November 20, 2023

Charles L. Nimick
Chief, Business and Foreign Workers Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: CIS No. 2740-23; DHS Docket No. USCIS-2023-0012, RIN 1615-AC76 – Modernizing H-2 Program Requirements, Oversight, and Worker Protections

Comments submitted via https://www.regulations.gov.

Dear Mr. Nimick:

Thank you for accepting these comments.

Wafla is a non-profit 501(c)(6) membership association 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 2022, wafla filed H-2A applications for approximately 250 member employers who collectively were certified for more than 17,000 H-2A positions. 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.

Wafla has long been an advocate for workers and for our member farmers. Workers coming to the United States on a temporary visa should be a fair deal for all involved. This is why farmers receive a steady, legal supply of labor while the workers receive free housing, free transportation, guaranteed contracts, and high hourly wages set by the government.

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 difficult 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 be unable to grow those crops, which are vital components in our national food security system.

Agriculture is unlike many other industries because it involves multiple production variables and requires flexible work schedules. The success of agriculture is entirely reliant on weather patterns, much more so than any other industry. 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. Increases in input costs, such as labor, can squeeze these family businesses perilously close to the edge of going out of business. Higher labor and regulatory costs contribute to jeopardizing the continued viability of agricultural employment and hampering domestic food production. Our country requires 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.

The Department of Homeland Security (DHS) released this Notice of Public Rulemaking (NPRM) for public comments during the autumn months of 2023. These months of September through November are the busiest for the agricultural industry because of crop harvest. As such, stakeholders have had limited time and resources to review, analyze, and comment on this proposal. The limited time period and time of year has not allowed for proper vetting and response by stakeholders. A fair proposal would have considered this timing and allowed for a longer public review process at a more convenient season for the affected industry.

This NPRM, which focuses on worker protection and flexibility, is a mixed bag. Regarding worker protection, wafla strongly believes that workers should not be charged recruiting fees, and laws against charging recruiting fees to workers need to be enforced. However, the enforcement methods suggested by DHS in this proposal are heavy-handed and would force employers to prove their innocence. This approach is inconsistent and incongruent with the basic tenets of the American justice system. In contrast to the worker protection proposals, the proposed worker flexibility standards are much-needed improvements to the H-2 system.

We urge the Department to discard—or at a minimum rework—the worker protection provisions of this NPRM so that regulations against illegal fees can be enforced without forcing employers to prove their innocence. We also request that the Department adopt the worker flexibility standards, which will benefit workers and employers. H-2 program efficiencies will help facilitate vital domestic food production.

## **Comments**

Below are our comments on the details of the NPRM. For the Department's convenience, we have listed the original heading from the proposed rules, followed by our comments on that section.

## IV. Discussion of Proposed Rule

*A. Program Integrity and Worker Protections*

1. Payment of Fees, Penalties, or Other Compensation by H-2 Beneficiaries

a. Fees, Penalties, or Other Compensation "Related To" H-2 Employment

The Department appears ready to adjust its regulations to ensure H-2 workers are not paying fees "related to" their H-2 employment. These fees include the employer's agent or attorney fees, visa application and petition fees, and recruitment costs. They do not include fees, such as government-required passport fees, that are for the benefit of the worker and are the worker's responsibility. Workers should not pay fees to get onto a recruitment list or be allowed to work in H-2 employment. We agree with this goal and appreciate that DHS is attempting to define more accurately which fees the employer should pay and which ones the worker is responsible for.

The Department should make one clarification. We read the term "visa application" to mean the $205 for the DS-160 visa application owed to the Department of State to make an appointment. 8 CFR 214.2(h)(5)(xi)(A) clarifies that the visa is an allowed reimbursable cost. Also, prohibiting the reimbursement of the visa application fee could encourage workers to be dishonest on their applications regarding their previous immigration-related offenses, as they have nothing to lose if they are rejected. If workers must pay the fee and then reimburse the employer, there is some financial repercussion for workers who knowingly falsify their immigration histories on the DS-160 form. If DHS were to require an employer to pay the DS-160 fee upfront, we would expect more rejections and administrative holds by the consulate. This requirement would make the H-2A process less efficient and encourage dishonest behavior by applicants, not to mention financial impacts on employers. We believe "visa application" should be removed from this section because it is recognized elsewhere justifiably as a reimbursable cost.

b. Clarification of Acceptable Reimbursement Fees

The Department wishes to clarify that some fees are still allowed if those fees benefit the worker and are disclosed in the job order. This proposal is reasonable and fair to both the H-2 worker and the employer, and we support the inclusion of this clarification in this rulemaking.

c. Prohibiting Breach of Contract Fees and Penalties

The Department would like to list a "fee or penalty for breach of contract" in the list of prohibited fees. Apparently, DHS has seen these fees imposed, sometimes taken from a worker's final paycheck. Wafla agrees with the Department's assessment that these breach of contract fees should be prohibited and supports this part of the NPRM.

d. Strengthening the Prohibited Fees Provisions

The Department's proposals regarding employer penalties for violation are our biggest concern with this NPRM. We believe the standards to prove the employer did not know about prohibited fees being charged are extremely high. While we take a hard line against the charging of prohibited fees and appreciate the perspective of DHS that even fees that are ultimately reimbursed still negatively impact H-2 or potential H-2 workers, we are concerned that all H-2 employers cannot reasonably know everything happening throughout the supply chain.

