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Northwest Forest Worker Center

March 30, 2021

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, D.C. 20528

The Honorable Antony J. Blinken
Secretary
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
Mary E. Switzer Building
330 C Street SW Room 5123
Washington, D.C. 20201

RE: H-2B Temporary Workers and the Impact of COVID-19

Dear Secretaries:

We are advocates and legal services providers from across the U.S. who advocate for workers' rights across the country. Through this letter, we are asking for a number of protections for workers employed by H-2B employers in a wide variety of industries in the United States. Because of the vulnerability of the H-2B workforce, including their international travel, their frequent residence in employer-provided or controlled group housing, and the close quarters associated with the work some H-2B workers perform, for example, work in meat processing plants,, federal agencies like yours need to take action now to protect these workers and the community from additional spread of COVID-19.

This letter is a follow up to a letter originally sent to Secretaries Scalia, Pompeo, Wolf, and Azar in April 2020 (attached as Appendix I) that outlined our concerns regarding H-2B workers' vulnerability to COVID-19 and requested actions to help workers in the program prevent and respond to COVID-19. We are coming up on a year since the declaration of the coronavirus public health emergency and yet little has been done to protect H-2B workers in the program. Last year presidential proclamations purposefully exempted H-2B workers in the "food supply chain" from travel bans otherwise applying to foreign nationals.¹ Most H-2B workers were deemed essential, but no enhanced protections were issued to protect this vulnerable workforce. During the pandemic many H-2B workers have, as expected, contracted COVID-19 at their worksite as a result of living and working in close proximity.² There are also workers that have been retaliated against for raising complaints over the lack of health and safety protocols, such as not having personal protective equipment or receiving prompt medical attention.

At this time, there are tens of thousands of H-2B workers currently in the United States, with many thousands more to enter the country this March to work in landscaping, seafood processing, hospitality, and other industries.³ These workers will travel, live, and work in close quarters.

Many of these workers will be deemed "critical infrastructure" workers and required to work and travel in states that have COVID-19 restrictions. They will work in or near communities with confirmed community spread of COVID-19. They will be unfamiliar with the U.S. healthcare system and ineligible for many benefits. For these reasons, they are uniquely vulnerable to acquiring and transmitting COVID-19, and will face many barriers in accessing care and support.

Other workers are employed by or are being recruited for employment with H-2B employers in industries and jobs where employers are optimistically hoping that they will be able to operate and employ the H-2B workers they have petitioned for despite the continued impact of the pandemic, but where the optimism may not turn out to be the reality.⁴ The economic

¹ Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, Proclamation 10052 of June 22, 2020. Federal Register Vol. 85, No. 123, 38263-38267, June 25, 2020.

² Murray, C., Mexican Seafood Workers Fight Back Over U.S. Coronavirus Sacking, Reuters. June 16, 2020, <https://www.reuters.com/article/us-usa-mexico-migrants-trfn/mexican-seafood-workers-fight-back-over-u-s-coronavirus-sacking-idUSKBN23N2MF> (Two H-2B crawfish workers in Louisiana fired for seeking medical treatment); Rentsch, J., As COVID-19 Sickens 50 Maryland Crab Pickers, Advocates Say Protections Lacking, Delmarva Now. Sept. 14, 2020, <https://www.delmarvanow.com/story/news/local/maryland/2020/09/13/covid-19-sickens-50-crab-pickers-advocates-say-protections-lacking/5678694002/> (H-2B crab pickers in Maryland contract coronavirus).

³ The USCIS Cap Count webpage reflects that on February 12, 2021, USCIS reached the cap of 33,000 H-2B visa approvals for the second half of FY 2020 beginning on April 1, 2021. *See id.* Pursuant to 9 FAM 402.10-11 (U) VALIDITY OF H VISAS, an H-2B visa may be validly issued for entrance to the U.S. ten days prior to the petition date. As a result, under normal circumstances the 33,000 FY2021Q3 H-2B visas for employment beginning on or after April 1, 2021 would permit entrance of those workers beginning on March 22, 2021.

