



National Association of State Departments of Agriculture
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November 20, 2023

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

Re: **DHS Docket No USCIS–2023–0012; CIS No. 2740-23 - NPRM Modernizing H-2 Program Requirements, Oversight, and Worker Protections**

Chief Nimick:

The National Association of State Departments of Agriculture (NASDA) represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs, including food safety, conservation, and fostering the economic vitality of our rural communities. NASDA believes both the current H-2A visa for temporary agriculture workers and the H-2B visa for temporary non-agricultural workers are unworkable. NASDA supports labor policy that protects employers of non-U.S. citizens when those employers make reasonable efforts to document labor status. As with any program, employer involvement and full compliance are key to ensuring the best outcomes for both the employer and the employee.

NASDA remains concerned with an increase in the cost of the H-2 program that will inevitably fall on agricultural employers if DHS moves forward with the changes in this proposed rule. The agency admits that the proposed rule would “directly impose costs on petitioners in the form of increased opportunity costs of time to complete and file H–2 petitions and time spent to familiarize themselves with the rule.” The range and diversity of agricultural operations across the states and territories are vast and complex. NASDA fears that this proposed rule will adversely impact smaller agricultural employers and operations, who, at times, have limited or lessened access to financial and technical resources to help them navigate complex regulatory environments. NASDA is concerned that smaller producers may not have the resources, legal expertise, and technical experience to adapt to the proposed changes quickly and effectively, potentially jeopardizing the success of their operations and the H-2 program. NASDA supports agricultural operations of all shapes and sizes and strongly encourages the DHS, in coordination with other federal agencies, to make all efforts to reach and inform smaller producers of these proposed changes and the potential business impacts.

DHS is also proposing to provide H–2A and H–2B workers with “whistleblower protection” comparable to the protection currently offered to H–1B workers. NASDA is concerned that this

change could leave employers with an increase in actions on their H-2 petitions, potentially resulting in higher costs and lower productivity. NASDA also requests that DHS clarify how the agency proposes to investigate and confirm whistleblower accounts and claims, as well as what due process protections will be provided to the agricultural employer.

NASDA supports an immigration process to be authorized and established by which current H-2A and H-2B temporary visa workers in good standing are permitted to apply for permanent visa residence or citizenship. NASDA is therefore interested in the DHS's provision in this proposed rule that would clarify that H-2 workers may take steps toward becoming lawful permanent residents of the United States while still maintaining lawful nonimmigrant status. NASDA does question whether this change could potentially cause additional administrative burdens for both the agricultural employer and employee, along with the thresholds and requirements for such lawful permanent resident status to be awarded. NASDA requests that the agency clarify the details of this immigration process in the final rulemaking.

NASDA also seeks an "at-will" visa where employees do not have contractual commitments and can move between employers as seasons and labor demands change. DHS seeks to enact a similar situation in the proposed rule through permanent portability to H-2A workers. However, if during the process of applying for and receiving permission to port, the worker finds a new H-2 employer, they could begin working for that new employer immediately upon the filing of a new nonfrivolous H-2 petition on the worker's behalf. For many employers seeking to fill immediate labor gaps, this would be welcomed news. For some other employers, this could create instability and uncertainty. NASDA supports the worker portability portion of this NPRM. The purpose of an employer petitioning to receive H-2 employees is to allow them to fill labor gaps and address their immediate labor needs. This permanent portability allowance, if it allows an employee to immediately begin new employment, will have an impact on the overall success of the program. The nature of agricultural employment often includes narrow windows for things like fresh produce harvest or other labor-intensive work. NASDA is relatively concerned that the ability of an H-2A employee to up and leave for new work during the middle of a harvest could potentially result in lower productivity and financial losses for some producers. NASDA requests that the agency provide further clarity on the "immediate" effectiveness of the portability allowance without consideration for the approval of the petition, except in the case of blatant misuse of the program or abuse of an agricultural employee by the petitioner.

NASDA remains concerned with the overwhelming number of proposed changes and potential opportunities related to the H-2A program. While producers are considering DHS's proposed changes and seeking to understand the complexities of prior recent rulemakings, they also simultaneously considered a rulemaking by the Department of Labor (DOL) titled *Improving Protections for Workers in Temporary Agricultural Employment in the United States* with a deadline of November 18, 2023, along with a recent Notice of Funding Opportunity from the United States Department of Agriculture (USDA) for the *Farm Labor Stabilization and Protection Pilot Program (FLSP)*, with a deadline of November 28, 2023. Each proposed rulemaking or agency action requires a significant amount of stakeholder engagement and competing timelines and comment periods have not provided NASDA members, nor the

agricultural employers and producers in their states, enough time for thorough review and comment.

American agriculture continues to face a critical shortage of labor that impacts annual harvests, animal agriculture production, and processing facilities throughout the entire supply chain. This damages American competitiveness and overall food and national security. According to USDA's Economic Research Service, agriculture, food, and related industries contributed roughly \$1.264 trillion to U.S. gross domestic product (GDP) in 2021, a 5.4% share. If faced with some of these costly changes DHS proposes, producers may have no choice but to change their entire operations and grow or raise less labor-intensive agricultural products. This rulemaking, in conjunction with several other proposed and finalized actions by this Administration, has the potential to change the entire U.S. agricultural industry, including both imports and exports of fresh produce and other products. NASDA urges DHS and the Administration to consider the lasting impacts these proposed regulations will inevitably have not just on agricultural producers – but the entire supply chain and ultimately, the American consumer. The increased costs associated with several of these proposed changes will, and already have, impacted the way producers are structuring their businesses. Those costs must be absorbed somewhere and, ultimately, could fall on the backs of consumers.

Under this Administration, producers utilizing the H-2 program have faced eight new rulemakings – finalized or initiated. The regulatory burden that agricultural employers face, especially as they emerge from a global pandemic, is unreasonable. NASDA strongly encourages the Department of Homeland Security to reconsider many of the proposed reforms, provide greater clarity, and consider the impacts such reforms could have – including administrative delays to the program, higher costs for the agricultural employer, and severe work and supply chain disruptions.

Should you have any questions, please contact Stephanie McBath, Associate Director of Public Policy, at Stephanie.McBath@nasda.org.

Sincerely,

A handwritten signature in black ink that reads "Ted McKinney". The signature is written in a cursive style with a large, sweeping loop at the end.

Ted McKinney
CEO