

September 19, 2008

Secretary Michael Chertoff  
c/o Chief Regulatory Management Division  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
111 Massachusetts Avenue, NW  
Suite 3008  
Washington, DC 20529

RE: DHS Docket No. USCIS-2007-0058

Dear Secretary Chertoff:

We strongly oppose many of the Department of Homeland Security's proposed regulatory changes to the H-2B temporary foreign worker program. We request that the Department of Homeland Security (DHS) withdraw these proposed regulations. If DHS does not withdraw its proposals, the agency should substantially revise and submit them for additional public comment before it implements new regulations. We also propose several changes that DHS should make to the current H-2B program to fulfill the law's requirements.

We submit these comments on behalf of the following organizations, who seek just treatment for all low-wage workers:

Low Wage Worker Legal Network (Member organizations)

Southern Poverty Law Center  
Centro de los Derechos del Migrante, Inc.  
Equal Justice Center, Austin, Texas  
Friends of Farmworkers, Inc.  
Global Workers Justice Alliance  
North Carolina Justice Center  
Northwest Workers' Justice Project  
Workers' Rights Law Center of New York, Inc.

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)  
Change to Win  
Service Employees International Union (SEIU)  
United Food and Commercial Workers International Union (UFCW)  
United Electrical Workers  
United Farm Workers of America (UFW)  
American Federation of State, County and Municipal Employees (AFSCME)  
National Council of La Raza  
Mexican American Legal Defense and Educational Fund (MALDEF)  
Asian American Legal Defense and Education Fund (AALDEF)

National Employment Law Project (NELP)  
National Immigration Law Center (NILC)  
Interfaith Worker Justice  
Farmworker Justice  
Center for Community Change  
Rural and Migrant Ministry, Inc.  
National Lawyers Guild  
Labor and Employment Committee of the National Lawyers Guild  
National Immigration Project of the National Lawyers Guild  
Alliance of Forest Workers and Harvesters  
Pineros y Campesinos Unidos del Noroeste (PCUN)  
Texas RioGrande Legal Aid  
Comité de Apoyo a los Trabajadores Agrícolas (CATA)  
California Rural Legal Assistance Foundation  
Mississippi MPOWER  
Michigan Migrant Legal Assistance Project  
Oregon Law Center  
New York Immigration Coalition  
Sugar Law Center for Economic and Social Justice  
Farmworker Legal Services of New York  
Florida Immigrant Advocacy Coalition  
Legal Aid Justice Center—Immigrant Advocacy Program (VA)  
Florida Legal Services, Inc.  
Migrant Farm Worker Division, Colorado Legal Services  
Colorado Immigrants' Rights Coalition  
Community Justice Project (PA)  
Central New York Occupational Health Clinical Center  
Multicultural Association of Medical Interpreters (MAMI) of Central New York

Our organizations are leading advocacy groups for H-2B, immigrant, and other low-wage workers. Together, we have fought extensively for the rights of H-2B, immigrant, and other low-wage workers in the courts, before administrative agencies, and in Congress.

## **I. Introduction**

The Department of Homeland Security (DHS) proposes to amend its regulations that affect temporary non-agricultural workers within the H-2B nonimmigrant classification. In its Notice of Proposed Rulemaking (NPRM), DHS suggests that its proposals will “ensure the integrity of the H-2B program.”<sup>1</sup> In fact, DHS proposes several rule changes that will further undermine the integrity of the existing and deeply-flawed H-2B program.

DHS proposes regulations that will diminish accountability for employers and recruiters who engage in fraudulent and unlawful recruiting and employment practices. DHS proposes to prohibit recruiters and employers from collecting fees or other compensation from prospective

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<sup>1</sup> Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers [hereinafter Changes to Requirements], 73 Fed. Reg. 162, p. 49109 (proposed Aug. 20, 2008) (to be codified at 8 CFR pts. 204, 214 & 215).

H-2B workers in connection with employment.<sup>2</sup> This is a good step, as far as it goes. We agree that fee abuses and visa selling have led “to human trafficking and alien worker indenture.”<sup>3</sup> DHS, however, provides no process for H-2B workers or their advocates to intervene to protect workers from fee abuses, thereby substantially undermining the effectiveness of its proposed safeguards. Instead, DHS proposes to rely on employers to attest that they and their agents have not collected fees.<sup>4</sup> Additionally, DHS proposes to exclude transportation costs, passports, and visa and inspection fees from required reimbursements, which ignores years of federal case law and will push H-2B workers’ wages unlawfully below the federal minimum wage.<sup>5</sup>

In the proposed regulations, DHS also proposes to greatly alter the definition of “temporary” under the H-2B program, thereby transforming the very nature of the program. We strongly oppose that proposed change; three years simply is not a temporary job.

DHS proposes to delegate enforcement authority to DOL. While we agree that DOL is better suited to enforce labor rights, we disagree that such a delegation is necessary. DHS also proposes to prohibit employers from changing the employment start date. We agree with DHS that employers abuse the H-2B program when they misstate the employment start date. Here again, however, DHS provides an inadequate enforcement process and no protections for workers for lost wages during the period between the stated and actual employment start dates.

In the proposed regulations, DHS proposes to enhance requirements for employers to report H-2B workers who do not show for work, abscond, or are terminated.<sup>6</sup> DHS also proposes to expand its temporary worker visa exit program pilot. We strongly disagree with both of these proposed changes. Because most H-2B workers lack access to Legal Services Corporation-funded legal services,<sup>7</sup> advocates and workers cannot adequately intervene to contest employers’ reports. Employers will likely abuse the reporting process to threaten workers. Workers who leave their jobs because of unlawful conditions, because promised work is not available to them or because they have suffered injury on the job will have no way to protect their future eligibility for a visa to enter the United States.

Finally, DHS proposes to authorize petitioners to submit petitions for unnamed beneficiaries and to substitute beneficiaries.<sup>8</sup> We strongly disagree with DHS’s proposed unnamed and substitution provisions, which will severely harm prospective H-2B workers, who frequently spend tremendous resources and leave employment in their home countries to enter the H-2B program. We address the problems with the DHS’s proposed regulatory changes in detail in our comments below.

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<sup>2</sup> Changes to Requirements, *supra* note 1, at 49120 (to be codified at 8 CFR pts. 214.2(h)(6)(i)(B)-(C)).

<sup>3</sup> Changes to Requirements, *supra* note 1, at 49110.

<sup>4</sup> Changes to Requirements, *supra* note 1, at 49120 (to be codified at 8 CFR pt. 214.2(h)(6)(i)(C)).

<sup>5</sup> Changes to Requirements, *supra* note 1, at 49120 (to be codified at 8 CFR pt. 214.2(h)(6)(i)(B)(1)).

<sup>6</sup> Changes to Requirements, *supra* note 1, at 49120-21 (to be codified at 8 CFR pt. 214.2(h)(6)(i)(E)).

<sup>7</sup> See 45 C.F.R. § 1626 et seq.

<sup>8</sup> Changes to Requirements, *supra* note 1, at 49120-21 (to be codified at 8 CFR pts. 214.2(h)(2)(iii) & 214.2(h)(6)(viii)).

For these reasons, DHS should withdraw its proposed regulatory changes to the H-2B temporary worker visa program, revise and submit them for further comment, and propose regulations that protect low-wage workers, wages, and working conditions. Additionally, as we discuss further below, to ensure that recruiters and employers do not continue to engage in unlawful recruiting and employment practices that severely harm low-wage workers, DHS must cooperate with other agencies, such as the Department of Labor (DOL). DHS and DOL must enforce protections for all workers and Congress should act to provide avenues for workers and advocates to intervene when recruiters and employers violate the law.

## **II. The Proposed Protections In The Visa Revocation, Denial, and Attestation Process Do Not Protect Workers Against Recruitment Abuses By Employers, Labor Contractors, And International Recruiters.**

### **A. The Current International Recruitment System Leaves Low-Wage Workers Vulnerable To Abuse And Trapped In A Modern-Day System Of Indentured Servitude.**

Prospective H-2B workers frequently pay substantial fees to employers, labor contractors, and recruiters to apply for and obtain visas and job placement in the United States. Many workers liquidate life savings, pledge valuable collateral, and incur substantial debt to pay visa, travel, and recruitment fees. At best, the H-2B recruitment system makes low-wage foreign workers extremely vulnerable to exploitation. At worst, the H-2B recruitment practices trap foreign workers in a “modern-day system of indentured servitude.”<sup>9</sup>

International recruiters and other employer representatives frequently charge prospective H-2B workers exorbitant fees.<sup>10</sup> In a class action suit pending in the Eastern District of Louisiana against Signal International,<sup>11</sup> workers from the United Arab Emirates and India paid fees ranging from \$12,000 to \$20,000 each.<sup>12</sup> The recruiters lied to the workers about visa opportunities available through the program, claiming that they would be eligible to become permanent residents.<sup>13</sup>

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<sup>9</sup> SOUTHERN POVERTY LAW CENTER, CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (March 2007), available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf> [hereinafter SPLC, CLOSE TO SLAVERY]. See also Changes to Requirements, *supra* note 1, at 49112 (noting, “USCIS has learned that payment by [H-2B] workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture.”).

<sup>10</sup> ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE, INTERNATIONAL ORGANIZATION FOR MIGRATION, AND INTERNATIONAL LABOUR OFFICE, HANDBOOK ON ESTABLISHING EFFECTIVE LABOUR MIGRATION POLICIES IN COUNTRIES OF ORIGIN AND DESTINATION, (2006) p 129, available at [http://www.osce.org/publications/eea/2006/05/19187\\_620\\_en.pdf](http://www.osce.org/publications/eea/2006/05/19187_620_en.pdf) [hereinafter HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES].

<sup>11</sup> According to the Southern Poverty Law Center, who filed the suit on workers’ behalf, Signal is a subcontractor for global defense contractor Northrop Grumman Corp. Southern Poverty Law Center, Legal Action. See David, et al. v. Signal Int’l LLC, No. 2:2008cv01220 (E.D. La. filed Mar. 10, 2008) available at <http://www.splcenter.org/legal/docket/files.jsp?cdrID=72&sortID=0>. and [http://www.splcenter.org/pdf/dynamic/legal/Signal\\_Complaint\\_080321.pdf](http://www.splcenter.org/pdf/dynamic/legal/Signal_Complaint_080321.pdf).

<sup>12</sup> See Complaint ¶ 85 in *Signal Int’l*, No. 2:2008cv01220

<sup>13</sup> Recruitment fraud is pervasive because recruiters remain unregulated. See, e.g., SPLC, CLOSE TO SLAVERY, *supra* note 9.

International recruiters also mislead many workers about earnings opportunities and working conditions.<sup>14</sup> Last year, twenty temporary workers from Thailand paid \$11,000 to recruiters who falsely promised them three years of guaranteed agricultural work at \$8.24 an hour.<sup>15</sup> Upon arrival, their employers confiscated the workers' passports and other documents, forced the workers to live in squalid conditions without even potable water, and failed to pay the workers for many hours of work.

Vulnerable temporary foreign workers remain too intimidated to complain. H-2B workers typically arrive in the U.S. with program-related debt ranging from \$500 to well over \$10,000.<sup>16</sup> Because most temporary foreign workers are extremely poor, high-interest loans finance the bulk of their expenses. At risk of losing the family homes and businesses they supply as collateral for their loans, foreign workers become highly dependent on their U.S. employers for compensation. Dependence is particularly harmful in the H-2B context, where workers are tied to a single employer and lose their right to work and live in the U.S. if they lose their job in most situations.<sup>17</sup> The Organization for Security and Cooperation in Europe, the International Labour Office, and the International Organization for Migration, for example, recognize that a work permit limited to a specific employer results in dependency on that employer, which may enable exploitative working conditions.<sup>18</sup>

Knowing that H-2 workers are deeply in debt and unable to find other employment, employers often exploit this vulnerability. Plaintiffs in the recent case against Decatur Hotel paid between \$3,500 and \$5,000 in fees to work in fifteen luxury New Orleans hotels after Hurricane Katrina.<sup>19</sup> Although recruiters promised the workers a minimum of forty hours per week plus overtime, Decatur offered only twenty-five or fewer hours per week. Because Decatur also refused to reimburse the plaintiffs' recruitment fees, the workers received wages well below the minimum wage. The H-2B program left them with no legal means to supplement their income, since acceptance of any other work would violate their visa terms.<sup>20</sup> In another recent case, against Pro Tree Forestry, workers from Guatemala paid up to \$6,000 each in fees to acquire H-2B visas. On arrival, their employers paid only half of the \$7.50 per hour that recruiters had promised.<sup>21</sup>

Knowing that indebted workers are a captive workforce, a widespread and virtually unaddressed practice has emerged where employers recruit far more workers than they need and bring them to

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<sup>14</sup> HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES, *supra* note 10, at 129.

<sup>15</sup> See *Muangmol Asanok, et. al. vs. Million Express Manpower Inc. et. al.*, No. 5:2007cv00048 (E.D. N.C. filed Feb. 2, 2007) *cited in* SPLC, CLOSE TO SLAVERY, *supra* note 9, at 38.

<sup>16</sup> See SPLC, CLOSE TO SLAVERY, *supra* note 9, at 10.

<sup>17</sup> Moreover, DHS's proposed rules on abscondment and violations of H-2B status will make workers more vulnerable to employers' threats. Changes to Requirements, *supra* note 1, at 49112 (to be codified at 8 C.F.R. pts. 214.2(h)(6)(i)(E) and 214.2(h)(6)(ix)).

<sup>18</sup> HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES, *supra* note 10, at 103-104.

<sup>19</sup> See Complaint ¶ 1.4 in *Daniel Castellanos-Contreras, et al. v. Decatur Hotels, LLC et al.*, No. 06-4340 (E.D. La. filed Aug. 16, 2006) *available at* [http://www.splcenter.org/pdf/dynamic/legal/Decatur\\_Amended\\_Complaint.pdf](http://www.splcenter.org/pdf/dynamic/legal/Decatur_Amended_Complaint.pdf); See also SPLC, CLOSE TO SLAVERY, *supra* note 9, at 10.

<sup>20</sup> See Complaint ¶ 1.4 in *Decatur Hotels*, No. 06-4340.

