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CIS No. 2740-23
DHS Docket No. USCIS-2023-0012

Re: Modernizing H-2 Program Requirements, Oversight, and Worker Protections

Dear Chief Deshommes and Chief Nimick,

The American Immigration Lawyers Association ("AILA") submits the following comments (collectively the "Comment") in connection with the above-referenced Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services Notice of Proposed Rulemaking (NPRM) seeking to modernize the H-2A and H-2B program requirements, oversight, and worker protections as published in the Federal Register on September 20, 2023.[1]

Established in 1946, AILA is a voluntary bar association of nearly 17,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience make

[1] 88 FR 65040 (September 20, 2023)

us particularly well-qualified to offer views that will benefit the public and the government. We do so in the comments below.

I. Program Integrity and Worker Protections

A. H-2A Housing Visits by the Government

AILA supports the intent of the new rule, which is to strengthen the language requiring petitioners and employers to consent to and fully comply with USCIS audits, investigations, and other program activities.

AILA opposes the proposed changes to §214.2(h)(5)(vi)(A) to expand the employer's consent to include Government access to all sites where H-2A workers are or will be housed. H-2A employers' obligation to provide housing can be verified in less intrusive, less burdensome ways, such as providing the employer with written notice for each action and instances where such a visit can be rejected or rescheduled. In addition, investigations should be limited to gathering material and relevant information relating to H-2A program compliance.

B. Denial or Revocation of Petition for Payment of Prohibited Fees

AILA supports the proposed strengthening of the prohibition against a beneficiary paying or agreeing to pay specific, clearly defined prohibited fees to any agent, employer, an employee of the petitioner, agent, attorney, facilitator, recruiter, or similar employment service or joint employer, and agreements entered into to collect prohibited fees. However, AILA recommends the agency impose fines for first-time or less egregious violations when it has been determined that the H-2A or H-2B beneficiary has paid or agreed to pay a prohibited fee. The agency should only consider denial or revocation on a case-by-case basis for egregious circumstances or repeat offenders. In addition, denial or revocation must only occur after the petitioner has the opportunity to rebut any adverse information.

AILA seeks clarification on the definition of "prohibited fees," which are referred to collectively as including "no job placement fee, fee or penalty for breach of contract or other fee, penalty or compensation (either direct or indirect) related to the H-2B [and H-2] employment" in proposed 8 CFR 214.2(h)(2)(B)(1)(xi)(A) and (B). Passport fees are expressly excluded in the definition of prohibited fees as a "responsibility and primarily for the benefit of the worker." Still, there may be other fees that could benefit both employers and the workers not clearly addressed in the proposed rule.

Moreover, the definition of prohibited fees does not clearly define the scope of all prohibited fees. For example, certain costs related to the worker's travel to the work location are often paid in advance by the employer. Others are paid by the worker and reimbursed upon arrival. Specific costs related to processing H-4 visas for dependent family members can be intertwined with those related to processing the beneficiary's H-2 visa, which is for the worker's benefit. Greater specificity would be helpful in the scope of the definition of prohibited fees, given that subsequent reimbursement would no longer remedy the error.

AILA is concerned that inadvertent payment by an H-2B beneficiary of a prohibited fee, which the employer cannot control if paid inadvertently or mistakenly by the worker, would subject petitioners to significant consequences, including petition denial, revocation, and a bar against future filings as the result of an action taken by one or several workers when reimbursement will no longer cure the error, and instead requires "extraordinary circumstances" to be found, beyond the petitioner's control, as well as reimbursement. This is a high bar. Mistakes do, on occasion, happen. H-2 employers who uncover an inadvertent collection should not be precluded from approval of a petition or subject to a petition revocation in the absence of an intent to allow collection or an agreement to collect such a fee. AILA does support the proposed language requiring full reimbursement of any such fees collected.

Denial or revocation should be reserved for employers engaged in a pattern and practice of collecting such fees or those who intend to collect directly or indirectly such payment or allow their employee, agent, attorney, facilitator, or other employment-related service to collect such a fee, including, for example, a payroll deduction, or salary reduction.

