for speaking up about unacceptable conditions, resulting in the loss of one's livelihood and potentially the only chance to repay debt incurred to get the job in the first place. These factors too often leave workers trapped in conditions that amount to modern slavery. Between January 1, 2015 to December 31, 2019, more than 3,600 victims of labor trafficking who held legal, temporary work visas were reported to the Human Trafficking Hotline operated by Polaris. Approximately 87% of these individuals held H-2A or H-2B visas.

Even when conditions that meet the legal definition of trafficking are not present, tying workers to a single employer—which amounts to preventing workers from participating in free labor markets—makes H-2 visa holders just as vulnerable to abuse as undocumented workers.[8] One study of forest workers, for example, found that H-2B workers were just as likely to experience abuse in the workplace as workers with other immigration statuses.[9] H-2 visa holders often experience wage theft (not being paid for all the hours they worked or not being paid overtime), workers' compensation fraud (being told to lie at the hospital and say that their injuries are not job-related), and high levels of abusive supervision (being denied rest breaks and facing constant pressure to work harder and faster). Employers take retaliatory measures, such as firing workers who attempt to exercise their rights or refusing to hire them the following season, often enough to create a general atmosphere of fear among workers so that they are effectively silenced and often forgo opportunities to seek back wages they are owed or to otherwise remedy workplace issues.[10]

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[7] Griffith, Kati L. 2009. "U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law." *Comparative Labor Law and Policy Journal* 31:125-162; Hahamovitch, Cindy. 2013. *No Man's Land: Jamaican guestworkers in America and the global history of deportable labor*. Vol. 76: Princeton University Press.

[8] Sarathy, Brinda. 2012. *Pineros: Latino Labour and the Changing Face of Forestry in the Pacific Northwest*. Vancouver, British Columbia: University of British Columbia Press.

[9] Wilmsen, Carl, Diane Bush, and Dinorah Barton-Antonio. 2015. "Working in the Shadows: Safety and Health in Forestry Services in Southern Oregon." *Journal of Forestry* 113 (3):315-324.

[10] Wilmsen, Carl, A. Butch De Castro, Diane Bush, and Marcy Harrington. 2019. "System Failure: Work Organization and Injury Outcomes among Latino Forest Workers." *Journal of Agromedicine* 24 (2):186-196.

The temporary H-2A and H-2B rules do not stop these illegal practices and contain provisions that may encourage them to become even more widespread. We identify these provisions below and conclude with recommendations for improving the temporary emergency rules as well as for making permanent changes in the H-2 visa programs that will help reduce the abuse that H-2 visa holders all too often face.

Red Flags and Risks Associated with these Changes:

DHS exercised the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B) good-cause exception to forgo the notice-and-comment rulemaking period due to the extraordinary COVID-19 emergency.[11] This exception, reserved for the public to raise risks and concerns inherent to the proposed rule, has prevented opportunities for clarification, maintaining a level of ambiguity in the final rules that is dangerous and consequential to the more than 400,000[12] "essential workers" to which it applies. Mainly, the temporary rule changes **lack transparency into how the visa transfer process and affiliated agents will operate** and **reduce the scope of accountability reserved for employers/petitioners that will benefit from participation** in the programs. The following is a catalog of risks from the imprecisions contained in these final rules.

1. It is unclear which government agencies are responsible for **proper oversight** of the H-2A and H-2B visa transfer process.

While DHS published the temporary rule change, it is unclear whether DHS, DOL, or the U.S. Department of Agriculture (USDA) are responsible for oversight, enforcement, and protections within the regulation. This lack of clarity persists straight through to guestworkers and leaves them most at risk for exploitation and violations of protected rights.

- The temporary change enables H-2 employers with valid TLCs to acquire H-2 guestworkers through an extension of stay petition after submission, but before official approval. This generates a loophole in which H-2 guestworkers can start working for a new employer while the petition is still pending.
- It also raises the potential for instances in which petitions may be denied for an employer after a guestworker has already transferred to their new employment site, some of whom may have traveled long distances to reach their new

[11] Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B), authorizes an agency to issue a final rule without prior notice or opportunity to comment when the agency for good cause finds that those procedures are "impracticable or contrary to the public interest."

[12] https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q4.pdf and https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf.

employment. Since the rule change does not specify an enforcement body, it is unclear who the appropriate regulation body is for direction on next steps or possible remediation after a petition denial. This is particularly essential due to the program-mandated obligation for an employer to cover transportation costs for their H-2 guestworkers. Under this scheme, an employer whose petition is denied has no incentive or obligation to pay for the guestworker's outbound transportation costs. Subsequently, there is no language defining the responsible party for fulfillment of the outbound transportation obligation of the H-2 temporary guestworker program. It puts H-2 guestworkers at risk for financial loss and grave exploitation.

