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Samantha Deshommes
Chief Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
Mailstop 2140
20 Massachusetts Avenue NW
Washington, DC 20529

RE: DHS Docket No. USCIS-2021-0010 – DHS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

Comments submitted via https://www.regulations.gov/document/USCIS-2021-0010-0001.

Dear Ms. Deshommes:

Thank you for accepting these comments.

Wafla is a non-profit 501(c)(6) membership organization comprised of nearly 800 agricultural and seasonal employers. Wafla was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards.

In 2021, wafla filed H-2A applications for more than 200 member employers who collectively employed more than 16,000 individual H-2A workers. In addition, wafla employer members employed more than 20,000 U.S. workers. We assist farmers with their workers' housing needs and offer human resource training and advice.

We have seen interest and participation in the H-2A visa program grow over the past decade, as our members, agricultural employers, have found it increasingly hard to fill agricultural jobs. Their only option to help remedy this labor shortage under current law is the H-2A program. Without this program, farmers of labor-intensive commodities would not currently be able to grow those crops, which are vital components in our national food security system.

Our country needs a robust food supply and needs farmers and farmworkers to produce that food. As such, it is imperative that the H-2A guestworker program work efficiently and without artificial barriers. However, due to the nature of the national – and increasingly international – agricultural marketplace, farmers are severely limited in their options to pass on increased costs to consumers. Higher input costs, such as the fees proposed by the Department of Homeland Security in this rule proposal, jeopardize the continued viability of agricultural employment and hamper domestic food production.

Agencies are required to set fees for services that are fair based on the cost to the government and the value of the service to the recipient. First and foremost, the fee must be fair.

This Notice of Proposed Rulemaking (NPRM) proposes a fee structure that is not fair and therefore violates the law. It is not fair because it imposes a new standard – the ability to pay – that is inconsistent with the law. It is not fair because it imposes this new standard on some beneficiaries but not others. Individual visa applicants, even those with large family fortunes, are exempt from the "ability to pay" calculation. Finally, it is unfair because the proposed metric to measure a company's ability to pay, total revenue, is not predictive of the ability of a company to pay fee increases that in some cases are several hundred percent higher than the USCIS fees they currently pay.

The last DHS/USCIS proposal for a fee increase was mired in litigation and ultimately blocked. This NPRM will likely face similar legal scrutiny.

We urge you to scrap the new "ability to pay" standard and return to a fair, basic fee-setting proposal based on the cost to the government and the value of the service to the recipient for only the specific services that are actually necessary.

1. **DHS is required to charge fairly for the services it provides. There is no legal basis to justify altering fees based on the agency's subjective determination of the beneficiary's ability to pay.**

Numerous statutes, court decisions, OMB, GAO, and OIG guidance documents (some of which are cited in the NPRM) establish the general rule that **fees charged by agencies should fairly reflect the cost of the services provided and the value to the recipient.** The governing law for agencies who charge fees for services is 31 U.S.C. 9701(b). It requires agency heads to set ***uniform*** fees that ***shall be****:*

> *(1) fair; and*
>
> *(2) based on—*
>
> > *(A) the costs to the Government;*
> >
> > *(B) the value of the service or thing to the recipient;*
> >
> > *(C) public policy or interest served; and*
> >
> > *(D) other relevant facts.*

The standard for fee setting has long been described as the "beneficiary pays" standard, wherein the agency determines the direct cost for each service, along with the indirect costs to run the agency, and fairly distributes these costs among beneficiaries.

This NPRM proposes to overlay the "beneficiary pays" system with a fee structure based on the agency's subjective determination of an entity's "ability to pay." This "ability to pay" proposal runs afoul of the statutory requirements for fees to be uniform and based on actual costs.

The metric used by DHS to determine the ability to pay is the total revenue of a company. The metric eliminates individual petitioners, even ones who may have large personal or family fortunes. Only companies are charged the surcharge proposed in the NPRM. This is patently unfair. The "ability to pay"

based on the company revenue formula is unfair to farmers. Farming is a low-margin, high-cost business. Many small family farms generate relatively large revenues but little or no profit.

