fisherphillips.com

Atlanta
1075 Peachtree Street, NE
Suite 3500
Atlanta, GA 30309

(404) 231-1400 Tel
(404) 240-4249 Fax

Writer's Direct Dial:
404-240-4223
404-2404269
Writer's E-mail:
apointer@fisherphillips.com
jviau@fisherphillips.com

May 19, 2021

Via Federal – Rulemaking portal: http://www.regulations.gov

United States Department of Homeland Security
Citizenship and Immigration Services

Re: ***RIN 1615-ZB87***

Request for assistance and corrective action pursuant to notice requesting comments on needed Department actions at 86 Fed. Reg. 20398 regarding improving processes.

H-2A employers request denial of future H-2A visa authorizations to individuals who obtained H-2A visas authorizing them to enter the US from Mexico to provide agricultural labor or services only as employees of the designated H-2A employers but who immediately abscond from that employment after right being reimbursed by their first payday for incoming expenses, thus leaving these H-2A employers 1) without adequate workforces as planned for in connection with their DOL certification applications, 2) costing H-2A employers approximately $600 in fees and expense to obtain their visas and travel expenses plus other fees to federal agencies and thus costing thousands of dollars to these businesses, and 3) harming US workers by going to work for *other* employers without legal authorization—repeatedly, year after year, as they serially promise new H-2A employers that they will perform their jobs for their whole period of certification.

Dear Sir or Madam:

This letter requests the assistance of the United States Citizenship and

Immigration Services (USCIS) along with coordination by the USCIS particularly with the Department of State, Embassy and Consular Services personnel and organization in Mexico. As outlined above, too many individuals who obtain H-2A visa under which they may lawfully work temporarily in the US in agriculture for specific H-2A employers, obtain those visas for different H-2A employers each year, promising each new H-2A employer to work the full season but immediately leave the approved employers to work in unauthorized employment.

Too many of these individuals seemingly use the program *only* as a means of appearing to enter the United States via a legal means, only to leave those sponsoring H-2A employers immediately to take jobs for which they are not lawfully authorized to work in construction, in the food industry, and sometimes for other employers engaged in agriculture who do not use and abide by the legal processes of the H-2A program.

I attach for your review a letter recently provided by ten (10) H-2A Florida-based employers to the Honorable Marco Rubio. See Exhibit 1 to this letter. These ten and others who are copied on this letter ask for your assistance and that of other agencies to implement processes and procedures to prevent these abuses in the future. As you will see from the letter to Senator Rubio, these and other H-2A employers need the services of hundreds of H-2A visa-holding workers each year. These H-2A employers spend thousands of dollars to obtain legal authorization to hire hundreds of H-2A visa-holding workers. They pay H-2A application and visa petition fees to the USCIS, the US Department of Labor, and to the US Department of State to its Consular operations. These employers timely pay for or reimburse workers for the workers' visa application fees, their food, housing and other travel expenses. H-2A employers must pay for or reimburse workers virtually all of the workers visa application, travel and related expenses on or before the worker's first payday on arrival in the United States based on a decision by the Federal Circuit Court for the Eleventh Circuit, *Arriaga v. Florida Pacific Farms, LLC,* 305 F.3d 1228 (11th Cir. 2002) and current US Department of Labor, Wage and Hour Division policy.

We estimate, that in addition to the H-2A application fees to the US Department of Labor and the petition fees paid to the USCIS, also paid by H-2A employers, it costs H-2A employers some $600 for each worker to be brought to Florida to work, only for the

H-2A employers to lose too many of them who seemingly never intended to stay on the job with the H-2A employer who brought them to Florida as soon as the worker is reimbursed for any expenses the worker has incurred. Besides the out-of-pocket expenses of recruiting workers only to have them leave upon arrival in the United States, H-2A employers suffer from such workers' repeated abscondments from lawful H-2A employment in other ways.

These hundreds of H-2A visa-holding workers brought in by these petitioning H-2A employers alone are needed to work in agricultural jobs for which today human workers are needed, such as planting, harvesting, and packing fruits, vegetables and other Florida agricultural commodities. These H-2A employers and the crops for which they are needed are dependent on the timely presence of a ready, willing and adequate size workforce. When workers enter on an H-2A visa and leave as soon as they are reimbursed for unregulated employment they are not legally authorized to perform, crop production suffers, and thus these H-2A employers suffer in other ways besides direct, out-of-pocket expenses because they are not able to plant, harvest, pack or otherwise handle the quantity of fruits and vegetables a full, planned for crew would have been able to handle.

Under H-2A US DOL requirements, H-2A employers may only request the number of H-2A worker certifications that they reasonably believe they need, given the scope of planned work. The US DOL H-2A regulations contemplate that a worker who comes to the US, having promised to perform a particular job, will stay for the full season.

Abscondments from lawful H-2A employment and the attendant costs jeopardize these H-2A employers' ability to remain employers of H-2A worker and thus Florida crop production that is dependent on availability of workers when and where they are needed.

