

EPI comments on DHS and DOL Temporary Rule to increase the fiscal year 2023 numerical limitation for the H-2B visa program and portability for H-2B workers

Public Comments • By [Daniel Costa](#) • February 13, 2023

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TO: Alejandro N. Mayorkas, Secretary, U.S. Department of Homeland Security
Martin J. Walsh, Secretary, U.S. Department of Labor

Attention:

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RE: ***Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers; CIS No. 2731-22, DHS Docket No. USCIS-2022-0015; RIN 1205-AC14 and 1615-AC82; 87 Fed. Reg. 76816***

Thank you for the opportunity to submit written comments with respect to the temporary rule on the increase of H-2B visas for the 2023 fiscal year.

In addition to the comments submitted here, the Economic Policy Institute (EPI) contributed to and **endorses** the written recommendations and comments submitted by the **Migration that Works** coalition, which EPI is a founding member of. EPI also endorses the comments submitted by the AFL-CIO.

Introduction and about EPI

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve economic conditions and raise labor standards for low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals. EPI submits these comments to United States Citizenship and Immigration Services (USCIS), within the U.S. Department of Homeland Security (DHS), and the Employment and Training Administration and Wage and Hour Division in the U.S. Department of Labor, in response to their opportunity to comment on their Temporary Rule to exercise their time-limited fiscal year (FY) 2023 authority to increase the total number of noncitizens who may

receive an H-2B nonimmigrant visa by up to a total of 64,716 during FY 2023, along with other provisions and modifications to the H-2B visa program.

EPI has researched, written, and commented extensively on the U.S. system for labor migration, including in particular the H-2B program and other temporary work visa programs. EPI has published extensively on the H-2B program and provided expert testimony about the program to both the U.S. Senate and House of Representatives, and recently published a report detailing the extensive wage theft that occurs within H-2B industries, revealing the urgent need to better protect migrant workers employed through the H-2B program.

Given the numerous reports from advocates, news investigations, and even government audits over the years that have revealed how deeply flawed the H-2B program is when it comes to protecting the rights of migrant workers and labor standards for all workers, we were disappointed to see the Biden administration exercise its executive authority to nearly double the size of the H-2B program through this Temporary Rule. Before increasing the size of the H-2B program to an unprecedented level in fiscal year 2023, the administration should have focused, first, on crafting key reforms it has the legal authority to implement that would improve labor standards and protect workers. We hope the administration will seriously consider the recommendations of immigrant and worker advocacy groups and not delay in issuing new regulations and guidance to achieve this.

The Department of Labor should promulgate regulations to create a screening procedure to prevent lawbreaking employers from hiring through the H-2B program.

Available data from United States Citizenship and Immigration Services (USCIS) make it clear that in fiscal year 2021, the H-2B program grew to unprecedented levels, which will be surpassed in fiscal 2022.¹ At the same time, data on labor standards enforcement from the Department of Labor's (DOL) Wage and Hour Division (WHD) paint a picture of rampant wage theft and lawbreaking by employers in the industries that employ nearly all H-2B workers. In fact, across the 2000–2021 period, there were over 225,227 cases investigated by WHD in seven major H-2B industries that employ the vast majority of H-2B workers, and violations were found in 180,451 of those cases, or 80% of cases. That means that whenever WHD initiates an investigation into an employer in these seven major H-2B industries, there is an 80% chance—a very high likelihood—that WHD will detect employer violations.² WHD assessed a total of nearly \$1.8 billion in back wages that were owed to 1.7 million workers in those industries by their employers during the 22 fiscal years from 2000 through 2021; that's an average of nearly \$81.5 million stolen per year.³ Such a large dollar amount of stolen wages is particularly shocking when considering that most of the

jobs in the seven major H-2B industries (as identified by WHD) are associated with very low wages.

In addition to the systemic flaws in the H-2B program, the enforcement data from WHD prove that H-2B workers are being employed in industries where millions of workers are robbed regularly by employers. But at present, no laws or regulations prevent employers from hiring through the H-2B program if they have been found to have committed any labor, wage and hour, civil rights, anti-trafficking or anti-discrimination laws. Employers can be barred by DOL from the H-2B program for violating H-2B laws or regulations, but such examples are rare, and some repeat violators of H-2B laws and regulations continue to be able to hire through H-2B.⁴

Given the high prevalence of wage and hour violations in major H-2B industries, there is a strong case for DOL to require employers to register for eligibility to use the program, so their records on compliance with labor and employment laws can be screened up front. To break established patterns of abuse, employers that have violated any labor, employment, wage and hour, civil rights, anti-trafficking or anti-discrimination laws should be prohibited from hiring H-2B workers. Given the present and likely future reality that WHD will continue to be vastly underfunded and understaffed,⁵ such a screening process on the front end of the H-2B application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through lengthy and costly investigations on the back end, after workers have arrived in the United States and been robbed or otherwise exploited. This would also benefit employers with clean records by allowing them to hire more workers under the H-2B cap.

One possible model that could be adapted by DOL is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through another visa program, H-1B, for specialty occupations. USCIS describes the H-1B Electronic Registration Process as a system whereby employers “and their authorized representatives, who are seeking to employ H-1B workers subject to the cap, complete a registration process that requires only basic information about the prospective petitioner and each requested worker.”⁶ After that, USCIS takes the “properly submitted electronic registrations” and “[o]nly those with selected registrations will be eligible to file H-1B cap-subject petitions.”⁷

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers, the model could be adapted by DOL as part of the application process at the labor certification stage. For example, DOL could set up a registration process in which employers list basic information about their business and the purported need for H-2B workers (as is already done via the DOL labor certification attestation forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through H-2B, that they have not been found to have violated any labor, employment, wage and hour, civil rights, anti-trafficking or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records, and ultimately certify employers that have not been found to have violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.⁸

Employers should be required to recruit at the national level and offer transportation and housing to both H-2B and U.S. workers as part of that recruitment.

When it comes to determining labor shortages in the H-2B context, the H-2B statute sets a *national* standard for the protection of U.S. labor standards, clearly stating that H-2B workers can only be hired “if unemployed persons capable of performing such service or labor cannot be found *in this country*”⁹ (emphasis added). In order to determine whether there are “unemployed persons” in the United States capable of doing a job before an employer can hire an H-2B worker—in other words, to determine if a shortage exists—**employers should be required to offer to pay for housing and daily transportation to and from the worksite for both U.S. and H-2B workers.** Under the current H-2B recruitment rules, that’s not the case.

For example, if someone from Puerto Rico—a region with high unemployment—wants to work at a resort on Mackinac Island in Michigan, which has a small labor pool, or someone from Duluth, Minnesota, wants to work in a donut shop at the Outer Banks in North Carolina, employers should have to offer them free housing before being allowed to hire an H-2B worker. Otherwise, employers have not effectively recruited nationwide.

Paying for housing for H-2B workers is also essential because average wage rates for H-2B jobs are low and they are not living-wage jobs. For example, in Texas, the largest H-2B employment state, an H-2B worker earning the statewide average wage in 2021 for the most common H-2B occupation by far, Landscaping and Groundskeeping Workers, would have earned \$15.43 per hour, which translates to an annual average wage of \$32,090.¹⁰ On average, H-2B jobs are certified for just under eight months.¹¹ If an H-2B worker was employed for eight months, that salary would equate to maximum earnings of \$21,393 for an H-2B worker—in the most common occupation earning the state average wage in Texas, the biggest H-2B state—and if they remained in the United States for just over the average duration of an H-2B job certification.

If this hypothetical H-2B worker were somehow able to find a studio apartment that cost \$1,000 per month, those eight months of rent would account for roughly 40% of the worker’s entire salary. Clearly, H-2B workers should not be forced to use their already-meager earnings to pay for housing in the United States. Even in regions with more moderate housing prices, H-2B salaries are too low for H-2B workers to be expected to find and afford adequate housing. And in high-cost areas like Cape Cod, or in resort areas like Aspen, Colorado, it will be virtually impossible. As a result, the employers that benefit from the labor of H-2B workers should be responsible for covering those housing costs. In addition, offering to pay for housing for U.S. workers will provide them with a fair opportunity to access temporary and seasonal jobs in other regions of the United States.