⁴ A review by Justice at Work (Pennsylvania) of H-2B FY2021Q3 Priority Group A cases which likely qualified for USCIS issuance of I-129 visas for employment beginning April 1, 2021 has identified thousands

disruption caused by the COVID-19 pandemic has resulted, and will result, in H-2B workers being displaced from promised employment because their visas are tied to an employer that is unable to offer promised work. Such workers are at risk of potentially being left homeless, unemployed, and unable to return to their homes.

Our concerns and recommendations are outlined below:

1. Ensure group housing for H-2B workers complies with CDC recommendations.

Although most H-2B employers do not have to provide housing for their employees, in many locations across the United States, it is common for employers or contractors to either provide or facilitate group housing for H-2B workers. This is particularly true in the seafood, landscaping, horse track, and horse grooming industries. In addition, employers of forestry services workers and carnival workers are required to provide housing. Typically, employer-provided housing for H-2B workers involves crowded motel rooms or apartments (e.g., eight people in a two bedroom apartment or four in a motel room), barracks-style housing, tents, or carnival trailers. These close living conditions do not allow workers to adhere to the Centers for Disease Control and Prevention (CDC)'s social distancing recommendations, as they often sleep, cook, and use the bathroom in close proximity to others. In addition, because many H-2B workers live in congregate housing that is not registered with federal or state OSHA, government agencies, service providers, and advocates have difficulty locating such workers to provide them with important information related to COVID-19.

Recommendations:

The Department of Labor and/or Department of Health and Human Services should provide mandatory requirements for H-2B employers on the provision of group housing. This should include requirements for:

- Avoiding housing workers in situations where workers cannot maintain at least six feet of distance from one another;;
- Providing cleaning products and sanitizer;
- Arranging separate housing for each of the following groups: residents who are COVID-positive, residents who are COVID-symptomatic and awaiting test results, residents who are asymptomatic but COVID-exposed, and residents who are healthy and not COVID-exposed⁵;

of jobs with H-2B employers in resort travel and amusement industries where the reality of promised employment will be dependent upon substantial progress in reopening of large scale resort vacation travel and community venues for traveling amusement employers. The Office of Foreign Labor Contracting's (OFLC), a division of the Employment and Training Administration (ETA) within the Department of Labor's (DOL), process for granting of labor certification appears not to have required these employers to establish that the employment opportunities for work beginning April 1, 2021 represent actual *bona fide* employment opportunities.

⁵ If COVID-exposed residents who are asymptomatic reside in a one-family housing unit or in a family living unit that is a part of a multifamily unit and can effectively isolate themselves within the unit, it is not necessary to provide them with separate housing.

Separate housing means, at a minimum, separate sleeping areas. Separate bathing, toileting, and

- Posting signs with COVID-19 prevention information and contact information for a nearby clinic or health department, as well as conspicuously posting the housing address in a central location to ensure that workers will be able to call a 911 operator if needed;
- Ensuring rooms are properly ventilated in accordance with any applicable OSHA regulations ; and
- Other recommendations in alignment with CDC guidance.

Many states do not require inspection of H-2B housing. We recommend that all H-2B housing owned, operated, provided, or facilitated by the employer or an agent of the employer be inspected and regulated by the federal Occupational Safety and Health Administration (OSHA) or an OSHA-designated state or local agency, which should look to existing OSHA Temporary Labor Camp Standards and/or H-2A housing standards. Local, state, and federal agencies tasked with inspecting and certifying such housing should ensure the housing complies with CDC recommendations and require an additional COVID-19 plan, identifying the planned procedure if a housing occupant is experiencing symptoms or is diagnosed with COVID-19 .⁶ Any unregistered H-2B housing should be identified, with the location and occupancy dates of such housing publicly available so that health officials and advocates can locate the workers to provide COVID information, vaccines, and other assistance. Such COVID-19 plans should include the following:⁷

- Ensure housing capacity limits are in compliance with CDC recommendations, separating beds by at least six feet or more in all directions and arranging the beds in head to toe sleeping arrangements.⁸ Only one person should be permitted to sleep in a bed or bunk bed.⁹
- Provide designated areas with separate sleeping, cooking, and bathing facilities for quarantined workers.
- Post in each housing unit, in a language understood by the workers, educational materials regarding COVID-19 and best health practices, including washing hands frequently for a minimum of twenty seconds and working six feet apart.

eating facilities should be provided where feasible. If it is not feasible to provide separate bathing, toileting, and eating facilities, the housing operators must create schedules for when each group can use those facilities.