Because it violates the governing statute, this NPRM will almost assuredly be struck down by courts if not changed to make it fair to all petitioners.

2. The DHS fee-setting NPRM violates the Immigration and Nationality Act and other specific guidance provided to the agency.

In 2017, the DHS Office of Inspector General (OIG) conducted an audit of the H-2 petition fee structure to determine whether fees associated with H-2 petitions were equitable and effective. **Their conclusion: "USCIS' H-2 petition fee structure is inequitable and contributes to processing errors."**[1]

In its 2017 report, the DHS OIG admonished USCIS noting the following:

> According to Federal law, fees should be fair and based on the cost to the government and the value of the service provided to the recipient. Federal user fee principles state that agencies should assign costs in a way that is equitable to those who use and benefit from the services provided. Specifically, Office of Management and Budget (OMB) Circular A-25 implements the law by requiring that each identifiable recipient be assessed a user charge that is at least as great as the cost to the Government for providing such services. Similarly, GAO's user fee principles recommend that agencies charge different fees to different users commensurate with the costs of providing services to these users.[2]

The NPRM proposes a new fee regulation that disregards the 2017 OIG audit recommendation to the agency to set fees that are "fair and based on the cost to the government and the value of the service provided to the recipient" and are "at least as great as the cost to the Government for providing such services." USCIS proposes charging some fee-paying petitioners less than the cost to provide the service.

In the Immigration and Nationality Act, Congress exempted certain beneficiaries of immigration services from paying for the services they received and directed DHS to recover this shortfall from all fee-paying beneficiaries. 8 U.S.C. 1356(m) provides:

> **(m) Immigration Examinations Fee Account**
>
> Notwithstanding any other provisions of law, all adjudication fees as are designated by the Attorney General in regulations shall be deposited as offsetting receipts into a separate account entitled "Immigration Examinations Fee Account" in the Treasury of the United States, whether collected directly by the Attorney General or through clerks of courts: *Provided, however*, That all fees received by the Attorney General from applicants residing in the Virgin Islands of the United States, and in Guam, under this subsection shall be paid over to the treasury of the Virgin Islands and to the treasury of Guam: *Provided further*, That **fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to**

[1] DHS OIG, "USCIS' H-2 petition fee structure is inequitable and contributes to processing errors," March 17, 2017. Report available at https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-42-Mar17.pdf.
[2] Ibid., p. 4.

> **asylum applicants or other immigrants**. Such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected. *(Emphasis added.)*

Congress explicitly directed DHS to set its fees to cover the "full costs" of its services. With regard to USCIS, Congress directed the agency to deposit all adjudication fees into an account to offset receipts and set its fees at a level to ensure that the agency recovered its costs. The fiduciary nature of this arrangement is underscored in the INA, 8 USC 135(n), which provides:

> **(n) REIMBURSEMENT OF ADMINISTRATIVE EXPENSES; TRANSFER OF DEPOSITS TO GENERAL FUND OF UNITED STATES TREASURY**
>
> All deposits into the "Immigration Examinations Fee Account" shall remain available until expended to the Attorney General to reimburse any appropriation the amount paid out of such appropriation for expenses in providing immigration adjudication and naturalization services and the collection, safeguarding and accounting for fees deposited in and funds reimbursed from the "Immigration Examinations Fee Account."

In combination, the plain language of these statutes directs the agency to use a *fee-for-service* approach and to carefully monitor reimbursements of the fees it charges. Fee-for-service, when applied to agencies, is called *activity-based costing* (ABC). It is detailed in OMB circular A-25 and elsewhere.[3] Congress did not authorize DHS to use its monopolistic price-setting powers to garner excess profits from employers to whom it provides services, and nowhere does it allow the agency the discretion to charge more to applicants on the basis of what the agency believes the applicant can afford.