Also, AILA opposes the imposition of a "clear and convincing" standard of evidence as unduly burdensome concerning an employer's burden of proof to demonstrate that a failure to prevent an inadvertent payment resulted from extraordinary circumstances beyond the employer's control. The framework proposed by USCIS in the enforcement of the prohibition, which would result in denial or revocation, requires further detail to the extent that qualifying for this exception requires a showing of circumstances that were "rare and unforeseeable" and that "it had made significant efforts to prevent prohibited fees prior to the collection or agreement to collect such fees."

AILA requests greater clarification of a "due diligence" requirement and opposes a burden of proof for an employer to show that "it did not know or could not have learned of such a payment through due diligence …" presumably in advance of when it was collected. The proposed rule expressly rejects language in a written contract between the employer and a third party as satisfying that burden. It seeks from the public suggestions on how that burden may be satisfied. Therefore, it is in the interests of fairness and due process that there is no presumption that an employer knew or could have known of such payments.

C. Denial of H-2 Petitions for Certain Violations of Program Requirements

While AILA supports the provisions in the interest of protecting the integrity of the H-2B program and worker protections, the provisions allowing the denial of H-2 petitions for employers that have been found to have committed labor law violations or otherwise violated the requirements of the H-2B programs are overly broad and vague.

Under the proposed rule at 8 CFR 214.2(h)(10)(iii)(A), USCIS will deny H-2 petitions by petitioner and successor in interest if they have received a final administrative determination by the DOL debarring the petitioner during the pendency of the petition or debarment period; received a final USCS denial or revocation involving fraud or will misrepresentation of material fact during the petition or within 3 years before the filing of the petition; or received a final determination of violations of unlawfully employing workers under Section 274(a) during the pendency of the petition or within 3 years prior to filing the petition.

In addition to the basis for mandatory denials of H-2 petitions, the proposed rule at 8 CFR 214.2(h)(10)(iii)(B) provides USCIS with broad discretion to revoke or deny any H-2 petitions where USCIS finds that an employer violated any terms of an H-2 petition or violated any employment-related laws or regulations including health and safety laws even if these violations are not related to the employer's obligations under the H-2 program.

Furthermore, the ability of USCIS to issue a discretionary denial when it has not been a party to the proceedings finding violations is arbitrary and unfair. The discretion to deny an employer from filing an H-2 petition based on the findings of another agency makes it almost impossible for employers to defend themselves.

AILA does not believe USCIS should be allowed to issue a discretionary denial under 8 CFR 214.2(h)(10)(iii)(C), as it is violative of employers' due process rights. Should this language remain in the final rule, AILA urges USCIS to consider all relevant factors listed in 8 CFR 214.2(h)(10)(iii)(C), when making a determination, a thorough review process, and the opportunity for an expedited appeal process as well.

Moreover, the proposed rule, as written, does not allow for the employer to make corrections for future petitions following such denial or debarment, effectively denying the employer the right to "establish[ed] its intention or the ability to comply with H-2A or H-2B program requirements," as noted in 8 CFR 214.2(h)(10)(iii)(B).

D. Additional Comments Relating to Prohibited Fees

AILA suggests that DHS consider alternative ways to strengthen program integrity and enforcement beyond a burden to be placed on H-2 employers to use due diligence to ensure that third parties, such as their attorneys, recruiters, and facilitators, comply with program rules and legal obligations. DOL maintains and updates the H-2B Foreign Labor Recruiter List each fiscal year. With respect to prohibited fees, AILA recommends that DHS include a safe harbor for H-2B employers utilizing those recruiters.

In addition, any recruiter violating the prohibitions against collection and payment of fees should be required to reimburse the workers rather than the employer when there is no evidence that the employer knew or should have known. It is not practical to expect U.S. employers to have the means to exercise due diligence with respect to multiple parties outside the U.S. Similarly, H-2 employers should not be responsible for reimbursing payments collected by attorneys who also may fail to properly advise the employers or otherwise act without their knowledge in the collection of legal or other fees from

E. Convictions and Determinations Against Certain Individuals 8 CFR 214.2(h)(10)(iii)(D)

Under the proposed rule, conviction or final administrative or judicial determination against an individual will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest, including (1) an individual acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor; or (2)

With respect to paragraph (h)(10)(iii)(B) of this section, an employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker's position would believe is acting on behalf of the petitioning entity.