<sup>21</sup> *H-2A, H-2B Programs*. Rural Migration News. Vol 13 No. 2 (April 2007) *available at* [http://migration.ucdavis.edu/rmn/more.php?id=1204\\_0\\_4\\_0](http://migration.ucdavis.edu/rmn/more.php?id=1204_0_4_0).

the U.S. months before full-time work is available.<sup>22</sup> Because employers rarely pay passport, visa, and travel fees, they have little incentive to avoid overestimating their labor need in this way.<sup>23</sup> Vulnerable workers are legally bound to their employer, often “benched” for months before full-time work is available, do not receive wages, and are unable to seek employment elsewhere.<sup>24</sup>

This combination of circumstances makes it very difficult for H-2B workers to assert their rights no matter how low their wages or how poor their working conditions. Because most workers cannot earn enough to pay their debts in their home country, workers do not complain for fear of deportation, blacklisting, and even physical retaliation. Requirements that workers appear for hearings in the state and the lack of legal representation for transnational workers present enormous obstacles to pursuing valid workers compensation claims. Employers thus feel free to cut corners on health and safety and force workers to accept wages substantially lower than what they have certified to the U.S. government and often even less than the minimum wage. At worst, this scenario has resulted in such poor treatment of workers that DHS declared them to be victims of human trafficking.<sup>25</sup>

**B. DHS’s Proposals To Deny Or Revoke H-2B Visa Applications Do Not Protect Workers From Unreasonable Fees, Do Nothing To Mend The H-2B Program’s Effective System Of Indentured Servitude, And Contain No Enforcement Process, Rendering Them Virtually Useless To Individual Workers Whose Rights Have Been Violated.**

DHS acknowledges that labor recruiters and U.S. employers frequently charge potential H-2B workers exorbitant recruitment and job placement fees, which impose devastating economic burdens on workers and “resul[t] in their effective indenture.”<sup>26</sup> DHS, however, proposes a wholly inadequate process to enforce low-wage workers’ rights and to eliminate the system of temporary worker indenture.

Under proposed Section 214.2(h)(6)(i)(B)(1), DHS suggests that its ability to deny or revoke H-2B petitions will prevent employers and recruiters from abusing and unlawfully collecting fees from workers. However, DHS proposes no process to detect fee abuses and to enforce its proposed rule, which renders its proposed worker protections useless to workers whose rights have been violated. Because their rights to work and to live in the U.S. remain tied to their employer, H-2B workers are frequently too intimidated to report abuses. Moreover, most H-2B workers do not have access to Legal Services Corporation-funded (LSC-funded) legal counsel, which makes it extremely unlikely that advocates can intervene to guard against fee abuses.<sup>27</sup>

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<sup>22</sup> *H-2B Guestworkers Face Rampant Abuse*, Testimony of Mary Bauer, Director, Immigrant Justice Project at the Southern Poverty Law Center, before the U.S. House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law (April 16, 2008) *available at* <http://www.splcenter.org/news/item.jsp?aid=309>.

<sup>23</sup> *Id.*

<sup>24</sup> SPLC, *CLOSE TO SLAVERY*, *supra* note 9, at 10.

<sup>25</sup> Changes to Requirements, *supra* note 1, at 49113 (to be codified at 8 C.F.R. pts. 204, 214 & 215).

<sup>26</sup> Changes to Requirements, *supra* note 1, at 49112 (to be codified at 8 C.F.R. pts. 204, 214 & 215).

<sup>27</sup> Currently, only H-2B forestry workers are eligible for LSC-funded legal services programs for claims with respect “to wages, housing, transportation, or other issues specifically relating to the terms of the workers’ employment

Effective management and enforcement of H-2B regulations relating to working conditions is required to prevent exploitation by smugglers or traffickers as in the case of irregular migration, where workers are more vulnerable to exploitation because of lack of regulation and oversight.<sup>28</sup>

Not only does DHS fail to offer a process to enforce the minimal worker protections it proposes, its petition revocation system will punish H-2B workers for their U.S. employers' bad behavior. Section 214.2(h)(6)(i)(B)(2)'s proposed petition revocation system contains three major flaws. First, DHS's proposed thirty-day grace period provides inadequate time for H-2B workers to find alternative employment or to apply for an extension of stay if DHS revokes their employer's H-2B petition and does not supply workers with access to information about alternative employment or assistance in making this transition. Again, H-2B workers rarely have access to adequate legal counsel and lack resources to search for alternative employment if DHS revokes their employer's H-2B petition. Second, DHS does not define or describe how it will notify H-2B workers if it revokes their employer's petition, which makes H-2B workers vulnerable to deportation and legal penalties if their employer does not notify them about the petition revocation before the thirty-day period elapses. Third, DHS proposes to require employers to reimburse workers only for their costs of return travel. Not only does this proposal financially penalize workers for their employer's misconduct, it contradicts years of U.S. federal case law about reimbursements, which we discuss below.

Under proposed Section 214.2(h)(6)(i)(B)(3), DHS suggests that when it finds that H-2B workers have paid fees or other compensation as part of their application and placement process, it will require petitioners to show they have reimbursed fees to the H-2B workers before they can file subsequent H-2B petitions. This proposal is flawed because it relies far too optimistically on the benevolence of H-2B employers and the willingness of H-2B employees to speak up. Rather than proposing a process to enforce this rule or establishing a process to detect when recruiters or employers have charged fees, DHS proposes to rely exclusively on employers to police themselves and self-certify that they have reimbursed workers for fees.<sup>29</sup> The history of the H-2B program demonstrates that we can not simply rely on employers to play by the rules. Nor can we rely on H-2B workers to report abuses because their rights to work and to live in the U.S. remain tied to their employer. We can not rely on legal advocates to intervene to enforce recruitment laws because most H-2B workers do not have access to LSC-funded legal counsel. We can not rely on market mechanisms, such as an attestation system alone, to effectively regulate the working conditions of H-2B workers because vulnerable *human beings* with inadequate protection are the subject of trade.<sup>30</sup>

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contracts.” Legal Services Corporation, *Temporary Forestry Workers Now Eligible for LSC-Funded Legal Services*, Jan. 10, (2008) available at [http://www.lsc.gov/press/updates\\_2008\\_detail\\_T220\\_R0.php](http://www.lsc.gov/press/updates_2008_detail_T220_R0.php).

<sup>28</sup> HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES, *supra* note 10, at 161. When referring to “undocumented immigrants” or “illegal immigrants,” most international and regional organizations, such as IOM, ILO and the Council of Europe, use the terminology “irregular migration.” *Id.* at 163.

<sup>29</sup> DHS suggests, for example, that “the petitioner may submit a copy of the financial transaction record or a receipt signed by the beneficiary as evidence of reimbursement.” Merely requiring the employer to supply a copy of a financial transaction record does not ensure that employers will not conceal other fees. Changes to Requirements, *supra* note 1, at 49113 (to be codified at 8 C.F.R. pt. 214(h)(6)(i)(B)(3)).

<sup>30</sup> HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES, *supra* note 10.

<sup>30</sup> *Id.*

Even when legal advocates have sought to intervene to protect H-2B workers from unlawful recruitment practices, the U.S. government has routinely denied advocates' Freedom of Information Act (FOIA) requests to obtain any information about the terms of H-2B applications and certifications.<sup>31</sup> Moreover, because the U.S. Citizen and Immigration Services (USCIS) has refused to publish information about recruiters, workers and their advocates frequently cannot confirm whether a purported recruiter is even authorized to recruit for a U.S. employer. The H-2B recruitment system is rife with opportunities for authorized and unauthorized recruiters to extract enormous fees from prospective H-2B workers and to make fraudulent promises about terms of employment and opportunities for immigration. DHS's proposed rule will do nothing to prevent recruiters from continuing to defraud and exploit prospective H-2B workers.

**C. DHS's Proposals To Deny Or Revoke H-2B Visa Applications Only When Recruitment Fees are Not Reimbursed Contradict The Fair Labor Standards Act, Sending Countries' Labor Laws, And Years Of U.S. Federal Case Law.**

DHS incorrectly suggests that its proposed fee reimbursement requirements "would provide necessary protections against the alien worker's indenture[.]"<sup>32</sup> In fact, DHS proposes to exclude from reimbursement requirements the actual cost of travel to the United States and visa and passport fees – tremendous expenses for low-wage workers, which will push workers' net wages unlawfully below the minimum wage and will perpetuate the H-2B system of indentured servitude. Moreover, under the limited proposal for fee reimbursement, U.S. employers will continue to inflate their projected labor needs and over-recruit and bench H-2B workers because they can impose travel, visa, and passport expenses on the workers they recruit.

Stunningly, DHS's proposal to exclude travel, visa, and passport expenses from reimbursement requirements departs from and contradicts the Fair Labor Standards Act's<sup>33</sup> (FLSA's) minimum wage provisions, years of U.S. federal case law, and sending countries' labor laws.

U.S. federal courts have long recognized that employers must pay travel, visa, and passport expenses to the extent that they push workers' wages unlawfully below the minimum wage. Beginning in 2002, the Eleventh Circuit held in *Arriaga v. Florida Pacific Farms* that travel, visa, and immigration expenses are costs that H-2A workers have incurred primarily for the employer's benefit and that the employer must reimburse workers for these expenses.<sup>34</sup> The Eleventh Circuit urged "[n]onimmigrant alien workers employed pursuant to this program are not coming from commutable distances; their employment necessitates that one-time transportation costs be paid by [the employer]."<sup>35</sup> Moreover, the Court noted, by participating in

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<sup>31</sup> See, e.g., USCIS FOIA Request Denial Letter to Southern Poverty Law Center, Matter Number NRC2008011429, July 25, 2008 (denying SPLC's request for H-2B information about Signal International's H-2B materials). Signal International, a subcontractor, recruited workers from the United Arab Emirates and India, who paid fees ranging from \$12,000 to \$20,000 each, and fraudulently promised the workers legal and permanent work-based immigration to the U.S. See Complaint ¶ 85 in David, et al. v. Signal Int'l. LLC, No. 2:2008cv01220 (E.D. La. filed Mar. 10, 2008) available at [http://www.splcenter.org/pdf/dynamic/legal/Signal\\_Complaint\\_080321.pdf](http://www.splcenter.org/pdf/dynamic/legal/Signal_Complaint_080321.pdf).

<sup>32</sup> Changes to Requirements, *supra* note 1, at 49113 (to be codified at 8 C.F.R. pts. 204, 214 & 215).

<sup>33</sup> 29 U.S.C. § 201 et seq.

<sup>34</sup> *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1232 (11th Cir. 2002) (holding that employers must reimburse H-2A workers for their transportation, visa, and immigration expenses).

<sup>35</sup> *Id.* at 1242.

the temporary foreign worker program, the employers “created the need for [] visa costs, which are not the type of expense they are permitted to pass on to the [workers].”<sup>36</sup> Under *Arriaga*, H-2A employers must therefore reimburse workers at the end of their first week of employment to the extent that such expenses reduce net wages for that week below the minimum wage.<sup>37</sup>

The Eleventh Circuit’s reasoning has resonated among federal courts across the country. In 2004, the Eastern District of North Carolina agreed with the *Arriaga* analysis in *De Luna-Guerrero v. North Carolina Grower’s Association*.<sup>38</sup> There the court emphasized that transportation expenses “are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers.”<sup>39</sup> Likewise, the court found that the temporary worker visa “has no value outside of the employment and arises directly and necessarily out of H2A employment.”<sup>40</sup>

In *Recinos-Recinos v. Express Forestry, Inc.*, the Eastern District of Louisiana first held that “[t]he *rationale* employed by the *Arriaga* court is applicable to the H-2B program [because] *Arriaga* is an FLSA case which does not hinge on any differences between the H-2A and the H-2B guestworker programs.”<sup>41</sup> The Eastern District of Louisiana later affirmed that FLSA applies to H-2B workers and extended *Arriaga*’s analysis to H-2B workers in *Castellanos-Contreras v. Decatur Hotels, LLC*.<sup>42</sup> There, each H-2B worker incurred between \$3,500 and \$5,000 in travel, visa, recruitment, and other migration expenses. The Eastern District of Pennsylvania similarly applied *Arriaga*’s analysis to H-2B workers in *Rivera v. Brickman*.<sup>43</sup> There, the court agreed that point-of-hire transportation primarily benefits the employer and travel expense “arises out of Brickman’s decision actively to recruit workers from foreign countries.”<sup>44</sup> The *Rivera* court also affirmed *Arriaga*’s analysis with respect to temporary worker visa fees, adding that “H-2B visas only authorize their holders to work for one specified employer. . . . Thus, unlike ordinary living expenses, these visas had no value to the workers other than their authorization to work *for Brickman*.”<sup>45</sup> The Western District of Michigan agreed with the *Rivera* court’s analysis, and similarly affirmed that *Arriaga* applies to workers in the H-2B visa program.<sup>46</sup> In *Rosales v. Hispanic Employee Leasing Program*, the Western District of Michigan concluded that “point-of-hire transportation expenses, visa costs, and administrative fees were primarily for Defendants’ [employers’] benefit.”<sup>47</sup>

Despite *Arriaga*’s well-established reimbursement requirement, H-2B employers continue to conceal fee deductions and unlawfully pay H-2B workers wages well below the minimum wage. And as an unintended consequence of *Arriaga*, recruiters hide their fees by inflating the costs for

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<sup>36</sup> *Id.* at 1244.

<sup>37</sup> *Id.* at 1241.

<sup>38</sup> *De Luna-Guerrero v. N.C. Grower’s Ass’n*, 338 F.Supp.2d 649, 665 (E.D.N.C. 2004).

<sup>39</sup> *Id.* at 661.

<sup>40</sup> *Id.* at 662.

<sup>41</sup> *Recinos-Recinos v. Express Forestry, Inc.*, No. Civ.A. 05-1355, 2006 WL 197030 (E.D. La. 2006).

<sup>42</sup> *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F.Supp.2d 565, 571-72 (E.D. La. 2007).

<sup>43</sup> *Rivera v. Brickman Group, Ltd.*, No. 05-1518, 2008 WL 81570, at \*4 (E.D. Pa. 2008).

<sup>44</sup> *Id.* at \*12.

<sup>45</sup> *Id.* at \*12.

<sup>46</sup> *Rosales v. Hispanic Employee Leasing Program, LLC*, No. 1:06-CV-877, 2008 WL 363479, at \*1 (W.D. Mich. 2008).

<sup>47</sup> *Id.* at \*1

travel, visa, and passport expenses when they provide these services as a package to the H-2B petitioner. Express Forestry, for example, deducted \$40.00 to \$50.00 each week from each of its H-2B workers' paychecks for what it described as "personal rides" – transit in a 15-seat van.<sup>48</sup> The forester's agents also required workers to pay \$400 each as "advance deposits for lodging" before they could secure jobs in the U.S.<sup>49</sup> The Eastern District of Louisiana found that the so-called "personal rides" were "obviously a sham – *i.e.*, an attempt to disguise an otherwise unlawful payroll deduction" and that the forester had disguised "hefty recruiting fees" as "advance deposits for lodging."<sup>50</sup> But because DHS's proposals provide no process to detect fee abuse and will not require employers to disclose any information about deductions, employers will continue evade their *Arriaga* reimbursement requirement and pay workers unlawfully low wages.

Not only does DHS' proposal to exclude visa, passport, and travel expenses from its reimbursement requirements violate FLSA and contradict years of U.S. federal case law, it also violates sending countries' labor laws.

