CENTER FOR IMMIGRATION STUDIES

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Charles L. Nimick,
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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
Camp Springs, MD 20746

RE: *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*; DHS Docket No. USCIS–2023–0012; RIN: 1615-AC76.

Dear Chief 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 Notice of Proposed Rulemaking (NPRM) titled *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*, as published in the Federal Register on September 20, 2023.

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

Both the H-2A and H-2B nonimmigrant visa programs (referred to collectively hereafter as "H-2" programs) were created by Congress to allow for the admission of workers to fill legitimate gaps in temporary or seasonal labor and to provide protection for both U.S. and foreign workers. The Immigration and Nationality Act (INA) at section 101(a)(15)(H)(ii)(A) established the H-2A nonimmigrant classification for seasonal or temporary agricultural labor. Section 101(a)(15)(H)(ii)(B) of the INA established the H-2B nonimmigrant classification for nonagricultural temporary workers. Both the H-2A and H-2B programs are administered by DHS and the Department of Labor (DOL).

While the H-2A program provides seasonal or temporary agricultural labor, 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.[1] 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).[2] Congress imposed no cap on the issuance of H-2A visas.[3]

The H-2 nonimmigrant visa programs are known as "single intent" nonimmigrant programs, which means an applicant must intend to depart the United States following the termination of their authorized period of stay. This is established under section 101(a)(15)(h)(ii) of the INA, which provides, in part, that such nonimmigrant must maintain "a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform … agricultural labor or services … or to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country."

Statute also requires an employer seeking H-2 workers to petition DHS for classification of the prospective temporary worker as an H-2 nonimmigrant. [4] DHS must approve this petition before the beneficiary can be considered eligible for H-2 status. USCIS is the component agency within DHS that adjudicates H-2 petitions.[5]

For both H-2 programs, Congress requires employers to conduct a labor test to ensure that admission of workers under these programs supplement – not replace – U.S. workers. Before petitioning for an H-2 worker, an employer must obtain an approved Temporary Labor Certification (TLC) from the Department of Labor (DOL).[6] 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.[7] TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment.[8]

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.

Both H-2 programs have uncontroversially been plagued by abuse and fraud, as well as been used to facilitate illegal immigration and human trafficking into the United States.[9] In FY 2022,

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[1] U.S. Department of Labor, Wage and Hour Division, *Industries with High Prevalence of H-2B Workers* (2022).
[2] INA § 214(g)(1)(B).
[3] 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. § 655.103(d).
[4] 8 C.F.R. § 214.2(h)(5)-(6).
[5] *See* U.S. Citizenship and Immigration Services, *Temporary (Nonimmigrant) Workers* (Jan. 11, 2022).
[6] INA § 214(c)(1); 8 C.F.R. § 214.2(h)(6)(iii)(A) and (iv)(A).
[7] 20 C.F.R. § 655.1.
[8] 20 C.F.R. § 655.55(a).
[9] *See* 88 Fed. Reg. 65040, 65055 (Sept. 20, 2023); Vasquez, Tina, Prism Reports, *Human trafficking or a guest worker program? H-2A's systemic issues result in catastrophic violations* (Apr. 2023); Farmer Worker Justice, *No Way to Treat a Guest, Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers*; Centro de los Derechos del Migrante, Inc., *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Visa Program* (2020; *see*

DOL conducted 16 and 186 audits of temporary labor certifications for H-2A and H-2B petitions, respectively. By the end of the reporting period, 70 percent of the audits resulted in an action against the employer, such as a warning, supervised recruitment, or program debarment. As the Department of State (DOS) explains, these programs continue to enable human traffickers – employers, labor contractors, or agents – to maintain control of works. DOS blamed this in part to "weak" oversight of the temporary worker and other nonimmigrant visa programs. DOS also reported that between 2018 and 2020, the national human trafficking hotline identified 3,694 potential victims for labor trafficking on an H-2 visa.[10] Additionally, it referenced a report that analyzed 225,227 DOL investigations in seven major H-2B industries that found more than 80 percent of those investigations uncovered labor violations, including wage theft.

