



September 24, 2019

*Submitted via regulations.gov*

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Administrator, Office of Policy Development and Research  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue NW, Room N-5641  
Washington, DC 20210

Re: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States  
RIN 1205-AB89

Dear Ms. Gagliardi:

The International Labor Recruitment Working Group (ILRWG)<sup>1</sup> and Freedom Network USA (FNUSA) submits these comments to oppose the proposed changes to the H-2A temporary foreign agricultural worker program. The proposal is unfair and will worsen living and working conditions for both U.S. and foreign workers. The proposed regulations are devastating to farmworkers because they would decrease their wages, increase their costs, worsen their housing conditions, reduce job opportunities for U.S. farmworkers and weaken oversight and enforcement of program protections.

The ILRWG is the first coordinated effort to strategically address abuses in international labor recruitment across visa categories. Formed in 2011, the ILRWG is comprised of organizations working in many different industries and with internationally recruited workers from various visa categories. Many of our member organizations serve H-2A farmworkers throughout the country and abroad.

Each year, hundreds of thousands of people are recruited internationally to work in the United States on non-immigrant and immigrant visas. The workers are employed in a wide range of industries from low-wage sector jobs such as agriculture and landscaping, to higher-wage sector jobs in technology, nursing, and teaching. They come to the United States on a variety of visas, such as H-1B, H-1C, H-2A, H-2B, J-1, A-3, G-5, EB-3, B-1, O-1, P-3, L, OPT, and TN visas. Because each visa category and its corresponding regulations were created at different times in history and in response to specific labor market conditions, they vary significantly in their

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<sup>1</sup> The following organizations are members of the ILRWG: AFL-CIO; American Federation of Teachers (AFT); Janie Chuang and Jayesh Rathod from the American University, Washington College of Law; Centro de los Derechos del Migrante, Inc. (CDM); Coalition to Abolish Slavery and Trafficking (CAST); Department of Professional Employees (DPE); Economic Policy Institute (EPI); Farmworker Justice; Farm Labor Organizing Committee; Jennifer Gordon from Fordham University School of Law; Patricia Pittman and Susan French from George Washington University; Justice at Work; Justice in Motion; National Domestic Workers Alliance; National Employment Law Project; National Guestworker Alliance, New Orleans Workers' Center for Racial Justice; National Immigration Law Center; Oxfam; Towards Justice; Polaris; Sarah Paoletti from University of Pennsylvania Law School; Safe Horizon; Service Employees International Union; Solidarity Center; Southern Poverty Law Center; UniteHere! International Union; Jennifer Hill from the University of Miami, School of Law; and, Verité.

requirements for workers, employers, and recruiters.<sup>2</sup> Despite these differences, disturbingly common, systemic abuses affect workers across visa categories.

Regardless of their skill level or visa category, internationally recruited workers are extremely more vulnerable to exploitation. Moving far from home to a foreign country with a different legal system—often without family or other support systems and with little political influence over the system that regulates them—internationally recruited workers are in an extremely unequal bargaining position relative to their employers. Additionally, many of these workers face language barriers, racism, xenophobia, sexism, and the pressures of poverty both in the U.S. and in their home countries. The most significant barrier to asserting their rights is that most visas bind internationally recruited workers to their employers. With few exceptions, workers who are fired, often for speaking out against exploitative working conditions, are sent back immediately to their home countries.

Under these conditions many recruiters take advantage of their virtual monopoly over the job markets in which they recruit, charging substantial fees to the workers to work in the United States. Many workers borrow money at high interest rates, and some put up their homes as collateral to pay the fees. Recruiters often lie about visa and working conditions—some falsely promise green cards and others require workers to sign extremely disadvantageous employment contracts. Once in the U.S., workers often stay in abusive jobs to pay back recruitment debt. Other common abuses practiced by recruiters include outright fraud whereby workers are charged for visas they never receive, blacklisting of workers who report abuses and violations, collection of illegal and often exorbitant recruitment fees, and confiscation of passports to intimidate and control workers.<sup>3</sup>

The ILRWG seeks to improve transparency and accountability in the nonimmigrant and immigrant visa programs. The following changes are some of the most critical to protect the interests of foreign workers entering the U.S. with visas while combating waste, fraud and abuse in the legal immigration system.