Article 28 of the Mexican Federal Labor Law requires that employers pay "[t]he cost of transportation, repatriation, transport to the place of origin and nourishment of the worker and his family, as applicable, and all costs which arise from crossing the border and fulfillment of the arrangements of migration" for Mexican workers who work outside Mexico.<sup>51</sup> Employers may not deduct these expenses from the worker's salary.<sup>52</sup>

Similarly, the Guatemalan Labor Code provides that foreign labor contractors who recruit in Guatemala must pay all costs relating to transportation and visa applications.<sup>53</sup> The U.S. District Court of Connecticut granted a default judgment for H-2B workers from Guatemala in which this issue was raised.<sup>54</sup> Additionally, Costa Rica, Honduras, and Panama have labor laws that require foreign employers who recruit workers in those countries to pay the workers' travel costs.<sup>55</sup>

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<sup>48</sup> *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355 (E.D. La. Aug. 19, 2008) (order recommending grant of motion to enforce and denial of cross-motion for protective order).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Ley Federal de Trabajo [L.F.T.][Federal Labor Law], art. 28(I)(b), Diario Oficial de la Federación [D.O.], 1 de Abril de 1970 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/125.pdf> (Costs of transportation, repatriation, transition to the place of origin and feeding the worker and their family, where appropriate, and all that originates in the crossing of borders and the fulfillment of the dispositions about migration, or by any other similar concept, will be on the exclusive account of the employer. The worker will receive the complete wage that corresponds to him, without any amount of deductions for these concepts.). For an extended discussion of Mexico's foreign employer provision, see also Kati L. Griffith, *Globalizing U.S. Employment Statutes through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 389-90 (2008).

<sup>52</sup> *Id.*

<sup>53</sup> El Código del Trabajo, Contratos de trabajo, Guatemala, Art. 34(b), available at <http://67.18.189.122:6633/gt/empleadores/contratos-de-trabajo>.

<sup>54</sup> *Aguilar v. Imperial Nurseries*, No. 3-07-cv-193 9 (JCH), 2008 WL 2572250 (D.Conn. May 28, 2008). Documents related to this case have been filed as a separate document, Comment tracking number 8071099b.

<sup>55</sup> See Código de Trabajo: Costa Rica, Article 42(a), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.country?p\\_lang=en&p\\_country=CRI](http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI); Código de Trabajo y sus reformas: Honduras, Article 43(c), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.country?p\\_lang=en&p\\_country=CRI](http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI); Código de Trabajo: Panama,

Finally, El Salvador and Nicaragua’s labor laws “require specified employers to pay for relocation travel costs when a worker ‘has to move from his place of residence’ to perform services.”<sup>56</sup>

**D. DHS Should Clarify And Expand Section 214.2(h)(6)(i)(B)(1) To Establish A Process For Advocates And Workers To Enforce Workers’ Rights And To Publish Information About Recruiters. DHS Should Also Clarify And Revise Section 214.2(H)(6)(i)(B)(2) To Require Employers To Reimburse All Unreasonable Recruitment And Placement Fees And Extend The Proposed Grace Period For H-2B Workers To Find New Employment In The U.S. If A Petition Is Revoked.**

To end the system of indenture of temporary workers and to ensure that employers and recruiters do not extract unlawful fees or other compensation from prospective H-2B workers, DHS should expand proposed Section 214.2(h)(6)(i)(B)(1) to protect H-2B workers who whistleblow about fee abuses and to provide a safe and clear process for workers and their advocates to report fee abuses. Without information about recruiters, however, advocates cannot effectively intervene to stem recruitment abuses. DHS should coordinate with the U.S. Department of State to collect recruiter information from U.S. consulates and publish information about authorized recruiters and their ties to U.S. employers.

DHS should not punish H-2B workers for their employer’s bad behavior. First, DHS should revise proposed Section 214.2(h)(6)(i)(B)(2) to authorize a sixty-day grace period, provide affected H-2B workers with information about legal services, and create a database of alternative H-2B employment opportunities that workers can access if their employer’s petition status changes after they arrive in the U.S. Second, DHS should clarify Section 214.2(h)(6)(i)(B)(2) to describe how the agency will notify workers if it revokes their employer’s petition and to clarify that the grace period will not begin until DHS has notified the H-2B worker about the petition revocation. Third, if DHS does not amend Section 214.2(h)(6)(i)(B)(3) to require employers to reimburse workers’ costs of transit from their home countries, DHS should also revise Section 214.2(h)(6)(i)(B)(2) to require the employer to reimburse the H-2B worker’s cost of transit to the U.S. if DHS revokes the employer’s H-2B petition. Unless their employer reimburses H-2B workers for their costs of travel and associated costs to the U.S., affected H-2B workers will incur a severe financial penalty for their employer’s misconduct. Moreover, a reimbursement requirement for costs of travel to the U.S. will provide an additional incentive for employers to behave lawfully. Finally, workers who assist in identifying employers who are violating program regulations should be given the opportunity to remain in the United States to pursue their legal claims through the U or T visa programs, if appropriate, or through discretionary deferred adjudication, or even an extension of their H-2B visas, and a clear and simple process should be established to allow workers to re-enter the country to participate in legal proceedings.

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Article 100(1),(2), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.country?p\\_lang=en&p\\_country=CRI...](http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI...) See also, Griffith, *supra* note 51, at nn. 132-135.

<sup>56</sup> Griffith, *supra* note 51, at 415-16 and nn. 136-37. See Legislación Laboral, El Salvador, Art. 29(8)(a). See also El Código del Trabajo: Nicaragua, Article 202(g), available at [http://www.ilo.org/dyn/natlex/natlex\\_browse.country?p\\_lang=en&p\\_country=CRI](http://www.ilo.org/dyn/natlex/natlex_browse.country?p_lang=en&p_country=CRI).

DHS can include in its regulations a rebuttable presumption that someone who has worked in the U.S. under an H-2 visa and has an ongoing claim be entitled to humanitarian parole for "urgent humanitarian reasons" or "significant public benefit" standards as defined in 8 CFR 212.5(b).

Finally, in line with FLSA, years of U.S. federal case law, and sending countries' labor laws, DHS should revise Section 214.2(h)(6)(i)(B)(3) to require employers to reimburse all recruiting and placement costs, including the actual cost of travel to and from the point of recruitment in the home country, visa fees, and passport fees. To prevent employers from concealing unlawful deductions and disguising recruitment fees, DHS should also require employers to itemize and describe in detail all purportedly lawful deductions from H-2B workers' wages.

**E. DHS's Proposed Regulation To Require Employers To Include Attestations With Their H-2B Petitions Do Not Protect Workers From Recruitment And Fee Abuses, Do Nothing To Ensure That Recruiters Do Not Continue To Lie To Workers About The Terms Of Their Employment, And Contain No Enforcement Mechanism To Ensure That Employers Comply With Their Contractual Obligations To H-2B Workers.**

DHS proposes in Section 214.2(h)(6)(i)(C)(1) to require H-2B petitioners to attest that they will not materially change the information they provide on the Form I-129 and labor certification about the "alien workers' duties, place of employment, nor the entities for which the duties will be performed." In practice, recruiters frequently mislead prospective H-2B workers about wages, benefits, hours, and duration of employment. DHS's proposed rule does nothing to prevent employers from misleading H-2B workers about the terms of their employment. Moreover, DHS's proposed attestation rule provides no cause of action and no process for legal advocates or workers to intervene to ensure that employers comply with the terms of employment that recruiters offer to workers in their home countries.

Under DHS's proposed rule, employers will continue to over-recruit and bench workers, while relying on international recruiters to deceive prospective H-2B workers about wages, benefits, hours, and duration of employment. Requiring that H-2B employers attest that they will not materially change the information they provide on Form I-129 and temporary labor certifications does nothing to ensure that recruiters will not continue to mislead prospective H-2B workers about hours, wages, and length of employment. Indeed, the terms of employment that employers supply on Form I-129 and temporary labor certifications often differ radically from the terms of employment that recruiters offer to prospective H-2B workers.

In Sections 214.2(h)(6)(i)(C)(2)-(4), DHS also suggests that the petitioners' attestations will provide an adequate enforcement mechanism to ensure that recruiters and employers no longer extract unconscionable fees from H-2B workers and prospective H-2B workers during the recruitment and job placement processes. Again, DHS proposes no process to detect fee abuses. Here, too, DHS proposes to rely exclusively on employers to self-certify through attestations that they have reimbursed workers for fees and establishes no process to detect when recruiters or employers have charged fees. Again, because their rights to work and to live in the U.S. remain tied to their employer, H-2B workers are frequently too intimidated to report abuses and do not

have access to legal counsel, which makes it extremely unlikely that advocates can intervene to guard against fee abuses.

**F. DHS Should Expand And Clarify Proposed Section 214.2(h)(6)(i)(C)(1) To Require Employers To Attest That They Will Not Change H-2B Workers' Wages, Benefits, Hours, And Duration Of Employment After They Submit A Petition And To Establish A Process For Advocates And Workers To Enforce The Employer's Contractual Obligations To Prospective H-2B Workers. DHS Should Also Expand And Clarify Proposed Section 214.2(h)(6)(i)(C)(2)-(4) To Require Employers To Attest That They Will Reimburse All Recruitment And Job Placement Fees And To Establish A Process For Advocates And Workers To Enforce Fee Reimbursement Rules.**

To avoid confusion and abuse, workers, employers, and recruiters must have consistent information about the workers' terms of employment. DHS should revise the language of proposed Section 214.2(h)(6)(i)(C)(1) to require H-2B employers to attest that they will not change any of the information that they supply their H-2B petitions, I-129 forms, and temporary labor certifications. In addition, DHS should require employers to give a copy of the petition in the workers' native language to the H-2B workers at the time of recruitment to ensure that workers know its terms.

In order to make attestation meaningful, workers must have private and federal rights of action to bring claims against employers and recruiters who break the contractual obligations that they supply in their attestations. Without access to legal counsel, however, H-2B workers will continue to lack the means to enforce the terms of employment that recruiters offer and attestation will remain meaningless.

To ensure that prospective H-2B workers do not pay fees or other compensation, DHS should expand proposed Sections 214.2(h)(6)(i)(C)(2)-(3) to detect employer misconduct with respect to attestations and to provide additional protections for H-2B workers who whistleblow about fee abuses, as well as a safe and clear process for workers and their advocates to report fee abuses, and appropriate opportunities to remain in the United States, or return to this country, in order to pursue legal remedies.

Finally, in line with federal case law on reimbursements for H-2A and H-2B workers, DHS should revise proposed Section 214.2(h)(6)(i)(C)(4) to require employers to attest that they have reimbursed H-2B workers for costs of travel to and from the worker's host country, passport fees, and visa fees because these fees are primarily for the benefit of the employer.<sup>57</sup> Most importantly, however, workers must have a right of action and access to legal counsel in order to enforce the attestations that employers make. We understand that those are not changes DHS is empowered to enact by regulation, but they would be far more powerful remedies than those proposed by DHS at this time.

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<sup>57</sup> See *Rivera*, 2008 WL 81570, at \*4, *De Luna-Guerrero*, 338 F.Supp.2d at 665, and *Arriaga* 305 F.3d at 1232.

### **III. The Proposed Regulation Would Gut the Requirement that H-2B Workers be Hired Only into Temporary, Full-time Job Opportunities, Thereby Opening up Many More U.S. Workers to Unfair Competition for Work.**

The INA requires that the H-2B visa only be available to employers seeking foreign workers to come “temporarily to the United States” to perform “temporary service or labor.”<sup>58</sup> This mandate has been previously codified in regulation to require that employer H-2B applications only be certified if it can be shown that the employer’s need for the services or labor at issue is:

- a one-time occurrence;
- a seasonal need;
- a peakload need; or
- an intermittent need.

Specific criteria must be met to establish each category of temporary need, and these criteria are separate from and in addition to the requirement that an H-2B visa be initially granted for no longer than one year.<sup>59</sup>

The statutory and administrative requirements regarding the temporary nature of the employer’s need are central to avoiding employer abuse of the H-2B program. If employers are able to evade this requirement, they could employ workers on H-2B visas in positions in which the employer has a permanent or regular need, rather than a temporary need. Employers experiencing a long-term need for a larger workforce could completely avoid the demands of the domestic labor market by serially employing H-2B workers, on temporary visas, to meet this long-term need. Employers thus abusing the system could undermine those competitors who do try to meet their long-term labor needs through the normal channels of the domestic labor market, dragging down wages and working conditions for workers in the industry or region as a whole. Such exploitation of the H-2B visa to meet regular and long-term employment needs clearly violates both the letter and the spirit of the law establishing the H-2B program, and thus prevention of such abuse has been a key focus of the current labor certification system. The current certification process has successfully prevented at least some employers seeking fast food workers, janitors, launderers, and other services for which they had a permanent or long-term need from accessing H-2B workers.

In many seasonal industries in which many U.S. workers are or once were employed, like tourism, landscaping, food processing, construction, forestry, permanent workers would have steady employment for much of the year, but would face seasonal layoffs of a few months in each year, during which they would have to find other means to survive. Increasingly, many of these jobs are now being filled with H-2B workers because a need of up to ten months out of the year is considered “temporary.” A more stringent definition would be more in keeping with the objectives of the program, and more protective of U.S. workers. Worse, however, the proposed regulation, would allow for a “temporary” one time need of up to 3 years. It is hard to imagine many construction jobs, for example, that would not be “temporary” under this standard.

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<sup>58</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>59</sup> See 8 C.F.R. § 214.2(h)(6)(ii)(B) and TEGL 27-06 (June 25, 2007), 72 FR 38621, July 3, 2007.

Existing 8 C.F.R. § 214.2(h)(6)(ii) “Temporary services or labor” provides

(B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be *a year or less*, although there may be extraordinary circumstances where the temporary services or labor might last *longer than one year*.

(1) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

By comparison the proposed regulation would amend the current definition of temporary services or labor. Under the proposed rule, the job would be defined as “temporary” where the employer needs a worker to fill the job for a “limited period of time.” A “limited period of time” would be defined as a period of need that will end in the near, definable future of up to three years.

This change in the standard is not a minor semantic difference. Data from the Bureau of Labor Standards establishes that for workers ages 25 to 34 years of age the median job tenure is 2.9 years.<sup>60</sup> This program has the danger of perverting existing immigration law by forcing Congress to respond to increasing asserted shortages of H-2B visas as more and more existing jobs get classified as “temporary” in order to qualify for the H-2B program.

In addition, expanding the definition of temporary to three years has the danger of heightening any adverse affect on the wages and working conditions of U.S. workers that occurs as a result of the employment of foreign guest workers. As was discussed previously, H-2B workers are an exceptionally vulnerable workforce because of their poverty and the debt they often incur in order to take an H-2B job. Because of that vulnerability, they are incredibly reluctant to complain about poor working conditions or illegal pay. This effect will only be multiplied H-2B employers are allowed to keep this easily exploited work-force around for an additional two years.

