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Committee on the
Judiciary Subcommittee on Immigration
Policy and Enforcement

Hearing on "The H-2A Visa Program: Meeting the Growing Needs of American Agriculture?"

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Global Workers Justice Alliance ("Global Workers") combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. Global Workers believes that the concept of ***portable justice***, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is a key, under addressed element to achieving justice for today's global migrants. Global Workers' core work is to train and support the Defender Network, comprised of human rights advocates in migrant sending countries, to educate workers on their rights before they migrate, to work in partnership with advocates in the countries of employment on specific cases of labor exploitation, and to advocate for systemic changes. We currently operate programs in the United States, Canada, Mexico, and Guatemala and regularly provide advice and referral for cases around the world.

In this brief statement, Global Workers will limit its comments to two discrete issues:

1. Discrimination based on age and gender in the H-2A program.

2. DOL Over-certification resulting in a labor surplus of foreign workers.

A startlingly fact of the H-2A program today is that the public or Department of Labor does not know the composition of the workforce (age or gender) or how many H-2A visa workers actually end up employed at the job site. For a country concerned about security, the lack of information on how our H-2A program is operated is astounding.

Simple, low-cost, steps encouraged by Congress will shed light on these issues and enable us to craft informed solutions which, will improve the H-2A program for employers and workers alike.

Lack of Data Allows Age and Gender Discrimination to Flourish in H-2A Program

H-2A workers are mostly men under forty years of age.[1] Although anecdotes abound that women and older men are discouraged from applying during the overseas recruitment process, no data is publicly available to reveal the composition of the H-2A work force. Discrimination hurts U.S and foreign workers as well as U.S. employers who abide by the law but are undercut by cheating competition.

[1] *See e.g*, Reyes-Gaona v. N.C. Growers Association, 250 F. 3d 861, 863 (4th Cir. 2001) (noting that men over forty need not apply unless previously employed by company).

Only one of the three agencies involved in the H-2A process requests data on individual workers, the Department of State (DOS). The Department of Labor (DOL) asks employers for the numbers of aliens they seek. The Department of Homeland Security (DHS) asks the employers in which countries the employers will recruit the H-2A workers. It is only the third and final step, which occurs at the U.S. consulates that personal data for the H-2A applicants is requested in order to process the individual visas.

From interviews with consular officials in the field, I have been told that the consular databases have fields for gender and age (birthdate) but those fields are not searchable. That means DOS cannot easily run a report to indicate the gender or age of H-2A visa holders. The challenge, therefore, is not the lack of data, rather the manner in which the database is maintained. A review of individual H-2A visa applications is a time consuming and costly endeavor. However, a solution is to make more fields in the database searchable, a seemingly simple technological adjustment. DOS should then publish the information annually on its website.

Baseline data on the composition of the H-2A workforce will either support worker advocates anecdotal evidence that H-2A employers seek only men under forty or not. Without this baseline data is it difficult to argue one way or another.

The U.S. cannot and should not operate a H-2A worker program that unlawfully excludes potential employees during the overseas recruitment process. U.S. workers are hard pressed to compete with an H-2A workforce selected on a discriminatory basis. With the data on the composition of the H-2A workforce, employers, workers, and advocates can discuss the significance and seek possible solutions.

Over-Certification Of H-2A Workers Results In an On-Demand Labor Surplus

DOL certifies the number of aliens a U.S. employer is allowed to seek through the H-2A program. However, DOL never knows, because it does not ask, how many workers were ultimately employed. Anecdotal evidence suggests that U.S. employers sometimes exaggerate the need to DOL so it certifies many more aliens than are actually needed. Say for example, Employer X states that it needs 1,000 workers. DOL verifies that the requirements for recruiting U.S. workers have been met and certifies 1,000 workers. But maybe Employer X only needs 500 workers. By receiving permission to bring in more workers than needed, the employer has created for itself a foreign labor surplus. This means that if H-2A workers complain about working conditions or become sick, the employer can easily send them home and bring in new workers. The fear to complain about poor labor conditions means that the labor standards on farms will continue to decline, resulting in farm jobs even less attractive to U.S. labor.

If U.S employers were certified only for the number of workers they truly needed—a true labor assessment—the whole dynamic changes. H-2A workers would not be easily disposable because the U.S. employer would not have the time to go through the H-2A process quickly enough to bring in replacement workers. The result is that U.S employers will have to recruit local workers to fill those jobs. It also means that H-2A workers are more valuable to the U.S. employer. That will result in a more secure H-2A work force that may feel more empowered to complain about poor working conditions.

There are various ways to shed light on to this practice. One way is for DOS to publish the information it already collects. DOS knows how many workers were issued H-2A visas under which employer. This information should be published on the DOS website annually and provided to DOL. DOL should use this information as it engages in the certification process for the following year. If DOS data reveals that Employer X had many less than 1,000 H-2A visas issued under its name, it can engage in a discussion of why DOL should certify 1,000 in the present year. Of course, labor need changes. But if the employer cannot justify the higher need, than DOL should certify only what is actually needed, not a labor surplus.

Another approach is for DOL to start asking employers for past data during the certification process. The advantage of this approach, is that DOL can review payroll records to determine how many H-2A workers were ultimately employed, a more exacting number than DOS's number of visas issued. This information could also be used to address another common abuse of the H-2A program, that petitioners provide H-2A workers to other employers, and do not end up employing the workers themselves.

In conclusion, thank you for considering these very narrow, yet significant, issues about the H-2A program. As stated, some seemingly easy, low–cost changes could provide us very meaningful information so we can improve the H-2A program.