This problem of H-2A workers refusing to stay in the jobs for which they were hired and in which they are lawfully eligible to work under the H-2A visa program has become so prevalent that these H-2A employers wish the USCIS, the Department of State Consular officials, and others to know that unless H-2A workers who leave the certified job that they have agreed to perform are disallowed from obtaining future H-2A visas, the future successful operation of the program is in jeopardy.

These H-2A employers cannot continue such substantial out-of-pocket costs for workers who will not stay to perform the jobs the workers promised to perform and cannot continue the attendant production losses from having smaller workforces than they need and rightfully expect to employ.

There is a remedy available to stop these repeated abscondments by visa-holders who leave legally authorized employment to work in jobs they are not legally authorized to perform based on data the USCIS already collects from H-2A employers.

As you undoubtedly know, under both U.S. Department of Homeland Security, USCIS regulations at 8 C.F.R. 214.2 (h)(5)(vi)(B) and U.S. Department of Labor regulations at 20 C.F.R. § 655.122(o), an H-2A employer must notify both the USCIS and the U.S. Department of Labor, Office of Foreign Labor Certification, if an H-2A worker fails to appear for the job or if an H-2A worker quits and absconds. These notices must provide information concerning individual workers and include the date the abscondment is discovered. These notices are typically provided via email and are provided in a matter of 2 days after the abscondments are discovered. These H-2A employers who have already requested help from Senator Rubio, as shown in the attached Exhibit 1 letter and who now request corrective action by the USCIS, diligently submit the reports of worker "no-shows," quits and abscondments.

So far as the H-2A employers know, USCIS and Consular officials in Mexico are not disallowing H-2A visas to individuals who have repeatedly been "no shows," quits and absconders. Thus, workers who have repeatedly obtained H-2A jobs with new H-2A employers repeatedly obtain new H-2A visas only to leave those new jobs as soon as they are reimbursed for out-of-pocket expenses.

We have even heard that some Consular officials believe that applicable legal rules and requirements actually allow H-2A workers to leave authorized H-2A employments and take other jobs within the US. Surely that is not so. Surely US Consular officials are aware of I-9 documentation and related statutory requirements that forbid such workers taking jobs in unauthorized employments. Surely US Consular officials expect H-2A visa-

holding workers to stay in the employments they have accepted, not to leave the job during the certification period absent compelling circumstance, and to return to Mexico if they must leave a job.

The USCIS and Consular officials should share information regarding "no shows" and absconders that is already timely provided to the USCIS and deny visas to "no show" and absconder applicants.

Certainly, it would be helpful if, at the very least, Consular officials in Mexico questioned workers who were reported to the USCIS as not having finished the prior season regarding why they left the authorized employment, what they did upon leaving the authorized employment, and when they actually returned to Mexico. Certainly, red flags should arise for Consular officials if the worker did not immediately return to Mexico within a matter of days of the worker being reported as having quit and absconded. Certainly also, when an H-2A worker has arrived in Florida only to be reported as having left the job within 10 days of arrival, that recorded and reported early quitting and abscondment should signal a red flag to the Consular officials. Such quick/short term employment suggests that the worker may well have come to the certified and legally authorized job with the existing intent of moving to a different US job—possible a job in construction or food service or other unauthorized employment in which his wages would not be reported to taxing authorities.

Consular officials should note the reported date of an individual's "no show," quit and abscondment as demonstrating that the worker did not remain in the authorized employment for the certification period, which should be enough to deny a new H-2A visa, and the date of such reports further evidences likely unauthorized employment in the US, another reason to deny a new H-2A visa.

Our information is that individuals who engage in these repeated false promises to different H-2A employers that they will work for the whole season have learned that they should return to Mexico in accordance with the expiration date provided in the H-2A certification and on their I-94 documentation so that they will appear, based on their date of return to Mexico, to have acted in conformity with their visa authorization even though they quit or absconded shortly after arrival with the legally authorized H-2A employer.

Officials of the USCIS can correct or at least reduce the incidence of these repeated abuses of these H-2A employers and the whole visa-application process by providing information regarding the dates of these individuals' "early quits" and abscondments that these H-2A employers file with the USCIS as required under 8 C.F.R. 214.2 (h)(5)(vi)(B) to US Department of State Consular officials in Mexico. Obviously, the US Department of State Consular Officials in Mexico also have an important role because it will be up to these Consular officials and those representatives at the Consulates who review visa individuals' H-2A visa applications to match the individuals as to whom early quit and abscondment notices have been filed with the names, birth dates and place of birth of persons applying for new H-2A visas, all of which must be reported to the USCIS.

You will see that at the request of these H-2A employers, we are alerting representatives of the Department of State, Consular Offices in Mexico, as well as of the Department of Labor to this increasingly serious problem of workers' abscondments, and we are providing this information to Florida grower associations so that they also will be aware of what has become an increasingly, serious impediment to successful crop production and harvesting in the State of Florida that is so dependent on the H-2A program.