The H-2A law requires employers who would like to hire temporary foreign workers to obtain a labor certification from the Department of Labor (DOL) stating that they face a labor shortage and are offering wages and working conditions that will not “adversely affect” U.S. farmworkers’ wages and working conditions. DOL’s proposal violates this requirement by weakening existing protections meant to ensure the effective recruitment of U.S. workers and stop employers from hiring foreign guestworkers at exploitative wages and under harsh conditions. Farmworkers’ living and working conditions, including conditions under the H-2A guestworker program, are already exploitative - they need to be improved, not worsened.

Such is the story of Reynaldo. Reynaldo<sup>4</sup> was recruited from a small town in Michoacán, México to pick tomatoes on an H-2A visa in Arkansas. Before leaving Mexico, Reynaldo took out a loan to pay the \$360 recruitment fee demanded by the recruiter as well as the visa fee and travel costs. He was told by the recruiter to lie if asked about paying a recruitment fee during his interview at the U.S. Consulate. Upon arriving in the U.S.,

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<sup>2</sup> The term recruiter is used here to mean any individual, group of individuals, company, or its agents that acts in any way to further the process of advertising, locating, hiring, obtaining visas, and transporting workers for the end employer or its agents. This includes placement and staffing agencies. In some cases, several different companies and individuals are involved in the process of hiring a migrant worker. These companies form a chain of subcontracting that serves to further insulate the end employer from liability and makes accountability and transparency more difficult. Recruiters are also referred to as labor brokers or foreign labor contractors.

<sup>3</sup> Domestic servants employed in the households of foreign diplomats on A-3 and G-5 visas have routinely had their passports confiscated and been forbidden from leaving their work premises or speaking with strangers, making them virtual prisoners in the home. *See generally* Human Rights Watch, “Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States,” June 2001. Passports are also confiscated in other occupations. *See, e.g.* Southern Poverty Law Center, *Close to Slavery* (2013) at 12 (explaining that a large agricultural company would confiscate workers’ passports).

<sup>4</sup> *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*. Centro de los Derechos del Migrante, Inc. (CDM). 2018. Accessed here: [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf)

he found the working and living conditions fell short of what he was promised. Although he was promised free housing, as is required by U.S. regulations for H-2A visas, his employers charged him \$80 per month for “utilities.” In addition, the living conditions were indecent: he and 11 other workers shared a small, one-bathroom apartment with a non-functioning kitchen. He worked long, 80-hour work weeks and was paid only \$7.25 per hour. Upon returning to Mexico he was unable to pay back his loan. Workers like Reynaldo fill a critical role in the U.S. labor market, yet they are subject to pervasive mistreatment by employers and recruiters. This mistreatment is enabled by inadequate worker protections and lax oversight by the responsible government agencies. A flawed recruitment process and lack of worker protections in recruitment facilitate and, often, exacerbate many of the abuses that these internationally recruited workers may later experience.

**The proposal would deny U.S. workers access to needed jobs by reducing growers’ obligations to recruit and hire U.S. workers and deterring U.S. workers from applying.**

For decades, the H-2A program’s regulations have included certain protections to ensure U.S. workers’ access to jobs with H-2A employers. These protections include recruitment of farmworkers inside the U.S. before employers receive approval to hire H-2A workers. Many employers’ preferences for guestworkers and discrimination against U.S. workers are implemented through ineffective recruitment, refusal to hire qualified U.S. workers, onerous job qualifications for U.S. workers, and making the workplace so inhospitable that U.S. workers quit or avoid seeking jobs with H-2A employers.

One of the most important recruitment protections has been the “50% rule,” which gives U.S. workers preference for these jobs for the first half of the work contract period. A Congressionally-required study found the 50% rule to be valuable to U.S. workers and not costly to employers. On many farms, hiring continues beyond the first day of work before the peak of the harvest season. In spite of this, the DOL proposal seeks to eliminate the “50% rule.” The proposal would replace the 50% rule with a requirement to hire U.S. workers only for the first 30 days of a contract. This change means that U.S. workers applying for work at an H-2A employer with jobs lasting multiple months would be ineligible for the job after the first 30 days. The proposal also includes a “staggered entry” provision, a new system that would allow employers to bring in their H-2A workers at any time up to 120 days after the advertised date of need. Allowing H-2A workers to come in after the date of need in the proposed manner would undermine the labor market test, as U.S. farmworkers would lack clear information about work availability and start dates.