⁶ For guidance on steps to sanitize living facilities, see *CDC COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings*, https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf.

⁷ The recommendations are based on housing arrangements that include workers that have not received the COVID-19 vaccine and plans should change accordingly once all workers residing in the same household have been vaccinated.

⁸ The current temporary housing standard, which does not apply to most H-2B housing, requires fifty square feet per person in sleeping areas with beds as close as three feet together. *See* OSHA Temporary Labor Camp Standard 1910.142(b)(2)-(3); ETA Standard § 654.407.

⁹ These requirements should not apply to family members who live in their own family unit of employer-provided housing.

- Provide proof of sufficient sanitizing and handwashing supplies at the housing and at worksites.
- Provide proof of sufficient masks, or respirators, if available, for all housing occupants and require the use of face masks, or respirators, if available, in the housing at all times during the first 14 days after arrival, except when eating, drinking, sleeping, or performing personal hygiene activities or if the resident cannot medically tolerate a face covering
- Designate a specific member(s) of management responsible for ensuring workers comply with health and sanitation requirements.
- Designate a specific individual(s) responsible for disinfecting worker housing and any vehicles used to transport workers on a daily basis (or more often) at no cost to the workers.
- Designate member(s) of management who will receive reports from workers who may have COVID-19 symptoms, and who will safely coordinate and arrange transportation for such workers to obtain medical services and for all residents to be tested for COVID-19.
- Designate a specific individual(s) whose sole responsibility is to care for quarantined workers and ensure they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.
- Provide paid sick leave for workers who will be quarantined.
- Plan for responding to COVID-19 to limit exposure to other housing occupants and workers and ensure that affected workers/housing occupants receive the needed health care without overwhelming the health care network in rural areas.¹⁰
- Require DOL approval and that written notification be provided to the appropriate foreign consulate prior to any removal of workers from employer-provided housing for a non-COVID reason to ensure that H-2B workers with COVID symptoms or a COVID diagnosis are not subject to early termination of their housing during their quarantine period. Every effort should be made to keep quarantined workers in the housing they are in for the duration of their quarantine. They should only be moved if absolutely necessary. If they are moved, they should be quarantined elsewhere.¹¹
- Post a notice advising workers of their right to protection from eviction.

¹⁰ Katelyn Newman, *Rural Communities Brace for Coronavirus*, U.S. NEWS (Mar. 23, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-03-23/rural-america-braces-for-coronavirus>; see also Dan Keating & Laris Karklis, *Rural Areas May be Most Vulnerable During Coronavirus Outbreak*, WASH. POST (Mar. 19, 2020), <https://www.washingtonpost.com/nation/2020/03/19/rural-areas-may-be-most-vulnerable-during-coronavirus-outbreak/?arc404=true>. The National Rural Health Association has warned that the rural health care safety net, already “fragile before the national emergency, now . . . is being crippled by COVID-19.” Press Release, National Rural Health Association, Urgent Federal Action Needed for Rural Health Care Workers Combating COVID-19 (Mar. 2020), https://www.ruralhealthweb.org/getmedia/dc6252f4-5120-4d0e-91db-32cbb1e8d029/COVID-19-URGENT-REQUESTS-FOR-RURAL-HEALTH-WORKERS_4.aspx.

¹¹ Where employers control workers’ housing, they may revoke workers’ access to that housing on short notice. In our current situation, such eviction from housing could cause a public health crisis.

- Provisions for testing any housing resident with symptoms or suspected COVID-19.
- Testing for all newly arriving housing residents within 48 hours after arrival unless the resident has already been tested in the 72 hours before arrival.
- Housing newly arriving residents in a separate living unit from current residents for 14 days after arrival.
- Proving a second test to newly arriving residents 10-14 days after arrival.

Conducting temperature and symptoms checks of residents at least once a day.