Congress exempted asylum seekers from paying fees for immigration services and directed DHS to set fees such that the fees it recovers include ". . . the costs of similar services provided without charge to asylum applicants or other immigrants."[4]

Congress did not provide DHS with the discretion to set fees based on the agency's apparent political agenda. The agency and the Biden Administration have evidently pursued a political agenda permitting uncontrolled illegal entry, including for people allegedly claiming asylum, at the southern border. Now in response to that lawlessness, the agency proposes to pay for the processing crisis it has created by imposing gigantic cost increases on entities that follow the law and seek to hire legal migrants with visas.

In several portions of the NPRM, DHS concedes that Congress recognized the large and growing crisis of asylum seekers. DHS further concedes that Congress made a large appropriation in FY 2022 to fund services provided to asylum seekers. Despite receiving the additional appropriations, the agency still seeks to saddle law-abiding employers with the costs of financing the Administration's failure to enforce the southern border and encouragement of massive irregular migration to the United States. In so doing, DHS tries to blame Congress for this crisis by stating: *"USCIS continues to emphasize that Congress could reduce the burden on our fee-paying customers by fully funding our humanitarian mission, as it does for other agencies.*[5]*"*

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[3] See https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf.
[4] See text of 8 U.S.C 1356(m) quoted above.
[5] See DHS FAQs referenced in the NPRM: "How did DHS calculate the various fee increases in the proposed rule?"

Other statutes grant fee exemptions or cap fees below the cost of providing the service and permit DHS to recover the shortfall from fee-paying beneficiaries. For example, the filing fee for Temporary Protected Status (TPS) is capped at $50, and this fee does not cover the cost of adjudicating these benefit requests. *See* INA sec. 244(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B). However, in these instances, the exemptions and caps were specifically authorized by Congress and were not granted by sole authority of the agency.

In 2019, DHS proposed a fee-setting regulation that would have substantially increased agency revenue, but it was enjoined by the courts. Because of this fact, the agency should return to federal law, DHS OIG audit findings, and other federal mandates to promulgate a simple and fair regulation in which USCIS:

- **Clearly identifies** the cost for each service it provides. The cost should include the indirect cost of running the agency and the direct costs attributable to each service.
- **Clearly articulates** the shortfall associated with asylum seekers and others who have been statutorily granted a reduced fee.
- **Fairly** spreads the cost of subsidized services among all fee-paying visa beneficiaries.
- **Proposes** a separate levy to each fee-paying beneficiary to cover the shortfall.
- **Iterates** the exact appropriation it will need from Congress to cover this shortfall.
- **Returns** the separate levy to fee-paying beneficiaries if Congress appropriates the fee requested by DHS to cover visa beneficiaries who do not pay the cost of services received.

3. DHS lacks the discretion to reduce or waive fees, shift fees among fee-paying beneficiaries, or require that a small subset of beneficiaries bear the entire burden of any surcharges it imposes.

The NPRM proposes a separate asylum surcharge that will be charged only to one group – employers – who file on behalf of workers. In addition to the asylum surcharge, the NPRM describes several groups of fee-paying visa applicants for whom USCIS would charge less than the cost of the services it provides. The NPRM further proposes that other visa applicants pay more to cover the shortfall. This arrangement is unfair and is prohibited by law.

Congress has exempted certain visa beneficiaries from fees or capped fees for other beneficiaries at less than the cost to provide the service. In other circumstances, courts are permitted to waive fees on an individual basis when justice requires it.

Congress and the courts have the ability to exempt beneficiaries and waive fees. DHS does not. In this NPRM, DHS proposes to create, through supposed agency discretion, four distinct types of visa services beneficiaries:

- Beneficiaries whose fees are waived by DHS (not Congress or the courts).
- Beneficiaries who pay fees, but whose fees are set by DHS at less than the cost of the services provided.
- Beneficiaries who pay the cost of the service they are requesting, with no further contribution to the costs for groups whom Congress has exempted from charges.
- The subsidizing group. These petitioners pay the cost of the services they request, an inflated asylum surcharge, and other increased fees and charges to cover all of the costs of all other visa applicants for whom USCIS proposes to undercharge.

The approach violates both 31 U.S.C. 9701(b) and 8 U.S.C. 135(m). The agency lacks the legal discretion to provide discounts and shift costs except for what is explicitly directed by Congress.