Without such a requirement, employers should not be deemed to have effectively recruited nationwide.

Employers should also be required to pay for transportation so that U.S. workers may travel to other states in order to access seasonal and temporary jobs in those states. And if employer-provided housing is not located within close proximity to the job site, then employers should be required to provide daily transportation to and from the job site. Low-wage workers, whether recruited from abroad or neighboring states or regions, cannot reasonably be expected to be able to find and afford a means of daily transportation to and from the employer's worksite. For seasonal and temporary jobs located in rural and remote areas, almost certainly an automobile would be required for a U.S. or an H-2B worker to be able to get to work. Employers cannot reasonably expect that U.S. and H-2B workers earning low wages would be able to afford to purchase or rent an automobile in a region or state they are unfamiliar with—or in the case of H-2B workers, a country they are unfamiliar with and where they may not speak the language—nor the other associated expenses such as insurance, basic maintenance, and gasoline.

Under the current H-2B rules—where employers do not have to offer to pay for transportation and housing—the result is that DOL is approving H-2B jobs without providing U.S. workers with a fair opportunity to access temporary and seasonal jobs in other regions of the United States. In addition, this allows employers to use H-2B, a program intended for use during times of labor shortages, in times of extraordinarily high levels of unemployment in H-2B occupations—because employers can recruit abroad rather than in other U.S. states and regions.

DOL should update the H-2B prevailing wage methodology so that it requires the highest of the local, state, or national average wage for the occupation, according to the Occupational Employment and Wage Statistics survey data.

Another essential component with respect to DOL's role in determining labor shortages is the setting of an appropriate prevailing wage level, which both ensures that U.S. workers are recruited at fair wage rates that reflect market realities, and that migrant workers are not underpaid vis-à-vis U.S. wage standards. As noted above, when it comes to determining labor shortages in the H-2B context, the H-2B statute sets a *national* standard for the protection of U.S. labor standards, clearly stating that H-2B workers can only be hired "if unemployed persons capable of performing such service or labor cannot be found in this country."¹² In order to determine whether there are "unemployed persons" in

the United States capable of doing a job before an employer can hire an H-2B worker—in addition to offering to pay for housing and transportation for both U.S. and H-2B workers—**employers should be required to offer at least the local, state, or national average wage for the occupation (whichever is higher) to U.S. workers and H-2B workers, according to the Occupational Employment and Wage Statistics (OEWS) survey data from the Bureau of Labor Statistics.**

The prevailing wage rules that undergird the H-2B program exist for the purpose of establishing a minimum, legally required wage that jobs must be advertised at in the United States when recruiting U.S. workers—a requirement before employers can access the H-2B program—in order to determine if there’s a labor shortage. The purpose of the H-2B prevailing wage requirement is also to safeguard U.S. wage standards in H-2B occupations and protect migrant workers from being legally underpaid through visa regulations.

In most cases, since 2015, if no collectively bargained wage applies to an H-2B job, then the DOL’s H-2B wage methodology has required that employers advertise H-2B jobs to U.S. workers at the local average wage for the specific occupation and pay their H-2B employees that wage—according to data from the DOL’s OEWS survey.¹³ While at first glance this appears to be a reasonable wage rule, in practice, the available evidence makes clear that the H-2B wage rule is undercutting wage standards at the national level in H-2B occupations and is therefore not consistent with the law establishing the H-2B program.

To illustrate, see **Table 1** below, which shows the top 15 H-2B occupations in fiscal year 2019 by Standard Occupational Classification code, according to the number of H-2B jobs certified by DOL. For context, the top 15 H-2B occupations accounted for 84% of all certified H-2B jobs in FY 2019. The column to the right of the number of certified jobs is the nationwide average hourly wage for all certified H-2B workers in each of the occupations, according to DOL disclosure data. To the right of that are the 2019 average hourly wage rates for all workers in the occupation nationwide, according to DOL’s OEWS survey, which is used to set H-2B wage rates, making it an apples-to-apples comparison. The final two columns show the difference between the average hourly certified H-2B wage and the average hourly OEWS wage for all workers in the entire country—the dollar amount and in percentage terms.¹⁴ In other words, these numbers reveal the amounts by which certified H-2B wages were undercutting national-level wage standards in H-2B occupations in FY 2019.

Table 1 clearly shows that the H-2B program’s wage methodology that fails to use a national standard is allowing employers to legally undercut U.S. wage standards.¹⁵

Table 1 shows that in all but one of the top 15 H-2B occupations in fiscal 2019, the average hourly wage certified nationwide for H-2B workers was lower than the OEWS average hourly wage for all workers in the occupation. The biggest wage differential was found in the cement masons and concrete finishers occupation: The national average hourly wage was just over \$8.00 higher than the average wage certified for H-2B workers. The next biggest difference was in the construction laborers occupation, where the national

Table 1

Average certified wages for H-2B jobs are still too low

2019 national average certified H-2B wage, average OES wage, and dollar amount and percent below OES wage for the top 15 H-2B occupations

H-2B Rank	SOC Code	Occupation	H-2B jobs certified	H-2B average hourly wage	OES national average hourly wage	Amount below national average hourly wage	Percent below average hourly wage
1	37-3011	Landscaping and Groundskeeping Workers	66,151	\$14.18	\$15.75	\$1.57	11.1%
2	45-4011	Forest and Conservation Workers	11,283	\$12.34	\$15.96	\$3.61	29.3%
3	37-2012	Maids and Housekeeping Cleaners	9,869	\$11.78	\$13.05	\$1.27	10.8%
4	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	8,486	\$10.98	\$14.02	\$3.04	27.7%
5	39-3091	Amusement and Recreation Attendants	8,014	\$9.62	\$11.85	\$2.23	23.2%
6	35-3031	Waiters and Waitresses	4,104	\$13.11	\$13.04	-\$0.07	-0.5%
7	47-2061	Construction Laborers	3,369	\$16.18	\$20.31	\$4.13	25.5%
8	35-2014	Cooks, Restaurant	3,299	\$13.62	\$13.97	\$0.35	2.6%
9	53-7062	Laborers and Freight, Stock, and Material Movers, Hand	2,274	\$13.26	\$15.64	\$2.38	17.9%
10	35-3023	Fast Food and Counter Workers	2,255	\$10.46	\$11.32	\$0.86	8.2%
11	39-2021	Animal Caretakers	2,226	\$12.58	\$13.17	\$0.60	4.7%
12	51-9198	Helpers—Production Workers	1,728	\$12.78	\$14.86	\$2.08	16.3%
13	47-2051	Cement Masons and Concrete Finishers	1,610	\$15.48	\$23.53	\$8.05	52.0%
14	35-9011	Dining Room and Cafeteria Attendants and Bartender Helpers	1,238	\$11.12	\$12.18	\$1.06	9.5%
15	35-9021	Dishwashers	1,184	\$11.24	\$11.89	\$0.64	5.7%
Total jobs certified in top 15 H-2B occupations in 2019			127,090				

Note: H-2B and OES wage data are adjusted to 2020 dollars. H-2B wage data are the weighted average hourly wage of all workers in a respective occupation. H-2B wage data on Fast Food and Counter Workers (SOC code 35-3023) are the combined wage data of Combined Food Preparation and Serving Workers,

Table 1
(cont.)

Including Fast Food (SOC code 35-3021) and Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers (SOC code 35-3022). A negative value in the amount or percent below national average hourly wage columns represents an H-2B job that was, on average, certified at a higher wage rate than the corresponding OES national average hourly wage (there is only one instance of this, in the Waiters and Waitresses occupation).