The absence of language identifying and defining an appropriate authority for oversight and enforcement, plus subsequent remediation mechanism, amplifies the domain in which H-2 guestworkers can be abused and exploited. As written, the rule changes do not offer any guidance for guestworkers to access help. This absence of a centralized governing body in the rule changes obscures and further diminishes accountability in the H-2 guestworker program.

2. DHS does not identify how **information and communication** about the H-2A and H-2B rule changes will reach H-2 guestworkers.

The absence of information about proper communication channels or centralized access to knowledge about the rule changes and potential visa transfers is of particular concern and consequence to guestworkers. This generates an asymmetry in knowledge. H-2 employers, and their agents, will have superior access to information that—for the time being—is opaque to H-2 guestworkers. This asymmetry is a common foundation of visa fraud schemes that occur in the home countries of H-2 guestworkers. It reduces a guestworker's ability to discern facts from misinformation and real employers from fraudulent ones, as well as their agency to act.

As of today, there is no publicly available information to understand how H-2 guestworkers are being informed of the rule changes and the potential to extend their visas. It is also currently unclear how much, if any, agency guestworkers have in making a decision to participate in an extension of their stay. Additionally, it is unknown which agents will supervise and control the administrative tasks associated with a petition for extension of stay. A petition may require the possession of an H-2 guestworker's ID documents and passport. The rule change addresses nothing about this critical element of the visa transfer. It augments the potential dangers in which guestworkers place important documents in the hands of fraudulent actors. This is further compounded without any clear mention of language services for guestworkers to make sure they comprehend the changes to their visas and subsequent contracts.

DOL, DHS, USDA, and the Department of State (DOS) have produced a number of consequential H-2A program changes. Right now, that information mainly flows in the direction of employers and their agents. H-2 guestworkers, the "essential" component of the program, are

disproportionately absent in this flow of information. This neglect diminishes their ability to obtain information that protects their program mandated rights and is detrimental to the welfare of the entire country's food supply chain.

3. The changes to the rules fail to provide explicit language that defines the parties responsible for **contracts for workers and transportation associated with the regulations**.

As it stands, the DHS rule changes makes no delineation to mark which H-2 employer will be responsible for transportation costs associated with moving an H-2 guestworker from one employer to another that may be in a geographically distant location. There is also no discussion of how any relocation costs will be assessed. Subsequently, and perhaps most importantly, there is no language that defines which H-2 employer will be accountable for the provision of outbound transportation expenses for their H-2 guestworkers as mandated by DOL regulation. The language in the regulation enables many assumptions without true clarity.

Without explicit language that defines the responsibilities of H-2 employers and petitioners' party to these H-2 visa transfers, there will be an ecosystem of plausible deniability for violations of the H-2 program.

4. The DHS rule changes omit **transparency mechanisms** crucial to protect against fraud, exploitation, and labor trafficking.

Recruitment into the H-2 program lacks transparency, mainly due to the nature of it occurring in a foreign country. As written, the current rule changes invite similar uncertainty into how visa transfers and extensions of stay will be operationalized.

H-2 guestworkers generally come from vulnerable circumstances with communities that are impoverished, have high illiteracy rates, or face ethnic or racial discrimination. These vulnerabilities, coupled with systemic deficiencies within the H-2 program, exacerbate the potential for labor trafficking in U.S. agriculture. From 2012 through 2018, the Polaris-operated U.S. National Human Trafficking Hotline identified 1,506 H-2 visa holders who were victims of trafficking.[13] Any diminishment in transparency in the program has the unique consequence of exacerbating risks for guestworkers.

[13] This classification was determined using the definition of trafficking in the Trafficking Victims Protection Act ("TVPA") and includes individuals who had high or moderate level indicators matching the TVPA.

As it stands, the new visa transfer procedures are indecipherable to H-2 guestworkers and the public alike. There is no visibility into visa extensions and transfers to ensure greater accountability for all petitioners/employers involved, as well as DHS, USDA, DOL, and the integrity of the H-2 program.

5. The DHS rule changes fail to ensure that the many relevant government agencies involved in the H-2 program are **sharing data and information** related to the administration of guestworker programs.

The extraordinary circumstances of COVID-19 have diminished the resources and scope of authority of many labor protection bodies such as the DOL Wage and Hour Division and Occupational Safety and Health Administration. We are aware that all site inspections across the country have been suspended since mid-March. This translates into a potential stream of abuses that will go unchecked or fixed for months.