USCIS is not permitted to favor one group of visa beneficiaries over another based on the agency's political agenda. It cannot give a discount to family-based visa applicants and ask employment-based visa applicants to pick up the tab. But that is precisely what the NPRM proposes, without any citation to law permitting such action. Instead, the agency just claims that it can make such decisions based on its own discretion.

4. **DHS argues that it has policy discretion to favor one class of visa applicant over another. If this is the case, the policy should favor labor-intensive agricultural employers who strive to hire a legal workforce.**

The NPRM places labor-intensive agricultural employers who provide fresh fruits and vegetables for our nation in the subsidizing group. These farms have huge labor costs and lack a sufficient domestic workforce. The choice for farmers is to use the H-2A program or hire domestic workers who may, in actuality, lack sufficient legal work documentation.

From a policy standpoint, it is unimaginable that DHS would propose penalizing farmers. Labor-intensive agriculture in America is hamstrung by competition from foreign sources where wages are a fraction of what farmworkers earn in America, and where safety and sanitation do not meet robust U.S. standards. Did DHS consider these perspectives when drafting this proposed rule? Evidently not.

Small farms are disappearing at a rapidly accelerating pace. Instead of increasing costs disproportionately on farmers who use the H-2A legal worker program, DHS should revise the proposal to alleviate the costs to farmers and help keep them in business. Did DHS consult with USDA about the specific impact of the NPRM on small farms before proposing it? Evidently not.

5. **It is unfair to charge one group of visa applicants more based on their supposed ability to pay and not others.**

Even if DHS has the authority to apply a means test to visa applicants and increase charges based on the ability to pay, it could never be fair to means test only one class of fee-paying applicants. Yet this is precisely what is proposed in the NPRM. An individual or family with a large fortune is not required to pay a surcharge to sponsor a spouse or family member for legal permanent residence, but a small family farm with few or no resources will be charged the surcharge. It is patently unfair – and therefore violates the law – to base the fee on the ability to pay for some beneficiaries but not others. If DHS intends to continue with the ability-to-pay formula, we urge the agency to extend its means testing to all fee-paying beneficiaries. Failure to do so is a violation of the law.

6. **Assuming DHS has the authority to means test some recipients of its services, to discriminate in charges imposed on fee-paying beneficiaries, and the discretion to exempt certain beneficiaries, the test proposed to determine whether a fee is justified – the amount of the fee as a percentage of total revenue generated by a business – is devoid of any economic basis that is predictive of whether a farm can withstand fee these astronomical increases well in excess of 100 percent.**

As noted above, the law requires USCIS to set fees so that the agency recovers its costs to provide the service. DHS asserts considerable discretion to alter fees. This discretion is not contained in any law. In

the agency's own words, it charges some fee-paying applicants less than the cost to deliver services and charges others much more – at its sole discretion and without statutory mandate.

How does DHS justify its massive fee increases? In a classic reduction to the ridiculous formulation, DHS compares the fees it charges with the largest figure it can find for a company – total revenue. According to the Q&A referenced by the NPRM, the agency director has determined that the additional fees employers "must pay DHS to file a petition are not significant compared to even a small petitioner's revenue and profit."

Really? Some farms make little or no profit. The amount of revenue generated by a petitioner has little or no relation to profit. Despite the statement in the NPRM that "revenue and profit" are used for the comparison, it is clear that profit is not a factor at all. The base fee for a single H-2A application for even the smallest farm with 10 or fewer workers is proposed to increase 145 percent, from $460 to $1,130, when the surcharge is included. If that same farmer is required to extend these 10 workers for even one week due to a late fall or a large harvest, a separate fee is imposed that jumps from $460 to $1,690, a staggering 267 percent. Taken together, the fee increase for even the smallest farm is $1,900.

Most farms need more than 10 workers. Labor-intensive agriculture is, in fact, labor-intensive. Additionally, many farms are forced to file several H-2A applications for different crops, different jobs, and different seasons. For these employers, the 150-200 percent fee increase for each application is further multiplied. These fees are not insignificant, and they are only one of many fees and costs that farms must absorb to hire a legal and stable workforce.

7. There is no rational policy or economic basis to justify the extraordinary fee increases being proposed for labor-intensive agriculture.

Agencies are free to change policies. In this NPRM, DHS acknowledges shifting policies from a fee-for-service approach to one in which the agency will reward or discourage certain visa applicants. As proof of this policy shift, the NPRM proposes a 145 percent increase for H-2A unnamed employer applications, and a 267 percent fee increase for H-2A named employer applications of fewer than 25 workers.[6] (The imposition of a 25-worker limit is addressed later in these comments.)

As an initial observation, fee increases of more than 100 percent are shocking in any context, and commenters deserve a detailed explanation for these massive fee increases. How much does it actually cost USCIS to process an unnamed H-2A application? DHS refuses to reveal the actual costs for the petitions but concedes that these fees are more than the direct and indirect costs for USCIS to process the petitions.[7] Without being provided the actual costs, the agency prevents the public from having an opportunity to examine the data upon which the agency allegedly relies.

According to the NPRM, it takes 0.7 hours of staff time to process an H-2A application.[8] Considering only the base charge and not the asylum surcharge, the agency is charging farmers just over $757 per hour to process an H-2A application. The H-2B application process at USCIS is almost the same as H-2A. Indeed, some employers simultaneously file H-2A applications for agricultural jobs and H-2B applications for

[6] NPRM Table 1, with $600 asylum surcharge added to both.
[7] Although NPRM Table 9 states that the fee for an I-129 petition for H-2A is 100 percent of the fee-paying cost, the agency admits that employer petitioners must subsidize other petitioners who are charged less than the cost of the service.
[8] NPRM Table 10, p. 448.

non-agricultural jobs such as packing houses or food processing facilities. But USCIS charges less than $652 per hour to process an H-2B application. The agency provides zero explanation of, or basis for, the different rate that is charged to farmers as compared to employers who apply for non-agricultural H-2B workers. Although the agency is free to shift policies, as it attempts to do here, the agency must provide a rational and logical explanation for its new policy choices. None is forthcoming in the NPRM, as this example illustrates.

On a more fundamental level, DHS states that it is shifting its policy from a strict fee-for-service approach to a more nuanced approach in which the agency alters fees to assist or encourage some visa categories and asks other applicants to subsidize the reduced fees it charges to others.

Even if one accepts that DHS gets to choose winners and losers based on its policy goals, there is no rational policy for the decision to punish farmers who are trying their best to feed the nation with a legal workforce. Moreover, this policy directly contradicts the overall objective of DHS to encourage legal immigration channels and discourage undocumented immigration. It is unfathomable that DHS could fail to recognize that, for farmers, there are essentially two choices for seasonal labor: the H-2A program or undocumented workers. This dramatic increase in the cost of the legal worker H-2A program will make it more difficult for farmers to use the program and thus incentivize employers to use undocumented immigration, which will undoubtedly include scores of people released into the interior of the country with pending (and in many cases, unjustified) asylum claims. **Yet there is not one sentence of discussion in the NPRM of the policy objective of encouraging farmers to hire a legal seasonal workforce.**

Wafla urges DHS to review the information concerning undocumented immigration of agricultural workers provided in the U.S. Department of Labor National Agricultural Workers Survey.[9] The latest survey results show that while 63 percent of farmworkers report being born in Mexico, 56 percent of those surveyed claim to be legally present – either U.S. citizens, permanent residents, or holders of H-2A work visas. Thanks to the growing use of the H-2A program, the percentage of legally documented farmworkers increased through the 2019-2020 NAWS survey.[10] The exorbitant fee increases proposed in this NPRM are not the only fees farmers in the H-2A program must pay. When these increases are added to fees already imposed by the Department of Labor, the State Department, and some local jurisdictions, farmers are more likely to abandon the H-2A legal worker program and return to hiring workers who utilize fraudulent employment documents, as was predominant as recent as a decade ago according to prior NAWS surveys.

This NPRM even recognizes the inevitable subsidy that will flow to undocumented immigrants: ***"****For example, there is no fee to adjust status for an applicant who is in deportation, exclusion, or removal (Form I-485) proceedings before an immigration judge, when the court waives the application fee, which occurs quite frequently.*[11]***"***

The irony in the DHS proposal is rich. DHS apparently intends for farmers who use the H-2A legal worker program to subsidize petitions of undocumented workers who seek a stay of removal, so that they can presumably remain working (illegally) in the U.S. **If DHS desires to shift its policy to encourage certain types of visa categories, the agency should instead shift policy to facilitate the H-2A program – which**

[9] Available at https://www.dol.gov/agencies/eta/national-agricultural-workers-survey.
[10] NAWS research report #16, "A Demographic and Employment Profile of U.S. Farmworkers, 2019 – 2020 NAWS survey, https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf.
[11] NPRM, p. 416.

was explicitly created by Congress to assist farmers and U.S. agricultural production – and *lower* the costs of participating in the H-2A program rather than raise them.

8. The arbitrary imposition of a 25-person limit for named H-2A applications is unfair.

DHS proposes to dramatically increase the cost for I-129 (H-2A and H-2B) applications with "named workers" and to limit the number of workers permitted for one I-129 petition to 25. This is a significant deviation from the current practice, where there is no distinction between "named" and "unnamed" I-129 petitions and where there is no limit to the number of named workers permitted on a petition.

The decision to charge differently for named worker petitions may sound rational on its face, but it ignores reality. DHS states that it takes more time and effort to process named worker applications because USCIS conducts a background check for each worker. But the vast majority of petitions with named workers are petitions to transfer workers from one employer to another. The workers in question are already in the country on valid visas. USCIS is not required to conduct yet another background check on those workers who just received a visa a few months prior and were vetted by the U.S. State Department. These workers have already undergone a background check. This is a classic example of a government agency creating unnecessary additional work for itself and then claiming it is overworked and needs more funding. There is no need for the agency to spend significantly more time on these named petitions. In fact, the agency could likely spend far less time. At a minimum, the agency should exempt transfer petitions from this policy.

In addition, the proposal to impose an asylum surcharge of $600 per application combined with a cap on the number of workers listed on a single petition creates a proposal that is patently unfair. **It leads to the absurd situation wherein a farmer who requires 26 workers will pay USCIS fees of $68 per worker for the first 25 workers and $1,690 for the 26th worker.** Additionally, the NPRM **disadvantages small farmers**. A farmer who needs only 5 workers pays USCIS fees of $338 per worker, while a farmer who requires 25 workers again pays $68 per named worker. Please change the formula in the final rule so that it is fairer, as suggested here.

There is no good reason for requiring that farmers who need 30 or 40 workers file a second petition just because they name the workers. It is a waste of resources, expressly introduces inefficiencies into the system, and doubles the chance of a problem for these time-sensitive agricultural applications. Undoubtedly, DHS is interested in obtaining additional $600 asylum surcharges for every new petition that is filed. The ability to multiply the number of surcharges is not a rational or fair policy consideration.

For the agency to charge $68 per worker for the first 25 workers requested and $1,690 for the 26th worker is unfair and violates 8 U.S.C. 9701(b). We urge DHS to change the formula in the final rule to that it is fairer to all petitioners.

9. The Department did not analyze the substantial cost differential for a named beneficiary request when farmers file short visa extension requests for workers in the country and for whom they have already obtained a visa, compared with employers who file other named beneficiary requests.

DHS fails to recognize a special class of petitions wherein farmers file short extension requests for named workers in the country who already have obtained a visa. The agency included no analysis of the class of petitions in the NPRM and has failed to consider that it can **dramatically decrease the amount**

of time necessary to process a significant number of petitions, thus saving resources and decreasing costs.

H-2A visas are generally limited by DOL to 10 months or fewer, and the average H-2A term is six months.[12] Each year, workers return home at the end of the season. The next year (or season), farmers are required to file a new request with DOL and receive a new labor certification. For workers coming from Mexico or another country, this certification is filed with the USCIS form I-129 as an **unnamed worker petition. Each year, H-2A workers receive a new background check from the State Department as part of their visa application process.** USCIS states that the time to process these unnamed worker petitions, regardless of the number of workers, is 0.7 hours per petition.