Source: EPI analysis of the Bureau of Labor Statistics' 2019 Occupational Employment Statistics, and of H-2B 2019 fiscal year disclosure data from the [Office of Foreign Labor Certification's Performance Data](#)

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average wage was just over \$4.00 higher than the average wage certified for H-2B workers. If, for example, an employer hired an H-2B construction worker to work for 40 hours per week for 36 weeks (approximately nine months) at \$4.00 per hour less than the national average wage—due to local wage variations, as the H-2B wage rule allows—the employer would save, and an H-2B worker would be underpaid by, \$5,760.

In the top two occupations of landscaping and groundskeeping workers and forest and conservation workers—which combined accounted for over half (51.5%) of all H-2B certified jobs in 2019—the average H-2B wage was \$1.57 and \$3.61 lower per hour than the national average wage, respectively.

An easy way to fix this so that the H-2B wage rule no longer undercuts existing U.S. wage standards and so that it is consistent with the statute that establishes the program would be to require that employers pay at least the highest of the local, state, or national average wage for the occupation according to DOL's OEWS data. DOL could even require a higher wage—for example, the 75th-percentile wage instead of the average—in order to incentivize additional recruitment of U.S. workers. DOL has the legal authority to make these changes via regulation—and given the popularity of the H-2B program among employers, even during times of high unemployment,¹⁶ and the recent, rapid increase in the size of the program, DOL should prioritize making this change in order to protect wage standards in H-2B occupations and ensure that migrant workers in H-2B are not underpaid and exploited or hired as a lower-cost alternative to hiring U.S. workers.

Wage rates negotiated under collective bargaining agreements should establish the minimum wage regardless of whether an employer is a contracting party to the agreement or not.

The current H-2B prevailing wage methodology sets the H-2B wage at the rate negotiated in a collective bargaining agreement (CBA) between a union and an employer, if such an agreement exists and would apply to an H-2B worker. EPI supports this because allowing an employer to pay less than the collectively bargained wage would obviously undercut

the union and its members and adversely affect their wages and working conditions.

However, many employers who solicit and hire H-2B workers will not be a signatory to a CBA. If a CBA exists between any employer and any group of workers in the same occupational category within the same local geographical region or metropolitan statistical area, or even within the same state, the workers covered by the CBA will experience downward pressure on their wages if the non-CBA employer employs H-2B workers and pays them a lower wage than the CBA wage. To compete, the employer that is party to the CBA will have an incentive to not renew the agreement or to bargain with the union.

In order to avoid such a scenario, whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should be established as the floor wage for that particular category of worker and should apply to **all employers in the same state** who wish to hire H-2B workers in a similar occupation—whether they are a signatory to the CBA that establishes such wage or not.

Unions that want to prevent an adverse effect on their members' wages could be responsible for submitting their contracts to DOL to notify them of an applicable CBA wage. DOL could then post the CBA wage rates for H-2B occupations by state on the FLCdatacenter.com website, which currently hosts the applicable prevailing wage rates for H-2B jobs according to OEWS survey data. If unions or employers prefer to not have their CBAs made public, DOL could simply keep them on file and notify employers of the appropriate CBA wage during the prevailing wage determination process.

This solution would protect the integrity of all collective bargaining agreements across the country and ensure that employers do not seek to undercut and undermine the rights of U.S. workers to collectively bargain and unionize by exploiting the H-2B program.

Employer-provided wage surveys should not be a permissible method for establishing prevailing wage rates for H-2B occupations.

In October 2010, DOL issued a Notice of Proposed Rulemaking that proposed to end the use of employer-provided wage surveys to set H-2B prevailing wage rates.¹⁷ EPI supported this proposal at the time but the proposal never went into effect because of litigation and congressional appropriations riders that defunded DOL's enforcement of the rule. The elimination of employer-provided wage surveys did not later become part of the subsequent interim final rule (IFR) that was issued jointly by DOL and DHS in 2013¹⁸ (in other words, the employer-provided surveys remained permissible under the 2013 rule) nor were they eliminated under the final wage methodology rule that was later issued in 2015.¹⁹ While the 2015 rule on employer-provided wage surveys was an incremental improvement over the rule in place in 2010, it contained loopholes. The following fiscal

year after the 2015 wage methodology went into effect, a legislative rider addressing H-2B employer-provided wage surveys became law as part of congressional appropriations legislation. This FY 2016 rider resulted in allowing employers to be permitted to use private wage surveys in a much broader range of circumstances, by requiring DOL to “accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.”²⁰

At the time of the proposed rule that would have eliminated the use of employer-provided wage surveys in late 2010, EPI commended and supported DOL’s removal of the use of employer surveys as an option for determining prevailing wages for H-2B workers because such surveys are fundamentally flawed, regardless of the methodology used, and because employer surveys are conducted and/or funded by the employer or its agent. Such an arrangement creates an obvious conflict of interest. We do not assume that all employers would game the system and pay H-2B workers as little as possible in order to cut labor costs. But in light of evidence gathered by worker advocates showing that employer-provided wage surveys are used almost exclusively to lower H-2B wage rates, as well as the numerous documented abuses in the H-2B program and of H-2B workers, neither can we expect or assume that employers will act in an impartial manner when attempting to establish the wage levels of their migrant employees in H-2B status.

In practice, the use of employer-provided wage surveys has been one-sided and inherently unfair to workers, as well as worker advocacy organizations and labor unions, because only the employer’s voice is heard and considered by the DOL. Labor unions and other organizations and employee representatives have not been allowed to submit their own wage surveys—which may reach different conclusions than those of employer-funded or conducted surveys.

In fact, it is a well-established fact that low and below-average wage rates have directly resulted from the use of employer-provided wages surveys, leading to the underpayment of migrant workers in the H-2B program. For example, litigation revealed that employers responded to the higher prevailing wage requirements in the 2013 IFR by substantially increasing the number of employer-provided wage surveys they submitted to DOL in order to keep certified H-2B wages low.²¹ As information revealed in the *CATA v. Perez* decision and reported by Bloomberg in 2014 showed, a significant number of employers began to request that DOL approve their submitted wage surveys—by an increase of 3,182% soon after promulgation of the 2013 IFR—and in 21.1% of those determinations, the certified wage was lower than even the Level 1, 17th percentile wage for the position (by occupation and local area), and 94.4% of the determinations were for a wage that was lower than the Level 2 wage, set at the 34th percentile wage.²² In other words, over 94% of certified H-2B wages were set a wage that was not just lower than the local average or median wage for the occupation—but lower than the 34th percentile, i.e. the lower one-third of the wage distribution for the occupation and local area. This was clear evidence that the shift to the use of employer-provided wage surveys was a systematic response by H-2B employers to keep H-2B wages lower than the local average OEWS wage rate that would otherwise be required under the 2013 IFR.

Another, later example of how employers have continued to use employer-provided wage surveys to keep wages low even after the 2015 wage methodology went into effect, comes from the Maryland crab industry. In 2017, Washington D.C.'s WAMU aired a report highlighting the work of Mexican women on Maryland's Eastern Shore who picked crabmeat by hand for two employers, Russell Hall Seafood and G.W. Hall and Sons.²³ The 80 H-2B jobs that were certified by DOL for these employers showed—as WAMU also reported—that the workers were paid \$9.51 per hour.

These crabpicking jobs were classified under the occupational title of “Meat, Poultry, and Fish Cutters and Trimmers,” which is one of the top H-2B occupations every year. According to DOL survey data, the national average wage for this occupation in 2017 was \$12.27 per hour, and the Maryland statewide average wage for the occupation at the time was \$13.32 per hour. Thus, the \$9.51 the two employers paid their H-2B workers was \$3.81 less per hour than the statewide average wage for crabpicking. The wage the H-2B workers were paid of \$9.51 was also lower than the local average wage at the time, which was \$12.87 per hour, according to another database using the same DOL data set for the occupation in the “Upper Eastern Shore of Maryland nonmetropolitan area.” That means the local average wage for crabpicking was \$3.36 more per hour than what Russell Hall Seafood and G.W. Hall and Sons paid their H-2B employees. At \$9.51 per hour, they weren't paid much more than the Maryland state minimum wage at the time of \$8.75 per hour.²⁴

Another issue is that DOL must expend valuable staff time in order to review employer surveys that are not entirely standardized, that vary in quality and accuracy, and which are redundant to the work that DOL has already done in collecting vast amounts of representative wage data in the OEWS survey. In fact, in the aforementioned 2010 NPRM, the DOL “concluded that the review of such surveys is an inefficient and unnecessary expenditure of government resources.” We agree. From EPI's perspective, the inherent conflicts of interest preclude the use of employer surveys. In any event, to the extent DOL believes that in some cases, “private surveys can provide useful information,” we would argue, as did DOL at the time, that “the cost of reviewing the surveys outweighs their utility.”²⁵ DOL's cost-benefit analysis in October 2010 was a fair and reasonable justification for eliminating the use of employer-provided surveys, and we believe that DOL should consider reviving this proposal.

