"Global Workers Require Global Justice"

June 22, 2015

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Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave NW, Room N-5641
Washington, D.C. 20210

SUBMITTED ONLINE

Re: RIN 1205-AB76
Temporary Non-agricultural Employment of H-2B Aliens in the United States
80 Fed. Reg. 24,042-144 (Apr. 29, 2015)
Docket ID ETA-2015-0005

Dear Ms. Gagliardi:

Global Workers Justice Alliance (Global Workers) submits these comments on RIN 1205-AB76, Interim Final Rule, "Temporary Non-Agricultural Employment of H-2B Aliens in the United States," which was jointly promulgated by the Department of Labor (DOL) and the Department of Homeland Security (DHS) at 80 Fed. Reg. 24,042-144 (Apr. 29, 2015) ("2015 IFR"). Global Workers strongly supports the 2015 IFR.

INTRODUCTION

Global Workers combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. The right and ability of transnational migrants to access justice in the country of employment even after they have returned home is an under-addressed issue for today's global migrants. Global Workers is a member of various coalitions of worker advocates in the United States, including the International Labor Recruitment Working Group, as well as the Low Wage Worker Legal Network.

Global Workers' core work involves training and supporting a Defender Network, comprised of human rights advocates in migrants' countries of origin. The Network educates workers on their rights before they migrate, partners with advocates in the countries of employment on specific cases of labor exploitation, and advocates for systemic change. Global Workers' provides training, advice, referrals, and case facilitation support to U.S. and Canadian advocates after their migrant clients return home. Global Workers also engages in policy advocacy, both nationally

and internationally, adding insight into how various temporary work programs operate, from the perspective of both the countries of employment and origin. We have projects in the United States, Canada, Mexico, Guatemala, El Salvador, Honduras and Nicaragua.

Through promoting access to justice for transnational migrants who have been victims of labor exploitation, as well as human trafficking and other workplace crimes, we have one of the causes to be the design of the program itself.[1] Indeed, employment and civil rights violations within the H-2B program are well documented.[2]

We join our civil society allies in applauding the Departments of Homeland Security and Labor for jointly issuing the 2015 IFR, which will go a long way towards curbing H-2B worker abuse. In particular, we support critical changes in the following aspects:

- **Increased oversight to prevent employer abuse of the program**.
- **A true test of the labor market**.
- **Stopping recruitment abuse by promoting transparency**.
- **Improved protections for U.S. and H-2B workers alike**.
- **Better enforcement of workers' rights**.

Furthermore, we are taking the opportunity to raise additional changes needed to provide H-2B workers' **job portability** and ensure their **access to justice** through access to federal funded legal services and an established mechanism for deferred action for H-2B workers who are legitimately exercising their rights under U.S. law.

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[1] In May 2012, Global Workers published a report *Visas, Inc.: Corporate Control and Policy Incoherence in the Temporary Labor System*, available at http://www.globalworkers.org/our-work/publications/visas-inc. *Visas, Inc.* took a panoramic approach and revealed fragmentation among several government agencies and a wide divergence in worker protections. The system lacks transparency and government oversight. Rather than developing a coherent system, the U.S. has responded piecemeal to employer demands and created a patchwork of visa classifications subject to distinct rules. This has resulted in the abuse of both foreign and U.S. workers across nonimmigrant visa categories.

[2] Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154 (March 2015), available at http://www.gao.gov/assets/670/668875.pdf.
Urban Institute, Hidden in Plain Sight (2014), available at http://datatools.urban.org/Features/us-labor-trafficking/; Global Workers Justice Alliance, *Confiscación de Títulos de Propiedad en Guatemala: Por Parte de Reclutadores en Programas de Trabajadores Temporales con Visas H-2B* (July 2013), available at http://globalworkers.org/sites/default/files/Confiscacion%20de%20Titulos_Informe_Final.pdf; International Labor Recruitment Working Group, *The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse* (February 2013), available at http://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf; Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (February 2013), available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf; Centro de los Derechos del Migrante, Inc., *Recruitment Revealed* (January 2013), available at www.cdmigrante.org; Proyecto Jornaleros Safe, *Mexicanos en EU con visa: Los Modernos Olivados* (November 2012), available at http://www.globalworkers.org; see also Cindy Hahamovitch, *No Man's Land: Jamaican Guestworkers in America and the Global History of Deportable Labor* (Princeton University Press 2012).

COMMENTS

I. Increased Oversight Will Curb Employer Abuse of the Program.

A. Registration – 20 C.F.R. § 655.11

The Departments' changes to the overall procedure for obtaining temporary employment certification will provide better protection to U.S. workers and to those H-2B employers who actually have employment needs that fall within the parameters of the H-2B program. By requiring employers who desire to hire H-2B workers to establish that their need for services or labor is temporary by filing an H-2B Registration pursuant to § 655.11, prior to submitting their application, DOL will have a better opportunity to evaluate whether each employer has a legitimate temporary need for labor. We support this provision.

