

November 14, 2023

The Honorable Julie Su
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528

Dear Acting Secretary Su and Secretary Mayorkas,

We write to express our strong support for the following rules, proposed separately, by the Department of Labor (DOL) and the Department of Homeland Security (DHS): (1) Improving Protections for Workers in Temporary Agricultural Employment in the United States, DOL Docket No. ETA-2023-0003, proposed on September 15, 2023; and (2) Modernizing H-2 Program Requirements, Oversight, and Worker Protections, DHS Docket No. USCIS-2023-0012, proposed on September 20, 2023.

Farm workers are essential workers who play a critical role in the functioning of the United States economy and too often suffer wage theft, sexual assault, trafficking, and other forms of abuse and exploitation. The rule proposed by the DOL is an important effort to add new protections to promote worker self-advocacy, better protect H-2A workers against retaliation, make foreign labor recruitment more transparent and enhance the department's enforcement ability. The rule proposed by DHS is also an important effort to modernize and improve the H-2A temporary visa program by strengthening worker protections, improving recruiter accountability, and providing greater flexibility for H-2 workers. For these reasons, we urge DOL and DHS to swiftly finalize these proposed rules in their strongest form.

Farm Workers Should Have the Right to Advocate for Themselves and Engage in Protected Activities Without Fear of Retaliation from Employers

Workers in the H-2A program can be vulnerable to retaliation, which often discourages them from advocating for their rights. The proposed DOL rule would:

- strengthen farm workers' rights and ability to advocate for better working conditions without fear of retaliation;
- permit workers to designate a representative to attend any meeting between a worker and the employer where the worker reasonably believes that the meeting may lead to discipline, and prohibit employers from holding captive audience meetings unless the employer provides certain information to ensure that such meetings are not coercive;

- require H-2A employers to bargain in good faith over a labor neutrality agreement or explain their decision to not do so to prospective employees;
- target unfair treatment by employers who are intimidating or discriminating against workers; and
- allow farm workers to have guests, including union representatives and key service providers, in their living quarters in order to address the isolation and vulnerable living situations faced by farm workers and strengthen their rights to association and access to information and services.

These proposed changes would help address the intimidation and isolation faced by farm workers and equip them with more agency, access, and rights when seeking better working conditions.

Addressing Widespread Human and Labor Trafficking in the H-2A Program

Workers who come to this country on H-2A visas are vulnerable to labor trafficking. Polaris, which operates a National Human Trafficking Hotline, identified 2,841 H-2A workers who experienced labor trafficking from 2018 to 2020. During this time period, the report identifies a total of 15,886 survivors of labor trafficking, and when their visa status was known, 72 percent of these survivors had an H-2A or other temporary visa.¹ In late 2021, a federal investigation called “Operation Blooming Onion” led to the prosecution against multi-national traffickers in Georgia, Florida, and Texas who committed rape, kidnapping, and money laundering; with working conditions that led to two workers’ deaths; and which prosecutors called “modern-day slavery.”²

The proposed DOL rule would add urgently needed precautions such as directly prohibiting employers from confiscating a passport or other travel documents. It would also add needed transparency to the recruitment process, by requiring employers to identify and disclose the name and location of anyone soliciting H-2A workers on their behalf, and to submit a copy of all recruiting agreements. These changes would not only improve worker protections, but they would also bring the H-2A program in line with the H-2B program.

¹ Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63,750, 63,799 (proposed September 5, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-09-15/pdf/2023-19852.pdf> (citing "Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020," Polaris, May 2022, <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>).

² "Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment," United States Attorney's Office, Southern District of Georgia, November 22, 2021, <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>.

Protections Against Exploitative Practices Related to Worker Pay

The DOL rule proposes to target exploitative practices commonly used by employers, especially as it relates to worker pay. In 2021 and 2022, 73 percent of the back wages owed and civil penalties assessed by DOL were against H-2A employers.³ Less than one percent of agricultural employers are investigated per year but when DOL does investigate an agricultural employer, it detects wage and hour violations 70 percent of the time, indicating that wage theft by employers is grossly undetected.⁴ The rule proposed by DOL would make wages more predictable in the H-2A program by making new wage rates effective immediately. The DOL rule would also require employers to:

- notify prospective employees of the wages they'll be paying, whether it will be piece rate or another non-hourly rate, overtime pay, and whether there will be different pay rates for different tasks of the job;
- disclose minimum productivity standards, so that workers understand the material terms and conditions of the job, have a better understanding of what constitutes a termination with cause, and will not be subject to vague standards that are arbitrarily applied against them; and
- give notice when workers' start dates are delayed, and, when they do not, compensate workers for delays up to 14 days.