DOL now has a chance to implement a new H-2B prevailing wage methodology that would eliminate the use of employer-provided wage surveys and should do so as soon as possible. While some may argue that the FY 2023 appropriations rider language limits the ability of DOL to promulgate such a regulation, we would argue that the language does in fact permit the elimination of employer-provided wage surveys, or at least severely restrict their use. The current rider language states:

*In the determination of prevailing wage for the purposes of the H–2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not statistically supported.*²⁶

Given the serious data and methodological questions and deficiencies that have been raised by worker advocates with respect to employer-provided wage surveys, including in current litigation challenging their use,²⁷ and that experts have attested to,²⁸ DOL should simply require that employers prove and establish that their wage survey is methodologically superior to the OEWS survey—for example in terms of sampling and the number of respondents, etc. Any employer-provided survey that does not meet methodological standards that are equal to or better than those of the OEWS should be rejected as not being “statistically supported.”

DOL should calculate and add on the appropriate level of fringe benefits to the OEWS prevailing wage determination.

The lack of any fringe benefits in OEWS prevailing wage determinations²⁹ constitutes a severe deficiency in the OEWS wage data that conflicts with 8 CFR §214.2(h)(6)(i)(A), which requires that H-2B workers not displace qualified United States workers or adversely affect the wages and working conditions of United States workers. Failure to account for fringe benefits also undermines the statutory requirement to adequately test the U.S. labor market, so that visas are only issued only if no “unemployed persons capable of performing such service or labor” are available in the United States.³⁰

Reliance on the OEWS to determine prevailing wages—without adjustment—is not consistent with these requirements because the OEWS does not include fringe benefits. If the prevailing wages and benefits for a particular occupation in a particular Metropolitan Statistical Area are, for example, \$12.00 per hour plus \$3.00 per hour in pension and health benefit costs, but DOL determines the prevailing wage to be simply \$12.00, U.S. workers will be adversely affected. Employers will be encouraged to apply for H-2B workers, saving themselves \$3.00 in benefit costs and putting downward pressure on the locally prevailing compensation. When employers advertise for local workers at \$12.00 an hour, with no benefits, they will underprice labor by 20% and discourage U.S. workers from applying for those jobs. H-2B workers, on the other hand, cannot be expected to complain about this or have the bargaining power to negotiate adequate fringe benefits, because their employers control and have near-total power over their immigration status, and some workers will be also willing to accept the lower compensation, because it will likely be far more than they could earn in their country of origin.

BLS already collects the necessary data to determine the appropriate amount of fringe benefits that should be required as a supplement to the OEWS wages used to set H-2B prevailing wages. The *Employer Costs for Employee Compensation* (ECEC) report from the BLS “provides the average employer cost for wages and salaries as well as benefits per hour worked” for workers in the “civilian economy, which includes data from both private industry and state and local government.”³¹ The ECEC reports the total average wages and

benefits paid by employers and lists these data as they correspond to broad occupational employment categories. These data are also differentiated according to the average amount paid for the major categories of fringe benefits: paid leave, supplemental pay, insurance, retirement and savings, and legally required benefits. The ECEC also reports the average total compensation, wages and salaries, and total costs of fringe benefits paid by employers, broken down by geographic region, census division, and locality.³²

Using the aforementioned data sets from the ECEC, DOL can determine the appropriate level of fringe benefits that must be offered and paid to H-2B workers. The ECEC provides data on health and retirement benefits, and wages and wage-related pay such as paid leave and supplemental pay. The wages reflected in the OEWS survey capture the wages and wage-related parts of total compensation. Employers paying wages will already be paying the “legally required” payroll taxes. Therefore, the compensation missing from the OEWS wage rates is the cost of retirement and health benefits, which are approximately 11% of private sector compensation. The amount of pay reflecting these benefits that employers of H-2B workers should pay can easily be determined by taking the ratio of the sum of health and retirement benefits to the wages paid (the sum of wages, paid leave, and supplemental pay). This can be determined for a broad occupational grouping and perhaps done at a regional level as well. This ratio when multiplied by the OEWS wage shows the amount of benefits that would be comparable to that earned in the private sector or civilian sector.

Although the occupational groups and geographic areas listed and reported in the ECEC are not as numerous and detailed as those in the OEWS’s occupational categories and geographical areas, this should not deter the DOL from utilizing these data to calculate the percentage of wages that should be added on as fringe benefits to the OEWS wage. Only a percentage to be added on must be determined—not an exact dollar amount. To determine that percentage, DOL can use national-level data and a broad occupational or industry category, such as “goods-producing industries.”

Thus, the ECEC data are sufficient to provide DOL an average level of insurance and retirement benefits received by employees in that job and in that area. Following precedent from the Davis Bacon and Service Contract Acts, the fringe benefits could be paid by the employer through any combination of a variety of options, such as paid leave, health and life insurance, retirement and savings accounts, etc., or the employer could simply pay the benefits in cash.

A requirement that these fringe benefits be offered to H-2B workers would ensure that the wages and working conditions of similarly employed workers are not adversely affected, and that the labor market is adequately tested, in order to provide U.S. workers a fair opportunity for temporary and seasonal jobs, and so that H-2B workers are fairly compensated according to U.S. standards.

When DOL determines labor market needs at the labor certification stage,

the Office of Foreign Labor Certification (OFLC) should take a more holistic approach—one that considers national labor market data and trends—and reject positions in high unemployment regions and industries.

The rules and processes that are in place to require employers to recruit U.S. workers before hiring H-2B workers are clearly inadequate. Considering that the program is in place to help employers when they are experiencing a labor shortage, DOL should explore how to make improvements, so that shortage determinations are credible, and allow U.S. workers to have a fair shot at seasonal job openings, and so that jobs are not certified in industries and regions that are experiencing elevated levels of unemployment.

Thus, the H-2B statute, on paper, requires that employers first search for unemployed U.S. workers before hiring H-2B workers. But in practice, employers are able to circumvent lax requirements for recruiting U.S. workers.

Employers can use tricks to bypass the local workforce, for example, by the way they advertise H-2B jobs, as an investigative report from the *Washington Post* found.³³ There's also a *Buzzfeed News* report which found that employers will sometimes require “unusually stringent requirements” for local workers, including drug tests and unreasonable education and experience requirements.³⁴ While in the past three years virtually all of the recruitment for H-2B has moved online to the DOL job portal, a number of questions remain about its effectiveness (which have been commented on in more detail in the comments endorsed by EPI), and there is little to no oversight regarding U.S. workers who apply for open positions and are subsequently rejected, despite many, if not most, of the positions requiring minimal experience.

