



# CENTER FOR IMMIGRATION STUDIES

February 13, 2023

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Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
5900 Capital Gateway Drive  
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**RE: DHS Docket No. USCIS-2022-0015, Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers; RIN 1205-AC14**

Dear Mr. Nimick,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the request for comments on the Temporary Final Rule (TFR) titled *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, as published in the Federal Register on December 15, 2022.

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

## **I. Background**

The Immigration and Nationality Act (INA) at section 101(a)(15)(H)(ii) established the H-2B nonimmigrant classification for nonagricultural temporary workers. An eligible nonagricultural temporary worker must have “a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform ... temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>1</sup>

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<sup>1</sup> INA § 101(a)(15)(H)(ii).

The H-2B program is intended to be used when employers face temporary labor shortages, typically in seasonal jobs, with the most common industries including landscaping, construction, forestry, seafood and meat processing, restaurants, and hospitality.<sup>2</sup> Congress allows for 66,000 non-agricultural, seasonal foreign workers per fiscal year, with 33,000 available for the first half (October 1 to March 31) and 33,000 plus any unused first-half slots available for the second half (April 1 to September 30).<sup>3</sup>

Section 214(c)(1) of the INA requires an employer seeking H-2B workers to petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant. DHS must approve this petition before the beneficiary can be considered eligible for H-2B status. USCIS is the component agency within DHS that adjudicates H-2B petitions.<sup>4</sup>

Before petitioning for an H-2B worker, employers must obtain an approved Temporary Labor Certification (TLC) from the Department of Labor (DOL).<sup>5</sup> In order to award a TLC, DOL must determine that (1) there are not sufficient U.S. workers who are qualified and available to perform the work, and (2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.<sup>6</sup> TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment.<sup>7</sup>

The employer must submit a job order to the state workforce agency serving the area of intended employment to recruit U.S. workers. The employer also must conduct its own recruitment efforts to demonstrate that they are unable to find workers domestically.

In recent years, Congress has included a provision in various funding bills that allows the Secretary of Homeland Security to supplement the H-2B annual numerical limit if he determines U.S. employers cannot satisfy their needs in the upcoming fiscal year with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor.<sup>8</sup> Congress's most recent authorization for the current supplemental cap is under section 101(6) of Division A of Public Law 117-180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 which extended the authorization previously provided in section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117-103.

## **II. Secretary of Homeland Security's Decision to Increase the Numerical Limitation for FY 2023 for the H-2B Program**

With this TFR, the Secretary of Homeland Security is authorizing the release of an additional 64,716 H-2B visas for fiscal year (FY) 2023. The Secretary has allocated the visas into the following categories:

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<sup>2</sup> U.S. Department of Labor, Wage and Hour Division, [Industries with High Prevalence of H-2B Workers](#) (2022).

<sup>3</sup> INA § 214(g)(1)(B).

<sup>4</sup> 8 C.F.R. § 214.2(h)(6).

<sup>5</sup> INA § 214(c)(1); 8 C.F.R. § 214.2(h)(6)(iii)(A) and (iv)(A).

<sup>6</sup> 20 C.F.R. § 655.1.

<sup>7</sup> 20 C.F.R. § 655.55(a).

<sup>8</sup> 87 Fed. Reg. 76816 (Dec. 15, 2022).

- 1) For the first half of FY 2023, 18,216 visas were made immediately available to returning workers (workers who were issued H-2B visas or held such status in FY 2020, 2021, or 2022, regardless of their nationality). This category will only apply to petitions with start dates that are on or before March 31, 2023;
- 2) For the third quarter of FY 2023 (April 1 to May 14): 16,500 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These early second half of FY 2023 petitions must request employment start dates from April 1, 2023, to May 14, 2023;
- 3) For the fourth quarter of FY 2023: 10,000 visas for returning workers. These late second half of FY2023 petitions must request employment start dates from May 15, 2023, to September 30, 2023. Furthermore, employers must file these petitions no earlier than 45 days after the second half statutory cap is reached; and
- 4) For the entirety of FY 2023: 20,000 visas reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Central American countries) and Haiti as attested by the petitioner (regardless of whether such nationals are returning workers). Employers requesting an employment start date in the first half of FY 2023 may file such petitions immediately after the publication of this TFR. Employers requesting an employment start date in the second half of FY 2023 must file such petitions no earlier than 15 days after the second half statutory cap is reached.<sup>9</sup>