AILA commends USCIS for ensuring that employers are held accountable for their filings, petitions, and actions. However, AILA does not believe that a "reasonable person" standard should be applied with respect to an individual who an H-2 worker believes is acting on behalf of the petitioning entity. Instead, it should rely on whether an oral or written agreement was entered into.

F. Definition of Successor in Interest

The proposed rule provides that a company is a successor in interest when the "employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity." AILA is concerned that this definition, which is overly broad and assigns liabilities to new entities when it has expressly stated that it has not succeeded to all the rights and liabilities of the predecessor entity, could also negatively impact other visa categories. Should this new definition of "successor in interest" be codified and subsequently used for other visa categories, petitioners in those categories may be caught unaware and, moreover and more importantly, not given a chance for notice and comment, thus making this new definition possibly violative of the Administrative Procedure Act.

Also, imputing liability upon purchasing a business interferes with employers' free will to engage in business transactions. It unfairly assigns liability upon an employer for liabilities and obligations it has not chosen to freely acquire and where the employer did not participate in the predecessor's business conduct. AILA urges the agency to consider an alternative definition of successor in interest in this context. A successor-in-interest relationship should only apply when the employer that is controlling and carrying on the business of a previous employer has, via a written contract, agreed to succeed to all of the rights and liabilities of the predecessor entity.

G. One Year Ban on Approval of Subsequent Petitions by Successor in Interests

AILA is concerned about the overly broad interpretation of successor in 8 CFR 214.2(h)(6)(i)(D)(2) interest for purposes of applying this one-year ban on subsequent approvals. AILA appreciates that USCIS will consider multiple enumerated factors in determining whether an employer is a successor in interest. Given the proposed consequences of a one-year ban and the impact that would have on a succeeding owner or ownership of a petitioning employer who may not have a basis of knowledge as to the prior determination, AILA suggests additional language be added regarding notice and knowledge a successor in interest had or could have had regarding a prior determination resulting in a one-year ban.

II. Worker Flexibilities

A. Adjustments to Existing Admissions Period Before and After Validity Dates

AILA supports the proposed worker flexibilities granting grace periods to H-2 workers, especially H-2B workers. With the unpredictability of DOL processing times and the unavailability of

additional visa numbers, allowing workers a 30-day grace period at the end of their contract gives workers the opportunity and the time needed to find alternative H-2 employment from within the U.S. without having to potentially leave the U.S. and then subject themselves to the annual H-2B quota. Employers also benefit from this proposed 30-day grace period. With the current cap set at 66,000 workers, employers are often left with few alternatives once the cap has been met. They either must wait for DHS to grant an emergency allotment or to recruit H-2B workers already in the US. This additional grace period will make it easier for employers to recruit and file petitions to transfer workers to their employ within the US because the workers will remain in status for up to 30 days after the expiration of their program end date.

B. New 60-Day Grace Period

AILA supports the proposed worker flexibilities with regard to granting a 60-day grace period in the event of separation from their H-2B employer or revocation of their underlying petition. This is consistent with the benefits offered by other nonimmigrant classifications. It gives the workers enough time to find another H-2B employer or wrap up their affairs to leave the United States.

AILA also applauds the protections afforded to workers under the proposed 8 CFR 214.2(h)(11)(iv) whereby H-2 beneficiaries would be to remain in lawful status for 60 days or the end of their H-2B petition, whichever is shorter. AILA recommends that DHS consider providing these individuals with work authorization during this 60-day period.

C. Substitution of H-2A Beneficiaries After Admission

It is common in both programs for employees to leave the position prior to the end of the contract period for a variety of reasons, including family emergencies, poor health, and better opportunities elsewhere. AILA supports the provision in the proposed rule allowing for the substitution of H-2A beneficiaries after admission and urges DHS to extend it to H-2B beneficiaries.