The recruitment requirements for H-2B remain minimal, enforcement is lax, and therefore employers can still easily game the system with impunity. That's likely part of the explanation for how, in early 2021—despite the fact that unemployment in many of the top H-2B industries ranged from roughly 10% to 17%—DOL certified many more H-2B jobs than the number of visas available under the annual cap.³⁵

In addition, available data from DOL reveal that many H-2B positions are located in cities and regions that DOL has designated as experiencing high unemployment. DOL maintains a list of what it calls Labor Surplus Areas (LSAs), where unemployment is much higher than the national rate. DOL defines a Labor Surplus Area as:

a civil jurisdiction that has a civilian average annual unemployment rate during the

*previous two calendar years of 20% or more above the average annual civilian unemployment rate for all states (including Puerto Rico) during the same 24-month reference period. If the national annual average unemployment rate during the referenced period is less than 6.0% then the qualifying rate is 6.0%. If the national annual average unemployment rate during the referenced period is above 10% then the qualifying rate is 10%.*³⁶

DOL updates the LSA list every fiscal year. An unpublished analysis of FY 2022 OFLC disclosure data conducted by Arthur Read from Justice at Work Legal Aid in Pennsylvania, crossed referenced H-2B certified jobs with DOL's Labor Surplus Areas and found that 35.2%, over one-third, of certified H-2B jobs in FY 2022 were located in DOL's current list of designated Labor Surplus Areas.³⁷

In sum, the best way to prevent the misuse of the H-2B program is to have credible rules in place regarding employer recruitment of U.S. workers, and honest assessments about conditions in the labor market. Having credible rules would ensure that the H-2B program is not misused, whether there's a hot job market or in times of high unemployment.

Regulations and/or subregulatory guidance to implement this could, for example, **require that OFLC look at broader labor market trends when assessing employer requests for labor certification, and reject requests for jobs that are in industries experiencing high unemployment in the local area or nationwide.** This would not require much background research by OFLC officers; at a minimum, they could simply keep updated charts with national and regional unemployment rates that correspond to the relevant industries. If warranted, the OFLC officer could reject requests for jobs in high unemployment regions and industries, and/or request more information from employers to justify their requests for jobs in high unemployment areas and industries. OFLC could also reference DOL's list of Labor Surplus Areas, and if an H-2B job's worksite would be located in a high unemployment region—that should make the labor certification application a likely candidate for rejection, or at least further scrutiny.

DOL should provide information on job orders and labor certifications in real-time and create an avenue for stakeholders, including U.S. workers, to raise concerns about job orders and labor certifications.

DOL has a statutory duty to ensure that employers are making honest, good faith attempts to recruit U.S. workers at prevailing wages as part of the labor certification process. In some cases, job orders that advertise seasonal and temporary positions may not contain terms of employment, including wage rates, that are consistent with common or prevailing

practices or standards in the industry, whether it be in the local area or nationwide. Similarly, some requests for labor certification may have been approved by OFLC that did not contain terms and conditions that were consistent with standards in the industry.

As a result, DOL should ensure that information on job orders and labor certifications are made available in real time, or as close to it as possible, so that they can be assessed by stakeholders in a timely fashion. At present, this is not occurring, because key information is available months after it is no longer relevant to current job-seekers and other stakeholders. OFLC publishes labor certification disclosure data that corresponds to every quarter of the fiscal year, however it is often not published on the OFLC website until many months after the relevant quarter has ended. For example, at the time of writing this comment, on February 8, 2023—which is in the second month of the second quarter for the 2023 fiscal year—OFLC labor certification data are only available through the fourth quarter of the 2022 fiscal year, which ended on September 30, 2022.³⁸

Thus, DOL should make labor certification information available in real time or as close to it as possible, and in conjunction with this, DOL should create a clear process for stakeholders to raise concerns about H-2B job orders and labor certifications. Workers, unions, and advocates with localized expertise should also have opportunities to review job orders and certifications and an avenue to provide direct input to DOL as to workforce availability and the appropriateness of the occupational classification, job requirements, designated wage rates, and other relevant information.

One of the key inputs from stakeholders would be the ability of unions to submit collective bargaining agreements (CBA) that are in effect covering jobs that are in the same or similar occupation to H-2B jobs that have been certified in the same state as the CBA. If a CBA that was bargained for between a union and an employer covers an occupation that has been certified for H-2B jobs in the same worksite state, and the CBA sets a higher wage for that same or similar occupation as compared to the OEWS prevailing wage—then the CBA wage should set the H-2B prevailing wage—even if the H-2B employer is not a party to the CBA.

Allowing active scrutiny by individuals and organizations that are knowledgeable about the seasonal and temporary positions being advertised is the best way to prevent the misclassification of occupations of intended employment, which is a common means of wage suppression in temporary work visa programs, including H-2B. When legitimate concerns are raised, DOL should suspend the job orders and/or labor certifications in question.

USCIS should create a prioritization scheme to allocate H-2B visas when the number of petitions exceeds the annual numerical limit on cap-subject

petitions, rather than conduct a random lottery, and DOL’s assignment groups should mirror and support this prioritization.

Under the present system for allocating H-2B visas under the statutory annual numerical limit, there are two random lotteries being conducted.³⁹ DOL is first randomly sorting H-2B applications for labor certifications into assignment groups, starting with applications that were filed in the first three days after the application window opens and that list the earliest available start date for jobs for the half of the fiscal year to which those applications correspond.⁴⁰ DOL selects enough applications that it believes will lead to enough workers to fill the statutory annual numerical limit (for the half of the fiscal year to which they correspond). Employers that have their applications selected may then file petitions with USCIS.

Although DOL selects the number of applications that it believes will roughly correspond to the number of H-2B workers that are available for the half of the fiscal year, USCIS nevertheless receives more petitions for workers than the number of available slots for H-2B workers under the statutory numerical limit. As a result, USCIS then conducts its own random lottery of petitions to select that will ultimately be adjudicated and lead to approved petitions for H-2B workers.

These random lotteries have resulted because in recent years, as employer demand for H-2B workers has increased, the number of approved labor certifications for H-2B jobs and petitions for H-2B workers have exceeded the statutory annual numerical limit, as well as the supplemental visas that have been added in every fiscal year except for FY 2019. OFLC at DOL receives a flood of application at the beginning of each application cycle—for many more H-2B jobs than the number of visas that will be available under the statutory cap—and takes the applications that were filed in the first three days of the filing window and prioritizes those with the earliest start dates and sorts them into priority groups. This functions as a way to sort the applications and have staff review a reasonable number that will be consistent with the number of slots available under the numerical cap.

This is mostly a reasonable way to sort applications but not one that is ideal. One thing this system has done is to incentivize employers to set their start dates at the earliest possible date for the start of H-2B jobs, so that their applications are prioritized in the lottery that sorts them into groups. As a result, it is likely that many of the dates of need specified on labor certification applications are not genuine. Instead, DOL should prioritize H-2B labor certifications before sending them to USCIS using new criteria. H-2B jobs receiving top priority should be those where employers are offering to pay the highest wages, which will incentivize employers to offer better pay, as it will increase their chances of eventually being able to hire an H-2B workers, and other priorities can be included as well. Once the approved labor certifications then move on to the petition stage at USCIS, if and when there are more petitions than the number of available H-2B slots, USCIS can then continue

to prioritize the petitions according to the same framework.

Section 218A(h) of the Seasonal Worker Solidarity Act (SWSA) of 2022 offers a useful prioritization scheme for when there are more H-2B applications than the number of H-2B visas available under the annual numerical limit:

“(6) PRIORITY.—In a case in which demand for visas exceeds supply in the first 5 filing days of any given quarter, the Secretary of Homeland Security shall give priority in visa issuance to employers that—

“(A) pay wages at the 75th percentile or above based on Department of Labor survey data or collectively bargained wages or Davis Bacon wages;

“(B) are seeking to employ H–2B workers on worksites located in States with unemployment rates 20 percent or more below the national average;

“(C) are hiring returning workers previously employed in H–2B nonimmigrant status or workers from under-represented groups (based on gender or country of origin);
or

“(D) have less than 15 percent of their workforce in the United States comprised of H–2B workers.

DOL and USCIS should implement the SWSA's prioritization scheme to better allocate H-2B visas. Subsection (A) will incentivize employers to offer better wage rates for U.S. and H-2B workers; (B) will direct H-2B workers to the states that need them most, where unemployment is especially low; (C) will promote diversity; and (D) will help employers that employ fewer H-2B workers, rather than those workers going to employers that employ hundreds or even thousands of H-2B workers.