In order to petition for workers under the FY 2023 supplemental cap provided by the TFR, an employer must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H-2B worker is a Salvadoran, Guatemalan, Honduran, or Haitian national and counted towards the 20,000 cap exempt from the returning worker requirement.<sup>10</sup> Petitioners must also prepare and retain a “detailed written statement” describing the irreparable harm and provide evidence demonstrating such harm to support their claim.<sup>11</sup>

Both petitioners and applicants must meet all other existing H-2B eligibility requirements, including obtaining an approved TLC from DOL before filing a Petition for a Nonimmigrant Workers (Form I-129) with USCIS. The TFR also sets out additional requirements for employers filing an H-2B petition 30 or more days after a certified start date on a TLC.

In addition to making additional H-2B visas available, the TFR provides flexibilities to allow H-2B workers who are already in the United States to begin work with a new employer upon petitioning, so long as that employer has an approved TLC.

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<sup>9</sup> 87 Fed. Reg. 76816 (Dec. 15, 2022).

<sup>10</sup> 87 Fed. Reg. 76816, 76821 (Dec. 15, 2022).

<sup>11</sup> *Id.*

While this TFR was issued without prior notice, it is effect immediately. DHS and DOL are nevertheless accepting post-promulgation comments from the public in order to solicit feedback that may lead to future changes in the H-2B program.

### **III. Increase in H-2B Visas is Not Supported by Labor Market Conditions**

The United States is not experiencing a labor shortage that justifies increasing immigration levels to fill positions at often lower-than-national-average wages. Rather, the canard of a labor shortage is a fabrication that has been perpetuated by both business and mass-immigration lobbyists, often at the expense of labor conditions and workers' employment opportunities. The labor shortage myth serves two primary objectives: 1) keeping labor costs artificially low, thereby increasing businesses' and immigration attorneys' bottom lines; and 2) providing an argument to increase immigration levels to benefit special interest groups and political elites.

Public Law 117-180 only permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to supplement the H-2B numerical limit upon the determination that the needs of American businesses "cannot be satisfied ... with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor."<sup>12</sup> Upon making this determination, the Secretary may not increase the limit beyond the largest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation. DHS determined, based on its records, that the supplemental limit may not exceed 64,716 H-2B visas.<sup>13</sup>

DHS and DOL did not provide their analyses in making this determination. The Departments did note, however, that in recent years, members of Congress, U.S. businesses, chambers of commerce, employer organizations (all entities that have a political or financial interest in increasing H-2B visa availability) have expressed concern to the Secretaries of Homeland Security and Labor regarding the limit to H-2B visas.<sup>14</sup> While the Departments claim to have considered "the full range of evidence and diverse points of view," upon making their decision, organizations that represent the interests of U.S. workers are noticeably absent from the list of those who have lobbied the government for more foreign workers.<sup>15</sup>

Data from the Census Bureau and Bureau of Labor Statistics, analyzed by Steven A. Camarota and Karen Zeigler of the Center for Immigration Studies, however, demonstrate a consistent decline in labor force participation of U.S. workers. Camarota and Zeigler found that there were 1.9 million fewer U.S. border Americans working in the fourth quarter of 2022 than in the same quarter of 2019 (pre-COVID).<sup>16</sup> This figure is not reflected in the unemployment rate, *per se*,

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<sup>12</sup> Public Law 117-180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Division A, section 101(6) (providing DHS funding and other authorities, including the authority to issue supplemental H-2B visas that was provided under title II of Division O of Pub. L. 117-103, through December 16, 2022).