B. Labor Certification Determinations – 20 C.F.R. § 655.50

We commend the Departments for restoring government oversight of applications, returning to a certification process that existed prior to 2008 and that is required under the Immigration and Nationality Act.[3] As DOL noted, the attestation model was not providing sufficient protections to workers.[4] By merely attesting to compliance with the recruitment-related regulations, employers were able to circumvent some of the key protections for U.S. workers. The new rule requires employers to demonstrate they conducted the required recruitment and made the necessary assurances in order to receive an approved temporary employment certification.

C. Job Contractors – 20 C.F.R. § 655.6

We support limiting the participation of job contractors in the H-2B program. Previously, job contractors could submit applications for labor certifications without demonstrating their own temporary need. This effectively shielded employers from DOL's enforcement mechanisms, which addressed only the entities filing the temporary labor certification applications. Under the 2015 IFR, a job contractor may only file for certification if it demonstrates its own temporary need. Otherwise, it must file in conjunction with its employer-client. This new provision will ensure the Departments know the identity of the actual employer so it can enforce program requirements. We urge the Departments to carefully monitor job contractors given the history of abuse migrant populations have suffered with contractors as employers.

D. Special Procedures

The Departments did not modify the special procedures currently in place for the H-2B program, but noted in the 2015 IFR that they intend to review those special procedures "expeditiously."[5] It is critical that all H-2B workers receive the full protections of the rules. To the extent that occupations such as tree planting, other forestry related occupations or traveling carnivals require

[3] 8 C.F.R. § 214.2(h)(ii)(D).
[4] 80 Fed. Reg. at 24,059.
[5] 80 Fed. Reg. 24,051.

special procedures for the processing of H-2B labor certification applications, they should be designed to increase opportunities for employment of U.S. workers and ensure that all workers receive the prevailing wage wherever they are employed. It is essential that workers receive detailed written disclosures with the hourly rate for each location and wage statements explaining the basis of payment. The Departments have recognized that deductions for housing for traveling workers are impermissible. Therefore, any special procedures should reinforce those requirements.

II. The New Rules Better Ensure a True Test of the Labor Market.

In general, the H-2B regulations have not supported the statutory preference for hiring U.S. workers over foreign workers. For example the U.S. worker recruitment requirements were sparse at best, especially in comparison to the more robust scheme under the H-2A program. The labor market, in effect, has not been truly tested. The 2015 IFR for the first time imposes substantial and specific requirements on H-2B employers with regard to the recruitment and hiring of U.S. workers. These initiatives are necessary. As indicated below, we support them and offer suggestions to further ensure that the labor market is tested.

A. Recruitment and Hiring Period – 20 C.F.R. §§ 655.20(t), 655.40(c)

Section 655.40(c) substantially expands the period for domestic recruitment to last until twenty-one (21) days before the stated date of need. This is marked improvement. Previously, the extent of recruitment aimed at the domestic labor market was a mere 10-day window. This shorter recruitment period occurred long before the job was available. Thus, DOL never had an accurate measure of the availability of domestic labor when it certified the need for foreign workers. The 2015 IFR for the first time provides a meaningful gauge for domestic worker recruitment.

However, the Departments should strengthen this provision by adding a requirement that employers must hire U.S. worker applicants through the first 50 percent of the contract period (the "50 percent rule"). This protection for U.S. worker jobs exists in the H-2A agricultural program.[6] Additionally, when H-2B workers who are already in the United States are displaced under the 50 percent rule, the Departments should assist them in finding another H-2B job to which they could be referred for potential transfer of employment.

B. Electronic Job Registry – 20 C.F.R. § 655.34

We applaud the Departments for requiring the certifying officer to place for public examination a copy of every job order upon its acceptance and urge the Departments take steps to ensure that each job order is in fact posted on iCert in a timely manner. Making the job order information available to the public will not only offer another means for U.S. workers to learn about job opportunities, but will also increase program transparency and offer advocates for H-2B workers a chance to review the terms and conditions being offered to foreign workers.

[6] 20 C.F.R. § 655.135(d).

While it is helpful that the 2015 IFR notes specifically that the job order will be listed in the electronic job registry until the end of the recruitment period, as we argue above, the preferential hiring period should be extended.[7] Along these same lines, this rule could be strengthened by requiring that the job order be maintained in the system for the first 50 percent of the period of employment, as is required under the H-2A program.[8]

C. Recruitment Practices

1. Interviewing U.S. Workers – 20 C.F.R. § 655.40(d)

Historically, employers seeking temporary foreign workers have used interviews as a means to discourage and exclude U.S. worker applicants. While the 2015 IFR slightly limits improper use of interviews, it falls short of blocking employers from manipulating the process to exclude qualified applicants. Section 655.40(d) eliminates the requirement that pre-employment interviews be conducted in person. However, there is no other limitation.