There are other provisions regarding the recruitment process that would negatively impact U.S. workers’ access to jobs with H-2A employers and deter them from even applying. For example, the DOL proposal would allow mid-season changes to job terms. It has long been understood that U.S. and foreign workers need to know the job terms before accepting an H-2A job, including the location of worksites. However, the proposal would allow employers to amend their initial applications and job terms to add additional work sites, even after the positions have already been reviewed and certified.

**The proposal will increase uncertainty regarding farmworkers’ wages and will likely result in wage decreases for many workers.**

The proposal regarding wage rates would result in lower wages for many farmworkers. The DOL’s proposal for the AEW is focused on breaking down, or disaggregating, the Farm Labor Survey category of “field and livestock workers” into a larger number of job categories for purposes of setting the AEWs. The manner in which DOL would set the AEW based on this disaggregation would reduce the required wage rates under the H-2A program for many farmworkers and would create greater confusion about wage rates. That result is not consistent with the statutory obligation to protect U.S. workers’ wages against adverse effects and is not necessary or reasonable. DOL’s preference for disaggregation can be accomplished in accordance with its statutory obligations if its approach is revised. The proposal would also eliminate the longstanding requirement that employers must offer a local prevailing wage (if it is the highest wage) by eliminating the requirement to

conduct surveys of prevailing wages paid to U.S. workers, making it optional instead. In the absence of prevailing wage determinations, H-2A employers could lawfully offer below-market wage rates. For farmworkers, these could be very harmful pay cuts.

### **The proposal would shift transportation costs on to workers.**

The proposed regulations would unfairly and unwisely shift certain H-2A program costs from employers on to H-2A workers. The H-2A program for decades has required employers to reimburse workers for their long-distance travel costs to the place of employment. Now, DOL proposes to only require employers to pay the costs of transportation for H-2A workers to and from the U.S. consulate or embassy in their home country, rather than their homes. Yet workers often live far from consulate locations and are recruited where they live. DOL acknowledges that farmworkers will lose tens of millions of dollars per year from this change, which is money they cannot afford. Many H-2A workers borrow money to pay such costs and arrive in the U.S. under great pressure not to risk employer retaliation due to their fear of their inability to repay their loan. This change will only drive foreign workers further into debt to travel to jobs in the U.S. and make them more vulnerable to exploitation than they already are.

A large number of workers in the H-2A program come from Mexico. During outreach trips to embassies, advocates have spoken with several thousand workers who have made the trip from very remote areas of Mexico. These workers have shared stories of having to take multiple types of transit to be able to make it to the embassy for processing. When asked how they financed their trips, many, if not all, workers share that they had to take loans or ask family for money with the intention of paying them back once they get paid by their employers. The Notice itself states that close to \$789.6 million dollars in travel costs will be absorbed by the workers under this proposal. Workers consistently report having paid relatively high costs in lodging and transportation to arrive to the nearest consulates to process their visas. For example, a group of three workers travelled over 600 hundred miles in trucks and buses from their small town in Nayarit, Mexico to Monterrey, Mexico paying over \$70 USD each. These costs were a burden forcing the workers to incur debts to cover transportation costs in the hopes that they would earn enough to pay them back.

This story is far from unique. Most guestworkers live in remote regions, far from the cities where embassies and consular offices are located. Many must travel for days. Cab and bus fares quickly add up. By the time most workers arrive to the consular offices most workers have become indebted. The DOL should withdraw the proposed changes to the transportation reimbursement. This cost should continue to be covered by employers, not workers.