This proposal would require employers to monitor their entire recruitment and management chain strictly. Employers should monitor their supply chains as a best practice. Still, even one slip-up, one area of ignorance, could mean the difference between staying in business or being penalized and going out of business. Even when employers intend to do the right thing and attempt to have procedures in place to protect workers, the requirements of this proposal are relentless. Employers ought to know what is happening regarding fees, but even if they do not and then work to remedy the situations, the requirements of this rule proposal offer no relief. Employers must perform their due diligence to review the practices of agents, attorneys, facilitators, recruiters, or other employment service providers or risk being held liable with their petitions being denied and revoked.

Although the petitioner should take steps to ensure they are working with reputable recruiters or agents, they should not be held liable for actions of third parties if they took immediate remedial action upon learning about a potential violation.

In this context, we would extend the same argument to joint employers, associations, agents, facilitators, recruiters, and similar employment services. These entities and services should not be held liable when they are not involved in charging prohibited fees to workers or when they find out about a problem and take immediate corrective action.

Specifically, we have concerns with the Department's language that states, "any determination that an H-2 worker has paid or agreed to pay a prohibited fee to the petitioner's agent, facilitator, recruiter, or similar employment service would result in denial of the petition or revocation on notice, 'unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed.'" The shift in the burden of proof means that an employer, agent, etc., must provide evidence of their innocence rather than the time-honored practice of a person or entity being innocent until evidence proves them otherwise. We agree that impermissible fees should not be charged to H-2 workers, but these penalties against employers seem too harsh. Employers should not have to work to show their innocence.

Finally, the Department seeks input from the public on the types of evidence that may be relevant and available to meet its proposed standard. The examples offered by the

Department include "evidence of communications showing the petitioner inquired about the third party's past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources." This type of information is proprietary and should not be mandated to be disclosed to DHS for a phishing expedition. Is it common practice in other industries that service providers provide information about their revenue streams? The Department must show cause on an individual basis before requesting or demanding this type of information.

e. Consequences of a Denial or Revocation Based on Prohibited Fees

The proposal from the Department is that an employer with an H-2 petition denied or revoked for prohibited fees must be barred from the program for at least one year. This condition would apply even if any prohibited fees charged by the employer (with or without prior knowledge) or anyone else in the recruiting process had been reimbursed and the worker made whole.

We understand that the Department wants to draw a hard line on fee violations to stamp out an illegal, unethical, and unwarranted process, but a U.S.-based employer may not be aware of the illicit conduct of a foreign recruiter's employee. Under this proposal, if such an employer found out about the violation, self-reported it to DHS, severed ties with the recruiter and/or the recruiter's employee, and reimbursed the affected workers to make them whole, the Department would not commend that employer. Instead, DHS would still bar that employer from the program for one year. If evidence constructively links the employer to a scheme to defraud workers, then this type of punishment is in order. But an employer committed to following the law should not be punished for someone else's illegal action.

How would the Department handle a situation in which government employees of the Northern Central American countries are committing fraud and charging fees? These countries have been actively promoted by the Biden Administration to seasonal employers as preferred options for recruiting workers into the H-2 programs. If the Department's proposal were to proceed, an employer could be held liable for fraud committed by foreign government workers. The employer has no authority or way of vetting the processes and employees of these government recruiters, and the employer should not be held liable when any entity or employee of the U.S. or foreign governments commits fraud. We urge the Department to reconsider this proposal and make the necessary changes to distinguish between these scenarios.

Also, if fee violations are found, DHS says that for the next three years, H-2 petitions will only be approved if the employer can demonstrate that all workers have been fully reimbursed for all fees, with no exceptions. Again, our concern is with the language used, i.e., "all" workers. What if the employer and/or Department have trouble contacting all

foreign workers who were on a contract two or three years before? Is this employer debarred for life because a former employee cannot be found and contacted to see if any prohibited fees were even charged? We understand the Department's fervor on this issue, but using absolute terms in rule language could unjustly penalize an employer. We urge DHS to review this proposed regulatory language carefully before finalizing it.

2. Denial of H-2 Petitions for Certain Violations of Program Rules

a. Mandatory Denial Based on Certain Violations

The Department discusses making final determinations of debarment from DOL H-2 programs for petitions that include findings of fraud or willful misrepresentation. We understand the need for penalties, but this proposal also contains a three-year lookback period, and the determinations could be based on administrative findings by the Wage and Hour Division (WHD) at the U.S. Department of Labor that are then reported to DHS. We are concerned that the three-year lookback period and the involvement of WHD are overstepping boundaries in time and between agencies. We recommend looking only at the current year based on what DHS can discover through its investigations.

b. Discretionary Denial Based on Certain Violations

The proposal includes stronger language and heightened scrutiny of H-2 worker recruitment processes. DHS wants the authority to deny or revoke H-2 petitions based on arbitrary, undefined standards such as perceived labor violations or an employer's lack of cooperation with the agency.

The Department's language about labor violations or violations of federal, state, or local laws (with a three-year lookback period) casts a net that is too broad. Under this proposal, DHS is also playing enforcer of other agency laws and rules when, in fact, those other agencies should be enforcing their own standards.

Denials could occur if an H-2 petitioner had an application revoked, is debarred, or received a civil monetary penalty. Denials could also occur if USCIS determines the beneficiary was not employed by the employer in the capacity specified in the petition, either through a false or inaccurate statement of facts in a petition or if the petitioner violated the terms and conditions of a petition. Information could come out after a WHD investigation or a notice of early contract termination. Finally, there is a three-year lookback on labor law violations. We believe all of these penalty proposals spread the net too far. We ask the Department to scale back the enforcement provisions of this rule proposal and not duplicate revocation and debarment mechanisms already used by other federal agencies like the Department of Labor in its enforcement of the H-2 programs.

c. Convictions and Determinations Against Certain Individuals

The Department wants a criminal conviction or final administrative or judicial determination to be treated as a conviction or determination against the petitioner or successor in interest. In other words, the employer is expected to exercise due diligence over its employees and contractors, and individuals acting on behalf of the company, such as owners, employees, and contractors, should not be allowed to avoid liability for convictions. Consequently, DHS proposes taking action against such individuals up to and including the denial of visas.

Wafla believes this penalty must be taken in only the most egregious circumstances. We again question the Department's rationale that corporate leaders must know everything everyone in its recruitment chain has done or is doing. Such omniscience on the part of the employer is aspirational but also unrealistic. No one person can know everything. The Department should consider human limitations as it considers the final adoption of provisions in the NPRM.

3. Investigation and Verification Authority

The Department states that it wants to exercise authority under the Immigration and Nationality Act to conduct interviews that could be on-site, by telephone, or electronically. DHS officials could perform site visits and interview the employer and workers employer on immigration issues, as well as view human resource records. It further demands access to job sites and farmworker housing. Failure to allow the Department access could be grounds for the denial or revocation of a petition.

We question the implementation of this authority. Much of what the Department describes already occurs in visits from agents from the U.S. Department of Labor and/or State Workforce Agencies. We understand each agency inspects and interviews for its own portions of state or federal law, but the description in this NPRM seems duplicative of other government inspections. We are concerned that DHS is claiming for itself a rather large grant of authority to conduct complex, time-consuming investigations. We believe the Department needs to provide further details of its intended inspections, visits, and investigations, along with a more thorough legal defense of those enforcement powers. Also, we ask the Department to coordinate efforts with other similarly situated government agencies so that multiple visits for similar reasons do not inconvenience employers and workers.

4. H-2 Whistleblower Protection

We understand that DHS seeks to extend whistleblower protections to H-2 workers that are similar to protections afforded H-1B workers. These protections allow workers to extend their stay with a new H-2 employer or change status because of retaliation for being a

"whistleblower" when the worker provides certain evidence. This treatment would excuse a worker of unlawful presence if the worker were a whistleblower.

While we do not oppose the inclusion of whistleblower protections into these rules, we have some questions about and concerns with some of the details of this proposal. First, what is the Department's jurisdiction on this matter? What is the statutory basis to justify including this proposal? Second, this proposal resembles many other state and federal protections already afforded workers. It is redundant, so why include it? Finally, according to the Department, whistleblower claims would not have to be made in writing. Any worker could claim to be a whistleblower, complain about a manager or employer, and receive whistleblower protections even if the complaint is false. The trigger would only need to be a verbal report of a potential violation of protected activity, which could include advocating for better pay or working conditions. Nothing must be made in writing. While a process for worker whistleblower protections needs to be established, there need to be more guardrails around it than what are currently contemplated by this proposed rule.

*B. Worker Flexibilities*

1. Grace Periods

The Department proposed harmonizing certain differences between the H-2A and H-2B programs regarding worker stays. Specifically, H-2A workers would be given ten days to enter the United States before employment. This provision is already included in the H-2B program. Moreover, this proposal would allow H-2B workers to stay in the United States for up to 30 days post-employment, a provision already afforded to H-2A workers. We support this proposal because it makes the two programs more efficient and provides uniformity in standards for affected employers and employees.