These proposals collectively create stronger protections against exploitative practices commonly used by employers, especially as it relates to worker pay.

Accountability for Unscrupulous Employers and related Third Party Abusers

The proposed DOL rule would improve enforcement against all abusive third parties including recruiters, supervisors, contractors, joint employers, successors in interest, and others. For example, it would expand the circumstances when state workforce agencies can discontinue services and debar abusive H-2A employers and their agents, farm labor contractors, joint employers, and successors in interest. The proposed rule would also use a single employer test to identify when seemingly different employers are so intertwined that they are operating as one, for enforcement and debarment purposes. Collectively, these protections and enforcement capabilities would improve DOL's ability to identify and take appropriate enforcement actions against third parties.

Transportation Safety In and Around the Work Site

³ Costa, Daniel and Philip Martin, "Record-Low Number of Federal Wage and Hour Investigations of Farms in 2022," Economic Policy Institute, August 22, 2023, <https://www.epi.org/publication/record-low-farm-investigations/#full-report>.

⁴ Ibid.

The proposed DOL rule would require seat belts in most employer-provided transportation and require the use of the seat belts whenever the transportation is in use, making H-2A jobs more appealing to U.S. workers and introducing common sense safety measures.

Complementary Rules by DHS

The proposed DHS rule is vital because it would complement the protections and enforcement capabilities in the DOL rule by utilizing DHS's distinct immigration authorities. It would:

- bar employers from the H-2A program for up to four years for improperly charging workers prohibited fees and require employers to fully reimburse workers for the prohibited fees.
- provide H-2A workers with “whistleblower protection;”
- provide H-2A workers with greater flexibility and protections; and
- create a 60-day grace period for workers who want to leave an abusive employer and seek a new job while maintaining H-2 status and it would allow certain H-2 workers to apply for permanent residency without losing H-2 status.

Conclusion

The proposed rules represent an enormous opportunity for DOL and DHS to increase the wages and working conditions of H-2A and U.S. farm workers and improve the enforcement capabilities of agencies against abusive employers who circumvent U.S. law and undermine the Congressional intent behind the H-2A program. We urge the agencies to finalize these rules without weakening the proposed protections and to swiftly proceed towards critically needed accountability and transparency in the H-2A program and the broader agricultural industry.

Sincerely,



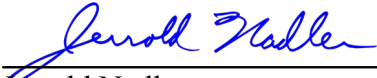
Pramila Jayapal
Ranking Member
Immigration Subcommittee



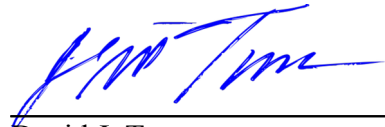
Nanette Diaz Barragán
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Jerrold Nadler
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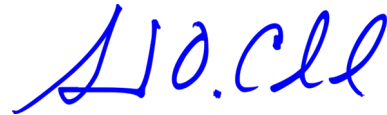
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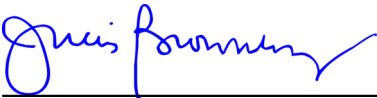
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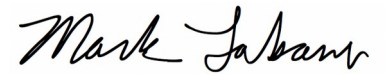
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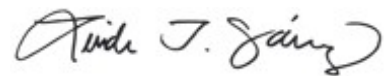
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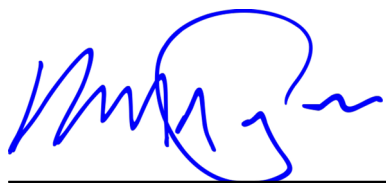
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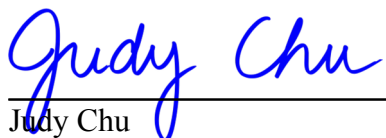
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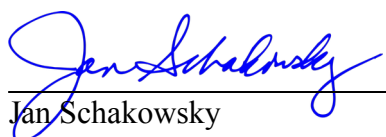
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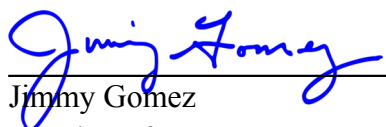
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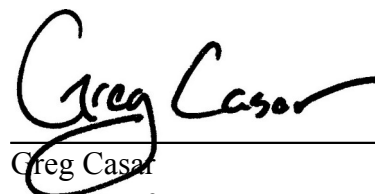
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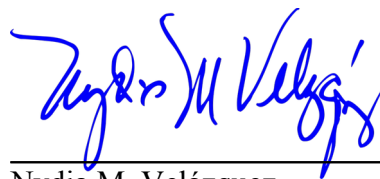
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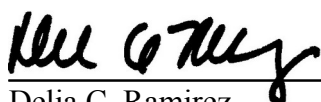
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