### **The proposal would reduce the frequency of inspections for farmworker housing and allow employers to “self-inspect” their housing, increasing the risk of dangerous conditions.**

Despite high profile stories of dangerous and substandard housing under the H-2A program, the proposed regulations would allow housing to be provided to farmworkers without annual inspections by government agencies. If a state workforce agency (SWA) notifies the DOL that it lacks resources to conduct timely, preoccupancy inspections of all employer-provided housing, DOL would allow housing certifications for up to 24 months, during which time conditions could deteriorate to unsafe levels. Further, following a SWA inspection, DOL would permit employers to “self-inspect” and certify their own housing. Given the high rates of violations of the minimal housing standards that apply, it is deeply troubling that DOL could allow vulnerable H-2A workers to live in housing that has not been inspected annually by a responsible government entity.

The proposed changes do include some modest improvements to address health and safety concerns regarding housing that must be provided to H-2A workers and long-distance, migrant U.S. farmworkers. In a very

troubling development as the H-2A program spreads to new areas where there is limited housing, some H-2A employers have been housing workers in motels or other rental or public accommodations. Under the proposal, where there is a failure of the applicable local or state standards to address issues such as overcrowding, adequate sleeping facilities, and laundry and bathing facilities, among others, DOL would require that the housing meet certain OSHA standards addressing those issues. While this is a step in the right direction, greater protections, including improved standards, are needed for H-2A housing. Furthermore, the effectiveness of these improved standards could be undercut if there is not a sufficiently strong system for and commitment to inspections and enforcement of housing violations.

Workers already live in housing that is far from safe. The living situation for Guatemalan workers recruited to work in the southeastern United States in 2012 illustrates typical farmworker housing conditions. Approximately 85 workers were housed in a crowded, isolated house on their employer's property. Sixteen workers slept in a room in a house with no air conditioning and with tap water that smelled so fouled the workers couldn't drink it.<sup>5</sup>

Last summer a group of Mexican workers also recruited to work in the southeastern region of the United States were forced to live in an uninhabitable trailer. The shower expelled sewage waste forcing the workers to take cold showers with a hose outside. The toilet never worked, again forcing workers to relieve themselves outdoors. While some workers were provided with old and dilapidated mattresses others were forced to sleep on the floor. Three women were told they would have to share a single mattress.

These stories are a cry for more robust housing protections for guestworkers. Anything less, puts these workers at grave risk.

**The proposal makes modest improvements to surety bonds for H-2A labor contractors, but these are not sufficient to fully compensate workers.**

One modest improvement in the proposal is an increase in the bond amounts required to be posted by H-2A labor contractors (H-2ALCs). This is important because H-2A labor contractors are often undercapitalized and unable to pay back workers for labor violations. DOL has recognized the need for higher surety bonds, but the increases are insufficient. Improvements are also needed to help victimized workers access the bonds. Finally, the proposal fails to address the number of other significant challenges workers face with H-2ALCs, and the already troubling lack of transparency with H-2ALCs will be exacerbated by the proposed changes. Too often farm operators seek to keep their labor costs low by hiring H-2ALCs and seeking to use the H-2ALCs as a shield to escape responsibility. The DOL is well aware that labor contracting is a notorious method for farmers to evade responsibility for the mistreatment of farmworkers, but its responses to these abuses are utterly inadequate.

### *Conclusion*

The Department of Labor should withdraw the harmful proposed changes to the H-2A program consistent with these comments. In addition, there are serious shortcomings in the program's policies, administration and enforcement that this proposal utterly fails to address. For example, in many locations around the country there are no prevailing wage surveys being done and therefore the prevailing wage is not required to be paid by H-2A employers, who are allowed to undercut the labor market. The Department and other agencies have also failed to prevent recruitment fees being charged to many farmworkers under the H-2A program, which leads to greater debt and contributes to the workers' vulnerability and fear of challenging unfair or unlawful conduct. Discriminatory job qualifications are applied to U.S. workers by employers that prefer guestworkers. There are also rampant violations of farmworkers' labor rights, including occupational safety protections.

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<sup>5</sup> See e.g. Southern Poverty Law Center, *Close to Slavery* (2013) at 36.

The proposed rule contravenes the Department's legal obligations under the H-2A program. The answer to America's need for agricultural workers is not to make wages and working conditions worse. The Department of Labor should not spend its limited resources removing and weakening protections for U.S. and foreign workers under the H-2A program.

Sincerely,

*International Labor Recruitment Working Group  
Freedom Network USA*