We suggest two modifications to this provision. First, any H-2B employer intending to require pre-employment interviews should demonstrate that comparable interviews are required of the H-2B workers. The regulations must make clear that unless the employer can demonstrate that H-2B workers are subjected to similar interview requirements, the employer may not insist that U.S. workers submit to pre-employment interviews. Second, any H-2B employer requiring pre-hiring interviews must promise to be available for interviews during normal business hours throughout the period for affirmative domestic recruitment, i.e., up until 21 days prior to the date of need. Similar requirements have long been imposed on H-2A employers, who were often found to be otherwise unavailable when domestic workers telephoned for interviews.[9]

2. Contact with Bargaining Representative, and Other Contact Requirements – 20 C.F.R. §§ 655.33, 655.45

We commend the Departments for requiring employers to contact their bargaining representatives, if applicable, and community-based organizations about the job opportunity. We also support the provision requiring employers to post the job opportunity at the anticipated worksite for at least 15 consecutive days "to provide that all of the employer's U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire H-2B workers."[10] We also support the requirement that the State Workforce Agency (SWA) contact the union where the "occupation or industry is traditionally or customarily unionized."[11]

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[7] As mentioned above, we urge the Departments to consider adding a 50 percent rule to the H-2B program.
[8] 20 C.F.R. § 655.121(d).
[9] 74 Fed. Reg. 45,906-01 (Sept. 4, 2009).
[10] 80 Fed. Reg. at 24,077
[11] 20 C.F.R. § 655.33(b)(5). There may be confusion over precisely what occupations and industries are considered to be "customarily unionized." We suggest that the construction, hospitality, food service, janitorial and health care assistant industries (including nursing home attendants), each of which include a substantial number of H-2B workers, be expressly identified in the regulation as industries which are "customarily unionized" based on the contracts negotiated by the SEIU, UNITE-HERE, building trades and other unions.

3. Non-Discriminatory Hiring Practices – 20 C.F.R. § 655.20(r)

We support the explicit prohibition on discrimination in hiring practices. Again, this protection helps the Department fulfill its obligation to ensure that U.S. workers are not adversely affected by the H-2B program and are given preference for H-2B job opportunities. We emphasize the importance of requiring employers to keep records of all U.S. worker applicants, and, in cases where the applicant was not hired, the reason for failing to hire the worker.

III. The New Rules Stem Abuse in the Recruitment of Foreign Workers.

The 2015 IFR includes a number of changes aimed at the abuse of H-2B workers during the recruiting process in their home countries. Among these problems are the chronic misrepresentations of job terms to prospective workers abroad and the charges imposed on workers by recruiters. The 2015 IFR takes important strides toward ensuring that workers are advised of the actual job terms prior to departing for the United States and are not subject to improper recruitment fees. Critically, the changes also include mechanisms to improve transparency in foreign recruitment.

A. Disclosure of Foreign Worker Recruitment - 20 C.F.R. §§ 655.9, 655.15(a), 655.20(aa), 655.56(c)(9)

The 2015 IFR requires employers to disclose any agreements with foreign labor contractors or recruiters with whom it engages in international recruitment. Further, employers must provide as part of the temporary employment certification process, the identity and locations of all persons and entities hired by or working for the recruiter or agent who has the agreement with the employer. We are thrilled the Departments are taking this important step forward to bring transparency to H-2B recruitment.

At present, workers often do not know if recruiters have a legitimate job for them in the United States and have no way to verify their connection to a legitimate U.S. employer with an approved job opportunity. Some recruiters set up shop, extract thousands of dollars in fees from workers, and then disappear with little trace.[12] Recruitment fraud and human trafficking have flourished in the H-2B program because of this lack of transparency.

We strongly support the publication of the list of recruiters and agents in Section 655.9(c) because it will bring transparency to the recruitment process. Public disclosure of the identity of foreign recruiters has been sorely needed for a very long time. With public information, workers and their advocates can verify that the recruiters in the field are actually authorized to recruit on behalf of the U.S. employers who have been certified to bring in temporary foreign workers.