Employer applications for temporary workers to fill a permanent need – whether for fast food cooks, hotel maids, or launderers – that have been rightfully rejected under the administration’s existing regulations would be automatically accepted in the future, with absolutely no recourse for those workers injured as a consequence. An ever-greater universe of employers seeking to fill regular and permanent labor needs outside of the domestic labor market would be able to freely take advantage of the H-2B program. The statutory mandate that H-2B workers be employed to perform “temporary” labor or services would be rendered meaningless. This result is unacceptable as a matter of policy and untenable as a matter of law.

The proposed regulation change that would require that H-2B workers who have reached the three year ceiling on H-2B nonimmigrant status depart the U.S. for three months, instead of six

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<sup>60</sup> See Bureau of Labor Studies Job Tenure “Table 1. Median years of tenure with current employer for employed wage and salary workers by age and sex, selected years, 1996-2006.” *available at* <http://www.bls.gov/news.release/tenure.t01.htm>

months as previously required, exacerbates this problem. These proposals allow employers to create a long-term, permanent workforce comprised of H-2B workers who reside in the U.S. for three years and then take a relatively short trip to their home country before re-entering to resume employment. This proposal eviscerates the mandate from Congress that these be “temporary” jobs. It also has the potential to seriously undermine the employment of U.S. workers in many industries.

#### **IV. The Proposed Delegation of Authority from DHS to DOL is unnecessary; The Department of Labor has Ample Authority to Meet the Goals of the INA. The Secretary of Labor Exercised Broad Regulatory and Enforcement Authority Under The H-2 Program Which Has Not Been Reallocated Or Revoked**

In Section M of the proposed regulations, DHS contends that it is currently in discussions with DOL concerning whether to delegate authority to DOL to establish an enforcement process to investigate employers’ compliance with H-2B requirements. While the undersigned agree that DOL should actively enforce the requirements of the H-2B program, we disagree that a delegation is required for DOL to obtain that authority.

##### **A. The Secretary Exercised Broad Regulatory and Enforcement Authority Under the H-2 Program which has not been Reallocated or Revoked.**

Since at least 1964, the Secretary of Labor has enjoyed, and has exercised, sweeping authority to adopt regulations concerning the terms under which H-2 workers could be employed, and governing enforcement of those terms. The Secretary of Labor established a broad regulatory regime for the H-2 program, with major changes in 1966,<sup>61</sup> 1968<sup>62</sup> and 1978.<sup>63</sup> Each reform cited two sources of authority: 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h).

Both the current H-2A and H-2B classifications are temporary foreign worker programs that grew out of the original H-2 program. The Immigration and Nationality Act of 1952 (INA) established the H-2 program, which provided mechanisms for the use of temporary foreign labor but did not distinguish between agricultural and non-agricultural work.<sup>64</sup> More than 30 years later, the Immigration Reform and Control Act of 1986<sup>65</sup> (IRCA) amended the INA to establish separate visa classifications for temporary H-2A agricultural workers and H-2B non-agricultural workers.<sup>66</sup> While IRCA split the H-2 program into H-2A and H-2B, the original purpose of the

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<sup>61</sup> Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 610.10 (1966).

<sup>62</sup> 20 C.F.R. Part 621 (1968); Part 621—Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 7570 (May 22, 1968).

<sup>63</sup> Temporary Employment of Alien Agricultural and Logging Workers in the United States, Final Rules, 43 Fed. Reg. 10306 (Mar. 10, 1978).

<sup>64</sup> INA, Pub.L. 99-603, Title III, 100 Stat. 3359, Nov. 6, 1986, *see also* Labor Certification Process and Enforcement (H-2A Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 8230, 8235 (Feb. 13, 2008).

<sup>65</sup> Immigration Reform and Control Act of 1986, Sec. 301 (codified at 8 U.S.C. 1101(a)(15)(h)(ii)(a) and (b)).

<sup>66</sup> INA Section 101(a)(15)(H)(ii)(A). Pub.L. 99-603, Title III, 100 Stat. 3359, (Nov. 6, 1986.).

H-2 program remained, i.e. to protect U.S. workers and prevent the depression of U.S. working conditions caused by employing foreign workers.<sup>67</sup>

ALJ cases show that DOL asserted authority under the INA pre-IRCA and had inherent authority to enforce contractual obligations under the H-2 regulations. In *Foster v. Wilfred Theriault Woods Contractor*,<sup>68</sup> the agency found that Foster was discharged in violation of the terms of his contract. Foster was hired as a "logger all-around." While pre-IRCA Foster was classified as an H-2 worker, under IRCA, Foster would be an H-2B non-agricultural worker.

Nor did the division of the program into H-2A and H-2B in IRCA in 1986 change the Secretary's underlying authority under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h) to regulate employment of non-agricultural temporary foreign workers, now separately classified as H-2B workers. Through IRCA, Congress codified the then-existing substantive H-2 agricultural regulations that the Secretary of Labor had promulgated in the 1960s and 1970s, as well as the designation in 8 C.F.R. 214.2(h) of the Department of Labor as the key agency to be consulted with respect to agricultural workers.<sup>69</sup> However, as concerns non-agricultural workers, no language in IRCA diminishes the Secretary of Labor's prior authority. The structure of the H-2B program still envisioned certification of applications by the Secretary. To do that equitably and effectively, the Department would necessarily have to develop and enforce standards as to what it meant to certify an application.

DOL cites 8 U.S.C. § 1184(c)(1), as amended in IRCA,<sup>70</sup> in part, to explain its professed lack of authority to enforce H-2B contractual agreements between employers and employees.<sup>71</sup> While that section codifies DOL authority with respect to regulating the temporary agricultural worker program and no parallel enforcement authority is expressly delegated under 8 U.S.C. § 1184(c)(1) with respect to non-agricultural workers, nonetheless, the Secretary's long-standing inherent authority discussed above was not expressly revoked, either. Nor may one infer that this authority was revoked by implication. The purpose of incorporating the agricultural regulatory protections into the statute was greater protection of agricultural workers, not less

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<sup>67</sup> Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991).

<sup>68</sup> *Foster v. Wilfred Theriault Woods Contractor*, 1982-TAE-7 (ALJ May 16 1983).

<sup>69</sup> See 8 U.S.C. §§ 1184(c)(1), 1188 and 20 C.F.R. § 655 Subpart B.

<sup>70</sup> 8 U.S.C.A. § 1184(c)(1)(2006).

(c) Petition of importing employer; involvement of Departments of Labor and Agriculture  
(1) The question of importing any alien as a nonimmigrant under section subparagraph (H), (L), (O), or (P)(i) of section 1101(a)(15) of this title (excluding nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant. For purposes of this subsection with respect to nonimmigrants described in section 1101(a)(15)(H)(ii)(a) of this title, the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture. The provisions of section 1188 of this title shall apply to the question of importing any alien as a nonimmigrant under section 1101(a)(15)(H)(ii)(a) of this title.

<sup>71</sup> Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008)

protection of U.S. workers generally. After all, the underlying purpose of IRCA was to protect U.S. workers' preferential access to jobs.<sup>72</sup>

The Homeland Security Act of 2002<sup>73</sup> transferred the prior authority of the Attorney General and the INS for administering certain immigration functions to the new Department of Homeland Security.<sup>74</sup> However, the savings provisions of that Act make clear that the underpinnings of the authority and duties of the Secretary of Labor to protect U.S. workers and their wages and working conditions, under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h), were unaffected by this transfer of authority.<sup>75</sup>

Nor did the Save Our Small and Seasonal Business Act of 2005<sup>76</sup> change the Secretary of Labor's authority to regulate or enforce. DOL also cites the Save Our Small and Seasonal Businesses Act of 2005 as a basis for its reluctance to assert any enforcement authority with respect to the H-2B program.<sup>77</sup> That Act gave the Secretary of Homeland Security certain administrative remedies, including penalties and debarment, if the Secretary of Homeland Security finds a substantial failure to meet any of the conditions of the petition to admit H-2B workers. While the Act does enable DHS to sanction employers for failure to comply with the terms in their H-2B petitions, the Act's narrow delegation to DHS of two types of enforcement methods—fines and debarment—does not modify DOL's pre-existing authority to protect U.S. and H-2B workers. Further, fines and debarment do not provide any direct relief to the aggrieved H-2B or U.S. worker. Because Congress did not delegate contractual remedies to DHS, then it intended that DOL continue to exercise them.<sup>78</sup> DHS's statutory duty to consult with appropriate agencies, including DOL, existed in the INA before and after the 2005 changes at 8 U.S.C. §1184(c). The Secretary of Labor's particular role in advising Homeland Security about the U.S. labor market was spelled out in 8 C.F.R. Part 214.2(h), before and after the 2005 Act.<sup>79</sup> No specific language diminished its authority to regulate employment under the H-2B program.

## **B. DOL's Power to Regulate and Enforce is Inherent in its Role in the Certification Process.**

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<sup>72</sup> See, e.g. Immigration Reform and Control Act of 1986, Sec. 101 (criminalizing—for the first time—the hiring of undocumented workers).

<sup>73</sup> 6 U.S.C. §§101, *et seq.* (Nov. 25, 2002)

<sup>74</sup> 6 U.S.C. §§ 202, 236.

<sup>75</sup> 6 U.S.C. § 552.

<sup>76</sup> Save Our Small and Seasonal Business Act of 2005, P.L. 109-13, 119 Stat. 318.

<sup>77</sup> Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008) (*citing* Save Our Small... Sec.404 [codified at 8 U.S.C. § 1184(c)(14)]).

<sup>78</sup> D.C. Fin. Responsibility and Mgmt. Auth. v. Concerned Senior Citizens of the Roosevelt Tenant Ass'n, 129 F. Supp. 2d 13 (D.D.C. 2000) (Lamberth, J.) (*citing* cannon expression exclusion rule).

<sup>79</sup> Both 8 C.F.R. 214.2(h)(ii)(D)(2004) and (2008), among other provisions, recognizes the DOL's role in the certification process.

(D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. . . This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.

Because of DOL's special role requiring that it certify whether unemployed persons capable of performing the work can be found in the United States,<sup>80</sup> DOL must have policies with respect to when, and under what conditions, it will issue such a certification. Inherent in that duty is the authority to issue regulations defining those circumstances under which it will certify—or not certify. Inherently, it has the power, and indeed, the duty, to determine when, and under what circumstances, certification should be denied, or conditioned upon an applicant's making good upon past representations. DOL maintains authority to certify and should therefore enforce the contractual obligations that arise out of the certification process.

Under the pre-IRCA H-2 program, certification authority was delegated to the Secretary of Labor from the Commissioner of Immigration and Naturalization, who had been delegated authority from the Attorney General. In other words, the Attorney General was initially charged with determining when unemployed persons capable of performing such labor could be found in the country.<sup>81</sup> The Attorney General delegated the responsibility to the Commissioner of Immigration and Naturalization,<sup>82</sup> who, in turn, delegated the determination to the Secretary of Labor.<sup>83</sup> Pursuant to INS regulations, DOL promulgated regulations for the certification of temporary employment in the United States.<sup>84</sup>

As has been demonstrated above, although the H-2B program has been separated from the agricultural worker program, and although DHS has taken the place of the Attorney General and the Commissioner of Immigration and Naturalization, nothing has changed in the structure of the program, or the delegated authority. Because DOL must certify that (1) there are not enough able and qualified U.S. workers available for the position sought to be filled and (2) that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers, it must be able to decide, in a principled way, what that means, and when it will deny certification. As DOL maintains authority to certify employers, it follows that DOL should likewise enforce the contractual obligations created by the certification. DOL is the governmental agency most capable of ensuring that employers comply with the very agreements that DOL has certified. Without authority to enforce, the DOL's power to certify employers is, in effect, only a gesture and has no teeth.

### **C. DOL'S Mandate to Protect U.S. Workers Depends on Ample Protections for Temporary Foreign Workers, as Well.**

In order to comply with the original purpose of IRCA, which was to address wage depression and job displacement caused by foreign workers,<sup>85</sup> DOL must enforce the contractual obligations

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<sup>80</sup> *Id.*

<sup>81</sup> 8 U.S.C. §1184(c).

<sup>82</sup> 8 C.F.R. 2.1.

<sup>83</sup> 8 C.F.R. § 214.2(h)(3), *see also Foster v. Wilfred Theriault Woods Contractor*, (ALJ May 16, 1983).

<sup>84</sup> *See, e.g.* Aliens Performing Temporary Service, Criteria for Clearance Order, Notice of Proposed Rule Making, 29 Fed. Reg. 15191 (Nov. 10, 1964); Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); Part 621—Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 7570 (May 22, 1968).

<sup>85</sup> Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec.

of employers of temporary foreign workers.<sup>86</sup> A staff report prepared for the Committee on Education and Labor of the House of Representatives summarized the objectives of INA as follows: "In creating the H-2 program, Congress attempted to address the problems that DOL had documented pertaining to wage depression and job displacement caused by foreign agricultural workers. An explicit intent of the law, therefore, was to reserve American jobs for American workers. Thus the H-2 program allowed the admission of nonimmigrant workers into the U.S. to perform temporary services only if willing, able and qualified U.S. workers could not be found. Further to offset the adverse impact of foreign labor on the domestic agricultural labor market, the regulations required H-2 agricultural employers to pay an enhanced wage rate, known as the "adverse effect wage rate."<sup>87</sup>

**D. DOL has Recognized the Inherent Authority Left it by Congress in Other Contexts, but Would Selectively Reject Parts of Its Mandate to Administer the Certification Process.**

DOL argues that the narrow delegation of enforcement authority to DHS in 8 U.S.C. § 1184(c)(14) totally precludes DOL from any enforcement action.<sup>88</sup> DOL has selectively rejected part of its statutory mandate when it chooses not to consider needed H-2B protections or enforce H-2B contracts while continuing to certify employers' applications that give rise to the contracts. This selective rejection of authority is irrational in light of the INA's underlying goal to protect U.S. workers and DOL's purpose to enforce labor laws.<sup>89</sup> Further, it is inconsistent with the position DOL has taken in other contexts.

After suffering unlawful rejection by H-2B employers, twenty U.S. workers sued DOL regarding the agency's lax administration of the H-2B program.<sup>90</sup> In the ongoing litigation, DOL contends it enjoys broad discretion to administer the H-2B program because of Congressional silence in IRCA, in juxtaposition to the detailed statutory provisions for the H-2A program.<sup>91</sup> DOL acknowledges it has prescribed fewer H-2B benefits and protections than the H-2A program, but maintains that the agency has complete power to do so because of this Congressional silence.<sup>92</sup>

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30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008).

<sup>86</sup> Office of Inspector General. *Top Management Issues at the U.S. Department of Labor*, (Jan. 2003).

<sup>87</sup> Part 602—Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008).

<sup>88</sup> Labor Certification Process and Enforcement (H-2B Workers), Notice of Proposed Rulemaking, 73 Fed. Reg. 29942 (May 22, 2008).