Structural shortcomings and the federal governments' failure to adequately audit and enforce immigration and labor law are to blame for the exploitation of foreign workers, labor violations, and unfair competition faced by U.S. workers as a result of the H-2 programs. DHS issued this NPRM to alleviate some challenges faced by migrant workers with exploitative employers, but overall, failed to propose reforms to meaningfully address human trafficking concerns, the harms caused to U.S. workers who compete alongside H-2 workers, or mitigate the programs' roles in facilitating illegal immigration into the United States.

II. *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*

CIS commends DHS for acknowledging the serious harms that the H-2A and H-2B program invite into the domestic labor force. CIS believes, however, that this rule does not go far enough to address the serious violations of labor, criminal, and immigration law that are facilitated by the H-2 programs and the federal governments' reckless failure to engage in meaningful audits of the programs. While CIS supports increasing protections for migrant workers, generally, we believe that DHS must rescind the unauthorized provisions of the NPRM that transform the H-2 programs into "dual intent" visas and rescind the provisions that eliminate the lists of countries that are eligible to participate in the H-2A and H-2B programs. Finally, DHS should impose stronger penalties to employers who are found to have violated requirements of the H-2 programs and should require all employers who participate in the H-2 programs to participate in E-Verify.

A. The Proposal to Transform the H-2A and H-2B Visa Programs into "Dual Intent" Visas is *Ultra Vires*.

DHS must withdraw proposed 8 C.F.R. § 214.2(h)(16)(i), which permits H-2 nonimmigrant workers to take steps toward becoming a lawful permanent resident (an immigrant status), transforming the H-2A and H-2B visa programs into "dual intent" visas. Proposed 8 C.F.R. §

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e.g., U.S. Department of Labor, *US DEPARTMENT OF LABOR RECOVERS $131K IN BACK WAGES FOR WORKERS, ASSESSES $13K IN PENALTIES AFTER FINDING MULTIPLE H-2A VIOLATIONS, MISSED PAYROLL* (2022); Polaris, *Labor Trafficking on Specific Temporary Work Visas* 16 (2022); Senate Judiciary Committee, Senators Raise Concerns over H-2B Visa Abuses that Enable Exploitation (Apr. 20219); LIUNA, *H–2B Guest Worker Program: Lack of Accountability Leads to Exploitation of Workers,*.

[10] U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, *2023 Trafficking in Persons Report: United States* (2023).

214.2(h)(16)(i) is not authorized by statute. Both the H-2A and H-2B visa programs are "single intent" visa programs which do not allow beneficiaries to intent to take steps to adjust status to that of a lawful permanent resident (an immigrant).

DHS only has the authority to act as "authoritatively prescribed by Congress."[11] It is unlawful for agencies to act in violation of its own authorizing statutes.[12]

An applicant for an H-2A or an H-2B visa must demonstrate that they have a nonimmigrant intent, i.e., possess the *bona fide* intent to return to their country of origin after the authorized period of stay for their nonimmigrant visa has expired.[13] Applicants for H-2A and H-2B visas are also subject to the general presumption in INA § 214(b) that aliens seeking admission to the United States intend to settle permanently. As a result, H-2A and H-2B applicants must demonstrate that they are not coming to the United States to reside permanently, as immigrants, but will return home at the end of their authorized period of stay.

Accordingly, proposed 8 C.F.R. § 214.2(h)(16)(i) is inconsistent with statute and must be withdrawn. If an alien enters the U.S. on a "single intent" visa but nevertheless intends to apply for a green card during the workers' time in the United States, this indicates that the alien misrepresented their intention when at the time they entered the United States. It is both *ultra vires* and inappropriate for the Executive Branch to actively encourage H-2A and H-2B workers to take steps towards adjustment of status, in violation of the INA.

B. DHS Should Maintain and Strengthen the Requirement that the Secretary Designate Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B programs.

CIS strongly recommends that DHS maintain and strengthen the regulatory requirement that the Secretary designate countries whose nationals are eligible to participate in the H-2A and H-2B programs based on such countries' overstay rates and other factors, as described below. Given the pervasive fraud and abuse that historically burdened both programs, CIS believes that it serves the interests of foreign workers and the U.S. government, which has its own interest in both the integrity of the immigration system, the security of the United States, and the welfare of workers generally to bar participation from countries who fail to cooperate with the United States or otherwise abuse the visa programs.