Some stakeholders, perhaps especially employers that pay lower wages and/or that employ large numbers of H-2B workers, may argue that such a prioritization scheme requires legislation and cannot be accomplished via regulation. Such arguments do not hold up to scrutiny. In fact, using a wage prioritization allocation for H-2B visas is reasonable and consistent with the H-2B statute.

It is worth recalling the recent history regarding proposed changes to how H-1B visas, for specialty occupations, are allocated. In late 2020, USCIS proposed a rule to prioritize H-1B petitions by prevailing wage, which was eventually withdrawn after being challenged in federal court and vacated by the court. The USCIS prioritization rule however, was vacated on procedural grounds, not because of any statutory constraints. One of the main substantive issues that likely would have come up, had the court reviewed the matter beyond procedural grounds, would have been whether the H-1B statute permitted USCIS to create a prioritization scheme for the allocation of H-B visas.

The main statutory language that opponents of a prioritization scheme for H-1B would likely point to is found at 8 USC §1184(g)(3), which requires that H-1B visas or statuses “be issued ... in the order in which petitions are filed for such visas or status.” This language, some may argue, restricts USCIS's ability to prioritize certain H-1B petitions over others,

and requires USCIS to consider them in the order in which they were filed. Since no petitions can be prioritized, the argument goes, USCIS must continue to consider and issue petitions via random lottery. As EPI argued in December 2020, “the practical realities of the H-1B annual numerical limit or ‘cap’ and the way that USCIS receives petitions for H-1B visas, renders this impossible to implement in practice—leaving USCIS little choice other than to propose a rational alternative that is consistent with intent of the H-1B statute.”⁴¹ In addition, a prioritization scheme for H-1B visas is a permissible exercise of discretion that Congress granted USCIS through the Immigration and Nationality Act and which warrants deference under the *Skidmore* framework⁴² and also under *Chevron*. As a result, USCIS clearly has the authority to implement a prioritization scheme for H-1B visas.

However, in the case of H-2B visas—which like H-1B, are also oversubscribed every fiscal year relative to the statutory annual numerical limit—no similar statutory language regarding the order of consideration or issuance of petitions exists. DOL and USCIS face a similar challenge however, in terms of how to best allocate labor certifications and petitions, because the number of applications exceeds the annual numerical limit. But in the case of H-2B, neither DOL nor USCIS are constrained in any way—however theoretical and illusory the constraint may be in H-1B—when it comes to implementing a prioritization scheme for H-2B rather than continuing to allocate jobs and petitions by random lottery.

Rather than being in conflict with the H-2B statute, a prioritization scheme will instead also make the H-2B program more consistent with the intent of the H-2B statute and regulations. By making higher wages for H-2B workers the top allocation priority, the prioritization scheme will put upward pressure on labor standards in the H-2B program, in turn making H-2B jobs more attractive to the unemployed U.S. workers referenced in the statute at 8 USC §1101(a)(15)(H)(ii)(b)—who may begin to see them as a more realistic option for employment. Higher wages will also help ensure that H-2B workers do not displace qualified United States workers or adversely affect the wages and working conditions of United States workers, as 8 CFR §214.2(h)(6)(i)(A) requires.

While USCIS is the ultimate adjudicator of which petitions will be selected and approved, it is important to note that DOL’s role here is also key. If DOL does not first sort the H-2B employer application groups according to USCIS’s priorities, then USCIS will not be selecting petitions that have the highest wage rates and other priorities from the entire group of applications—instead, they would be selecting only from a smaller group of applications—the ones that DOL has selected via their random lottery.

However if DOL were prioritizing with the same parameters from the larger, full group of applications, it makes it more likely that more of the applications with higher-wage rates and other priorities will ultimately be selected and approved for hiring an H-2B worker. DOL could accomplish this without issuing a regulation, via guidance, as they did when implementing the existing process for allocation groups—which did not require a regulation⁴³—setting out new priorities for the allocation groups that mirror USCIS’s priorities for selecting and adjudicating petitions. Given DOL’s consultative role in the H-2B program, DOL would be implementing a process that would assist USCIS in better implementing its prioritization scheme, which would be set out in a new regulation.

DOL and USCIS should implement new limitations on the types of employers and jobs in the H-2B program.

While some H-2B petitions should be prioritized, as discussed in the previous section, USCIS should consider new limitations on the types of employers and jobs in the H-2B program, which should include a reconsideration of the duration of the H-2B visa.

Limiting the number of petitions that can be approved for a single employer to 100.

A small number of employers are beginning to take a large share of the number of H-2B visas available under the annual numerical limit. In FY 2021, there were 4,400 employers with at least one approved H-2B petition from USCIS. Out of those 4,400 employers, there were two employers with over 1,100 approved petitions for new employment (excluding petitions for continuing employment), and two employers with over 2,000 approved petitions for new employment, with the largest H-2B employer being Brightview Landscapes LLC, with 2,767 approved petitions for new employment.⁴⁴ There were 159 employers in total with more than 100 approved petitions for new employment; 54 of those had over 200, and 12 had over 500.

In light of the annual numerical limit set in the statute and in order to provide a more equitable distribution of H-2B petitions to employers, USCIS should limit the number of approved petitions for new employment that can go to any one employer to 100. This would also discourage employers from relying on workforces comprised solely or overwhelmingly of H-2B workers. Once an initial distribution of petitions has been made subject to this limitation, any remaining H-2B visas under the limit could then be distributed to employers requesting more than 100 H-2B workers.

USCIS should not approve petitions for employers that will not employ H-2B workers directly, such as outsourcing firms and labor contractors.

Firms that outsource labor rather than employ workers directly, such as labor contractors, are associated with paying lower wages to their workers. This can result because those firms are taking a cut of workers' wages in order to make a profit for their service of connecting workers with employers. Firms that outsource workers with H-1B visas, for instance information technology firms—which now dominate H-1B employment⁴⁵—have been found to pay some of the lowest wages allowed by law,⁴⁶ and EPI has reported on evidence that wage theft at a mass scale is being perpetrated against migrant workers on H-1B visas by outsourcing firms,⁴⁷ which DOL's Wage and Hour Division has failed to address in any way. Agricultural workers employed by farm labor contractors earn lower

wages than directly employed workers in agriculture⁴⁸ and federal data show they are the biggest violators of wage and hour laws in agriculture, by far.⁴⁹ In a recent major human trafficking case involving farmworkers and H-2A workers, Operation Blooming Onion, farm labor contractors allegedly played a major role in perpetrating worker abuses and exploitation.⁵⁰

Outsourcing firms now dominate employment in the H-1B program and farm labor contractors now dominate employment in the H-2A program. These are troubling trends that DOL and USCIS should be aware of and should step in to prevent the H-2B program from also being dominated by employers with a fissured model that will degrade wages and working conditions in H-2B industries. A simple way to combat this, which appears to be an increasing trend in H-2B, would be to deny petitions for employers that will not employ the H-2B workers they petition for directly. Clearly, the presence and increase of H-2B labor contractors with a fissured employment model that is associated with lower wages and higher labor and employment law violations will result in adversely affecting the wages and working conditions of U.S. workers, as 8 CFR §214.2(h)(6)(i)(A) prohibits.

The duration of H-2B jobs should be limited to seven months.

The current maximum duration of temporary need for an H-2B job is 9 months, which is far too long for jobs that, by statute, are mandated to be for “temporary service or labor.”⁵¹ Allowing employment in H-2B status for jobs that may last nine months makes it more likely that the H-2B visa program will be misused for year-round employment, especially in jobs that are not temporary or seasonal, such as meat and poultry packing and processing jobs.

An unpublished EPI analysis of FY 2018 H-2B labor certification data from OFLC revealed that 58.2% of all H-2B jobs certified—nearly three-fifths—had a duration of more than eight months.⁵² More than one-quarter, 27.3%, had a duration of nine months or more. The overall average duration for H-2B jobs in FY 2018 was 234 days, just under eight months. The average job duration for two of the top five occupations that year—Landscaping and Groundskeeping Workers, which accounted for nearly half of all H-2B jobs in FY 2018, as well as Meat, Poultry, and Fish Cutters and Trimmers—had longer durations than the overall average, at 243 and 245 days, respectively; just over eight months.