<sup>13</sup> 87 Fed. Reg. 76816 (Dec. 15, 2022).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 76824.

<sup>16</sup> Camarota, Steven and Zeigler, Karen, Center for Immigration Studies, *The Employment Situation of Immigrants and the U.S.-Born in the Fourth Quarter of 2022* (Feb. 2023).

because that statistic does not include workers who are now considered entirely out of the labor force – neither working nor looking for work.

Camarota and Zeigler’s analysis also revealed that the long-term decline in labor force participation rates is especially pronounced among lower-skilled or less-educated workers. The labor force participation rate for U.S.-born adults ages 18 to 64 without a bachelor’s degree was 70.3 percent in the fourth quarter of 2022, down from 71.4 percent in 2019, before the COVID-19 pandemic; 74.8 percent in 2006, before the Great Recession (beginning in 2008), and 76.4 percent at the peak of the expansion in 2000.<sup>17</sup>

The falloff in labor force participation is not simply an economic issue. There is clear evidence that the long-term non-participation is associated with numerous undesirable outcomes such as substance abuse, welfare dependency, mental health issues, crime, and early death.<sup>18</sup>

Additionally, the unemployment rates of major H-2B industries, specifically, provide more useful information than the nationwide unemployment rate when assessing whether adding H-2B workers would be beneficial to the domestic labor market. Data from the Bureau of Labor Statistics shows that there continue to be high levels of unemployment in major H-2B industries, which include Amusement (8.6%); Construction (7%); Food Services (8.1%); and Hotels and Motels (8%) – demonstrating that increasing the cap for H-2B visas in 2023 is unwarranted and will hurt the opportunities, wages, and working conditions for the domestic workforce.<sup>19</sup>

Artificially increasing the pool of available workers by admitting foreign workers on H-2B visas prevents the labor market from correcting wage, condition, and participation-level deficiencies – and from supporting Americans, whom the immigration system is intended to benefit, not undermine. A tight labor market is necessary to allow wages to rise for jobs generally performed by people without college degrees, encouraging more of them to come back into the labor force.

#### **IV. Reforms are Needed to Curtail Substantial Fraud and Abuse**

DHS and DOL must immediately reform the H-2B program, which is rife with fraud and abuse in order to protect workers from exploitation and unfair labor competition.<sup>20</sup> CIS recommends DHS and DOL utilize their regulatory authority to:

- Require employers to pay H-2B workers higher wages;
- Require USCIS to prioritize the selection of petitions for employers in industries with the greatest need for workers;
- Amend DHS’s deferred action program to only include aliens who report unauthorized employment or violations of law that result in prosecution;

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<sup>17</sup> *Id.*

<sup>18</sup> Carol Graham and Sergio Pinto, Brookings Institute, [The Well-being Implications of Being Out of the Labor Force](#) (2021).

<sup>19</sup> U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [Unemployed persons by industry, class of worker, and sex](#) (Feb. 3, 2023).

<sup>20</sup> Jessica Garrison, et al., BuzzFeed News, [The New American Slavery: Invited to the US, Foreign Workers Find a Nightmare](#) (Jul. 24, 2015); Colleen Owens, et al., Urban Institute, Northeastern University, [Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States](#) (Oct. 2014).

- Rein in the ability of law-violators’ to petition for H-2B workers;
- Create a formal complaint in-take system for DOL’s website, SeasonalJobs.dol.gov; and
- Resume and expand worksite enforcement.

The Departments should pause any exercise of authority to increase the H-2B cap until it strengthens the program to protect both foreign and U.S. workers.

1. DOL must use its regulatory authority to require employers to pay higher wages to H-2B workers.

CIS strongly recommends that DOL amend its regulations to require employers to pay H-2B workers higher wages. All workers, U.S. and foreign, deserve fair pay and a temporary worker system that supports, not undermines, the domestic labor market. Current regulations are inconsistent with statute and allow employers to legally undercut national wage standards.