Current regulations require the Secretary of Homeland Security, with the concurrence of the Secretary of State, to consider factors including, but not limited to:

- The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order or removal;
- The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

[11] *City of Arlington v. FCC*, 529 U.S. 290, 298 (2013).
[12] *Id.*; *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).
[13] *See* INA § 101(a)(15)(H)(ii).

- The number of orders of removal executed against citizens, subject, nationals, and residents of the country; and
- Such other factors as may serve the U.S. interest.[14]

Limiting H-2 eligibility to nationals of countries who meet the above standards enables DHS to reduce unreasonable risks of fraud and abuse in the H-2 programs and reduce illegal immigration to the United States, which harms the interests of both U.S. and foreign workers, the overall integrity of the immigration system, and labor conditions in the United States generally. For example, in 2019, DHS determined that it should remove the Philippines from the list of eligible countries because DHS estimated that the nearly 40 percent of H-2B visa holders from the Philippines overstayed their period of authorized stay.[15] Here, there was substantial evidence that the temporary work visa program was used as an avenue for illegal immigration to the United States.

Additionally, DHS reported that among U.S. posts throughout the world, U.S. Embassy Manila issued the greatest number of T-derivative visas (T–2, T–3, T–4, T–5, T–6), which are reserved for certain family members of principal T–1 nonimmigrants (certain victims of a severe form of trafficking in persons), accounting for approximately 40 percent of the total of T-derivative visas issued worldwide from FY 2014-2016.[16] An agency review of T-1 status recipients during this time, however, revealed that approximately 60 percent were determined to be trafficked into the United States on H-2B visas. Given the high volume of trafficking victims from the Philippines under the H-2B program, DHS and DOS determined their concerns were severe enough to warrant removing the Philippines from eligibility from both the H-2A and H-2B visa programs, determining that the Philippines "continued inclusion [would create] the potential for abuse, fraud, and other harm to the integrity of the H-2A and H-2B visa programs."[17]

That same year, DHS removed the Dominican Republic from the list of countries eligible to participate in the H-2B program after determining that nearly 30 percent of H-2B visa holders from the Dominican Republic overstayed their visas.[18] Here, again, DHS determined that high overstay rates demonstrates an "unacceptable potential for abuse, fraud, or other harm to the integrity of the H-2B visa program and thus continued eligibility for H-2B visas does not serve the U.S. interest."[19]

Moreover, restricting H-2 participation from "recalcitrant" countries, or countries that refuse to repatriate their nationals or otherwise fail to cooperate with U.S. officials, is essential to promoting the integrity of the program. As the Congressional Research Service has summarized, "The ability to repatriate foreign nationals (aliens) who violate U.S. immigration law is central to the immigration enforcement system."[20] Additionally, the U.S. Supreme Court ruling in

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[14] *See* 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1).
[15] 84 Fed. Reg. 133, 134 (Jan 18, 2019).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] Congressional Research Service, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals* (updated July 2020).

Zadvydas v. Davis generally restricts the government's authority to indefinitely detain aliens who have been ordered removed.[21] As a result., "detained aliens subject to removal orders but for whom there is 'no significant likelihood of removal in the reasonably foreseeable future,' must be released into the United States after six months, with limited exceptions."[22] Therefore, DHS must not permit countries who prohibit the return of their own nationals to participate in any temporary work visa program.

Because 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(i) (H–2A nonimmigrants) or 214.2(h)(6)(1)(E)(1) (H–2B nonimmigrants) permit USCIS to, on a case-by-case basis, allow a national from a country that is not on the list to be named as a beneficiary of a H-2A or H-2B petition based on a determination that such participation is in the U.S. interest, CIS believes that excluding countries that do not meet the above standards or whose inclusion do not otherwise serve the U.S. interest is tailored appropriately to balance these competing interests. Additionally, foreign nationals from these countries that present exceptional talents and abilities may be eligible to work temporarily in the United States under other visa categories and may not be reliant on H-2A or H-2B eligibility for such purpose.