These are overly lengthy periods for so-called temporary jobs. DOL and DHS have the authority to define temporary and should reduce the temporary period to a maximum of seven months. Seven months is a reasonable duration that will allow employers to employ H-2B workers for more than one half of one year, which is ample time for a “temporary” position.

DOL should update the “three-fourths” guarantee and require

employers to guarantee all hours promised on H-2B job contracts.

In June 2015 EPI submitted comments on the Interim Final Rule on H-2B, “Temporary Non-agricultural Employment of H-2B Aliens in the United States.”⁵³ In those comments we generally supported DOL’s addition of a minimum hours guarantee and its method of calculation at 20 C.F.R. § 655.20(f) because it serves two valuable purposes: It provides an important protection for workers who travel long distances in reliance on promises of abundant work, only to have to wait weeks or months for the promised work actually to begin, and it encourages employers to estimate their need for workers accurately and discourages applying for an oversupply of labor to the detriment of workers.

Nevertheless, we argued that to strengthen the provision, DOL should require an employer to comply with 100% of the hours provided in the job order, and not just three-fourths of the hours. We again reiterate that DOL should provide H-2B workers with all hours promised on job contracts.

A party to a contract is expected to comply with the full terms of its obligations under the contract. It is a bit strange that within the context of temporary work visa programs, employers would be obligated to comply with only three-fourths of the promise they have made. When this three-fourths rule is considered in conjunction with the 35-hour workweek as defined in 20 C.F.R. §655.5, an absurd and unacceptable result occurs. Three-fourths, or 75% of a 35-hour minimum workweek over 4 weeks, equals 105 hours every 4 weeks. Migrant workers in H-2B status, like U.S. workers, face ever-increasing costs of living and are not likely to be able to afford them if they only work 105 hours per month or only 26 ¼ hours per week on average over 4 weeks, especially if they are earning the low wages usually associated with the jobs in the main H-2B occupations and industries. In addition, U.S. workers will also be less likely to apply for these positions, and may instead opt to continue to search for employment that can guarantee 40 hours per week, which is generally considered a full-time work week.

Although we do not concede the point, it can more reasonably be argued that the use of the three-fourths guarantee in the H-2A program is reasonable, instead of a 100% guarantee, in light of the uncertainties that farmers and agricultural employers face due to the weather and crop yields, which may impact the need for labor in a given month. This rationale is far less persuasive in the H-2B context because H-2B employers, on the other hand, are less at the mercy of the weather, and thus should not benefit from the three-fourths rule or the 35-hour workweek at the expense of workers traveling from abroad, especially when employers have viable options such as hiring fewer workers or increasing work hours for other workers. Exceptions for unforeseeable circumstances can be made to relieve hardship for truly unavoidable contingencies. Thus, a “four-fourths” guarantee would more accurately reflect the contractual expectations of the parties and would help prevent employers from recruiting more H-2B workers than needed (which in turn could lead to a more equitable distribution of the H-2B cap).

DOL, USCIS, and the State Department should collect and release more and better data about the H-2B program in a timely fashion.

When it comes to the H-2B visa program, there should be much more transparency across the board in order to protect workers, as well as disclosure of information at all stages of the H-2B process. Unfortunately, the SeasonalJobs.dol.gov portal as currently constituted does too little to make job seekers and H-2B workers aware of current employment opportunities, and on the back end, too little is made public by DHS and the State Department in terms of how the H-2B program is ultimately being used by employers. If workers had real-time access to information about current and prospective employers and recruiters in the H-2B program, they would become better empowered to vet whether job opportunities in the United States are legitimate while they are being recruited abroad, as well as to seek and find available opportunities in the United States if they need to leave a U.S. employer because of abuses or labor disputes. Because this is not the case at present, recruiters and employers hold a disproportionate amount of power over H-2B workers, which can be used to exploit them and keep them in a dangerous situation.

In order to resolve this and put power back in the hands of workers and the advocates who assist them, there should be much more transparency with respect to data that the U.S. government collects and stores about the H-2B program, in order to, for example, ensure that the immigration system is not being co-opted in ways that allow employers to discriminate and segregate the workforce through recruitment, or to keep H-2B workers underpaid and toiling in unlawful employment situations. More and better data transparency would also help advocates to assist workers and labor standards enforcement agencies to fulfill their missions, and could serve as a tool to aid organizations and advocates who are fighting human trafficking that occurs on temporary work visas. In fact, data transparency to protect workers and hold employers accountable is an action that federal agencies could take quickly and that is practicable and feasible.

Below is a list of recommended actions that agencies could take regarding data disclosure and transparency on H-2B:

- a. DOL should substantially enhance and improve the SeasonalJobs.dol.gov website to be a useful portal for job seekers both inside and outside the United States.
 - DOL should enhance SeasonalJobs.dol.gov so it can serve as an effective, online H-2 visa employment portal where job seekers from the United States and abroad can view a full list of DOL/DHS approved employment opportunities. DOL should aim to develop a standardized national platform for job postings that has the capacity to reach current and prospective U.S. workers, as well as H-2B workers seeking to change jobs, with real time information in a way that is easy to navigate and language appropriate. The portal should also provide information about worker and job-seeker rights and clear steps to take when those rights are

violated.

- b. H-2B data releases from USCIS and OFLC should be published on a schedule that is closer to being in real time. This would, for example, allow US-based job-seekers to see which positions have been certified and the salary levels, while also providing information to potential and current H-2B workers about the validity of H-2B jobs and the job terms that have been offered. Releasing this information in real time would allow stakeholders to challenge certified wages and working conditions that are not consistent with labor market realities or that do not reflect the best available information about current wage rates.
- c. Labor certification data from OFLC and petition data from USCIS should be connected through the use of case numbers in the H-2B Employer Data Hub, as well as full employer identification numbers (EINs) instead of just the last four digits of the EIN (which creates duplicates and makes the information difficult to analyze).
- d. USCIS should provide more clarity and explanation regarding the data in the H-2B Employer Data Hub; for example more context on the many cap exempt approvals in the data, and it is unclear which petitions represent workers who changed employers or had their employment conditions changed with the same employer.
- e. USCIS should provide additional information about the employers recruiting from Central America to help workers and advocates know more about how the program is being used in the region, and whether any problems are being observed. This could be reported out, either via the White House H-2B Worker Protection Taskforce, or in some of the existing reports—such as the USCIS Ombudsman report or the USCIS H-2B Characteristics reports, which are published annually and are mandated by Congress.
- f. The State Department releases very little data when it comes to the H-2B program, other than aggregate data on the number of visas issued and the countries of origin. State should begin releasing more data based on the information collected at consulates. This would be helpful in myriad ways, for example, data on the sex/gender of workers, which would help advocates identify and combat gender discrimination. Data on nationality and gender could also be connected to the petition data in the Employer Data Hub and reported there (this would require coordination between State and USCIS).

DHS must ensure that H-2B workers are able to access deferred action quickly when their employers break the law and when workers are in labor disputes.

EPI has applauded the Department of Homeland Security (“DHS”) for protecting noncitizen

workers who are victims of—or witnesses to—labor rights violations with a streamlined deferred action request process.⁵⁴ DHS must ensure that this process—and DHS’s other tools—fully protect H-2B workers exercising their rights and when engaging in labor disputes.

We urge DHS and DOL to coordinate with other federal labor standards enforcement agencies to ensure they understand the unique pressures that workers with H-2B visas—and H-2A and other work visas—face and to streamline and accelerate their processes for issuing letters or statements of interest in support of deferred action. When temporary migrant workers in nonimmigrant statuses leave abusive and lawbreaking employers and search for legal advocates who can support them in vindicating their rights, they risk accruing unlawful presence in the United States if they remain for legal or administrative proceedings without first being granted deferred action. Unlawful presence may then render them inadmissible to the United States in the future, which may deter them from reporting violations or attending proceedings. While we understand that federal labor standards agencies are working towards streamlining their processes for letters or statements of interest, advocates have observed that the process may sometimes takes many months. Making the promise of deferred action a reality for temporary migrant workers, including H-2B workers, will require the DOL and other labor standards enforcement agencies to issue letters or statements of interest expeditiously—within days, not months.