<sup>89</sup> Part 602 — Cooperation of United States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964); 20 C.F.R. § 655.0 (2008); 8 U.S.C. 1188(a)(H-2A program); 8 C.F.R. Part 214.2(h)(6)(2008)(H-2B program); 8 U.S.C. §§ 1101(a)(15)(h)(ii)(a) and (b) (2008). *see also* Office of Inspector General. *Top Management Issues at the U.S. Department of Labor*, (Jan. 2003).

<sup>90</sup> *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Pls.' Compl. (W.D.Tex. filed Oct. 9, 2007).

<sup>91</sup> *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 7, (W.D.Tex. filed Feb. 25, 2008).

<sup>92</sup> *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 7, 9, 10 n.4 (W.D.Tex. filed Feb. 25, 2008).

Based on DOL's own reasoning, DOL could prescribe more benefits and protections, and also enforce them.

In addition, DOL made the following argument in its motion to dismiss the U.S. workers' lawsuit:

Many courts have given considerable deference to DOL on questions arising under the temporary labor certification program. Due to the complex nature of the statutory and regulatory scheme, such considerable weight should be given to the expertise of DOL. *See Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303-304 (5th Cir. 1976) ("the Secretary might have utilized any of a number of reasonable formulas...."); *Florida Fruit & Vegetable Association v. Donovan*, 583 F. Supp. 268, 272 (S.D. Fla. 1984) (deference accorded in "setting of rates"), *aff'd sub nom, Florida Fruit & Vegetable Association v. Brock*, 771 F.2d 1455 (11th Cir. 1985; *Shoreham Cooperative Apple Producers Association, Inc. v. Donovan*, 764 F.2d 135, 141 (2d Cir. 1985) ("the agency enjoys considerable discretion in ensuring that importation of H-2 workers does not adversely affect domestic workers' jobs."); *Virginia Agricultural Growers' Association, Inc. v. Donovan*, 74 F.2d 89 (4th Cir. 1985) (deferring to DOL's determination of Adverse Effect Wage Rate); *Rowland v. Marshall*, 650 F.2d 28 (4th Cir. 1981) (*per curiam*)(same); *Williams v. Usery*, 531 F.2d 305, 306 (5th Cir. 1976)(same).<sup>93</sup>

All of the cases that DOL cites predate IRCA, and thus apply to DOL's authority to regulate the H-2 program—including non-agricultural temporary workers. As demonstrated above, Congress did not revoke this authority when it created the H-2B program.

DOL selectively interprets its statutory mandate—including Congressional silence in IRCA and the narrow delegation of enforcement authority to DHS in the Save Our Small and Seasonal Business Act—to reach an irrational result that fails to protect U.S. workers. Thus, according to the agency, DOL has total discretion to prescribe fewer H-2B protections but zero discretion to enforce them. This is arbitrary and capricious.

#### **E. DOL's Office of Inspector General has Investigative and Enforcement Authority over the H-2B Program.**

DOL's Inspector General is authorized "to conduct and supervise audits and investigations relating to programs and operations of the . . . Department of Labor."<sup>94</sup> DOL's OIG has authority over all "DOL programs" including foreign labor certifications.<sup>95</sup> The Inspector General Act of 1978 states "the Inspector General should not be prevented or prohibited from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of

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<sup>93</sup> *Riojas, et al. v. Chao, et al.*, No. 07-CV-058, Def.'s Mot. To Dismiss at 10 n.4 (W.D.Tex. filed Feb. 25, 2008).

<sup>94</sup> Inspector General Act of 1978. Pub. L. 95-452, § 1, Oct. 12, 1978, 92 Stat. 1101, *as amended by* 1988--Pub. L. 100-504.

<sup>95</sup> 20 CFR Ch. V (4-1-07 Edition)

any audit or investigation."<sup>96</sup> In a 2003 report, DOL's Office of Inspector General (OIG) listed "Integrity of Foreign Labor Certification Programs" among the top ten challenges facing DOL. The report includes fixing the H-2B program as a top governmental priority and asserts that DOL must enforce certifications that it grants instead of simply giving employers a "rubber stamp" to abuse certifications. DOL should acknowledge OIG's authority to enforce and to initiate, carry out, and complete audits and investigations.<sup>97</sup>

**F. DOL Has Authority to Enforce H-2B Contracts because the Agency has Authority under the Wagner-Peyser Act to Investigate and Sanction H-2B Employers.**

DOL has broad authority under the Wagner-Peyser Act to regulate and police the job service system.<sup>98</sup> DOL has the authority to investigate complaints against employers and to discontinue job referral services, or delegate this power to the state workforce agencies.<sup>99</sup> Thus, DOL can bar employers from the job service system and refuse to circulate job orders.

DOL requires H-2B employers to circulate local job orders for ten days in order to receive labor certification.<sup>100</sup> DOL has authority to bar an H-2B employer who has not complied with his representations to the department from the job system. Unable to post a job order, such an employer could not comply with the conditions for obtaining a labor certification, and DOL would deny labor certification.

If DOL can deny an employer the ability to obtain job referral services, and hence, labor certification, surely it could also condition access to the Wagner-Peyser job service and labor certification on compliance with the terms of past representations the employer has made to the department about the terms of employment of workers in job opportunities for which the employer sought H-2B workers.

**G. As a Signatory to the ILO'S Labor Administration Convention and the North American Agreement on Labor Cooperation (the NAFTA Labor Side Agreement), the United States is Obligated to Offer Appropriate Adjudication and Enforcement of Labor Laws.**

The United States has ratified the ILO's Labor Administration Convention and North American Agreement on Labor Cooperation (NAALC) language obligating the United States to enforce its labor laws. Article 4 of NAALC is meant to ensure H-2B workers have appropriate access to enforcement of labor laws.<sup>101</sup> ILO's Labor Administration Convention ensures that H-2B

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<sup>96</sup> Inspector General Act of 1978. Pub. L. 95-452, § 1, Oct. 12, 1978, 92 Stat. 1101, *as amended by* 1988--Pub. L. 100-504.

<sup>97</sup> As noted above, we would support the Secretary of Labor designating the Employment Standards Administration (ESA) Wage and Hour Division as the primary entity within DOL with responsibility for investigating worker complaints about violations of workers rights under the H-2B system.

<sup>98</sup> 29 U.S.C. § 49; 20 C.F.R. § 658; NAACP, W. Region v. Brennan, 360 F. Supp. 1006, 1009 (D.D.C. 1973).

<sup>99</sup> 20 C.F.R. §§ 658.501, 658.503, 658.420, and 658.602.

<sup>100</sup> TEGL 21-06 (IV)(C).

<sup>101</sup> NAALC, Art. 4, § 1

workers have access to the most competent bodies within the system of labor administration, which in the United States is DOL, in order to implement labor laws and regulations.<sup>102</sup> DOL is the agency most directly charged with administering Federal labor laws.<sup>103</sup> Because of its charge and experience, DOL is the most competent agency to administer and enforce labor laws under the language of both the ILO's Labor Administration Convention and NAFTA.

### **1. DHS and DOL Serve Unique Enforcement Functions, and DHS is not Suited to be the Sole Enforcer of Employment Contracts.**

The DHS's narrow charge to enforce immigration, and not employment, laws is expressed in The Powers and Duties of the Secretary, the Under Secretary, and the Attorney General Statute. The Secretary of Homeland Security is charged with enforcement of all laws relating to the immigration and naturalization of aliens, and has no mandate to enforce employer-employee contractual obligations.<sup>104</sup> In fact, DOL maintains authority to enforce employer-employee contractual obligations under H-2A regulations, despite the above Act. The protections for U.S. workers under H-2 were meant to apply to both H-2A and H-2B. DOL is clearly authorized to impose sanctions and seek appropriate injunctive relief and specific performance of contractual obligations as may be necessary to assure employer compliance with terms and conditions of H-2A employment under this section.<sup>105</sup>

DOL's Wage and Hour Division (WHD) is dedicated to the enforcement of labor laws, including the enforcement of H-2A contracts.<sup>106</sup> Consequently, DOL has extensive experience and expertise enforcing labor laws and contracts. DHS has no equivalent subdivision or expertise. Although the statute could clearly delegate enforcement authority to DOL as it does for the H-2A program, the fact that the statute is silent is not dispositive.

When the Department of Homeland Security (DHS) replaced INS in 2002, DHS was charged with carrying out the immigration enforcement functions vested by statute to the Commissioner of Immigration and Naturalization and establishing national immigration enforcement policies and priorities.<sup>107</sup> According to the Department of Labor, the Secretary of Homeland Security is

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<sup>102</sup> C150 Labor Administration Convention

<sup>103</sup> See US DOL Mission Statement, *available at* [www.dol.gov/opa/aboutdol/mission.htm](http://www.dol.gov/opa/aboutdol/mission.htm).

<sup>104</sup> The Secretary of Homeland Security is charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. 8 U.S.C. § 1103(a)(6).

<sup>105</sup> 8 U.S.C. § 1188.

<sup>106</sup> 8 U.S.C. § 1188 Admission of temporary H-2A workers: (2) The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section; 29 C.F.R. Part 501 (2007). The president delegated power to the concerning the H-2A conditions set out in the 8 U.S.C. § 1188 statute: Executive Order 12789 Delegation of Reporting Functions Under the Immigration Reform and Control Act of 1986, Feb. 10, 1992. *see also* Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3 (Comm. Print 1991).

<sup>107</sup> Homeland Security Act of 2002, 6 U.S.C. §101 (Nov. 25, 2002).

charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, but is authorized to confer its powers upon DOL.<sup>108</sup> Greater, not less, enforcement of these requirements is appropriate given the abuses demonstrated in recent H-2B applications.<sup>109</sup> This is more likely to happen if the agency most appropriate to enforce employment law exercises that authority.

Additionally, Articles 4, 6, 9 and 10 of the International Labour Organization's C150, the Labour Administration Convention, which the United States has ratified, require that labor law enforcement and policy development be undertaken through an effective operation of a labor administration, with responsibilities properly coordinated amongst the competent bodies, and that a ministry of labor or other comparable body shall oversee compliance by other agencies, whose staff are suitably qualified for the activities to which they are assigned.<sup>110</sup> Therefore, under international law, the DOL, and not DHS, is the proper agency to lead labor law enforcement of employer-employee contractual obligations.

## **2. Currently, No Agency in the United States Accepts Any Responsibility for Enforcing Compliance with H-2B Standards, in Violation of the Binding International Obligations of the United States.**

Once an employer has been certified as an H-2B employer, there is no federal agency that investigates whether the employer is in fact complying with the terms of the H-2B program, including the right to receive the prevailing wage, or respond to complaints regarding an employer's lack of compliance. The U.S. Department of Labor does not do so.<sup>111</sup> Nor does the Department of Homeland Security. This is evident from the agencies' responses to Freedom of Information Act requests filed in 2008 for records of complaints filed, investigations conducted, or penalties imposed from January 2003 to date regarding employers' noncompliance with the terms of the H-2B program: the Department of Labor referred the requestors to the Department of Homeland Security ("I regret to inform you that in fact this agency does not have jurisdiction over the H-2B visa program under the Immigration Reform and Control Act of 1986. Your request should have been directed to Department of Homeland Security. You may submit your

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<sup>108</sup> 8 U.S.C. § 1103(a)(6).

<sup>109</sup> See, e.g. *Riojas, et al. v. Chao, et al.*, No. 07-CV-058 (W.D.Tex. filed Oct. 9, 2007)(involving fraudulent visa applications that misclassified agricultural work as nonagricultural to qualify for H-2B visas. Despite DOL Wage & Hour inspections revealing the violations, DOL took no enforcement action and continued to grant subsequent labor certifications for two years); *David, et al v. Signal Int'l LLC, et al.*, No. 08-1220 (E.D.La. filed Mar. 7, 2008)(involving human trafficking claims by H-2B workers); *Castellano-Contreras, et al. v. Decatur Hotels*, No. 06-4340 (E.D.La. filed Aug. 16, 2006)(involving H-2B workers deprived of wages, and approved to work in New Orleans hotel that housed unemployed victims of Hurricane Katrina); *Chellen, et al. v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278 (N.D.Okla. 2004)(involving misclassified Indian guestworkers treated like indentured servants in poor conditions); L.M. Sixel, Congressman, Union question effort for 6,000 unskilled [H-2B] workers, *Houston Chronicle*, Dec. 1, 2007 (detailing fraudulent applications for non-existent companies). Such abuses have led experts to conclude that the H-2 programs, as currently administered by DOL, encourages a form of modern-day slavery. SPLC, CLOSE TO SLAVERY, *supra* note 9, at 1-2.

<sup>110</sup> C150 Labour Administration Convention, 1978, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>

<sup>111</sup> U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division, Field Assistance Bulletin No. 2007-1: Enforcement Provisions Applicable to H-2B Workers (May 2, 2007) (stating that DOL will take the prevailing wage into account for purposes of calculating overtime and compliance with the Migrant and Seasonal Agricultural Worker Protection Act, but not for purposes of considering whether an employer is complying with its obligations under the H-2B program).

request to the Department of Homeland Security . . .”)<sup>112</sup> and the Department of Homeland Security referred petitioners to the Department of Labor (“We recommend that you redirect your request to the following government agency: Department of Labor, Office of the Solicitor . . . If you should have additional questions on the above subject, please direct your inquiries to the Department of Labor.”).<sup>113</sup>

Because these regulations begin from an anemic view of the power at the disposal of the Secretary, they are deeply and fundamentally flawed. The Secretary should withdraw these regulatory proposals, consider means at its disposal to meet its obligations to protect workers in the United States and U.S. working conditions, and propose a more robust regulatory regime to remedy the severe problems that are occurring in this program. At a bare minimum, if the Department remains unconvinced of its broad regulatory authority, nonetheless, any regulations are premature until it obtains a clear delegation of its authority to regulate and enforce program requirements.

## **V. The DHS’s Proposed Regulatory Change with Regard to Employer Start Date is Wholly Inadequate to Protect Against Employer Manipulation.**

### **A. The Proposal to Prohibit Employers from Changing the Employment Start Date is a Step in the Right Direction, but is Not Sufficient to Protect U.S. and H-2B Workers from Abuse.**

DHS proposes in 8 C.F.R. § 214.2(h)(6)(iv)(D) to prohibit employers from requesting an employment start date on the application for visas that is different from the date on the approved temporary labor certification. Under the current regime, an employer who receives an approved labor certification from DOL can apply for visas through DHS with different start dates than those listed on the labor certification, so long as they are within the approved labor certification period, without requiring an amended DOL certification. DHS believes that this change is necessary in order to ensure a “fair and equitable distribution of the H-2B visa numbers among all H-2B employers” as well as to eliminate the “unintended consequences” which result from the current system. Those unintended consequence identified by DHS are 1) that under the current arrangement, employers with longer seasonal or temporary employment needs are unfairly benefited; 2) allowing employers to change the employment start date after receiving labor certification from DOL invalidates the labor market test that the certification was based on; and 3) the system can be easily exploited by certain employers to gain an advantage in obtaining H-2B visas from the limited pool of 66,000 available each fiscal year.