[12] In 2013, a recruitment agency Chamba México defrauded over 3,000 persons from almost twenty different states in Mexico. Prospective workers paid recruitment fees only to see their investment disappear. The system allowed no mechanism for the workers to verify the recruiter's promises. See Jornaleros Safe, *Press Release* (in Spanish) (April 24, 2013), available at http://www.globalworkers.org/sites/default/files/NOTA_ChambaMX_Jornaleros-SAFE_0.pdf

However, these provisions can be strengthened. It is critically important that employers provide complete information to DOL during the temporary employment certification phase in a standardized manner that will facilitate its entry into a list. Furthermore, any list must connect each foreign recruiter with its respective employer and legitimate job opportunity. The list should be easily accessible as a searchable database, available online and updated in real time so that prospective workers are able to have complete information available at the moment they are recruited.

B. Prohibitions Against Recruitment Fees – 20 C.F.R. §§ 655.20(o), 655.20(p)

The 2015 IFR continues the Departments' efforts to keep foreign workers from paying fees to recruiters to obtain H-2B jobs. Section 655.20(o) requires employers, their attorneys, agents, or employees to comply with the prohibition against the charging of recruitment fees. This provision, while important, will not cover the instances when workers are charged a fee by a local recruiter only loosely affiliated with the employer or its agents. Section 655.20(p) helps to prevent this scenario by requiring the employer to contractually prohibit in writing any agent or recruiter (or subagents), whom the recruiter engages, either indirectly or directly, in the recruitment of H-2B workers from receiving fees from such workers.

Nevertheless, it is still possible for employers to avoid responsibility for the actions of these local recruiters by restructuring their businesses and obtaining a written assurance from their agents that no fees are being charged. To avoid this result, employers must be held strictly liable for these charges. Absent legal responsibility for these charges, U.S. employers have little incentive to monitor the activities carried on in their behalf in the locales where their H-2B workers are recruited. We urge the Departments to adopt a strict liability standard and require employers to reimburse recruitment fees whenever workers pay them.

C. Disclosure of Job Order - 20 C.F.R. § 655.20(l)

We support the 2015 IFR's requirement that the employer provide to its H-2B and corresponding workers a copy of the job order. This disclosure requirement helps to ensure that workers understand the terms of their employment. H-2B workers arrive in the U.S. expecting the wages, hours, contract period, and working conditions promised by their recruiters and employers. It will ensure the H-2B workers have an accurate picture of the terms and conditions of the job prior to departing their countries of origin. This is a critical and long-awaited step in protecting the rights of H-2B workers.

However, a few changes are needed to strengthen this provision. First, the Departments should remove the phrase "as necessary or reasonable" after the provision regarding when the employer should have to provide the job order in a language the worker understands. The latter should be a requirement without qualification to ensure workers comprehend the job order.

Secondly, mandating disclosure of the job order does not go far enough – the Departments should firmly establish in the H-2B regulations that the representations made by employers in their assurances, applications and job orders are binding, mandatory enforceable obligations intended to benefit U.S. and H-2B workers alike. Indeed, both DHS and DOL "view the terms

and conditions of the job order as binding."[13] Thus, it is reasonable and just to include an explicit statement noting that in the absence of a separate, written work contract, the job order is an employment contract that would be privately enforceable in any applicable jurisdiction.[14]

D. Transportation and Visa Fees – 20 C.F.R. § 655.20(j)

The 2015 IFR makes important strides in clarifying and strengthening an employer's obligations for reimbursing workers for H-2B program-related fees that are clearly for the benefit of the employer. Notably, the 2015 IFR clarifies that the employer must "provide or fully reimburse" temporary workers for the "visa and related fees" in the first workweek and "inbound and outbound transportation and daily subsistence costs" when the worker completes 50 percent of the period of employment covered by the job order. These provisions are essential to combat the system of debt peonage that pervades the current H-2B program.

H-2B temporary workers often arrive in the U.S. with tremendous program-related debt that their employers fail to reimburse, even though those expenses are entirely for the benefit of the employer. Further, the H-2B visa binds the worker to a single U.S. employer. Unlike their U.S. counterparts, H-2B workers who suffer workplace violations cannot leave their designated H-2B employer to work with another U.S. employer unless that employer goes through the temporary labor certification and nonimmigrant petition processes. For all practical purposes, aggrieved H-2B workers must return to their country of origin. The Departments' rule reduces the workers' vulnerability by requiring employers to reimburse expenses that are primarily for their benefit. This is an extremely important and very welcome step forward.