For the purposes of an H-2B temporary labor certification, regulations require that, in the absence of a wage set in a valid and controlling collective bargaining agreement, employers must pay H-2B workers the prevailing wage for the occupation in the pertinent geographic area of the job, derived from the Bureau of Labor Statistics’ Occupational Employment Statistics survey.<sup>21</sup> Some H-2B employers also have the opportunity to request that the prevailing wage determination be based on a private, employer-provided survey rather than an OES survey. Because the H-2B statute is clear that H-2B workers can only be hired if “unemployed persons capable of performing such service or labor cannot be found *in this country*,” (emphasis added) and specifically not merely the geographical area where the job is located, the current rule does not accomplish the goal of the statute and legally allows employers to underpay H-2B workers below national averages.<sup>22</sup>

DOL data analyzed and reported by the Economic Policy Institute (EPI) shows that, as a result of the current regulation, H-2B workers are underpaid in nearly all of the top 15 H-2B-employing industries when compared to national wage standards for those industries.<sup>23</sup> EPI uncovered that H-2B cement masons and concrete finishers were subject to the largest pay differential, making approximately \$8.00 per hour less than the national average wage. Construction laborers on H-2B visas made over \$4.00 less per hour than the national average wage for that occupation. The result, in just two industries, is that the regulation provided employers the opportunity to save approximately \$26 million over a matter of months when they hired H-2B workers instead of U.S. workers.<sup>24</sup>

Accordingly, the Departments should amend their regulations to properly determine whether there are “unemployed persons” in the United States capable of performing such temporary labor by requiring employers to offer *at least* the local, state, or national average wage for the

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<sup>21</sup> 20 CFR § 655.10.

<sup>22</sup> See INA § 101(a)(15)(H)(ii).

<sup>23</sup> Daniel Acosta, Economic Policy Institute, [Wages are still too low in H-2B occupations. Updated wage rules could ensure labor standards are protected and migrants are paid fairly](#) (March 2021).

<sup>24</sup> Using the EPI data cited above, and some rounding, this figure was calculated by assuming H-2B employees worked 1,000 hours per worker (full time for six months), which adds up to a total wage loss of \$26,276,000.

occupation (whichever is highest). Raising the minimum amount an employer can pay an H-2B worker to a level that is more likely to attract an available U.S. worker benefits both U.S. workers, who may be seeking an adequate employment opportunity, and H-2B workers, ensuring those who are selected are paid well. The U.S. government could set the wage floor even higher (at a percentile above the prevailing or average national wage) if it truly intended to encourage employers to seek out unemployed U.S. workers before seeking out H-2B workers. A higher minimum wage rate would also more effectively negate wage suppression caused by artificially inflating the supply of available workers for these jobs.

Additionally, employers should be required to pay for housing and transportation for both U.S. and H-2B workers in order to ensure that the regulations do not improperly provide employers an incentive to favor H-2B workers over available U.S. citizens and lawful permanent residents. This reform will likewise prevent employers from abusing H-2B workers by forcing workers to accumulate debt to the employer. Workers who become indebted to their employers are significantly more vulnerable to exploitation, trafficking, and other forms of abuse.<sup>25</sup>

Finally, DOL should amend its regulations at 20 CFR § 655.10 to bar employers from using private or employer-provided wage surveys to demonstrate the prevailing wage for that occupation. The legitimacy of such surveys is difficult to verify and this tactic often allows employers to legally pay workers even less than what otherwise would be required according to DOL data.

2. USCIS should prioritize selection of petitions in industries with the greatest need for workers.

Additionally, rather than selecting H-2B petitions sequentially or on a random basis when the number of petitions exceeds the numerical limit for visas, USCIS should prioritize petitions for industries with the lowest unemployment rates for domestic workers. This reform would ensure that H-2B workers are placed in industries with the greatest actual need for additional workers – and reduce the possibility that H-2B workers are placed with unscrupulous employers who intend to minimize labor expenses by undercutting U.S. workers.

3. DHS should amend its new deferred action program to provide prosecutorial discretion only to workers who report violations of INA § 274A, or employment of unauthorized workers or violations that result in prosecution.