Additionally, DOL and DHS should fully implement 8 CFR § 214.2(h)(17)(iii) to protect H-2B workers who leave abusive employers from having to leave the United States immediately. That regulation provides, “[i]f the alien has already commenced employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers[.]” The DOL and DHS should use the regulation to ensure that workers do not accrue unlawful presence.

DOL and DHS should improve labor mobility for H-2B workers so they can find and access new employment after leaving abusive and lawbreaking employers.

Every worker should be able to leave a job for *any reason* without fearing that their employer will retaliate against them or that they will be barred from employment elsewhere. This fundamental principle of workers’ mobility is enshrined in US anti-retaliation laws.⁵⁵ And workers should especially be allowed to have the freedom to leave

an employer that does not comply with workplace laws such as wage and hour and safety laws, as well as civil rights, anti-discrimination, and anti-trafficking laws. But the H-2B program currently prevents most migrant workers from leaving one job and finding another because the worker's visa is tied to a single employer, and that employer controls the process for applying for the worker's visa and immigration status, which allows the worker to remain and work in the United States.

Workers with abusive employers often face an impossible choice in the H-2B program—continue to work in dangerous, unlawful conditions, where they are often threatened with immigration-based and other types of retaliation—or risk losing their job, visa, and work authorization in the United States. H-2B workers are exceptionally vulnerable to abuse because the program prevents them from leaving an abusive employer and having mobility in the U.S. labor market. Given the recent, rapid expansion of the H-2 programs, the need to ensure mobility mechanisms that benefit workers—rather than just employers—is more important than ever.

Thus, tying workers' immigration status to their petitioning employer is a foundational flaw in the H-2B visa program, as well as work visa programs more broadly.⁵⁶ Restricting labor mobility enables abusive employers to commit labor trafficking, retaliation, wage theft, and other labor and workplace violations. Employers know that H-2 workers generally have no viable option to leave their jobs if they wish to remain legally in the United States—and, in many cases, have limited access to legal tools to seek accountability for violations. In this context, low-road employers have little incentive to follow the law.⁵⁷

Over the past three years, DHS has issued Temporary Final Rules (TFR), including this one, that purport to provide “portability” for workers with H-2B visas.⁵⁸ (Similarly, in 2020, DHS issued multiple TFRs that extended “flexibilities” to petitioners seeking H-2A workers.)⁵⁹ These TFRs make the same basic change: they allow petitioner-employers to begin employing workers who are currently in an H-2 status as soon as an H-2 petition is filed, before USCIS has adjudicated and approved it. By basing visa status on the date an employer files a petition, the TFRs do little to strengthen workers' power. In theory, portability should mean *workers* can leave one job to seek another. But in practice, portability under the TFR gives *employers* additional flexibility to hire workers they have already found without giving workers any independent protection that would provide them the time or access to the information they need to use the TFRs' portability provision. Advocacy groups that are part of the Migration that Works coalition, which EPI is a part of, and that work directly with and represent H-2 workers have noted that they are not aware of a single worker who has left an H-2 employer and found another H-2 job under DHS's portability provisions.

As a result, DHS should modify and improve its portability provisions with the goal of protecting workers by allowing them to have a feasible path to leave an abusive or lawbreaking employer without immediately losing their status and right to remain in the United States—this would be a critical step toward promoting compliance with H-2B program's rules and protecting workers' rights.

To make this workable, DHS should immediately issue a regulation that allows H-2B

workers a grace period of at least 60 days, where the worker can be unemployed without losing their immigration status or work authorization. This would give workers a real opportunity to leave an abusive or lawbreaking employer, and provide them with more time to search for and obtain employment with another employer, in a job that is appropriate within what is permitted in the H-2B visa classification. An existing regulation permits workers in other nonimmigrant statuses such as H-1B, L-1 and TN, to have a 60-day grace period to be unemployed and seek alternative employment.⁶⁰ At the very least, H-2B workers should also have this flexibility. But USCIS should consider increasing the grace period to 90 days for all temporary work visas and nonimmigrant statuses.

While H-2B workers are in this grace period, they need to be better informed about available opportunities for alternative employment and to know how to access them. In particular, they need to be able to apply for positions that have been approved for labor certification by DOL, and they need to be able to identify and apply to them quickly. The DOL's SeasonalJobs.dol.gov site would be the logical place for workers to go to find information about open positions. While the website is searchable in Spanish for active and inactive certifications and their job orders, it nevertheless does not provide insight as to which jobs and labor certifications have been filled. This severely limits the utility of the site as a job searching tool because it requires workers to contact employers individually to determine whether positions are still available, and it is possible that not all employers will speak the language of the H-2B job-seekers.

DOL should increase the use of its authority to debar employers that violate labor and employment laws.

As discussed above, DOL does not adequately screen employers before approving their labor certifications. With virtually no screening, employers who violate labor, employment, wage and hour, civil rights, anti-trafficking or anti-discrimination laws can receive H-2B labor certifications and access visas—and continue violating workers' rights. DOL has the authority and mandate to debar employers for violating H-2B laws or regulations, but rarely exercises that authority, as evidenced by at least one investigative report and by the limited number of employers who are currently debarred.⁶¹ Consequently, repeat violators of labor, employment, and H-2B laws and regulations continue to employ H-2B workers.

A BuzzFeed News investigation confirms that DOL rarely debars employers from the H-2 programs, despite widespread H-2 program violations.

By its own admission, the Labor Department very frequently finds problems with guest workers' labor conditions. In the 2014 fiscal year, it identified violations in 82% of the H-2 visa cases it investigated. Yet federal records show that the department bans — or to use its term, debars — very few companies, and in at least one year didn't debar a single one in the entire country. Between 2010 and 2014, agency investigators identified nearly 1,000 companies that had violated H-2

*laws, yet in that time period, the Labor Department debarred fewer than 150. Twelve employers were found to have each stolen more than \$100,000 from their guest workers in that time period; only one was debarred.*⁶²

DOL should consistently use its debarment authority to prevent abusive employers from exploiting the H-2B program—and deter other employers from violating workers’ rights. We urge DOL to heed Senator Jeff Merkley’s (D–Oregon) call for lawbreaking employers to “face real consequences...That means first time-offenders should be banned until all issues are remedied, and repeat offenders should be banned permanently.”⁶³

USCIS should issue a regulation allowing H-4 spouses of H-2B workers to be eligible for employment authorization.

Many temporary work visa programs technically allow migrant workers to bring their spouses and children with them to the United States, including the H-2A and H-2B programs, where the spouses of H-2 workers are eligible for H-4 visas that allow them to accompany the primary H-2 beneficiary. However, H-4 spouses of H-2A and H-2B workers are not authorized to work, making it difficult, if not impossible, for spouses and children to accompany H-2 workers because of the high cost of living in the United States and low pay in H-2 occupations. USCIS has the requisite legal authority to make all H-4 spouses eligible for employment authorization documents (EADs),⁶⁴ and should issue a regulation allowing H-4 spouses to apply for EADs. This will promote family unity. However, H-4 spouses should not be allowed to work for the same employer as the H-2 spouse, because, although H-4 visas are not tied to a single employer, an employer that employs both H-2 spouses would have an excessive level of control over the visa status of both spouses and whether they would be allowed to remain in the United States. Employers of H-2B workers could also use H-4 visas to circumvent the H-2B cap by hiring spouses.

Thank you to DOL and DHS for considering these recommendations, I look forward to their implementation, as well as further improvements that the Biden administration can make to the H-2B program that will improve labor standards for both U.S. workers and migrant workers.

Best regards,
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Endnotes

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