We agree with DHS that this change is necessary. We agree that the unintended consequences identified by them are common, problematic, and need to be addressed. We agree that the

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<sup>112</sup> FOIA response of Connie Klipsch, Regional Administrator, Employment Standards Administration, Atlanta Regional Office, USDOL to Ivy Hernandez, Correspondence ID # 519146 (Jan. 9, 2008). Filed by D. Michael Dale on behalf of Low Wage Worker Legal Network, July 7, 2008 submission (Regulations.gov comment tracking number 8065b65e), “Responses to Freedom of Information Act Requests.” See Exhibit 5, attached hereto.

<sup>113</sup> FOIA response of T. Diane Cejka, Director, United States Citizenship and Immigration Services, Department of Homeland Security to Ivy Hernandez, Correspondence ID # NRC2008024085 (April 21, 2008). Filed by D. Michael Dale on behalf of Low Wage Worker Legal Network, July 7, 2008 submission (Regulations.gov comment tracking number 8065b65e), “Responses to Freedom of Information Act Requests.” See Exhibit 5, attached hereto.

current way in which visas are allocated is neither fair nor equitable. We do not agree, however, that this modification will achieve their stated goals. Nor will it bring the H-2B program into compliance with its statutory obligations: that employment of foreign temporary workers may not “adversely affect the wages and working conditions of workers in the United States similarly employed.”<sup>114</sup> Congress’ policy regarding the H-2B program is that domestic jobs be protected and temporary workers be admitted *only when their admission tends to serve the national economy, the cultural interests, and the welfare of the United States.*<sup>115</sup> The proposed modification is a good starting point and we applaud DHS for proposing it, but more change is needed if DHS actually hopes to eliminate the adverse affects on U.S. workers, end the widespread abuse of H-2B workers, encourage employers to comply with the regulations, and ensure that the ongoing use of the H-2B program serves the welfare of the United States.

As a preliminary matter we are concerned that this proposed change, even if adopted, could be rendered void through a procedural loop hole. Due to the short time period permitted to comment on this proposal we are unable to further investigate the situation. However, if it is the case that a visa is issued with a certain date can be used to enter the U.S. for the first time at any point during the validity period of the visa, then this change is meaningless. For example, if an H-2B worker is issued a visa to come to the U.S. and the visa is valid from January 1 through June 1, can that worker enter the U.S. on January 2<sup>nd</sup>? Or May 1<sup>st</sup>? Or, if the worker uses that visa to enter on January 1<sup>st</sup> but then returns to his or her home country, could that worker then use the visa to return to the U.S. so long as it is before the end date of June 1<sup>st</sup>? If the answer to any of these questions is yes, then requiring employers to petition for visas with the same starting date as the employment certification will not make a difference because the employer may still require the workers to remain in their home countries until the work actually begins, thus evading the visa caps.

### **1. This Proposed Change Will Not Entirely Eliminate The Advantage To Employers With Longer Periods Of Need In Obtaining Visas.**

Currently those employers with longer periods of need have an advantage over other hopeful H-2B employers. They are more likely to successfully obtain visas from the limited pool available each year because if they aren’t able to obtain of the first 33,000 allotted, they will be first in line for the second batch. DHS is aware of this problem and proposes that prohibiting employers from changing their employment start date will eliminate it. With regard to a portion of those employers, they are probably correct. Some H-2B employers simply make mistakes when they fill in the employment dates on their application for labor certification with DOL. Others have circumstances change between submitting the application and the beginning of that employment certification period which change their dates of need. Those two groups of employers, who are not entirely blameworthy, are the ones who are most likely to then comply with the regulations and submit a new or amended application for labor certification with their corrected dates of need or to be more cautious about filling in accurate dates of need to begin with. (Their reward for compliance will often be a notice that the visa caps for that half of the fiscal year has already been reached.)

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<sup>114</sup> 20 C.F.R. § 655.3.

<sup>115</sup> H. Rept 1365, 82d Cong.2d Sess., 2 U.S. Code Cong & Admin. News, 1952, p. 1705 (emphasis added).

Regrettably, there are also a significant number of culpable H-2B employers. Fraud and misrepresentation are routine in the H-2 programs.<sup>116</sup> Employers regularly overstate their dates of need, quantity of workers needed, and/or the amount of work available without consequence. These are not innocent mistakes but intentional misrepresentations made by employers who are only thinking of their own interests. They are not concerned with fairness to other potential H-2B employers or an equitable distribution of visas. They are not interested in protecting the rights of U.S. workers unjustly overlooked for job openings. They are certainly not at all troubled by the abuse suffered by H-2B workers as a result of their fraudulent H-2B applications. The proposed changes will not deter that group of employers from misstating their period of need. Those employers who are well versed in how to manipulate this system need more than encouragement to do the right thing. In order to stop their fraudulent practices we need a regulatory change that will actually discourage their bad behavior.

## **2. The Proposed Change Will Not Correct Flawed Labor Market Test.**

The law requires that H-2B visas be available to employers only when “unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>117</sup> Accordingly, DOL is only supposed to certify application for temporary foreign labor when the labor market test reveals that no such workers are available. H-2B employers may only begin applying for labor certification 120 days in advance of their need so that their recruitment efforts are an accurate reflection of whether there are people available to fill the positions within the U.S..

Undoubtedly, DHS is correct in saying that allowing employers to change their employment start dates on a whim invalidates the labor market test.<sup>118</sup> This is true for two reasons. The first is that labor market conditions change rapidly. A landscaping company, for example, that tries and fails to recruit landscapers in November for a temporary job to begin in February may then receive labor certification from DOL for a period beginning on February 1. But, if the landscaping company then decides they don’t actually want H-2B workers to begin for a few more months (or they never actually wanted the workers to begin then in the first place), and they petition for visas with start dates of April 1, the fact that no workers were available back in November tells us nothing about whether workers are now available to fill those positions. In order to ensure that employment of foreign temporary workers does not adversely affect the wages and working conditions of similarly employed U.S. workers, a new labor market test must be conducted before the employer can change the employment start.

The second reason has to do with the intentional and strategic overstating of need by some H-2B employers in order to deter potential U.S. workers from applying for the job because they strongly prefer employing more vulnerable temporary foreign workers. Another example will be

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<sup>116</sup> See SPLC, CLOSE TO SLAVERY, *supra* note 9..

<sup>117</sup> See 8 U.S.C. § 1101(a)(15) (H)(ii)(b) (1999).

<sup>118</sup> For the sake of argument, we are assuming that the testing of the labor market that occurs under the current DOL regulations is effective and that DOL issues labor certifications based on accurate domestic labor information. However, we believe that the testing of the labor market that occurs as part of the H-2B program is fundamentally flawed and inaccurate. See Statement of the Low Wage Workers Legal Network in Opposition to RIN 1205-AB54, DOL Proposed Regulations Labor Certification Process and Enforcement for Temporary Employment in Occupation Other than Agriculture or Registered Nursing in the United States (H-2B Workers) and Other Technical Changes, Comment Tracking Number ETA-2008-0002-0087.

illustrative. Suppose the peak forestry season in Arkansas begins in November and runs through April and potential workers in Arkansas are familiar with that season. Now suppose that a forestry company in Arkansas submits a clearance order to DOL requesting forestry workers beginning in September and to continue through June. The advertisements that the forestry company runs in order to recruit workers will state that the job is to last from September through June and that workers must be available those dates. Local workers, familiar with the season, will be discouraged from applying because they know there is no real money to be made in forestry until the season begins in November. The forestry company will then receive temporary labor certification, based on that flawed labor market test, from September through June but will petition for visas beginning on November 1. The change DHS is proposing will hopefully reduce this practice and enhance the accuracy of labor market tests by discouraging employers from overstating their period of need to DOL and, consequently, overstating the employment period in their advertising efforts. This is a necessary change.

Savvy and unscrupulous H-2B employers will see a way around this modification, however. They will petition to DHS for visas with the same start date as the date on the DOL certification, but rather than change the dates they use for DOL in order to be more accurate, they will change the dates they use for the visa. As will be further discussed below, some employers will simply bring the H-2B workers in before they are needed, before the work begins. The employers will not be required to retest the labor market and give U.S. workers a chance to apply for these job openings, and U.S. workers will be no better off. Furthermore, H-2B employers who are inclined to comply with the law remain at a disadvantage as long as this practice is possible.

### **3. The Proposed Change Will Not Deter Or Prohibit Employers From Continuing To Manipulate The System.**

Again, we agree with DHS: H-2B employers can and do easily exploit the H-2B requirements in order to fraudulently obtain some of the 66,000 visas available each year. Because there is so little enforcement in the current system, overstating the amount of workers needed, the period of need, and the amount of work available are epidemic among would-be H-2B employers. Unfortunately, it does not appear that this practice is only characteristic of an outlying group of evil and abusive employers, but rather it is common among all H-2B petitioners save the very new and inexperienced who haven't yet learned how to compete for visas. Trying to address this issue by preventing employers from changing their employment dates is a good starting point, but it is just one small step that needs to be followed by many more changes.

As the following examples will hopefully demonstrate, simply modifying the regulations so that employers are prohibited from changing their employment start dates after receiving the DOL certification will do very little to fix these real problems. H-2B employers who are inclined to be careless about the employment dates they list, or who are inclined to intentionally manipulate those dates, or maybe even those who make an honest mistake with regard to their period of need will not be encouraged to more accurately and honestly state their period of need by this regulatory change. The alternative is much more appealing. They can simply obtain visas with start dates that are too early. Return to the previous example of the landscaping company who was certified by DOL to employ H-2B workers beginning February 1st. Under the proposed changes the landscaping company must apply for visas beginning February 1<sup>st</sup> as well. If the

landscaping company's actual need doesn't begin until April 1 or they decide that for some reason they would just rather wait until April 1, they have two options. They can re-apply through DOL for labor certification beginning on the later date, which would require them to re-fill out the paper work or amend their original application, re-advertising the position for the required amount of time, paying the associated fees, and re-demonstrating their need to DOL, then waiting to receive the certification. Or they could just petition for visas with the February 1 start date, have workers show up for work in February, and allow the workers to sit and wait for work to eventually begin a couple months later. There is currently very little disincentive built into the regulations to prevent employers from doing this and what little is there is hardly enforced. The proposed change does nothing to discourage this behavior. This practice, clearly, is devastating for the foreign workers who give up jobs and homes to come to the U.S. to work, often taking out loans to cover the visa, passport and travel expenses, and then are unable to make any money for weeks or months because they are not permitted to find other employment. In addition, the result is damaging to U.S. workers who were prevented the chance of accepting the job because it was advertised so far in advance or because the original time period was unappealing.

Unfortunately, this is not just an abstract hypothetical but a reality for far too many H-2B workers. Currently employers regularly petition for visas with later start dates than those in the labor certification they obtained from DOL, but not for the reason stated above. Rather, employers tend to bring H-2B workers in a few weeks before the real need begins because they would rather have a captive workforce ready to report to duty the moment they are needed than risk the workers' arrival a few days too late. For example, the pattern over the last several years among seafood processors in North Carolina has been to petition for workers from March 1 through December 31, regardless of their actual dates of need. A quick glance at the payroll records of those same seafood processors demonstrates that work for temporary employees routinely begins in April or May, rather than March, and only resembles full time work in July, August and September.<sup>119</sup> Furthermore, the records reveal that during the months of April and May it is normal for an employee to average less than ten hours per week of work.<sup>120</sup> Until then, the crabpickers can only hope for a few hours of work a week. Their employers, on the other hand, can relax, knowing that the moment the crabs start running they will have plenty of hands ready to pick them. Furthermore, the employers only have to pay the workers for the few hours they put in each week, and do not have to provide them housing. It is a win-win for the employers.

Recognizing that the end of the Save our Small and Seasonal Business Act<sup>121</sup> this year would mean fewer available visas, two North Carolina seafood employers found clever ways to guarantee that they would be able to obtain visas by manipulating start dates.<sup>122</sup> Both employers have customarily applied for one group of H-2B workers to shuck oysters from October through April or May and for a second group of workers to pick crabs from March through December. This has normally been done through two separate DOL labor certifications, two separate I-129

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<sup>119</sup> Of the seven North Carolina crab processors whose 2006 payroll records we reviewed, only two reported having any work performed by temporary employees in March of that year. *See* Exhibit A, attached hereto.

<sup>120</sup> *See Id.*

<sup>121</sup> Save Our Small and Seasonal Business Act of 2005, P.L. 109-13, 119 Stat. 318.

<sup>122</sup> *See* Affidavit of Clermont Fraser, attached hereto as Exhibit B.

petitions, and sometimes under two different corporate names. Anticipating that the visa cap for the second half of the fiscal year would be reached before they could apply for the crabpickers, both employers opted to bring in workers to pick crabs on the approved order for the oyster season. For one of the employers that meant that a group of women arrived from Mexico in early March<sup>123</sup>, leaving their homes and families behind a couple months earlier than usual, so that they could wait around for months for the crabs to start running. The other employer brought his second group of workers in at the beginning on May, just a month before their visas were to expire.

Requiring the seafood employers in the examples above to petition for visas with the same start dates as the employment certification will not change anything about this system. What DHS desires is a “fair and equitable distribution of the H-2B visa numbers among all H-2B employers,” but the only thing the employers participating in the H-2B system desire is to know that they will have plenty of foreign workers to rely on each year. Asking them nicely to play by the rules so that their competition can have a turn is not likely to succeed.

**B. In Addition to Prohibiting Changes in Employment Start Date by Regulation, DHS or USDOL Should Take Meaningful Action to Deter Employers Who Misstate the Date of Need.**

Though prohibiting employers from requesting an employment start date on the application for visas that is different from the date on the approved temporary labor certification will not entirely achieve the result DHS suggests, there are some regulatory changes that could be more successful. First, the proposed clarification in 8 C.F.R. § 204.5(o) and 8 C.F.R. § 214.1(k) of DHS’s authority to issue a denial or revocation of the visa petition would also help with this problem. A few additional suggestions are discussed below.

**1. DOL Is The Appropriate Agency To Enforce The H-2B Regulations.**

Delegation of authority from DHS to USDOL to enforce the H-2B regulations, or an acknowledgement that USDOL already possesses such authority, would go a long way in ensuring accurate dates of employment. As argued in Section IV , above, DHS and DOL serve unique enforcement functions, and DHS is not suited to be the sole enforcer of employment contracts.