Moreover, CIS requests that DHS make public information it considered regarding agency resource allocation for making such eligibility determinations. The public is not equipped to comment on DHS's determination that the significant public interests in maintaining the country eligibility list does not alone justify the cost in agency resources to undertake such analysis.

CIS also disagrees with DHS that program reforms made under this proposed rulemaking will be sufficient to guard against the types of harms that this regulation was intended to interrupt. Often, foreign workers who enter under the H-2 programs are complicit in the illegal conduct that this regulatory provision is intended in part to guard against or such conduct goes unnoticed because of weak auditing and enforcement protocols.[23] Extending worker flexibilities, such as increasing grace periods, may benefit certain H-2 visa holders who are victims of abuse, but ultimately, these types of reforms do little to nothing to discourage use of the program as a "lawful pathway" for illegal immigration and human trafficking.

Finally, in addition to maintaining the current regulatory standards for country eligibility, CIS recommends that DHS incorporate the following additional requirements for country eligibility:

- DHS should determine that a country's inclusion in the visa programs would not negatively affect U.S. law enforcement and security interests;

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[21] *See Zadvydas v. Davis*, 533 U.S. 678 (2001).
[22] Congressional Research Service, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals* (updated July 2020).
[23] *See* Costa, Daniel, Martin, Philip, Economic Policy Institute, *Record-low number of federal wage and hour investigations of farms in 2022* (Aug. 22, 2023); *see, e.g.*, Memorandum to 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); *see also*, Feere, Jon, Center for Immigration Studies, *Biden's DHS Has Made Every City an Illegal Alien Sanctuary, 'Protected places' guidelines shield criminals from enforcement* (Oct. 2022).

- Participating countries should make similar forms of temporary work visas available to U.S. citizens; and
- Participating countries should enter into agreements with the United Staes to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

These requirements, which are already required to be eligible to participate in the Visa Waiver program,[24] add meaningful incentives to foreign governments to share security and fraud related information with U.S. officials and help ensure that these programs are not being used for nefarious ends.

C. DHS Should Amend Proposed 8 C.F.R. § 214.2(h)(5)(xi)(A)(1) and 8 C.F.R. § 212(h)(6)(i)(B)(1) to Impose Longer and Permanent Bars to Employers Who Collect Prohibited Fees from H-2 workers.

CIS strongly recommends that DHS strengthen its reforms in 8 C.F.R. § 214.2(h)(5)(xi)(A)(1) and 8 C.F.R. § 212(h)(6)(i)(B)(1) to impose longer periods for debarment from petitioning for H-2A or H-2B workers. CIS does not believe that a one-year debarment from H-2 petition approvals following an H-2A or H-2B denial or revocation based in whole or in part on prohibited fees is sufficient to deter employers in engaging in such illegal and harmful acts.

As DHS itself has acknowledged, "recruitment fees put workers at risk for exploitation because workers who incur debt to cover such fees are vulnerable to predatory lenders and are at increased risk of debt bondage, human trafficking, and other abuses."[25] Additionally, requiring workers pay such fees strengthens incentives for employers to improperly prefer hiring a foreign workforce over U.S. workers, in violation of law and Congress' intent in creating the H-2 programs.[26]

Accordingly, CIS suggests DHS instead raise the penalty of a first offense to a minimum of five-year debarment, and all following offenses to permanent debarment from H-2 petition approvals. As a longstanding requirement for participation in the H-2 programs, petitioning employers should already be treated as "on-notice" of the prohibition. Acknowledging that the H-2A and H-2B programs create systematic disincentives for workers to report violations, CIS believes this alternative more strongly protects works from exploitation and trafficking, and better reflects the serious nature of these violations.