CIS urges DHS to amend the deferred action program the agency announced on January 13, 2023, which provides deferred action to foreign workers who are victims of or witnesses to labor violations.<sup>26</sup> DHS claims that this program is necessary to uncover labor violations and protect foreign workers from immigration-related retaliation by exploitative employers. The low standards DHS imposes on eligibility for deferred action under this program, however, will likely encourage just as much fraud among applicants as it is meant to expose among employers.

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<sup>25</sup> Colleen Owens, et al., Urban Institute, Northeastern University, [Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States](#) (Oct. 2014).

<sup>26</sup> U.S. Department of Homeland Security, [DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations](#) (Jan. 13, 2023).

At the same time, by failing to provide deferred action for workers who report violations of INA § 274A, the program does not go far enough to address worker exploitation and protect the domestic workforce.

Specifically, CIS recommends DHS amend the program to provide deferred action only to workers who report violations of INA § 274(a), which prohibits the knowing employment of unauthorized workers, or to workers who report employment or labor violations that result in prosecution or debarment by the government. By giving foreign workers an incentive to report employers who knowingly employ unauthorized workers, DHS would quickly minimize employers' incentives to hire an unlawful and vulnerable workforce. Additionally, only providing protection for claims that result in an actual enforcement action against the employer reduces the risk that temporary workers, whose visas inevitably expire, submit fraudulent or frivolous claims to DHS for the sole purpose of extending their stays in the United States.

As many foreign and U.S. workers understand too well, employers who hire unauthorized workers often violate other employment and labor laws, including those related to antidiscrimination, health, and safety. DHS itself acknowledged in its October 12 memorandum that, "These employers engage in illegal acts ranging from the payment of substandard wages to imposing unsafe working conditions and facilitating human trafficking and child exploitation. Their culpability compels the intense focus of our enforcement resources."<sup>27</sup> Equally important, unchecked unauthorized employment causes substantial economic hardship to U.S. workers who may face unfair labor competition, wage suppression, and reduced working conditions as a result of contending against an illegal and unregulated labor market.

4. DOL should screen for past violations on the front-end in order to curb abuse by employers and third-party contractors.

In order to reduce the risk that H-2B workers will be exploited at their worksites, CIS strongly recommends that DOL screen prospective H-2B employers on the front-end of the H-2B process – before DOL adjudicates a TLC. Employers who are pre-screened by DOL for labor, employment, or other serious criminal violations should not be eligible to participate in the H-2B program.

To accomplish this, DOL could require employers to attest, under penalty of perjury, that they have not violated pertinent labor, health, or employment laws and to confirm the accuracy of the attestations by checking government sources. DOL should implement an electronic registration process similar to USCIS's H-1B electronic registration requirement that intakes basic information about the petitioner.<sup>28</sup> In the H-1B process, only employers with approved registrations are able to file cap-subject petitions.

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<sup>27</sup> Memorandum for Tae D. Johnson, acting director, U.S. Immigration and Customs Enforcement, et al., from Alejandro Mayorkas, secretary, U.S. Department of Homeland Security, "Re: Guidelines for the Enforcement of Civil Immigration Law", September 30, 2021.

<sup>28</sup> U.S. Citizenship and Immigration Services, [H-1B Electronic Registration Process](#) (Apr. 25, 2022).

While regulations already authorize DOL to debar employers from participation in the program, in practice, the agency rarely uses this authority.<sup>29</sup> The agency's most recent publication of debarred entities includes just 54 employers.<sup>30</sup> Evidence shows, however, that exploitative practices are much more commonplace than DOL's list suggests. Research from EPI displays a high prevalence of wage and hour violations in H-2B industries, finding violations in nearly 80 percent of cases investigated by DOL's Wage and Hour Division in seven major H-2B-hiring industries between 2000 and 2021.<sup>31</sup> Additionally, EPI's analysis of DOL data shows that nearly \$1.8 billion of wages were stolen from workers employed in these major H-2B industries between 2000 and 2021.<sup>32</sup>

Implementing a front-end screening system would provide workers with protections before they are exploited, and maximize DOL's limited investigative resources. This reform is especially needed to curb abuse by third-party contractors or recruitment agencies, who have no direct need for H-2B workers, but directly profit off of the placement of H-2B workers with employers – often at the expense of U.S. workers' employment opportunities. The implementation of a registration or certification program for these petitioners may also help DOL uncover recruiters who are involved in abusive human trafficking schemes.