**2. Information On H-2B Employers’ Violation Of Labor Laws Should Be Routinely Shared Within Different Divisions Of DOL And Between DOL And DHS.**

If USDOL followed its own regulation and re-established the National Farm Labor Coordinated Enforcement Committee, as is required under 29 C.F.R. § 42.3, then regular communication between the Employment Standards Administration and the Employment and Training Administration would help USDOL keep track of employers who do not comply with basic labor

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<sup>123</sup> Though workers arriving in March to pick crabs corresponds with the certification period obtained by that employer, many of those same employees were accustomed to arriving to begin their crab picking work for the employer in June.

laws and/or the H-2B regulations, at least with respect to workers in reforestation and other industries that are broadly defined as agriculture.<sup>124</sup> It would be very beneficial to have such an enforcement committee to monitor H-2B compliance among non-agricultural employers as well.

Any new regulations should mandate that the WHD share with ETA, OFLC any prior or pending investigations involving the employer, any outstanding civil money penalties or unpaid wages, any unpaid judgments relating to employment-related claims, or any failure to cure violations. Should DOL not assume authority over H-2B enforcement, Wage and Hour should share this information with DHS as well. ESA should uniformly and regularly report to ETA and to OFLC, in particular, the names of any employers who are the subjects of open investigations. OFLC should promptly share with ESA the names of all interested parties on any H-2B application for certification, so that ESA can be sure that the OFLC has timely information about any history of violations of the FLSA or other laws. While DHS cannot mandate this type of interagency cooperation, they should vigorously pursue it.

One egregious example of the importance of this oversight involves Evergreen Forestry Services, Inc. This labor contractor brought H-2B workers from Mexico and Central America. For many years, the WHD routinely investigated the company and found wage and safety violations. These fines were generally reduced with an employer promise of future compliance. The same cycle of violations, investigation, fines, reduction of fines, more violations, new investigations, etc. occurred repeatedly. Despite a WHD investigator's statement that Evergreen had "a woeful history" of labor violations, and despite a requirement that WHD and ETA communicate, Evergreen nonetheless continued to obtain H-2B workers. DHS (at that time, Immigration and Naturalization Services) was also notified, but did not revoke or deny visas. This tragic situation finally ended in September, 2002, when fourteen (14) Evergreen workers drowned when their vehicle veered off the road in Maine. Some of the same safety violations previously cited may have contributed to the accident.<sup>125</sup>

Another example occurred when the DOL ETA OFLC office in Chicago ignored evidence of a Wage and Hour investigation finding that H-2B workers were employed by a Colorado employer in agriculture and certified the employer again for H-2B workers. They were once again employed in agriculture without receiving the benefits to which they were entitled as H-2A agricultural workers. Given the dismal failure of the "coordinated enforcement" mechanism between ETA and WHD, this cooperation should not be assumed and should be mandated in the regulations.

In a case from Texas, the DOL ETA OFLC office in Chicago either knowingly approved a group of employers' fraudulent H-2B applications, or failed to coordinate with DOL's Wage and Hour Division, and DHS and the Department of State continued to issue visas.<sup>126</sup> Twenty-two U.S. workers and one H-2B worker sued a watermelon grower, two farm labor contractors, their

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<sup>124</sup> Agriculture is defined differently under different statutes that DOL enforces. *See* *Bresgal v. Brock*, 833 F.2d 763 (9<sup>th</sup> Cir. 1987).

<sup>125</sup> *See*, Exhibit B, attached hereto, Correspondence Relating to Evergreen Forestry Services.

<sup>126</sup> *Do Federal Programs Ensure U.S. Workers Are Recruited First Before Employers Hire From Abroad?: Hearing before H. Comm. and Edu. and Labor*, 110th Cong. (May 6, 2008)(testimony at 2, 4 of Texas RioGrande Legal Aid attorney Javier Riojas describing the case of *Riojas, et al. v. Chao, et al.*, No. 07-CV-058 (W.D.Tex. filed Oct. 9, 2007).

shared immigration attorney and DOL. Plaintiffs prayed for the reinstatement of 29 C.F.R. Part 42, coordinated enforcement. The plaintiffs alleged that the employers falsely misclassified their jobs as nonagricultural in order to qualify for H-2B workers and avoid the H-2A program's relatively more stringent recruitment requirements for U.S. workers, free housing and transportation, Adverse Effect Wage Rate, fifty percent rule, three-fourths guarantee, and other benefits. The employers acquired over 400 Mexican H-2B workers from 2001 to 2007 to work mainly harvesting watermelons and onions in their fields in Edinburg, Quemado, and other areas in Texas. The Texas and Arkansas workforce agencies referred about 720 U.S. workers for the H-2 jobs. Almost all of them were rejected outright or received the "run-around." The few U.S. workers who were hired suffered abusive treatment and received lower pay and fewer benefits than the H-2 workers. Year after year, DOL continued to approve the employers' fraudulent applications despite mounting evidence of visa fraud and U.S. worker discrimination. In 2005, DOL's Wage and Hour Division conducted a field inspection of one of the employers and reported H-2B workers in the field—a serious violation of the non-agricultural requirement of the H-2B program. The Chicago OFLC office continued to certify the employers for H-2B workers for two more years, and the employers received visas from DHS and the Department of State. In 2002, one of the farm labor contractors in the group applied for H-2B workers to pack sweet corn in Newport, Arkansas starting in February 2003, and then other work in the Rio Grande Valley and west Texas the rest of the year. Because of the H-2B program's fewer U.S. worker recruitment requirements, the employer only needed to recruit U.S. workers for ten days in Newport in the fall, and avoided recruiting farmworkers in Texas in the spring and summer. Still, at least twelve U.S. workers applied and the farm labor contractor hired zero because they lacked "experience." DOL ETA certified the application even though sweet corn is not ready to harvest or pack in Arkansas in February, and DHS and the Department of State issued the visas. Each year from 2005 to 2007, the Texas Workforce Commission sent numerous warnings to DOL OFLC office in Chicago that the employers were discriminating against U.S. referrals. Finally in 2007, the Chicago OFLC office required one of the three employers to submit an H-2A application, which the agency approved despite multiple unlawful rejections of U.S. workers.<sup>127</sup>

### **3. Fines, Debarment, And Revocation Of A Visa Petition Are Not Sufficient Remedies To Address Employer Misstatements Of The Period Of Employment, Or Of Other Violations Of The Terms Of The Clearance Order.**

The Save Our Small and Seasonal Business Act of 2005<sup>128</sup> gave the Secretary of Homeland Security certain administrative remedies, including penalties and debarment, if the Secretary finds a substantial failure to meet any of the conditions of the petition to admit H-2B workers. DHS is also proposing a revision designed to clarify its authority to deny or revoke an I-129. These remedies do not provide any direct relief to the aggrieved H-2B or U.S. worker.

By the time DHS revokes a petition or DOL recommends debarment of an employer, the job opportunity will have already been filled by an H-2B worker and no longer be available, and no compensation will be available to U.S. workers harmed as a result. Revocation and debarment

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<sup>127</sup> *Id.*

<sup>128</sup> Save Our Small and Seasonal Business Act of 2005, P.L. 109-13, 119 Stat. 318.

would also fail to remedy the broader negative impacts on the domestic labor market by allowing employers to refuse to consider U.S. workers for H-2B positions until their violation is discovered. In fact, an employer could fire its U.S. workforce and seek to hire H-2B workers in their place, misrepresent its recruitment efforts in the labor attestation, and suffer no consequences until after the H-2B visas have been granted. This stands in stark contrast to the current procedures, which are designed to prevent harm to U.S. workers and the domestic labor market from ever occurring in the first place by denying certification to employers who cannot demonstrate that no U.S. workers are available.

Finally, if revocation and debarment procedures fail to account for the ability of employers to manipulate their legal identities, employers will easily be able to circumvent even the most effective debarment and revocation procedures to continue to exploit the H-2B visa system to avoid recruiting and employing U.S. workers. When companies retain labor contractors or temp agencies to serve as the “employer” for a group of foreign workers at the companies’ work site, there will undoubtedly be cases where the companies deny that they are the “employer” and then take advantage, in the form of lower labor costs, of the labor contractors’ false claim that no domestic workers could be found. If the labor contractor is ultimately debarred, the same companies could simply hire another labor contractor to repeat the same abuses. The lack of an advance process for examining employment relationships during the H-2B application process will result in abuses that will go uncured.

**C. Employers Should be Required to Pay Workers for the Period of Need Listed on the Order.**

In order to address the problem more completely, employers should be required to provide the promised full-time employment at the prevailing wage or higher promised wage for workers hired pursuant to an approved H-2B order for those dates listed on the order. DOL’s current practice is to require that employers certify that the employment listed on the clearance order will be full-time but because there is no enforcement, employers routinely provide part-time employment, especially at the beginning of the contract period, because the true date of need for the number of workers employed is later than the date of need on the labor certification.<sup>129</sup> Some employers actually provide less than 10 hours of work during the early weeks of the visa period and there is no regulatory or enforcement mechanism to discourage this behavior. The employer enjoys the benefit of having a captive workforce, ready and able to begin working more hours when they need arises, but, until then, the employer can just let the workers wait with little pay.

This practice is harmful to U.S. workers and to H-2B workers. There may be U.S. workers who are interested in pursuing a job in the period between when H-2B workers arrive and the actual work begins, but because the employer already has a full staff of H-2B workers and the recruitment period has ended the employer does not have to offer the U.S. worker the job. For H-2B workers, the damage is arguably much worse. Most H-2B workers come from the most impoverished regions of poor sending countries. They usually have to borrow large sums of money to cover their visa and transportation expenses. They are willing to borrow that money because of the promise of plenty of work and better wages in the U.S. Instead, however, they could find themselves without any income or barely enough to cover the cost of food for the first

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<sup>129</sup> See Exhibit A, attached hereto (payroll records for crab employers that do not match dates of need).

few weeks. Unlike U.S. workers who find themselves with too little work, the H-2B workers cannot go find work elsewhere. While their debt grows larger, they have nothing to do but sit and wait, far from their families and isolated from American society. By the time work begins they are even more economically vulnerable and desperate than they were when the first arrived at the job site. Therefore, they are less likely to complain about poor working conditions or problems with their pay. That, in turn, harms the U.S. workers and violates the statutory mandate of the program because it clearly has an adverse effect on the working conditions in the area.

Simply requiring the same date on the labor certification and the visa petition will not eliminate the employer's incentive to state a false date of need. If there were actually an enforceable requirement to provide employment starting from the date of employment on the labor certification and visa petition (or to pay workers if there was not employment), employers would have a strong incentive to correctly state the date of need. U.S. workers should also be more interested in applying for jobs that actually exist during the entire stated period of need.

## **VI. Employer Notification to DHS of Worker Abscondment, Consequences to the H-2B Worker for Violation of Status, and Temporary Worker Visa Exit Pilot Program**

DHS proposes to enhance requirements for employers to report H-2B workers who do not show for work, abscond, or are terminated.<sup>130</sup> In addition, DHS proposes to create a five-year bar on H-2B workers who violate their status that would preclude the issuance of a new H-2B visa to a worker who violated his H-2B status within the previous five years.<sup>131</sup> DHS also proposes to expand its temporary worker visa exit program pilot.<sup>132</sup> We strongly disagree with both proposals:

### **A. When combined with the proposed 5-year bar for H-2B workers who violate their status, DHS's enhanced reporting requirements give employers extreme leverage over H-2B workers; thus further exacerbating the vulnerability that gives rise to indentured servitude and human trafficking.**

DHS's enhanced reporting requirements—in conjunction with the proposed 5-year bar for H-2B workers who violate their status—give employers even more leverage over H-2B workers than the already strong leverage that inherently exists in a program where the worker is effectively bound to one employer. This increased leverage further exacerbates the vulnerability of guestworkers that gives rise to the existing forms of—as DHS states in its background to the proposals—“human trafficking and alien worker indenture.”<sup>133</sup>

DHS should recognize the obligation to investigate the conditions under which alleged “absconders” left the job, as in some cases the employers engaged in illegal or inappropriate conduct that either caused the workers to engage in a protest that should be protected activity or were forced to quit by the employers' conduct. Such workers should be protected and should not

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<sup>130</sup> Changes to Requirements, *supra* note 1, at 49120-21 (to be codified at 8 CFR pt. 214.2(h)(6)(i)(E)).

<sup>131</sup> Changes to Requirements, *supra* note 1, at 49124 (to be codified at 8 CFR pt. 214.2(h)(6)(ix)).

<sup>132</sup> Changes to Requirements, *supra* note 1, at 49122 (to be codified at 8 CFR pt. 215.9).

<sup>133</sup> Changes to Requirements, *supra* note 1, at 49110.

be barred from future H-2B employment. The standard should not rely on an employer's contention that a worker "absconded" because he or she left work "without the consent of the employer."<sup>134</sup>

Because most H-2B workers lack access to Legal Services Corporation-funded legal services,<sup>135</sup> advocates and workers cannot adequately intervene to contest employers' reports. Employers will likely abuse the reporting process to threaten workers. Workers who leave their jobs because of unlawful conditions, because promised work is not available to them or because they have suffered injury on the job, will have no way to protect their future eligibility for a visa to enter the United States.

DHS's proposals are inimical to Congress's intent to equalize the bargaining power between workers and their employers in order to stabilize the economy; according to the National Labor Relations Act ("NLRA"):

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries....<sup>136</sup> (emphasis added).

Congress's statement from 1935 rings true today in 2008, especially in the context of H-2B guestworkers and today's unstable, weak economy. Most H-2B workers, as non-agricultural workers, are covered by the NLRA and Congress's statutory statement of labor policy.<sup>137</sup>

DHS's proposed regulation expressly lists two violations of status that will give rise to the five year bar: overstaying the visa period and engaging in unauthorized employment.<sup>138</sup> Without any corresponding protections, these two violations pose serious problems and aggravate the vulnerability and leverage concerns above. If a worker has filed a complaint against an abusive employer, he will probably need to stay and work in the United States to prosecute his lawsuit after his visa expires. Most H-2B visas are less than a year, but civil lawsuits can last several years. The employer-defendant in a lawsuit will be under no corresponding immigration pressure to depart the country or risk being barred from the H-2B program for five years. In a common situation, an H-2B worker is injured on the job and the employer terminates him without offering any assistance. Unlike H-2A employers, H-2B employers are not required to provide workers compensation insurance. The H-2B worker will need to be examined and treated by medical professionals in the United States in order to successfully bring a personal injury negligence lawsuit against his former employer. Such lawsuits are important for two policy reasons. First, H-2B employers should not be able to shift their health care obligations to

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<sup>134</sup> Changes to Requirements, *supra* note 1, at 49121 (to be codified at 8 CFR pt. 214.2(h)(6)(i)(E)(2))

<sup>135</sup> See 45 C.F.R. § 1626 et seq.

<sup>136</sup> National Labor Relations Act of 1935 as amended, 29 U.S.C. § 151.

<sup>137</sup> National Labor Relations Act of 1935 as amended, 29 U.S.C. § 152 (definition of "employee").

<sup>138</sup> Changes to Requirements, *supra* note 1, at 49124 (to be codified at 8 CFR pt. 214.2(h)(6)(ix)).