We and these H-2A employers will appreciate your attention and that of the other agencies to this serious problem and will be glad to work with you and them to find a solution that respects the rights of H-2A workers and H-2A employers.

Thank you for your attention to this matter.

Very Truly Yours,

Ann Margaret Pointer

Ann Margaret Pointer
Joshua H. Viau
For the H-2A Contractors who are listed below

AMP/dfw

cc:

Mr. Aaron Luster
Country Coordinator for Visa Services
US Embassy Mexico City
lusteral@state.gov

Mr. Michael R. Dolce
Country Guest Officer
US Embassy Mexico City
DolceMR@state.gov

Officer in Charge of H-2A Visa Issuance
US Consulate, Monterrey Mexico
MonterreyH2Visas@state.gov

Administrator Brian Pasternak
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
Pasternak.Brian@dol.gov

Mr. Michael Marsh
President
Mr. Nigel Bocanegra
Manager of Association Services
National Council of Agricultural Employers
michael@ncaeonline.org
nigel@ncaeonline.org

Mr. James B. Fussell, Jr.
Director of Labor Relations
Ms. Christine A. Synan
Labor Relations Manager
Florida Fruit & Vegetable Association
Jamie.fussell@ffva.com
Christine.Synan@ffva.com

Ms. Melanie Burns
Florida Citrus Mutual
Director, Market Information
melanieb@flcitrusmutual.com

Mr. Kevin Morgan
Director Agricultural Policy Division
Florida Farm Bureau
kevin.morgan@ffbf.org

Mr. Kenneth Parker
Executive Director
Ms. Tiffany Dale
Director Member Services/Community Relations
Florida Strawberry Growers Association
kenneth@flastrawberry.com
Tiffany@flastrawberry.com

Mr. Bob Morrissey
Executive Director
National Watermelon Association, Inc.
bobm@nwawatermelon.com
bmorrissey@tampabay.rr.com

Mr. Peter Chaires
Florida Citrus Packers
pchaires@flcitruspackers.org

Mr. Steve Smith
Gulf Citrus Growers Association
steve.smith@gulfcitrus.org

Mr. Ben Bolusky
Florida Nursery, Growers and Landscape Association
bbolusky@fngla.org

_____

Ms. Yolanda (Cucu) Celaya
cucu_celaya@comcast.net

Mr. Hector Barajas
hbharvesting@hotmail.com
Mr. Alexander Cisneros
alxharvesting@yahoo.com

Mr. Fidel Cisneros
fcofarcadia@yahoo.com

Mr. Gustavo Cisneros
Gustavocisneros44@outlook.com

Mr. Juan Maldonado
Maldonado.harvesting@gmail.com

Mr. Gustavo Martinez
gmharvesting@yahoo.com

Mr. Andrew T. Pace
apace@atplogistics.com

Mr. Benjamin Ramírez
benjamin.ramirez.harvesting@gmail.com

Mr. José Ramirez
Joseramirez9466@yahoo.com

Mr. Jose Valdovinos
jvaldovinos68@yahoo.com

Mr. Mario Vargas
vvargasfc@yahoo.com

Exhibit 1

Office of U.S. Senator Marco Rubio

We are Farm Labor Contractors that uses the H-2A Program, every year we bring thousands of Ag workers under this program but we have encountered a huge problem that is getting worst every year. By law when a worker absconds we have to report them to the Labor Department and to Immigration, many workers are using this program to come to this country (for free) once they get here they abandoned the work site and go to work in other areas such as construction, food industry etc... this Visas are for agriculture work and they can only work under the Certification in connection to their Visa, even though this workers are reported to Immigration there are no consequences so they keep coming over and over because they are granted a Visa, they come under a different Labor Contractors every time, they are using the Labor Contractors to cross the border and then they abscond, when the Visa expires they go back home and do it all over again because they know there are no consequences .

This is costing the Labor Contractors millions of dollars since they have to pay for all the expenses and on top of that they are left without the necessary work force to fulfill the contracts with the growers and crops will not be harvested.

We are requesting to please stop giving H-2A Visas for absconded workers, we understand that some workers need to go back home for various reason, family emergencies, and health problems etc... but the ones using the Labor Contractor as means to cross the border should not have any additional Visas issued, at the moment around 25% of the H-2A workers abscond and they will not stop unless there are consequences for breaking the law.

Respectfully

Signature

Signature

Fidel Cisneros
Labor Contractor Name

Mario A Vargas
Labor Contractor Name

Gustavo Cisneros
Signature

Gustavo Cisneros
Labor Contractor Name

Signature

Signature

Alejandro Cisneros
Labor Contractor Name

Signature

HB Harvesting inc
Labor Contractor Name

Signature

ATP Agri Services Inc
Labor Contractor Name

Signature

Maldonado Harvesting, LLC.
Labor Contractor Name

Jose Valdovinos
Signature

J-V. Harvesting.
Labor Contractor Name

Benjamin Ramirez
Signature

Benjamin Harvesting
Labor Contractor Name

Signature

G.M. HARVESTING
Labor Contractor Name