Seasonal agricultural employers are required to specify the start and end dates of their respective seasons.[13] It is a violation of the regulation to artificially request a longer season for foreign H-2A workers.[14] DOL recognizes that sometimes the season may end later than normal and therefore allows farmers to file extension requests of up to 14 days without requiring an additional review and approval by the Certifying Officer. DOL recognizes that the same farmer is employing the same workers, who have received State Department vetting in the past year, and therefore requires no additional review for a simple 14-day extension. USCIS may argue that it must check to see if the H-2A workers in question have exceeded the mandatory 36-month limit for a consecutive stay in the United States. However, the maximum overstay for a worker for whom an extension has been requested could be only 14 days. Rather than USCIS going through an inefficient process of checking each worker to verify they are not overstaying the 36-month limit, a more efficient process to accomplish the same result would be to require employers to certify that these workers have been in the United States for less than 36 consecutive months.

USCIS should follow the lead of DOL by making agency procedures consistent and dramatically decreasing resources. When an agricultural employer requests an extension of up to 14 days for workers who are currently present in the country and have received a visa in the past year, USCIS should forego the background check. There is no reason for USCIS to conduct a background check for an employer to extend the visas of workers who have received a background check in the past 10 months and who wish to remain working with the same employer for 14 days or less**.** It is a waste of valuable resources.

We are open to working with USCIS to craft a more sensible and efficient process for USCIS when an agricultural employer requests a short extension of worker visas.

10. The Proposed Rule lacks basic information concerning the actual cost of the services provided.

Perhaps the most discouraging aspect of the NPRM is the failure to disclose the actual cost of providing each service, so that commenters can evaluate whether the fees are "**set at a level that will ensure recovery of the full costs of providing all such services"** as required by the governing law.

As an extreme example, the NPRM proposes raising the cost for an H-1B applicant to have the company's name listed in the annual H-1B lottery from $10 to $215 dollars, an absurd increase of 2,050

[12] See https://www.dol.gov/agencies/eta/foreign-labor/performance.
[13] 20 CFR 655.181(a)(1).
[14] Ibid.

percent. The agency assures commenters that the $10 fee previously charged was less than the cost to provide this service, raising the following questions:

- Why were the fees previously set too low? Did the agency feel the need to subsidize employers who seek skilled workers?

- What is the true cost to create a list for the estimated 273,990 companies who wish to enter the H-1B lottery?

- If DHS can state with certainty that the $10 fee is less than the full cost of providing the service, doesn't it stand to reason that the agency knows what this cost truly is?

In Table 9 on p. 443 of the preamble, the NPRM lists the fee-paying percentage for this service (and other employer-related services) as 100 percent. Is this an admission that USCIS plans to charge employers well in excess of the cost to provide its services? In Table 10, the agency lists the number of hours required to complete each benefit request and concedes that H-1B registration takes no time at all. Finally, the proposed cost for the right for employers to register for the H-1B lottery ($215) multiplied by the number of companies who are projected to register is approximately $60 million. We are left to wonder what the cost of creating this service truly is and how much is an overcharge to fund other beneficiaries. This is vital information for the public to analyze the fairness of the proposed rule.

This is one extreme example of how DHS refused to provide the public with basic cost information for delivering services, and it highlights the agency's lack of transparency in reporting to the public what the actual costs are for these services, as required by the statute. Without access to the data upon which the agency relies, the public is prevented from analyzing the data and effectively commenting on or challenging the agency's rationale.

Thank you for accepting our comments. We look forward to working with you to craft a revised regulation that meets the needs of the agency, farmers and farmworkers, visa applicants and visa holders, and our nation.

Sincerely,

Enrique Gastelum
Chief Executive Officer
wafla
975 Carpenter Rd NE, Ste 201
Lacey, WA 98516
egastelum@wafla.org
(360) 455-8064