The new requirement of subsistence reimbursements is also an important and needed change. The time workers spend obtaining their visas and traveling to their employers' jobsites has increased in recent years. In Mexico, the largest country of origin for H-2B workers, workers regularly spend two to three days to apply, be interviewed, and receive visas. Workers incur substantial expenses for meals during these sojourns in the consular cities awaiting issuance of their visas. For these same reasons, the rule should also expressly require employers to reimburse the workers for any lodging costs incurred.[15]

Finally, we are pleased the Departments will require that the computation of the reimbursement of these pre-employment expenses be based on the worker's receipt of the "offered wage," rather than simply the Fair Labor Standards Act (FLSA) minimum wage.[16] Protecting the prevailing wage against erosion from *de facto* deductions is essential to guard against adverse effects from the employment of temporary foreign workers.[17]

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[13] 80 Fed. Reg. at 24063.
[14] This is the current rule in the H-2A program. 20 C.F.R. § 655.122(q).
[15] See, e.g., *Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 WL 2106188 (S.D. Ga. 2007).
[16] 20 C.F.R. § 655.20(c).
[17] 80 Fed. Reg. 24,063.

The 2015 IFR also includes a reminder to employers that the FLSA applies independently of the H-2B regulations with respect to reimbursement of pre-employment expenses.[18] Unfortunately, however, in the preamble the Departments affirm the decision in *Castellanos-Contreras v. Decatur Hotels, LLC*.[19] In *Decatur Hotels*, the court ruled that H-2B pre-employment expenses were not recoverable under the FLSA because they were not for the primary benefit of the employer. This reasoning was based on a pre-2009 DOL guidance letter. The Departments must limit the *Decatur Hotels* decision to events occurring prior to 2009 and state that it no longer reflects the Departments' position about the recoverability of pre-employment expenses under the FLSA.

E. Compliance with Applicable Laws – 20 C.F.R. § 655.20(z)

The 2015 IFR helps to combat human trafficking in the H-2B program by requiring employers to comply with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Too often employers confiscate H-2B workers' identity documents and then threaten immigration action for complaints about poor working conditions. Debt peonage is perpetuated by failing to reimburse substantial program-based expenses, including unlawful recruitment fees, and visa, transportation, subsistence, and related expenses. Requiring employers to reimburse those expenses and comply with the TVPRA is an important measure to combat the trafficking of H-2B workers.

IV. The New Rules Include Stronger Protections for U.S. and H-2B Workers.

The 2015 IFR is a vast improvement over the 2008 regulations because it provides more robust and much-needed protections for H-2B and U.S. workers. We discuss the most essential of these protections below, as well as offer recommendations for making them even stronger.

A. Definition of Full Time – 20 C.F.R. §§ 655.4, 655.5

The Departments have defined a full time job opportunity as constituting 35 or more hours per week. The 35-hour workweek definition is an improvement over the former definition of 30 hours per week. We also support the Departments' clarification in the preamble that an employer is required to disclose and offer to its H-2B workers the hours it represents on its job order.[20]

B. Corresponding Employment – 20 C.F.R. § 655.5

We support the 2015 IFR's protections for U.S. workers who are employed in similar positions as the H-2B workers ("corresponding employment," as defined by § 655.5). Previously, the 2008 regulations only ensured equal treatment for U.S. workers hired in conjunction with the employer's H-2B recruitment activities. This subjected the employer's existing U.S. workers to discrimination in favor of H-2B workers (e.g., by not paying those U.S. workers the prevailing wage paid to the H-2B workers). Under the 2015 IFR, workers in corresponding employment

[18] 20 C.F.R. § 655.20(j).
[19] *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010).
[20] 80 Fed. Reg. 24,054.

will be entitled to all the employer assurances and obligations in § 655.20 regardless of the circumstances of their recruitment. The "corresponding employment" provisions will provide long-overdue protection to U.S. workers' jobs, wages and working conditions.

C. Wages Free and Clear/ Deductions – 20 C.F.R. §§ 655.20(b), (c)

Sections 655.20(b) and (c) strengthen workers' protection from unlawful deductions. We support the Departments' requirement that all deductions other than those required by law be disclosed in the job order. We also support the inclusion of additional language specifying authorized deductions. Section 655.20(c) also helpfully limits proper deductions to those required by law, the reasonable cost of board, lodging, or facilities, or authorized payments to third persons for purposes such as union dues.

We also strongly support the 2015 IFR's prohibition on kickbacks. This level of specificity is valuable and necessary to prevent employers from taking advantage of vulnerable workers with little understanding of what employers may lawfully deduct from their wages. Section 655.20(b), which requires that wages be paid "free and clear," will ensure that employers do not evade the prohibited deductions rule by requiring workers immediately to pay them back upon receiving their paychecks for certain expenses that are otherwise prohibited as deductions.

D. Employer Provided Items – 20 C.F.R. § 655.20(k)

This section is another important step for protecting wages by requiring the employer to provide workers with tools necessary to perform the job and to prohibit shifting to the employee the responsibility to account for loss of or wear and tear to such items. Under the current rule, many employers using the H-2B program have shifted the cost of tool acquisition onto H-2B workers, which cuts into their wages. Because cost shifting adversely affects the working conditions of U.S. workers who would be less likely to accept these conditions, the Departments' new rule protects the integrity of the H-2B program.