2. Ensure that H-2B workers travelling to the U.S. can maintain social distancing protocols.

H-2B workers embark on a long journey from home communities to their ultimate worksite in the U.S. The first leg of the trip is from their home community to the U.S. Consulate’s office. There they must wait for visa processing, and, we expect, COVID-19 testing.¹² Once they receive their visas, the second leg of the trip is to their worksite in the United States, often via crowded bus. Federal regulations provide that H-2B employers must arrange for or reimburse workers’ reasonable transportation and subsistence expenses,¹³ therefore workers are typically encouraged to share overcrowded hotel rooms and buses with many other workers to curb expenses. Once in the United States, H-2B workers also often are transported in groups via bus or van to their worksites, to buy groceries, and cash checks.

Recommendations:

Your agencies should encourage H-2B employers, including foreign labor contractors, to arrange modes of transportation that follow the CDC COVID-19 recommendations and allow for requisite social distancing.¹⁴ If possible, all workers should be vaccinated and tested before traveling internationally. High quality masks such as N95s should be provided to each worker for international and domestic travel. Bus travel should be staggered so workers are distributed over multiple, half-full buses. Employers utilizing private bus companies should make arrangements for increased ventilation and disinfection and more frequent stops to allow workers to eat outside the bus in accordance with the latest CDC recommendations for travel on public transit.¹⁵ Employers should alternatively be encouraged to fly workers commercially to minimize travel time, and also to provide high quality masks for air travel.¹⁶ During travel from workers’ home

¹² CDC Order: Requirement for proof of Negative COVID-19 Test Result or Recovery From COVID-19 for all Airline Passengers Arriving into the United States (Jan. 26, 2021), *available at* <https://www.cdc.gov/quarantine/fr-proof-negative-test.html>.

¹³ *See* 29 C.F.R. §§ 655.173, 655.20(j)(1)(i).

¹⁴ CDC, “Protect Yourself When Using Transportation: Public Transit,” (updated Feb. 17, 2021) *available at* <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/using-transportation.html#PublicTransit>.

¹⁵ *Id.*

¹⁶ CDC, “Travel During COVID-19,” (updated Feb. 16, 2021), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html>.

communities to their worksite, employers should arrange for or encourage workers to seek individual hotel accommodations for each worker and reimburse the higher cost of accommodations while traveling. Within the United States, employers should mitigate the serious transmission risks of group transportation by allowing social distancing and regular disinfection of vehicles used to transport workers.

3. Ensure working conditions for H-2B workers comply with CDC recommendations and OSHA guidance.

Migrant workers—and, most acutely, those working on H-2 visas—have risked their lives since the onset of the COVID-19 pandemic. Even in normal times, H-2B workers are subject to disproportionately high occupational hazards; COVID-19 exacerbated these concerns. Still, in spite of requests by workers and advocates, many reasonable protections have not been granted to these workers who are traveling long distances to feed their families, remain safe at the workplace, and keep the economy afloat.

In our April 2, 2020 letter, we requested a panoply of common sense protections for H-2B workers. Four months later, on August 3, 2020—several months into the height of both the migrant season and the pandemic—DOL responded to our letter. In relevant part, DOL stated that we “suggested a number of enhancements to the H-2B program to implement additional worker protections” and that “[m]any of these suggestions are beyond the scope of the Department’s authority to implement without congressional action and/or additional rulemaking.”

More disappointingly, the remainder of the agencies to whom our April 2, 2020 letter were directed did not substantively respond at all. But, federal agencies were in a position to act, and remain in a position to act. Federal agencies readily have at their disposal emergency rulemaking procedures, and the ability to conduct interagency coordination. Further, the letter stated that “many” of the suggestions are beyond DOL’s scope, but did not delineate which recommendations were beyond their scope, nor rationales for those suggestions that they could act on, but did not.

Finally, even with the existing protections on the books, history shows that H-2B workers’ lack of awareness of key protections that provide for their health and safety in the workplace. They may also not be aware of most recent guidance around precautions they can take to protect themselves in the workplace.

In that light of the foregoing, we re-emphasize the following recommendations that can be deployed now by federal and state health and safety agencies to support employers and H-2B workers through the COVID-19 pandemic:

Recommendations:

- Provide employers of H-2B workers with resources and information. Agencies should make posters, public health guidelines, and educational materials on COVID-19 available to employers in multiple languages. Employers, recruiters, and labor contractors need this information readily available so they can share with their H-2B workers. Importantly, consulates in home countries need to provide the same

guidelines and educational materials to workers before they leave their homes, so that they are adequately prepared for both work and health considerations well in advance of their arrival at their work sites.

- Create an emergency plan. Require employers to have an emergency plan in the event an H-2B worker falls ill with COVID-19. This plan should anticipate quarantine housing needs and proper medical care. H-2B workers often work in rural settings with little to no access to medical care. Agencies need to work with employers to identify medical care and what to do if COVID-19 strikes their workplace. H-2B workers depend on their employers for medical treatment.
- Promote proper hygiene. Require employers to provide H-2B workers with sufficient breaks in order to implement frequent hand washing and social distancing. H-2B employers should provide proof of adequate hand washing stations, disinfecting and sanitizing materials, disposable gloves, masks, and other industry-specific personal protective equipment (PPE). Employers should develop schedules to regularly sanitize and disinfect commonly touched surfaces like doorknobs, handrails, and workstations. Employers should provide for increased ventilation in enclosed workspaces. Employers should stagger shifts and lunch breaks to facilitate social distancing. Employers should hang signs encouraging hand washing and proper sneezing and coughing hygiene.
- Encourage the reporting of COVID-19 symptoms. H-2B workers should be required to report if they are experiencing COVID-19 symptoms to their employers and employers must not take adverse actions against employees for doing so.
- Ensure workers recruited from out-of-state are informed of the risk of exposure to COVID-19. This is accomplished by providing information regarding the danger of COVID-19, the prevalence of COVID-19 in the community where the worker will be working compared to the worker's current location and permanent residence, the risk of exposure during transportation, the CDC's recommendations for work and social distancing, and the proposed living and working conditions.
- Ensure workers will be housed and transported in compliance with the CDC, and, if applicable, OSHA, social distancing recommendations.
- Provide workers with access to testing for COVID-19 at no cost to the workers.
- Provide paid sick leave for workers who are unable to complete the job contract due to COVID-19.

4. Assure that H-2B workers have access to COVID-19 vaccines as soon as possible to mitigate the risks of COVID-19.

Now that COVID-19 vaccines are becoming more widely available, the Departments of Health and Human Services, Labor, State, and Homeland Security (the Departments) should prioritize vaccine access to foreign temporary workers, including H-2B workers, who have not been vaccinated in their home countries. To this end, the Departments should work with state departments of public health to assure that H-2B workers are permitted to be vaccinated through any special procedures states and counties have in place for vaccinating farmworkers and other

frontline workers. In states where proof of residency is required for vaccination, the H-2B visa must be an acceptable proof of (temporary) residency.

In addition, the Departments should require employers to have a plan in place for vaccinating the hires who have not been vaccinated in their home countries. For these workers, the employer should be required to:

- Provide opportunities for the workers to be vaccinated as soon as possible after their arrival in the U.S.;
- Provide workers with accurate, up-to-date information in a language they understand on vaccination sites, including locations, dates and hours of operation, documents necessary to prove eligibility for vaccination (ID, visa, etc.), and information on how to make appointments;
- Give workers paid time off to get vaccinated;
- Provide workers with transportation to and from the vaccination sites;
- Give written notice of the presence of the H-2B workers to the bargaining representative in the area of intended employment (if there is one) *and* a community based organization (CBO) that routinely provides services to immigrants and nonimmigrants in the area (note that employers are already required to notify bargaining representatives and CBOs in the areas of intended employment of the job opportunity during initial recruitment (20 CFR § 655.45(a) and (c));
- Facilitate access to workers by the bargaining representative and/or the CBO for the purposes of providing the workers with information about vaccinations and to assist workers in getting vaccinated.

For workers who travel to multiple work sites in different states, such as forest and carnival workers, and who need a second dose of the vaccine, employers should be required to take these same steps in the areas in which the workers are working to assure that they get the second dose they need.