5. DOL should create a complaint intake system.

CIS strongly recommends that DOL create a formal complaint-intake system for U.S. workers to report employers who overlook them for jobs listed in [SeasonalJobs.dol.gov](https://www.seasonaljobs.dol.gov) and for individuals to report employers they believe are not offering workers wage rates consistent with local rates. By creating a formal complaint in-take system, DOL can deter unfair labor competition and wage suppression all while better focusing its investigative resources on employers whom there is a reason to believe are unlawfully use the H-2B program to supplement their workforce.

6. DHS must expand worksite enforcement and rescind its overbroad non-enforcement policies.

CIS urges DHS to rescind its October 27, 2021 policy memorandum, *Guidelines for Enforcement Actions in or Near Protected Areas*.<sup>33</sup> As a result of this overbroad policy, U.S. Immigration and Customs Enforcement (ICE) officers are fundamentally barred from engaging in any enforcement action in the interior of the country in places that are located in or near locations that DHS has identified as "protected places." Such places include recreation centers, schools, places of worship or religious study, locations that offers vaccinations (such as pharmacies), community-based organizations, any locations that host weddings (such as a civic center, hotel,

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<sup>29</sup> 20 C.F.R. § 655.73.

<sup>30</sup> Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, [Program Debarments](#) (Sept. 2020).

<sup>31</sup> Daniel Acosta, Economic Policy Institute, [As the H-2B visa program grows, the need for reforms that protect workers is greater than ever](#) (Aug. 18, 2022).

<sup>32</sup> *Id.*

<sup>33</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021).

or park), any locations with a school bus stop, any places “where children gather,” and many more sites that are also common places of employment.<sup>34</sup> Under this policy, officers are also prohibited from enforcing the law anywhere “near” these locations, an imprecise standard that has “no bright-line definition.”<sup>35</sup>

DHS must also resume widespread worksite enforcement audits to ensure compliance with employers’ federal immigration and labor laws and to rescind its October 12, 2021 policy memorandum, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*.<sup>36</sup> Robust worksite enforcement efforts are necessary to ensure the integrity of labor and immigration laws, and promote a fair and healthy domestic labor market. Any robust worksite enforcement endeavor cannot be effective so long as DHS continues to broadly prohibit ICE officers from engaging in enforcement actions. Overly narrow DHS guidelines already drastically limit which aliens can be subject to immigration enforcement,<sup>37</sup> but DHS’s October 2021 policies further undermines ICE’s mission by severely limiting where officers may even conduct enforcement actions or observation.

Eradicating unauthorized employment is essential to enforcing both immigration and labor laws as a whole. DHS’s minimal worksite enforcement, dictated by its October 2021 policies, however, does nothing but embolden corrupt employers to degrade working conditions in the United States. DHS cannot accomplish its enforcement mission when it has defined “protected areas” so broadly as to include large portions of U.S. communities, including businesses and locations that employ millions of people in the United States.

#### **V. DHS’s Adoption of this Regulation Violates National Environmental Policy Act (NEPA)**

DHS’s invocation of categorical exclusion (CATEX) A3(d) “because it interprets or amends a regulation without changing its environmental effect” is arbitrary and capricious. DHS has never justified its assertions that adding up to an additional 64,716 visas will not result in an “meaningful, calculable change in environmental effect” with any analysis. DHS has analyzed the effects of population growth through immigration, and therefore DHS’s assertions each time it invokes a categorical exclusion claiming that any particular addition to the U.S. population is negligible in environmental impact has no basis in the record. NEPA’s very adoption in 1969 was grounded in Congressional concerns for the “profound influences of population growth” on the natural environment, but nonetheless, DHS has admitted in prior regulations and litigation that it does not know how to calculate the population impacts of its immigration programs at all

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<sup>34</sup> *Id.*

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

<sup>36</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (October 12, 2021).

<sup>37</sup> Memorandum for Tae Johnson, Acting Director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, Re: Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021).

and has never attempted to figure out how to do so.<sup>38</sup> Therefore, DHS has no rational basis to conclude whether this particular change to its regulations changes the environmental effect of the regulation, which it never studied in the first place.

DHS' categorical exclusion A3(d) is wholly inadequate for the purpose of dismissing the environmental impact of immigration programs by fiat. Categorical exclusions must be defined with "adequate specificity."<sup>39</sup> CATEX A3(d), which applies to those rules "that interpret or amend an existing regulation without changing its environmental effect," is very broad, potentially applying to any type of regulation or policy directive at all. CATEX A3(d) also fails to include any caveat ensuring the existing regulation itself went through proper NEPA analysis. An infinite variety of types of action could be included in this category. This demonstrated lack of specificity undermines the purpose of NEPA by creating a danger (that in case of the DHS mission of immigration has been realized) that DHS may simply assign any action it finds inconvenient or impractical to evaluate under NEPA into this enormous "black hole" categorical exclusion on a "improper post-hoc" basis.<sup>40</sup>

Nor does CATEX A3(d) provide safeguards against the cumulative effects of many excluded actions changing the environmental effects of the regulation. Because DHS never engaged in scoping related to the effects of population growth before adopting categorical exclusion A3(d), DHS cannot "ensure that projects taken under it do not individually or cumulative inflict a significant impact."<sup>41</sup>

There is no administrative record evidence of any NEPA analysis by DHS of growth-inducing impacts or cumulative impacts in connection with its discretionary actions relating to the entry and settlement of foreign nationals into the U.S. Such a scoping process is essential for the agency to demonstrate that it made a reasoned decision before adopting this categorical exclusion. If an agency could shield any action from review by simply claiming it fits into a categorical exclusion, NEPA would be rendered a toothless statute.<sup>42</sup> "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant."<sup>43</sup> Here, the agency's invocation of this categorical exclusion is clearly grounded in nothing but the agency's own assertion that it has no significant effect on the environment.

## **VI. Conclusion**

CIS urges DHS to pause its supplemental increase of H-2B visas until labor conditions, specifically the labor participation rate, demonstrate a need to supplement the work force. Recent data on the domestic labor force participation rate and unemployment rates in major H-2B hiring

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<sup>38</sup> 42 U.S.C. §4331(a).

<sup>39</sup> See, e.g. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007).

<sup>40</sup> *Bosworth*, 510 F.3d at 1026.

<sup>41</sup> *Id.* at 1032.

<sup>42</sup> See, e.g., *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985).

<sup>43</sup> *Id.* at 1393.

industries show that the TFR's increase of visas is unfounded and will detriment domestic labor conditions.

Additionally, DHS and DOL must reform the H-2B program in order to weed-out fraud and abuse that harms foreign workers and U.S. workers. CIS recommends DHS and DOL utilize their regulatory authority to:

- Require employers to pay H-2B workers higher wages;
- Require USCIS to prioritize the selection of petitions for employers in industries with the greatest need for workers;
- Amend DHS's deferred action program to only include aliens who report unauthorized employment or violations of law that result in prosecution;
- Rein in law-violators' ability to petition for H-2B workers;
- Create a formal complaint in-take system for DOL's website, SeasonalJobs.dol.gov; and
- Resume and expand worksite enforcement.

Finally, DHS's adoption of this TFR violates NEPA. DHS cannot avoid the statutory responsibilities under NEPA by merely asserting that an activity it wishes to pursue will have an insignificant effect on the environment.

Sincerely,

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