Because there was no single enforcement body identified and no information made available about how various agencies will collaborate under this new regulation, important facets of the H-2 program have the potential to go unchecked and enforced. One such regulation includes housing inspections. Currently, DOL is permitting State Workforce Agencies (SWAs) to conduct virtual inspections (or technology assisted inspections) where possible. This is directly consequential for guestworkers who may be subject to live in dangerous close-quartered housing during a pandemic.

There are many inherent dangers for guestworkers in a system that fails to take appropriate action, or collaborate, to protect those workers.

6. The temporary rules will inevitably **increase the number of guestworkers** present in the U.S. who will be **at risk of exploitation and abuse with little recourse**.

The DOL enforcement unit is deeply under-resourced and largely unable to resolve complaints within a reasonable period of time.[14] This is particularly concerning because the temporary rules will likely result in an increase in numbers of guestworkers working in the U.S. without a concomitant increase in funding for protection of labor rights. Whereas the H-2A program provides no cap for the number of H-2A workers present in the U.S., the H-2B program has a yearly cap of 66,000. *See* 8 U.S.C.§ 1184(g)(1)(B). Moreover, 8 U.S.C. § 1184(g)(10) requires that the number of nonimmigrants issued H-2B visas during the first six months of a fiscal year be no more than 33,000. However, under 8 CFR 214.2(h)(ii)(A), extensions of H-2B status do

[14] For example, a group of workers represented by the Southern Poverty Law Center filed complaints with the DOL for, *inter alia*, owed wages, travel reimbursements, and threats to their life in January 2019. To this date the complaint remains "under investigation."

not count against the H-2B numerical limitations. Thus, where the temporary rule allows for an unlimited number of extensions of previous H-2B status, the number of guestworkers toiling under the H-2B visa program will far exceed the 66,000 cap for the fiscal year. This is of great concern because DOL, as outlined above, does not have the capacity to adequately enforce the protections available to guestworkers under the H-2B program.

7. The **attestation requirement** under the H-2B temporary rule is too lose and leaves workers vulnerable to serious employer abuse.

The H-2B temporary rule provides that H-2B workers may start working for the new H-2B employer upon USCIS' receipt of the new H–2B petition, accompanied by an attestation[15] to USCIS stating that the guestworker qualifies to work under the rule. The attestation merely requires employer to check off that the worker will be engaged in:

> Work essential to the U.S. food supply chain…[in] a variety of industries and occupations…including, **but not limited to** work related to the processing, manufacturing, and packaging of human and animal food; transporting human and animal food from farms, or manufacturing or processing plants, to distributors and end sellers; and the selling of human and animal food through a variety of sellers or retail establishments, including restaurants.[16]

The broad language in the attestation requirement under the new rule could lead to many employers petitioning for workers in industries that do not fall squarely within the food supply chain. For example, an H-2B resort employer could claim a need for H-2B workers who provide maintenance and housekeeping of its resort to be able to run its restaurant. This creates a serious risk of workers being recruited to work at businesses without sufficient work to provide full-time hours as required by the visa programs. Days, weeks, or months of less than full-time employment leaves workers vulnerable to other abuses, including trafficking.

8. The H-2B rule's **three-year effective period** could run afoul of the Administrative Procedure Act.

As stated above, DHS exercised the good cause exception to the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B) in order to forgo the notice-and-comment rulemaking period due to the extraordinary COVID-19 emergency. However, DHS fails to explain how a three-year

[15] Form ATT–H2B, Attestation for Employers Seeking To Employ H–2B Nonimmigrant Workers Essential to the U.S. Food Supply Chain. https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

[16] *Id*. (emphasis added).

effective period for the H-2B temporary rule is appropriate to meet the current exigencies related to the COVID-19 pandemic. The H-2B rule three-year effective period goes far beyond the H-2A rule's four-month effective period. Indeed, the three-year effective period makes the H-2B rule something other than a "temporary rule." A rule that will remain in effect for as long as three years must provide opportunity for the public to participate in the rule making as required under 5 U.S. Code § 553(c). [17]

Recommendations to Alleviate the Red Flags and Risks Associated with the DHS Rule Changes:

H-2 guestworkers employed in the U.S. food supply chain have been designated by the highest levels of the U.S. government as "essential workers" for the security of the country's food supply chain. They deserve to be treated as such. As written, the DHS rule changes lack the necessary details to protect and account for the safety and well-being of this essential workforce.

The following recommendations would ameliorate some of the risks already existent in the H-2 program and magnified by the temporary rule changes.