D. DHS Should Require All Employers Who Petition for Temporary Workers to Participate in Good Standing in E-Verify.

CIS opposes DHS's proposal to remove the requirement that H-2A workers can only port to an employer who participates in good standing in E-Verify. DHS initially limited H-2A portability to E-Verify employers to incentivize the use of E-Verify and to reduce opportunities for

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[24] *See* INA § 217(c).
[25] 88 Fed. Reg. 65040, 65055 (Sept. 20, 2023).
[26] *See* INA § 101(a)(15)(h)(ii).

unauthorized workers to workers to work in the agricultural sector.[27] CIS believes that these concerns remain of utmost importance. Additionally, because E-Verify participation provides negligible costs and significant benefits to employers who participate, DHS should not only maintain this requirement but extend it to all employers who petition for workers in either the H-2A and H-2B program.

E-Verify participation provides significant benefits to employers, most notably by reducing the risk of hiring unauthorized workers and providing such employers with the benefit of a rebuttable presumption that the employer has not violated section 274A of the INA.[28] E-Verify is also free to use, has a high rate of accuracy, and in the vast majority of cases, takes employers minutes (or less) to verify a worker's status.[29]

Requiring E-Verify participation also significantly reduces the likelihood that an employer will engage in harmful or illegal conduct because improper use subjects employers to significant criminal and civil liability. Employers who misuse E-Verify, including by only verifying some (but not all) workers they hire, are subject to:

- Civil penalties for knowingly hiring unauthorized workers;[30]
- Criminal penalties for making a materially false, fictitious, or fraudulent statements or representation or false document knowing to contain any materially false, fictitious, or fraudulent statements to the federal government;[31]
- Criminal penalties for knowingly possessing identification documents with the intent to defraud the United States;[32]
- Criminal penalties for using, obtaining, accepting, receiving, any document prescribed by statute for the regulation for employment in the United States knowing it to be forged, counterfeit, altered, falsely made, or procured by fraud or unlawfully obtains;[33]
- Criminal penalties related to Social Security Fraud;[34]
- Criminal penalties related to tax fraud;[35] and
- Criminal penalties for conspiracy offenses.[36]

Widespread E-Verify use, combined with adequate worksite enforcement, are two of the most effective tools DHS has to execute its mission, improve labor conditions for both U.S. and foreign workers, and address the root causes of illegal immigration and trafficking into the

[27] *See* 73 Fed. Reg. 8230, 8235 (Feb. 13, 2008); 73 Fed. Reg. 76891, 76905 (Dec. 18, 2008).
[28] U.S. Citizenship and Immigration Services, *Why Should I participate in E-Verify* (Apr. 2014).
[29] *Id.*; *see also* U.S. Citizenship and Immigration Services, *E-Verify is Business Friendly* (2018); U.S. Department of Homeland Security, *E-Verify Performance* (2023).
[30] INA § 274A(e)(4).
[31] 18 U.S.C. § 1001(a).
[32] 18 U.S.C. § 1028.
[33] 18 U.S.C. § 1546.
[34] 42 U.S.C. § 408.
[35] 26 U.S.C. § 7206(1).
[36] 18 U.S.C. § 371.

United States. Accordingly, DHS should take every opportunity to require H-2A and H-2B petitioners to participate in the program.

III. Additional Reforms Needed to Curtail Substantial Fraud and Abuse in the H-2 Visa Programs

DHS should work with DOL immediately to reform the H-2 programs to protect workers from exploitation and unfair labor competition.[37] CIS recommends DHS work with DOL utilize their regulatory authority to:

- Require employers to pay H-2 workers higher wages;
- Require USCIS to prioritize the selection of H-2B 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 the ability of law-violators' to petition for H-2 workers;
- Create a formal complaint in-take system for DOL's website, SeasonalJobs.dol.gov; and
- Resume and expand worksite enforcement.

Additionally, the DHS 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-2 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.

Section 218 of the INA requires that "employment of the [H-2A worker] in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." Regulations require employers to pay H-2A workers at least a prevailing wage, the Federal minimum wage, or state minimum wage, or wage rates set by DOL, called the Adverse Effect Wage Rate (AEWR), whichever is highest.[38] DOL sets the AEWR for each Standard Occupational Classification (SOC) code or codes assigned to a job, which is based on the job description provided on an employer's application.[39] Studies have shown that H-2A workers are paid less than comparable non-agricultural jobs – making employment in such

[37] 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).
[38] *See* 20 C.F.R. § 655.122(I).
[39] U.S. Department of Labor, *H-2A Adverse Wage Effect Wage Rates* (Jun. 30, 2023).

occupations noncompetitive for U.S. workers who may be eligible to work in other professions, if they are even selected by employers.[40]

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.[41] 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.[42]

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.[43] 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.[44]

Accordingly, DOL should amend its 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 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.