Not allowing the substitution of beneficiaries following admission for the H-2B program puts H-2B employers on a different footing than H-2A employers. It also hinders H-2B employers who were looking for foreign labor assistance because they could not find U.S. workers. When employees leave, especially through no fault of the employer, the employer is still in the same precarious position.

D. Return Travel Costs

AILA supports this provision, requiring H-2A employers to pay for reasonable return transportation costs in the event of petition revocation. This is consistent with other nonimmigrant visa categories, including H-1B, O, and P, and ensures that the worker has the means to return to their home country upon separation from their employment.

E. Portability

AILA supports making permanent the portability provisions in place during the COVID-19 pandemic. This flexibility allows the employers to have their H-2 workforce begin their

employment upon filing the H-2 petition with USCIS, thereby allowing employers to fully staff their workforce at the outset of the petition validity date instead of having the H-2 workers remain idle until the petition is approved.

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

DHS proposes to remove the phrase "abscondment," "abscond," and its other variations to emphasize that the mere fact of leaving employment, standing alone, does not constitute a basis for assuming wrongdoing by the worker.

AILA supports the removal of this language. Workers leave their employment for various reasons, the majority of which are entirely legitimate. Examples are to undergo medical procedures, injury, pregnancy, emergencies back home, or to assume more advantageous employment elsewhere. The negative connotation surrounding the words "abscondment" and "abscond" can negatively impact the workers' ability to obtain future U.S. immigration benefits. It is, therefore, critical to ensure that DHS uses appropriate and fair language when describing those workers who leave their place of employment for valid reasons.

G. 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

AILA applauds DHS' proposal to amend 8 CFR 214.2(h)(16)(ii) to incorporate elements of "dual intent".

This proposed regulation reflects the reality that agricultural and nonagricultural employment can be temporary and permanent. The nature of the employer's need should not be imputed on an H-2 worker's intention regarding employment or future permanent status in the U.S.

Current regulations serve as a significant deterrent for both agricultural and nonagricultural employers and their employees in taking steps to apply for permanent resident status in fear that future H-2 status could be denied based on immigrant intent. Under existing regulations, approval of a permanent labor certification or filing a preference petition for an H-2A or H-2B worker currently employed by or in a training position with the same petitioner is considered sufficient reason to deny the worker's extension of stay. 8 CFR 214.2(h)(16)(ii).

In the proposed rule, DHS takes a more balanced approach by looking at the totality of circumstances to determine whether an H-2 worker/applicant for permanent resident status is maintaining temporary nonimmigrant status, such as maintaining a foreign residence with no intention of abandoning.

Prior agency interpretation unfairly focused on the employer's intent and attributed such intent to the H-2 worker when it should be the H-2 workers' intent that determines whether a worker is maintaining H-2 status in the U.S. This new interpretation outlined in the proposed regulations does not undermine or in any way compromise the integrity of the H-2 programs as the requirement

that such employers demonstrate a temporary and/or seasonal need remain covered by current regulations at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

III. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Immigration

A. Removing Designated Country List

AILA applauds removing the Designated Country List found at 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(E). Removing the eligible countries list requirements would improve H-2 program efficiency by reducing burdens on DHS, USCIS, and H-2 employers, consistent with DHS's goal of streamlining the H-2 petition process. Furthermore, removing the eligible countries list requirements would enhance the accessibility of the H-2 programs, consistent with DHS's commitment to eliminate unnecessary barriers to legal migration and promote regular migration.

B. Uniform Standard for Resetting Three-Year Clock

While AILA can appreciate that the current regulations regarding the three-year requirement to remain outside the country and believes that calculating interruptions in imposing that requirement is complicated for employer-petitioners to understand, AILA does not believe that the solution would be to eliminate the calculation of interrupted stays in their entirety. Instead, AILA would encourage leaving in the ability for employees to return to the United States if they have spent less time in H-2 status given potential "interrupted status".

Regardless, AILA is supportive of shortening the regulatory period to be outside the country from three months to two months prior to resetting the clock and sees that as a welcome change. H-2 workers are filling an important economic need for the United States, and removing unnecessary hurdles to their contributions is important.

IV. Conclusion

We appreciate the opportunity to comment on this NPRM and look forward to a continuing dialogue with DHS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION