U.S. Chamber of Commerce

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November 20, 2023

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

Re: Notice of Proposed Rulemaking, U.S. Citizenship and Immigration Services; Modernizing H-2 Program Requirements, Oversight, and Worker Protections (88 Fed. Reg. 65,040-65,108, September 20, 2023)

Dear Chief Nimick:

The U.S. Chamber of Commerce submits the following comments on the above-referenced notice of proposed rulemaking ("NPRM" or "proposal"). The Chamber appreciates the opportunity to comment on this proposal, as there are multiple provisions that would improve the operation of the H-2 programs and provide more certainty to employers regarding their workforce planning decisions. These beneficial provisions include the extension of grace periods for H-2 workers once their employment opportunities have ended, the explicit acknowledgement that applications for permanent residency will not be grounds for denial of an H-2 petition, and the increased portability provisions for H-2 workers that will allow individuals to move from one job to another with greater ease and certainty.

However, the proposal contains many provisions that are of great concern. Chief among these concerns are the potential penalties and liability that is created for employers of H-2 nonimmigrants when putative beneficiaries of these visas have allegedly paid prohibited recruitment fees. These provisions include much more onerous compliance burdens, as well as significantly harsher punishments. The Chamber and its members share the Department of Homeland Security's ("DHS" or "the Department") concerns about worker protections. We do not want workers being harmed by the imposition, or the threat of imposition, of prohibited fees upon them. However, the proposed strict liability regime, the expanded debarment authority, and the significantly tougher (and in many ways, poorly defined) standards that employers must meet to avoid liability contained in this NPRM are going to harm all types of employers of H-2 nonimmigrants.

The Department's explanation of these provisions does not provide nearly enough specificity needed to properly apprise stakeholders of what is to be expected of them under this proposed rule. To that end, the current proposal does not provide the regulated community with a meaningful opportunity to comment on several provisions. We urge the Department to work with the Chamber and other stakeholders in a more fulsome notice-and-comment process on these provisions to ensure that the interests of employers and workers are adequately balanced as this rulemaking moves forward.

Businesses Welcome Codification of H-2 Grace Periods and Increased Portability for H-2 Workers, but Desire Further Clarity on Their Prospective Implementation

The Department is proposing several changes to how H-2 workers can take advantage of "grace periods" when the workers can either enter or remain in the country in limited circumstances outside of the petition's validity period. Given the demands of various types of businesses and the unanimity in their desire for increased workforce certainty, our members welcome the following proposed changes:

- The 10-day grace period prior to the H-2 employment commencing;[1]
- The 30-day grace period following the expiration of the H-2 petition, subject to the 3-year maximum limitation of stay;"[2]
- The 60-day grace period that is provided for one time during an H-2 workers authorized period of admission when his/her employment has ceased;[3] and
- The 60-day grace period provided for when an approved H-2 petition has been revoked.[4]

Many H-2 employers believe the increased flexibility in these grace periods will help them meet their workforce needs.

The 10-day period prior to the commencement of work will help the employee get themselves settled before their job begins, which will alleviate stress for both the employer and the employee. There are several logistical challenges that can make it difficult for individual employees to arrive in the U.S. in a timely fashion, as well as for them to get acquainted with their new surroundings in the country.

The 30- and 60-day grace periods will also help companies seek to hire additional temporary workers when the individual's prior H-2 employment opportunity

[1] See proposed 8 CFR §214.2(h)(5)(viii)(B) for H-2A 10-day grace period and proposed 8 CFR §214.2(h)(6)(vii)(A) for H-2B 10-day grace period; 88 Fed. Reg. 65040, 65103, 65105 (Sept. 20, 2023).
[2] See Id.
[3] 88 Fed. Reg. 65107.
[4] Id., at 65106.

has run its course and the next company has filed to transfer that individual to their company. Examining these grace periods in combination with the enhanced portability provisions in the proposal, employers are confident that the ability for H-2 workers to find subsequent employment will inure direct benefits to their companies because these provisions will help those individuals transfer to their companies. With respect to H-2B employers, this will help them avert quota related issues, as these individuals have already been subject to the cap and will not need to worry about that issue as they transfer from one company to another in the same fiscal year.

However, there are several causes for concern among companies regarding how these provisions would be implemented. For agricultural commodity producers that employ H-2A workers, they are responsible to provide housing for those workers and meals in certain circumstances. The grace period and portability provisions do not provide sufficient clarity on when an employer's obligations to its former employees cease in these circumstances. Regardless of how an employee ceased to be on one's payroll, companies are opposed to the idea that they would nevertheless be obligated to abide by the terms and conditions of the H-2 program when those H-2 workers are no longer in their employ.

For example, let's say an H-2A employer needs to seek additional workers in an emergency when other H-2A employees have ended the employment relationship in the middle of a contract period. If the company is lucky enough to find workers in that type of emergency, they will need to be provided housing. If the Department intends for that H-2A employer to still be responsible for providing his or her ex-employees with housing during that interim "grace period," there could be significant problems for that farmer if they do not have the housing facilities for all these people. Further clarity on this point is needed to not only grasp what exactly these provisions entail, but also to provide meaningful comments on these provision to the Department.

Another line of concern conveyed to us is the risk posed by these portability provisions for the initial H-2 employer. Companies invest significant resources in the process of hiring H-2 workers and there is a level of trepidation about workers seeking to avail themselves of a 60-day grace period if they've only been on the job for a week. While we understand the Department's concerns regarding hostile workplace environments for H-2 workers, there are many instances where a worker simply quits. In those latter situations, the employer is without recourse and the worker can stay in the country to find a different job for a longer period than they were employed by the petitioning employer. The Department did not consider these situations in their proposal, and we urge them to consider options that will ensure that workers do not take advantage of this grace period in a manner that harms employers. One option would be to foreclose an H-2 worker's ability to avail themselves of the 60-day grace period within the first month of their entry into the U.S. Workers that find themselves

in an unacceptable situation shortly after their entry may still avail themselves of the proposed 30-day grace period, but that shortened-time period will help diminish the potential for mischief involving the longer 60-day grace period.

Simplifying Interrupted Stay Calculation Benefits Employers

Employers greatly appreciate the proposed simplification of the interrupted stay calculation whereby the 3-year "stay clock" resets when an individual H-2 worker has been outside the U.S. for 60 uninterrupted days.[5] The current rules are very confusing for both employers and the agency because depending upon whether the individual has been in the country for less than 18 months or more than that, the interrupted stay calculation is either 45 days or 60 days, respectively.[6] The difficulties for employers and the Department are heavily influenced by the significant number of H-2 workers that cross our southern land border with Mexico. Individuals who leave the U.S. through a land port on the southern border are not tracked by the federal government, thus making it difficult to ascertain the specific amount of time they've been present in the U.S. The harmonizing of this to a uniform 60-day period provides further clarity with regard to an individual worker's ability to return to the U.S. and still maintain their H-2 nonimmigrant status.

Given the administration's usage of the CBP One application for various purposes, it is possible that the Department could build out the application's capabilities to help track this information. This could be done in a manner where the H-2 worker is responsible for logging in and recording their exit from the U.S. Alternatively, a two-step process where the employee and his/her last employer engage in a multi-step process to record the worker's exit from the U.S. It would start with the employer recording the cessation of the H-2 worker's employment, followed by the employee logging in their official exit on the application when they leave the U.S. The Chamber would welcome the opportunity to work with the Department on various ways to help solve the problems associated with the interrupted stay calculations.

Incorporating Dual Intent into H-2 Context is a Positive Development, but Further Clarity and Cooperation Among Other Federal Departments is Needed

The Chamber appreciates the revisions DHS proposed to 8 CFR § 214.2 (h)(16)(ii) that form the beginning of a "dual intent" regime for H-2A and H-2B workers. Many H-2 workers would welcome the opportunity to obtain lawful permanent residency and it would be a great relief to them and their employers if an immigrant visa petition made on their behalf would not preclude them from obtaining or

[5] 88 Fed. Reg at 65070-1.
[6] Id.

maintaining H-2 status. Expanding the concept of dual intent in this regard will provide more certainty to both H-2 employers and workers. However, we believe that these provisions could benefit from further refinement.

First, in both agricultural and non-agricultural H-2 contexts, there are many employers that would love to keep their H-2 employees on their respective payrolls in long-term roles. The current provisions in the NPRM do not specify that the entity filing the permanent labor certification, the employment-based immigrant visa petition, or the application for a lawful permanent residency/an immigrant visa can be the same employer of that worker on an H-2A or H-2B visa. The Department justifies its proposed changes based on the fact that current prohibitions are overly broad and that these changes will help H-2 worker mobility.[7] This is all well and good, but many Chamber members have conveyed to us that they have their H-2 workers return to them for many years and in other cases, those workers persuade their offspring and their extended family members to come to the U.S. to work for the employer as well. Given this state of affairs, it would beneficial if DHS provided further clarity in situations where the petitioner for the immigrant visa and the H-2 visa are the same entity.

Lastly, the problems that could potentially arise for H-2 workers in this context are not limited to adjudications before DHS. As H-2 workers come and go from the U.S., many of them will be subject to consular review as they seek to return to the U.S. to work on another H-2 visa. While the dual intent regulations will help as the individual is reviewed by DHS, these regulations hold no sway over consular officials under the State Department's purview. The Chamber fully appreciates that DHS cannot hold DOS to its standards. Nevertheless, to truly ensure these proposed changes bring about the most benefit for H-2 employer and H-2 workers alike, we encourage DHS to work with their counterparts in the State Department to harmonize their respective regulations and guidance documents such that the Department's stated goals are not thwarted due to inconsistent policies between the two agencies.

Proposed Program Integrity Provisions are Ill-Defined and Do Not Afford Stakeholders the Opportunity to Provide Meaningful Comments to the Department

The Department is proposing several changes to the current regulations that concern the charging of prohibited fees to putative H-2 workers, as well as the penalties that employers are subject to with respect to violations of these fee rules. One provision that is very concerning to companies is the elimination of the current exceptions that provide businesses with the ability to avoid a petition denial or revocation when USCIS determines that the H-2 visa petitioner collected or planned

[7] 88 Fed. Reg. at 65068.

to collect a prohibited fee from an H-2 worker.[8] The current exceptions allow companies to avoid liability when:

- The company reimburses the worker prior to the filing of the H-2 petition; or,
- The company terminated the agreement before the prohibited fee was collected.

Similarly, current regulations allow companies to avoid liability when they knew or should have known that its agents, facilitators, recruiters, or similar employment service providers collected a prohibited fee if:

- The employer reimbursed the worker for the fee they paid;
- The agreement to collect the fees was terminated prior to the collection; or,
- If the payment or the agreement to pay was entered into after the petition was filed, the petitioner notified DHS of the payment/agreement within 2 days of learning of the prohibited conduct that transpired.[9]

The Chamber shares the Department's concerns and supports enforcement efforts to prevent this type of prohibited activity, but the Department's proposal to eliminate these exceptions would cause havoc for many well-meaning employers. In proposing these changes, the Department is assuming that American employers have the resources and wherewithal to prevent the collection of prohibited fees that their agents, with whom they have an arm's length transaction, from engaging in this type of activity. Companies cannot monitor their agents around the clock and imposing the harsh punishment of a petition denial or revocation, as well as potential debarment from the programs, will cause unnecessary disruptions for businesses that are desperately relying upon these visa programs to meet their workforce needs.

Current regulations that allow employers to rectify these types of situations by reimbursing the workers for any prohibited fees that were paid should not be abandoned by the Department in this proposal. As stated before, eliminating these exceptions would cause a significant amount of business disruptions for well-meaning employers. Moreover, the Department did not consider other alternatives that could serve the Department's interest in strengthening the protections for H-2 workers in a manner that would avoid the foreseeable problems for companies.

One such way for the Department to address this would be to retain the exception, but impose a set of reasonable, supplemental fees/penalties that would be owed by the petitioner to the Department for this type of conduct. This would be eminently reasonable if the questionable activity is being directly committed by the petitioner or the petitioner is a knowing accomplice to the agent's untoward activities against putative H-2 workers. To that end, the Department could have a graduated

[8] 88 Fed. Reg at 65053.
[9] See Id.

scale of these types of penalties and if the company's track record was such that the imposition of these fees could be deemed a pattern/practice the employer, then perhaps the harsh penalty of a denial or revocation would be fitting in those situations. However, the Department's blanket, one-size-fits-all approach that removes any discretion to evaluate each case on its merits and is unnecessarily punitive should be abandoned.

If that wasn't enough, the imposition of debarment from the H-2 programs for a period of 1-4 years will further put employers in a bind that could be avoided had the Department approached these issues in a more balanced and rational manner. For employers subject to these proposed changes, their H-2 petitions will be denied or revoked unless they can show through *clear and convincing evidence* that a) *extraordinary circumstances beyond its control* resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and b) the company has fully reimbursed all affected beneficiaries and designees.

The Department's ill-defined standards in these situations will require employers to demonstrate that the "extraordinary circumstances" were "rare and unforeseeable" and that the petitioner made "significant efforts" to prevent the collection of prohibited fees.[10] The proposal states that "a mere lack of awareness" would not be sufficient to protect the employer from liability. To that end, the Department proposes that if it determines that an H-2 worker has paid or agreed to pay a prohibited fee to the petitioner's *third-party agent, attorney, facilitator, recruiter, or similar employment service,* that turn of events would also result in the denial or revocation of an H-2 visa petition "unless the petitioner demonstrates to USCIS through *clear and convincing evidence* that it did not know and could not, *through due diligence*, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed."[11] The written contract between the petitioner and a third party preventing such fees is not sufficient to meet the standard of proof and that the standard applies irrespective of whether the employer is in contractual privity with the third party or if the third party is operating in the United States.[12]

These provisions are incredibly problematic for the business community. As stated before, the consequences for employers in these situations are completely out of balance when compared to the alleged violation, especially in situations where the employer has reimbursed the worker. More importantly, the Department's proposal fails to provide stakeholders with any clarity as to the definitions of these critical terms in its proposal: "extraordinary circumstances;" "rare and unforeseeable;"

[10] 88 Fed. Reg. 65054
[11] Id.
[12] Id.

"significant efforts;" and "due diligence." The Department does not even attempt to explain how it plans to evaluate the facts and circumstances in its decision-making process in these situations, nor does it provide any context for employers regarding what actions it could take to prevent a violation under this section. The lack of substantive information provided by the Department on these provisions inhibits stakeholders from providing meaningful comments to this part of the proposal. Put another way, this section of the proposal reads more like a Request for Information or an Advance Notice of Proposed rulemaking, as opposed to the NPRM that it is. We urge the Department to issue another notice in the Federal Register that provides additional clarity on these provisions so stakeholders can better inform the government as to the impact they will have on H-2 employers and workers.

Conclusion

There are many welcome developments put forward by the Department in this proposal. At the same time, there are several provisions that are very concerning to the Chamber and its members, many of which lack the specificity necessary for stakeholders upon which to provide the Department with meaningful comments. We urge the Department to engage in additional listening sessions with stakeholders and to publish additional notices in the Federal Register that provide needed details so that we can properly provide the Department with meaningful comments on those provisions.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Vice President, Immigration Policy
U.S. Chamber of Commerce