Finally, the Departments should issue applicable guidance explicitly stating that retaliating against workers who seek vaccinations or obtain vaccination is unlawful.

5. Protect H-2B workers displaced from employment by layoffs and early termination of work, and provide assistance for H-2B workers who are unable to return to their home countries.

Analysis of the categories of jobs for which employers have historically received H-2B workers and pending FY2021 Q3 requests for U.S. DOL labor certification indicates that significant numbers of H-2B workers are being sought for positions dependent upon a hoped for revival of the economy and significant relaxation of public health standards.

We are concerned that many H-2B workers will find themselves stranded in the United States, facing the expiration of their visas and unable to work or access basic resources, such as food, medical care, housing, or money to pay for their basic subsistence.

Recommendations:

- The Department of Labor and the Department of Homeland Security, in accordance with 20 C.F.R. § 655.20(g), should:
 - *Require* H-2B employers to comply with the requirement to obtain *written approval* of the DOL Certifying Officer before terminating employment of any H-2B worker because of loss of work;
 - *Withhold* such approval until DOL and the employer (and its H-2B processing agent) have made efforts to offer comparable employment to each such worker;
 - *Require* each H-2B employer to provide temporary housing and a daily subsistence allowance until the employer is able to make arrangements at the employer's expense to return the H-2B worker to their home.
 - *Require* the H-2B employer to be responsible for continued housing and subsistence for that worker until the worker can return home or has accepted alternative H-2B employment, where border closings or other barriers prevent that worker from returning to their home.
- The Department of Homeland Security should automatically extend the visas of H-2B workers who are unable to leave the United States and expedite or streamline the processing of requests for workers to transfer to new employers.¹⁷
- The Department of Labor should verify that a worker's decision to seek other employment is voluntary and should verify job offers so that H-2B workers can avoid fraud and only transfer to employers that have received H-2B labor certifications.

The Department of Labor should ensure that H-2B workers that have been laid off or face reduced hours of work because of COVID-19 can access unemployment insurance benefits through their state's UI program or via the Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Pandemic Unemployment Compensation programs, which expand eligibility to provide unemployment compensation to workers who are not normally eligible for benefits so long as their unemployment was connected to the COVID-19 pandemic.

6. Scrutinize employers seeking additional H-2B workers.

The Immigration and Nationality Act defines an H-2B worker as:

(H) an alien . . . (ii) . . . (b) having a residence in a foreign country which he has no intention of abandoning who is coming

¹⁷ In our April 2020 letter we had recommended a process for an H-2B worker to transfer to a different employer on an expedited basis similar to that at 8 C.F.R. § 274a.12(b)(21) for H-2A workers without requiring the new H-2B employer to participate in the E-Verify program. We suggest that DHS permit an H-2B worker to "transfer" to any employer with a previously approved H-2B labor certification by DOL. On May 14, 2020 USCIS published "Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency" at 85 Fed. Reg. 28,843-28,851. That temporary regulatory change needs to be revisited for its applicability to current employment this year. Attached hereto is a detailed critique of that regulation and a companion regulatory change for the H-2B program. See June 24 2020 "Migration that Works Letter to DHS DOL DOS re H-2 Temp Rule Changes."

temporarily to the United States to perform . . . [non-agricultural] temporary service or labor *if unemployed persons capable of performing such service or labor cannot be found in this country.*

8 U.S.C. § 1101(a)(15)(H)(ii)(b) (emphasis added).

In accordance with DOL H-2B regulations, each employer seeking an H-2B labor certification from DOL is required to execute an ETA 9142B, Appendix B Employer Declaration stating:

I HEREBY CERTIFY my knowledge of and compliance with the following conditions of employment applicable to H-2B workers and/or U.S. workers who are hired during the recruitment period for positions covered by this application, including any approved extension thereof:

1. The job opportunity is a *bona fide, full-time* temporary position (of at least 35 hours per workweek). . . .

8. The employer has not laid off *and will not lay off* any similarly employed U.S. worker in the occupation and area of intended employment within the period beginning 120 days before the date of need *through the end of the period of certification*, unless the layoff is for lawful, job-related reasons and all H-2B workers are laid off first.