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[40] Costa, Daniel, Economic Policy Institute, *The Farmworker Wage Gap, Farmworkers earned 40% less than comparable nonagricultural workers in 2022* (Oct. 5, 2023).
[41] 20 CFR § 655.10.
[42] *See* INA § 101(a)(15)(H)(ii).
[43] 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).
[44] 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.

Additionally, employers should be required to pay for housing and transportation for 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.[45]

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 the Selection of H-2B 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 Only Provide Prosecutorial Discretion to Workers Who Report Violations of INA § 274A 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.[46] 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. 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

[45] Colleen Owens, et al., Urban Institute, Northeastern University, *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States* (Oct. 2014).
[46] U.S. Department of Homeland Security, *DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations* (Jan. 13, 2023).

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."[47] 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 to Curb Abuse by Employers and Third-Party Contractors and Create a Certification Process for Third-Party Recruiters.

To reduce the risk that H-2 workers will be exploited at their worksites, CIS strongly recommends that DOL screen prospective H-2 employers on the front-end of the H-2 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-2 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.[48] In the H-1B process, only employers with approved registrations are able to file cap-subject petitions.

While regulations already authorize DOL to debar employers from participation in the program, in practice, the agency rarely uses this authority.[49] The agency's most recent publication of debarred entities includes just 54 employers.[50] 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

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[47] Memorandum to 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.
[48] U.S. Citizenship and Immigration Services, *H-1B Electronic Registration Process* (Apr. 25, 2022).
[49] 20 C.F.R. § 655.73.
[50] Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, *Program Debarments* (Sept. 2020).

industries between 2000 and 2021.[51] 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.[52]

Implementing a front-end screening system would provide workers with protection 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-2 workers, but directly profit from the placement of H-2 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. DHS Should Work with DOL to Create a Complaint Intake System.

CIS strongly recommends that DHS work with DOL create a formal complaint-intake system for U.S. workers to report employers who overlook them for jobs listed in 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-2 program to supplement their workforce. DOL can subsequently refer active concerns to DHS for audit and enforcement purposes.

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*.[53] 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, 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.[54] Under this policy, officers are also prohibited from enforcing the law anywhere "near" these locations, an imprecise standard that has "no bright-line definition."[55]

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[51] 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).
[52] *Id.*
[53] Memorandum to 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).
[54] *Id.*
[55] *Id.*

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.*[56] 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,[57] 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.

IV. Conclusion

DHS must withdraw its unauthorized and unlawful provisions that encourage H-2A and H-2B applicants to apply for adjustment of status, in violation of the requirements Congress imposes on these nonimmigrant classifications.

Likewise, DHS must eliminate the provisions that repeal the list of countries that are eligible to participate in the H-2A and H-2B programs. DHS has not justified its policy decision to weaken the integrity of both temporary work programs and has improperly withheld information from the public regarding the basis of its decision.

While CIS supports increasing protections for migrant workers, generally, CIS believes that DHS must impose stronger penalties to employers who are found to have violated requirements of the H-2 programs. Additionally, DHS should only permit temporary workers to port to employers who use E-Verify, and should generally require all employers who participate in the H-2 programs to participate in E-Verify.

CIS also believes that the reforms aimed at protecting migrants do little to address the serious violations of labor, criminal, and immigration law that are facilitated by the H-2 programs and

[56] Memorandum to 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).

[57] Memorandum to 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).

the federal governments' reckless failure to engage in meaningful audits of the programs. DHS must work with DOL to reform the H-2 programs to:

- Require employers to pay H-2 workers higher wages;
- Require USCIS to prioritize the selection of H-2B 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-2 workers;
- Create a formal complaint in-take system for DOL's website, SeasonalJobs.dol.gov; and
- Resume and expand worksite enforcement.

Sincerely,

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