E. Three-fourths Guarantee – 20 C.F.R. § 655.20(f)

We generally support the Departments' addition of a minimum guarantee and its method of calculation. This minimum work guarantee requires employers who are unable to offer the promised amount of work during the contract period to pay compensation for the shortfall. The guarantee serves two valuable purposes: (1) 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 (2) it encourages employers to estimate their need for workers accurately and discourages applying for an oversupply of labor.

We also support calculating the minimum work guarantee on a piece rate basis where applicable. The Department proposes to use the higher of the worker's average hourly piece rate or the required hourly wage to calculate the amount due under the guarantee. This is valuable to workers in industries where piece rate pay is common, such as forestry, where experienced workers can often earn wages that are significantly higher than the prevailing wage. These

workers base their decision to travel to the U.S. to work on the expectation that they can earn this higher wage. Calculating the minimum work guarantee based on a significantly lower prevailing wage would defeat the purpose of adding predictability to wages and scheduled work over the course of the season.

To strengthen this protection, however, we urge the Departments to require employers to comply with 100% of the hours provided in the job order, and not just three-fourths. A party to a contract is expected to comply with the full terms of its obligations under the contract. There is no basis within the context of the H-2B program to require employer compliance with only three quarters of the promised work. In the H-2A program, the rationale offered for the three quarter guarantee is that the work is so dependent on the vagaries of weather that it is very difficult to project how many hours of work will be required. This rationale is simply not persuasive in the H-2B context where jobs are not necessarily weather-dependent. Exceptions for unforeseeable circumstances are available to relieve hardship for truly unavoidable contingencies. A "four" quarters guarantee more faithfully reflects the contractual expectations of the parties and would better protect workers and prevent over recruitment.

F. No Preferential Treatment of H-2B workers – 20 C.F.R. § 655.20(q)

We commend the Departments for prohibiting preferential treatment of foreign workers in the employer's job offer. This protection is critical to the Departments' obligation to ensure that the employment of foreign workers will not adversely affect the wages or working conditions of similarly employed U.S. workers. It is important to clarify that this rule does not absolve employers from providing H-2B workers the minimum benefits, wages, and working conditions which must be offered to U.S. workers under Section 655.18(a)(1). Advocates have seen routine discrimination against temporary workers, often paying temporary workers a lower wage rate than their U.S. counterparts and relegating them to poorer housing and working conditions.

G. No Unfair Treatment – 20 C.F.R. § 655.20(n)

We strongly support the Departments' prohibition on unfair treatment. This protects workers from retaliation or discrimination as a result of a number of protected activities, including filing a complaint, instituting proceedings, testifying or planning to testify, or consulting with an attorney. We commend the Departments for not limiting this protection merely to unfair discharge, but extending it to a number of other harmful activities including threatening and blacklisting. The scope of protected communications is also important in that it includes consultations with unions, worker centers or other community advocacy organizations, as these groups are often the point of contact for workers who suffer abuse and violations of their rights.

The 2015 IFR's anti-retaliation provision is invaluable to the integrity of enforcement of the broader H-2B regulations. Indeed, "it is a widely held view among foreign guest workers that they will be put on an ineligible list for H-2 visas if they complain about violations of the H-2

program, federal wage-and-hour legislation, or their work contracts."[21] By giving workers confidence to file complaints and talking to investigators without fear of retaliation, it will help WHD to conduct more thorough investigations and to ensure effective enforcement of the regulations. However, to strengthen enforcement and better protect workers who take action against unlawful working conditions, the Departments should provide workers with access to expedited immigration relief so that they may remain in the country to pursue their claims. As discussed below, access to justice is a critical issue for temporary workers who must depart the country before achieving relief for wrongs suffered while they are in the United States.

H. No Strike or Lockout/No Recent or Future Layoffs – 20 C.F.R. § 655.20(u), (v)

The expanded protections under subsections (u) and (v) are positive developments. As the Departments note, expanding the anti-strike and anti-lockout protections to the entire area of intended employment will reduce use of H-2B workers to break labor disputes. Extending the period of no lay-offs to include the entire certification period undercuts employers' ability to use unrealistic production standards or other adverse terms and conditions of employment as bases for firing U.S. workers while maintaining an H-2B workforce.

I. Public Disclosure – 20 C.F.R. § 655.63

The public disclosure requirement is very useful and we support it. We appreciate that DOL will maintain an electronic file accessible to the public with information on all employers seeking certifications and the disposition of those certifications. However, the list of information that will be publically disclosed is incomplete. Currently, the 2015 IFR only includes the employer's name, the number of workers requested, the date filed, the date decided, and the final disposition as fields that will be revealed.