U.S. or foreign publicly-funded clinics. Second, H-2B workers who bring civil suits against non-compliant employers act as “private attorneys general” and help police the H-2B program when DHS and DOL have limited resources to do so, or chose not to enforce as is the current situation. (The second policy rationale would be more effective if LSC-funded attorneys could represent H-2B workers.)

Therefore, H-2B worker plaintiffs and complainants need a mechanism—like an extension of the same H-2B visa, U- or T-Visas, Deferred Adjudication or Humanitarian Parole—for maintaining legal status for remaining and working in the U.S. while their complaints are being investigated and prosecuted. Moreover, H-2B workers with abusive, non-compliant employers need a mechanism to allow them to easily switch employers. Their H-2B visas need more “portability.” For example, DHS could provide a national database of H-2A and H-2B employers with current certifications and vacancies with whom an aggrieved H-2B worker could apply. The aggrieved H-2B workers seeking to switch employers should have higher hiring priority over new, foreign workers coming from abroad to fill certified openings. If H-2B workers could switch employers more easily, the labor market would help police and correct employers’ unlawful job conditions and conduct.

DHS justifies its proposed 5-year bar for H-2B workers by comparing it to the existing bar in the H-2A program at 8 C.F.R. § 214.2(h)(5)(viii)(A).<sup>139</sup> DHS states: “USCIS has determined that there is no reason for this disparity.”<sup>140</sup> Multiple, glaring and irrational disparities exist between the H-2A and H-2B programs: the H-2B program does not require the H-2A program’s Adverse Effect Wage Rate, workers compensation insurance, free housing, free transportation, free tools, 75 percent work guarantee, 50 percent U.S. worker hiring rule, and other benefits and protections—all of which could be promulgated by regulation in the H-2B program.<sup>141</sup> Moreover, H-2A workers qualify for LSC-funded legal representation whereas H-2B workers do not.<sup>142</sup> Employers often commit visa fraud by misclassifying their agricultural work as non-agricultural work to qualify for H-2B visas and avoid the H-2A program’s benefits and protections.<sup>143</sup> It is a positive step that DHS recognizes the importance of removing irrational disparities between the H-2A and H-2B programs because these disparities cause the fraudulent misclassification of job duties. It is shameful, however, that DHS focuses on this particular disparity to the grave detriment of the working conditions of foreign and U.S. workers in a program the agency itself characterizes as vulnerable to “human trafficking and alien indentured servitude,”<sup>144</sup> while ignoring the other glaring and irrational disparities. Working conditions will

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<sup>139</sup> Changes to Requirements, *supra* note 1, at 49114.

<sup>140</sup> *Id.*

<sup>141</sup> See generally 20 C.F.R. § 655, Subparts A to C.

<sup>142</sup> 45 C.F.R. § 1626 et seq.

<sup>143</sup> *Riojas, et al. v. Chao, et al.*, No. 07-CV-058 (W.D.Tex. filed Oct. 9, 2007) (detailing over 400 H-2B workers misclassified as non-agricultural, and employed in harvesting and packing onions and watermelons in Arkansas and Texas from 2001 to 2007. Employers admitted in Consent Decree that work was agricultural and subject to H-2A program); Letter from Colorado Legal Services to Marie C. Gonzalez, Certifying Officer, U.S. Dept. of Labor Employment Training Admin., re. Mountain Fresh Corn, Sept. 25, 2006 (Visa Fraud: avoidance of H-2A benefits by misclassifying 299 agricultural workers as H-2B); Attachments and Exhibits: Letter to USCIS, Affidavit of Outreach Worker, 28 H-2B worker declarations of field work, Montrose Daily newspaper article, 12 H-2B worker declarations of field work. See Exhibit 40 at 5 of Farmworker Justice’s group comment, dated Apr. 14, 2008, to DOL’s proposed H-2A regulations at RIN 1205-AB55.

<sup>144</sup> Changes to Requirements, *supra* note 1, at 49110.

worsen due to increased fear of complaining, protesting, or striking because employers can invoke the 5-year bar, and threaten to notify DHS.

Worker advocate experience from the H-2A program has shown that H-2A workers are often afraid to complain about unlawful work conditions because they fear being “quemado” (“burned”) by the employer. This refers to the employer practice of notifying DHS and the U.S. Consulate—often with a single phone call or the threat thereof—that the H-2A worker has absconded, whether true or not, and can result in the H-2A worker being denied future H-2A visas for five years.<sup>145</sup> This is, in effect, an official form of blacklisting, and the regulation gives H-2A employers extreme bargaining power over H-2A workers. On the other hand, in the unlikely event that H-2A employers are threatened with being debarred from the program, they are entitled to an elaborate investigative and regulatory appeal process with legal standards of culpability and review that can take months or years to complete.<sup>146</sup> The maximum period of debarment for H-2A employers is three years.<sup>147</sup> H-2A workers have no corresponding, codified right to contest employers’ reports of their abscondment and the resulting five-year bar on H-2A admission.

DHS’s current proposals also include an appeals process for H-2B employers facing denials, revocations or sanctions.<sup>148</sup> The last sentence of the same proposed provision exemplifies the stark contrast between the due process afforded H-2B employers and workers: “There is no appeal from a decision to deny an extension of stay to the alien.”<sup>149</sup> There are also no proposed appeals process for workers who are allegedly terminated, accused of failing to appear for work, absconding, or violating their H-2B visa status. Moreover, these proposed regulatory classifications too narrowly define the termination or suspension of the employment relationship; glaringly absent are the instances when an H-2B worker strikes to protest conditions and wages, quits for good cause, or is constructively discharged due to unlawful working conditions. Therefore, DHS should include striking, quitting for good cause and constructive discharge as notification categories of employment termination or suspension, and also afford an appeal and notification mechanism for H-2B workers to both report, receive notification of the employers’ reported classification, and appeal the category of employment separation. An H-2B worker who shows striking, quitting for good cause or constructive discharge should then become eligible for legal status, as discussed above, to prosecute his complaints.

### **B. The Temporary Worker Visa Exit Program Is Unduly Burdensome to Foreign Workers.**

We oppose DHS’s proposed land border exit pilot system for H-2A and H-2B workers (proposed 8 CFR 215.9) because it is unnecessary and imposes an undue physical and financial burden upon alien workers. DHS states in the preamble to proposed rule changes that, “[a]vailable statistics indicate that a significant number of nonimmigrant aliens either do not turn in their

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<sup>145</sup> 8 C.F.R. § 214.2(h)(5)(viii)(A).

<sup>146</sup> See, e.g. 20 C.F.R. §§ 655.110 (Employer penalties for noncompliance with terms and conditions of temporary alien agricultural labor certifications) and 655.112 (Administrative review and de novo hearing before an administrative law judge).

<sup>147</sup> 20 C.F.R. § 655.110(a).

<sup>148</sup> See, e.g., Changes to Requirements, *supra* note 1, at 49121 (to be codified at 8 CFR pt. 214.2(h)(6)(x)(10)(ii)).

<sup>149</sup> *Id.*

Form I-94 [defining the terms of admission] upon departure or overstay their authorized period of stay.”<sup>150</sup> However, the agency fails to cite any data demonstrating that these numbers are indeed “significant.” DHS’s concern also fails to recognize the important differences between the numbers of guest workers who do return to their home country, but may not have their I-94 in their possession at the end of their months’ long stay in the U.S., and those who they say entirely fail to depart. To the extent that such short-comings are the result of conduct by employers, like confiscating immigration documents to “traffic” labor, DHS should instead encourage DOL to conduct more workplace enforcement efforts. Moreover, under DHS’s proposed pilot program, all guestworkers selected for participation would have to “present designated biographic and/or biometric information upon departure at the conclusion of their authorized period of stay,”<sup>151</sup> regardless of whether they had dutifully complied with the terms of their previous stays. The pilot system therefore unfairly seeks to punish all guestworkers chosen for the pilot, by further restricting their points of entry and exit into the U.S., without an adequate basis for such physical and financial burdens. Indeed, it is curious that DHS’s comments admit to testing similar pilot programs for air and sea ports from August 2004 through May 2007, without citing any evidence of the programs’ successes.<sup>152</sup>

If DHS would, instead, adequately manage and internally share data received at various ports of entry, exclusive points of entry and exit would be unnecessary. Foreign workers, especially those who may choose to lawfully extend their stays under the proposed regulations, cannot afford additional travel costs to return to their original point of entry, especially when such costs are not consistently reimbursed by their employers. Nor is it likely that publication of these requirements in the Federal Register will be sufficient to notify the selected foreign workers of their special duties, a failure for which DHS should not then hold such workers responsible. The proposal raises many unanswered questions that should be addressed adequately before implementing such a system.

## **VII. The Proposal To Allow Petitions For Unnamed Beneficiaries And Substitution Of Beneficiaries Will Lead To Greater Worker Abuse.**

Recruiters frequently misrepresent terms of employment, recruitment expenses, and services that recruiters will provide when they meet with prospective H-2B workers in their home communities. Prospective H-2B workers often leave employment in their home communities and incur substantial expenses to travel to the U.S. consulate, where they are confronted with different terms of employment, charges that had not been discussed, and other, similar, unpleasant realities. However, having committed substantial resources and lost opportunity, most feel they have no choice but to accept the harsh terms offered, even though different from the initial understanding, in order to come to work in the United States.

The requirement that the I-129 petition name the individual beneficiaries serves as a check on these practices to some extent. The recruiter cannot afford for too many of the named workers to become disillusioned and go home, so the degree to which conditions can be altered is restrained. Allowing the recruiter to fill a quota of unnamed beneficiaries with any available worker will

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<sup>150</sup> Changes to Requirements, *supra* note 1, at 49114.

<sup>151</sup> *Id.*

<sup>152</sup> Changes to Requirements, *supra* note 1, at 49115.

encourage over recruitment and remove any existing incentive to assure that the workers recruited to the consulate find the actual job terms acceptable. The recruiter can attract enough extra workers to assure that a full complement is available, and if too many workers show up, the surplus will simply be sent home. Temporary work visas should belong to the worker, not the employer. Although the current program falls far short of this ideal, the worker's name on the visa petition gives a worker some consideration, at least if the worker cannot easily be replaced by the recruiter on a whim. The provisions concerning substitution of beneficiaries are written in very confusing language, but appear to have the same negative effect. Particularly in applications where the employer is demanding minimum qualifying eligibility criteria, screening of employee eligibility will be diffuse, and most likely, less effective.

Employers should be required to name the employees they have recruited when the petition for visas and substitution of other workers should be strictly limited.

## **VIII. To Protect The Rights and Safety Of All Low-Wage Workers, DHS Should Implement The Following Best Practices.**

### **A. DHS Should Promote Inter-Agency Cooperation.**

Although many of the following best practices may not be within the authority of USCIS or even directly speak to the proposed regulations, creating effective policies for labor migration should take into account the overall objectives of labor migration in a holistic fashion, considering simultaneously the destination and sending countries' respective needs of filling labor shortages, managing efficient labor migration, interstate cooperation, development and capacity building.<sup>153</sup> Creating effective policies for labor migration should take into account the overall objectives of labor migration in a holistic fashion, considering simultaneously the destination and sending countries' respective needs of filling labor shortages, managing efficient labor migration, interstate cooperation, development and capacity building. To this end, cooperation and collaboration between almost all departments and agencies is required, particularly, the DHS (especially USCIS within DHS), DOL, the U.S. Department of Justice (DOJ). With respect to the issue of adequately meeting labor shortages in the U.S. through programs such as the H-2B programs, and, concurrently, the issue of employers overestimating their employment needs, over-recruiting and leaving workers idle for months before work becomes available, USCIS should collaborate with DOL to adequately assess labor needs and establish mechanisms to measure the extent to which foreign labor will fill the shortages, and how, with actual numbers obtained through the U.S. Bureau of Labor Statistics' Job Openings and Labor Turnover Survey, for example. Allowing only a quota system to form the basis for the number of visas USCIS may provide has its disadvantages in that it allows employers to overestimate the workers they need, and creates situations whereby unscrupulous employers or recruiters will promise wages and work that does not exist and charge exorbitant fees for them.

USCIS should also collaborate with the Department of State to propose to the President bi-lateral labor agreements with respect to assessing labor needs, managing labor demand and supply, and regulating recruitment so that workers do not go to waste. Ever since the passing of the Migration for Employment Convention 1949 of the ILO (No. 97), the ILO provides model bi-

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<sup>153</sup> HANDBOOK ON EFFECTIVE LABOR MIGRATION POLICIES, *supra* note 10, at 4.

lateral agreements that many nations have used, including Austria, France, Portugal, Chile, Guatemala, U.A.E., India, Romania and Rwanda. In addition, they can be used to assist the development of the countries of origin, reducing the incentive of irregular migration, similar to Germany's agreements with some Central and Eastern European countries. Another option includes encouraging memoranda of understanding between national employment agencies of receiving and sending countries, tailoring them to specific industries.

USCIS should also collaborate with the Social Security Administration to protect the right to social security, recognized as such by the world community and confirmed as a basic right at the General Discussion on Social Security at the International Labor Conference in 2001 (ILO, 2001a: para.2). Bilateral social security arrangements between receiving and sending countries, which would preserve social security benefits accrued in destination countries and export them upon return home, would also provide incentive for guest workers to go back home. Finally, USCIS should also consider collaborating with DOL to regulate and license recruitment agencies for H-2B workers, as Ireland does. For example, working with the Social Security Administration as well, such recruitment agencies should be required to pay social security for its contracted workers.

**B. Workers Must Have Free Access To The Labor Market.**

One way to prevent the problem of benching workers when an employer overestimates his or her need is to provide the worker free access to the labor market. The International Labour Office, Organization for International Migration and the Organization for Security and Cooperation in Europe, in their Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination, recommend protecting workers from the potentially exploitative relationships that arise as a result of dependency on one employer by allowing workers the right to change employer and occupation after three months in general, with no specific time limitations in low wage industries where employer abuses are prevalent.

**C. DHS Should Advocate To Protect Wages And Provide Legal Avenues For Undocumented Workers To Remain In The U.S. To Participate In Civil or Criminal Proceedings Against Employers Who Violate The Law.**

To address the differential treatment with respect to enforcing unpaid wages as between H-2B workers and U.S. workers, USCIS could advocate to legalize the stay of undocumented migrant workers who have made credible complaints to employment and labor authorities so that they may participate in civil and criminal proceedings against employers, similar to the protections provided under the U-visa regulations for victims of violent crimes.

In addition to these comments, we would also ask that you consider certain evidence and arguments made in comments previously filed at Regulations.gov in response to DOL's proposed regulatory changes to the H-2B program, RIN 1205-AB54. The comments we ask that you consider are listed in Exhibit C, attached.

## **IX. Conclusion**

For the foregoing reasons, we urge that the Secretary withdraw the proposed regulations. At the very least, far greater time should be permitted for the submission of comments.