The Department's clarification on grace periods should be subject to the worker's three-year limitation on stay. As such, we understand and agree with DHS that a worker nearing the end of their three years would not get a full 30-day grace period.

The proposal for a 60-day grace period when a worker ceases employment before the work contract ends is fair. In situations usually outside of the worker's control, such as termination, resignation, or revocation of a petition by USCIS, the H-2 worker should be allowed to seek new employment. Again, this change seems fair and reasonable, and we support its inclusion in the NPRM.

2. Transportation Costs for Revoked H-2 Petitions

The DHS proposal would require an H-2A employer to pay a worker's return transportation if their petition is revoked. This requirement would be ported over from H-2B, creating some uniformity between the two programs. Also, the worker's transportation costs would not have to be paid by the first employer if the worker finds post-revocation employment. We believe this proposed change is fair and efficient, and we support it.

3. Portability

The Department seeks to enhance options for H-2 workers to be allowed to start work immediately upon filing a petition for an extension of status in the same category or on the start date of work petition, whichever is later.

This proposal would also remove the E-Verify requirement for an employer receiving the worker on a transfer, and the transfer would be acceptable if the worker has maintained their status, is within their authorized period of stay, and has not worked unlawfully.

We believe these conditions are fair and reasonable, and this proposed change is sound from both the employer's and the H-2 worker's perspectives. We support it because wafla has long advocated for increased portability for H-2 workers. This idea also gives H-2B employers significant cap relief, which means an H-2B worker can seek employment, remain longer, and not count toward an H-2B cap. The proposal seems to be a win-win for employers and employees.

4. Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa

The Department seeks to remove the "dual intent" standard from H-2 workers, which means family members or employers could file for permanent residence for an H-2 worker while the worker maintains their H-2 status. We support this change that will allow for more worker flexibility. H-2 workers are an essential part of the temporary, seasonal economy, and this change will possibly help them attain permanent residency. We know DHS will scrutinize the employer's job position and the possible conversion from an H-2 seasonal need to a permanent, year-round need. But this conversion will likely assist both the H-2 employer and the H-2 worker with ongoing labor needs and, we hope, eventual labor stability. We support this proposed change.

5. Removing "Abscondment," "Abscond," and Its Other Variations

We understand that some people have a negative connotation of the words "abscond" and "abscondment" and recognize that workers may sometimes have valid reasons for leaving their contracts. We do not object to the Department's proposal to replace these words with "does not show up for work for 5 consecutive days" or other similar phrases.

*C. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration*

1. Removal of the H-2 Eligible Countries Lists Provisions

Removing the eligible countries list provides another efficiency to the H-2 program. We support this change.

2. Eliminating the H-2 "Interrupted Stay" Calculation and Reducing the Period of Absence to Restart the 3-Year Maximum Period of Stay Clock

In these proposed rules, the Department suggests removing the interrupted stay provision and reducing the requirement for an H-2 worker to be absent from the United States for three months before the worker's 3-year visa limit can be reset. Instead, the Department proposes resetting a worker's 3-year limit after every 60-day absence.

This proposed change would be helpful to both H-2 workers and employers. It offers uniformity between the two H-2 programs, as well as increased efficiency and opportunity. We support this change.

*D. Severability*

We have no objection to including severability in this rule proposal.

*E. Request for Preliminary Public Input Related to Future Actions/Proposals*

DHS is seeking input on ways to inform H-2 beneficiaries who are already in the United States of actions being taken on their behalf.

The Department could add an email section to Attachment-1 of Form I-129. Doing so would allow USCIS to email the beneficiary (i.e., worker) that someone applied to amend their status. At times, this may result in more work for employers, agents, and associations, but it would be an efficiency that would benefit the worker.

## Concluding Remarks

Thank you for accepting our comments.

While we believe many of the enforcement provisions of these proposed regulations are too heavy-handed toward employers and hold employers accountable for actions and situations beyond their control, we are also encouraged that the Department has offered to make some necessary efficiencies to the H-2 program.

We hope the Department moves forward with its proposals regarding those efficiencies and increased worker flexibility, and we urge DHS to reconsider and rewrite the provisions dealing with increased enforcement and penalties. We agree with DHS that H-2 workers should not pay prohibited fees, and we offer to work with the Department and other authorities to eliminate this abhorrent, anti-worker practice. However, the penalties and penalty structures in these proposed rules are harsh, overbearing, and, in some cases, legally questionable. Holding employers liable for actions beyond their control and inverting the standards of justice so that the accused must prove their innocence presents a fundamentally unfair system.

We want domestic food production that is fair for producers, workers, agencies, and consumers. Wafla stands ready to engage in constructive dialogue with the Department and other stakeholders to accomplish these goals.

Sincerely,

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