We urge the Departments to include in the rule the requirement that all foreign recruiters utilized to recruit workers in their countries of origin – including any subcontractors/subagents revealed pursuant to Section 655.9 – be publically disclosed in this same historical list, as well as in the separate real-time list contemplated by 655.9. The names and locations of every link in the foreign recruiter chain should be listed in a separate field alongside the employer and particular job certification details. It is important for stakeholders, including workers and their advocates, to be able to make connections between individuals who are recruiting workers in their countries of origin and the employers who are entering into contracts with those individual recruiters. Transparency in this regard has been lacking in the H-2B program since its inception. The 2015 IFR is the opportunity to fix this problem.

V. The New Rules Allow for More Rigorous Enforcement of Workers' Rights.

We support the inclusion of enhanced enforcement measures in the 2015 IFR. As we have noted earlier, and as the Departments have noted in their preamble, the H-2B program has been

[21] Letter from Douglas Stevick, Southern Migrant Legal Services, to U.S. Department of State, Office to Monitory and Combat Trafficking in Persons, *Response to Request for Information for the 2011 Trafficking in Persons Report* (February 15, 2011).

plagued by wage and hour violations, fraudulent applications for jobs, race and gender discrimination and human trafficking. The enforcement measures that can be undertaken by both the Office of Foreign Labor Certification (OFLC) and the Wage and Hour Division (WHD) will help reverse this trend and make certain that the program is used consistently with its aims and in compliance with the law.

A. Enforcement – 29 C.F.R. § 503.15

The 2015 IFR clarifies that the enforcement authority of WHD extends to H-2B workers, any worker in corresponding employment, or any U.S. worker improperly rejected for employment, fired, or displaced. This provision also establishes WHD's enforcement authority to ensure the 2015 IFR rights of U.S. workers in corresponding employment, as defined in Section 655.5.[22]

B. Document Retention Requirements of H-2B Employers – 29 C.F.R. § 503.17

We commend the Departments for requiring that documents be retained for three years. This provision will allow the WHD to conduct more effective investigations of H-2B employers. This provision further incorporates an employer's obligation to retain the contracts the employer has with its recruiters and agents and the lists of such recruiters and agents, which will facilitate the enforcement of the 2015 IFR's new recruitment provisions.

C. Debarment – 29 C.F.R. § 503.24

We support the Departments' decision to permit both WHD and OFLC to debar an employer's agent or attorney for committing a violation under the new rules.[23] This is a huge step forward for the H-2B program. It is not uncommon for agents and attorneys of H-2B employers to contribute to or commit fraudulent and abusive practices under the H-2B program.[24] Subjecting those individuals/entities to potential debarment will surely help curtail program abuse and recruitment fraud.

VI. Additional Areas to Consider Including in the 2015 IFR

A. Job portability for H-2 workers

When an H-2B worker suffers labor abuse, there should be an easier process to change jobs. Currently, the process for a worker to transfer to another H-2B employer requires that the worker find an employer willing to submit a new I-129 form on behalf of the worker to change employment, and if necessary, extend the validity period of their visa.[25] Even if the H-2B employer already has an approved petition, it must pay another $325 fee and the H-2B worker

[22] 80 Fed. Reg. 24,086.
[23] 20 C.F.R. § 655.73(b).
[24] See, e.g., *David, et al. v. Signal International, LLC, et al.*, No. 08-1220 (E.D. La.) (finding the law offices of employer's attorney liable for violations of the TVPRA, RICO, state law fraud and breach of contract related to H-2B worker recruitment scheme).
[25] 8 C.F.R. § 214.2(h)(2)(i)(D).

must wait for the new petition to be approved before beginning work. We urge the Departments to simplify this process. An H-2B worker with a valid visa should be able to immediately begin working for any new H-2B employer who has a current approved I-129 petition, so long as the start date is on or before the date of need. In the alternative, if the new employer is still required to submit a new I-129 petition, the worker should be allowed to begin work as soon as the petition is filed and the $325 fee should be waived. Reducing the cost and burden on the new employer will incentivize that employer to hire an H-2B worker who is already in the country.

B. Access to Justice

1. Access to federally funded legal services.

Even if H-2B workers are courageous enough to speak out about unlawful conduct at work, they have limited legal options by themselves to hold recruiters or employers accountable.[26] DOL has previously stated, "few legal options exist for H-2B workers who feel their work contracts have been violated."[27] Finding a lawyer is difficult for H-2B workers due to language barriers, cultural differences, geographic isolation, and the limited duration of their time in the United States.