For the government agencies involved in the processing the visas and extensions, immediate action is needed to properly implement the rule change to protect H-2A and H-2B workers:

a. **Clarify the following provisions** under the temporary rules:
    i. If an H-2 petition for extension is denied, the employer will be responsible for costs for the worker to return home as well as payment for the ¾ guarantee of hours promised in the job order. In addition, upon denial of the employer's petition for extension, DHS should readily inform and/or make available to the worker information about other available H-2 job opportunities. A guestworker's decision to not apply for other available H-2 jobs within her visa category must not affect the former employer's obligation to pay for the worker's outbound expenses as well as payment of the ¾ guarantee.

[17] Although the H-2B rule on its face states that it is in effect for three years, its immediate practical implications will clearly include H-2B employers seeking to file non-immigrant visa petitions for the first quarter of FY2021 since those visa applications can be filed during the period beginning in July 2020. There has generally been no significant shortage of H-2B visas for employment beginning between October 1 and December 31. However, there is a significant danger the H-2B employers seeking visas for later calendar quarters in FY2021 will seek to require current H-2B employees to remain in the U.S. working for another H-2B employer so that the worker will not be subject to the H-2B visa cap for re-employment. This occurred in FY2008 when the H-2B cap was not lifted by a Congressional appropriation rider.

ii. A worker who has been unlawfully terminated from her current position or who has resigned from her job due to unlawful working conditions is eligible for the extension under the temporary rules.

b. Identify and assign adequate resources to the government agencies that will be responsible for **proper oversight** of the temporary changes of the H-2 visa programs. Providing adequate resources for proper oversight should extend beyond the period of the temporary emergency rules to ensure continued proper oversight of the H-2 visa programs.

c. Ensure that sufficient and language-appropriate **communication and resources** are in place and available for guestworkers about the rule changes as well as the mechanisms for reporting abuse or exploitation.

d. Implement greater **transparency and visibility into H-2 employer petitions and work authorization extension** from the government agencies involved in the execution of the H-2 program, including:
   i. the number of nonimmigrants solicited and their country and local region of origin
   ii. beneficiaries' job descriptions, the standard occupational classification codes, work locations, and contact information for the employers
   iii. whether employers' nonimmigrant visa workforce is over 30% and/or 50%
   iv. whether the employers' action was a blanket petition and, if so, whether they were authorized to make a blanket petition
   v. name and last known address of recruiters, or agents involved in the visa transfer petition

e. **Transparency and visibility in the creation of a report for each nonimmigrant authorized and extended to work in the United States** that must include:
   i. visa classification
   ii. labor certification form number
   iii. gender, age, and country of origin
   iv. occupation and compensation
   v. details of new contracts for guestworkers associated with visa transfer/extension of stay
   vi. location of work and if applicable (ZIP code and nationality only for a household employer)
   vii. name of permanent status petitioner if applicable

f. Develop a mechanism for H-2 visa holders to identify and apply for job opportunities open to them, such as through a requirement that employers seeking

H-2 visa holders advertise with SWAs. Employers should be required to post in language(s) that workers understand, in the same locations where they post legally-required information about workers' rights, information on the availability of jobs and how to contact the local SWA to apply.[18]

g. Make job opportunities open to anyone, including U.S. workers.

h. Bar employers from discouraging H-2 visa holders from applying for alternate employment through intimidation, threats, or the provision of false information.

i. Forbid employers from charging fees for job referrals.

These provisions should be permanent additions in the H-2 visa regulations.

We encourage your agencies to take immediate action to implement these provisions to ensure the safety and wellbeing of H-2 workers and prevent the exploitation and trafficking of these essential workers. We would be happy to discuss our recommendations further. Please contact Allison Grossman, Director of Public Policy and Strategic Advocacy at Polaris (agrossman@polarisproject.org) and Norma Ventura, Legal Fellow at the Southern Poverty Law Center (norma.ventura@splcenter.org). We look forward to your prompt response.

Sincerely,

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Polaris

Andrea Rojas,
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[18] The DOL website https://seasonaljobs.dol.gov/ has classified as "inactive" many of the H-2B approved labor certifications which the emergency rule would appear to make available for workers currently in the U.S. on prior H-2B visas. As a result, neither U.S. workers nor displaced H-2B workers will be able to be readily referred to these jobs. Both categories of workers should be able to obtain current information about any such jobs for which employers might seek H-2B workers.

Migration that Works
Members
Centro de los Derechos del Migrante, Inc. (CDM), Chair
AFL-CIO
American Federation of Teachers (AFT)
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Michigan Immigrant Rights Center
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North Carolina Justice Center
Wind of the Spirit Immigrant Resource Center

CC:

Ken Cuccinelli
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