At present, federally funded legal services organizations may represent only certain classes of aliens.[28] With the exception of forestry workers, generally speaking, individuals with H-2B visas are not eligible for federally funded legal services.[29] At minimum, DHS and DOL should recommend in preamble their position that H-2B nonimmigrant visa holders be added to the classes of aliens eligible for legal services by Legal Services Corporation grantees.

2. Deferred action to pursue legitimate employment complaints.

The H-2B visa program does not set up a way for workers to enforce their rights or denounce abuses after the work period ends. Workers who are owed money or injured on the job are forced to make a decision: go home and lose the practical ability to exercise their rights, or stay in the U.S. in unlawful status.[30] Deferred action is an act of prosecutorial discretion and serves as an important tool postponing removal and enabling an individual to remain in the United States for

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[26] Jayesh M. Rathod, A Season of Change: Reforming the H-2B Guest Worker Program, 45 Clearinghouse Review 20, 27 (May–June 2011) (discussing H-2B workers' limited access to justice).
[27] 76 Fed. Reg. 15129, at 15143 (March 18, 2011).
[28] 45 C.F.R. § 1626.5.
[29] Legal Services Corporation, Temporary Forestry Workers Now Eligible for LSC-funded Legal Services (Jan. 10, 2008), available at http://www.lsc.gov/media/newsletters/2008/lsc-updates-january-10-2008; Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 540, 121 Stat. 1844, 1934 (2007); By way of contrast, all H-2A agricultural workers are eligible for legal services. There is another exception to the LSC rule, allowing legal services lawyers to represent H-2B workers who may be a victim of domestic violence, human trafficking or another crime. See Legal Services Corporation Program Letter 05-2 (Oct. 6, 2005), available at http://globalworkers.org/sites/default/files/visafiles/LSC%20letter%2005-2.pdf
[30] Returning home in compliance with visa program rules gives rise to several logistical challenges. For example, workers who are injured on the job and have to return to their countries of origin at the end of the visa period may require continuing medical treatment in the United States. The same issues present for workers involved in cases regarding problems with their jobs – they will need to return to the U.S. to give testimony at trial.

a certain time.[31] In June 2011, the DHS reminded ICE officers, special agents, and attorneys to "exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints" and to pay particular attention to individuals involved in non-frivolous disputes with employers.[32] However, the A-3 and G-5 visas for domestic workers of diplomats and international organization employees, are the only nonimmigrant visas with this explicit deferred action procedure for immigration relief after employment ends.[33]

The Departments should adopt a mechanism to provide deferred action for H-2B nonimmigrant visa holders who must remain in the U.S. after their employment program ends either to secure access to workers compensation benefits or to pursue legitimate employment claims against their employers. This would be an important step ensuring access to justice for H-2B workers who suffer injury and employment abuse while in the United States.

CONCLUSION

We appreciate the opportunity to comment on the 2015 IFR. The rule is a vast improvement over the 2008 regulations, and we encourage the Departments to maintain the 2015 IFR's strong worker protections intact as the rule is finalized. We also hope the Departments will sincerely consider some of the recommendations we have made to make the rule even more effective at fulfilling the Departments' mandate to protect U.S. and H-2B workers.

Thank you.

Sincerely,

Nan Schivone
Staff Attorney & Legal Manager
Global Workers Justice Alliance

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[31] See, e.g., U.S. Dep't of Homeland Security, Guidelines for Deferred Action for Childhood Arrivals, available at https://www.dhs.gov/deferred-action-childhood-arrivals (last visited March 2014); for history of deferred action relief up until DACA, see Wadhia, Shoba S., *The Role of Prosecutorial Discretion in Immigration Law*, Scholarly Works Paper 17 (2010), available at http://elibrary.law.psu.edu/fac_works/17 (last visited March 2014).

[32] John Morton, Director, U.S. Immigration and Customs Enforcement, *Memorandum: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[33] 8 U.S.C. § 1375c(c)(1), (2) (former A-3/G-5 workers may be eligible for deferred action for the amount of time necessary "to fully and effectively participate in all legal proceedings related to such action."). This relief was created by the 2008 reauthorization of the Trafficking Victims Protection Act. See Martina Vandenberg and Alexandra Levy, *Human Trafficking and Diplomatic Immunity: Impunity No More*, 7 INTERCULTURAL HUM. RTS. L. REV. 77, 96-97 (2012). The right does not just apply when trafficking is alleged but also applies in any civil case the worker brings against his or her employer alleging violations of employment terms. See 8 U.S.C. § 1375c(c)(1), (2) (applies to A-3/G-5 workers with regard to civil actions alleging "a violation of any of the terms contained in the contract or violation of any other Federal, State, or local law in the United States governing the terms and conditions of employment").