Recommendations:

Under the unique circumstances of massive nationwide layoffs of U.S. workers and state and local closures of non-essential critical infrastructure businesses, a redetermination that U.S. workers would not accept employment and that the offer of employment is a *bona fide* offer of *full time* employment for the period of requested need is appropriate.¹⁸

7. Require enhanced procedures during consular processing of H-2B workers.

H-2B workers who are applying for visas at U.S. Consulates around the world need up-to-date information on health conditions and restrictions on movement and gathering in the U.S. locations where they are headed.

Over the past year many states and local jurisdictions have implemented stay-at-home orders restricting the movement of individuals for very narrow purposes and shutting down businesses that are not deemed essential or part of “critical infrastructure.” This is of particular concern for H-2B forestry services workers and carnival workers who travel on approved itineraries from state to state, since conditions and restrictions are likely to vary by location. Employers are required to provide H-2B workers with a contract that includes the terms and conditions of employment. Protections need to be in place prior to the workers’ arrival, and complete information related to COVID-19 should be included in the contract. This can be ensured if USDOL includes new requirements for H-2B job order approval.

¹⁸ This is particularly true since DOL is barred by Congressional Appropriations restrictions from directly enforcing H-2B regulations for the three-fourths guarantee of the amount of work promised to H-2B workers.

Recommendations:

The Department of Homeland Security should provide information to U.S. Consulates to give to workers in their home countries during the visa application process explaining any current restrictions on each location listed in that worker's H-2B order, as well as general information on how to protect oneself from COVID-19. To the extent that consulates are not having in-person contact with H-2B workers during the visa issuance process, employers should be required to have any in-country recruiter provide this information to each person recruited along with a copy of the H-2B contract. The information should be posted on the Department of State website. H-2B workers should have access to unemployment insurance and expanded pandemic-related disaster benefits. Given the quarantine orders set in place in numerous states to self-isolate after traveling, H-2B workers and out-of-state workers should be paid for this time period.

In addition, the Department of State should determine if visa applicants have been vaccinated in their home country and should communicate to employers which workers have been vaccinated and which have not.

Prior to approval of a job order, the agencies tasked with reviewing job orders should ensure that an employer has a plan for preventing and responding to COVID-19, including plans for providing workers who have not been vaccinated in their home countries with opportunities to get vaccinated upon their arrival in the U.S. We make recommendations for vaccinating workers above in section 4 of this letter. In their plans for preventing and responding to COVID-19 employers should be required to:

- Designate a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements.
- Plan work crew activities to ensure proper distancing to avoid unnecessary transmission of the disease at work.
- Ensure sufficient bathroom and hand washing facilities are available at the worksite.
- Ensure daily sanitization of bathroom and handwashing facilities.
- Provide proof of sufficient personal protective equipment required for any workers handling or working around pesticides, free of charge.
- Provide paid sick leave, workers' compensation coverage and/or the three-fourths guarantee if the worker is unable to complete the contract due to COVID-19, to ensure that all COVID-19-related treatment and medical expenses, including transportation and lost wages, are covered.
- Guarantee that no worker will be sent home while experiencing COVID-19 symptoms.
- Designate a hotline number capable of receiving information or messages twenty-four hours a day in order to allow workers to report potential symptoms and request medical assistance and COVID-19 testing.

Employers are required to provide workers with the terms and conditions of employment when workers are still in their hometowns. In addition to the normal terms and conditions, all

persons who are recruiting workers for H-2B employment in 2020 must provide written information that includes detailed information about COVID-19, including:

- The health risks;
- The risk of exposure during travel;
- The prevalence of COVID-19 in the community where the worker will be working;
- How employers will protect their safety while transporting, housing, and employing them in the United States;
- The promise of free individual cleaning and sanitizing products and the schedule for regular sanitizing of the housing, transportation, and other communal areas;
- The employer's approved COVID-19 Response Plan, including that workers will:
 - Receive free testing and treatment at no cost should they develop COVID-19 symptoms.
 - Be quarantined if they develop symptoms or test positive.
 - Not be sent home until all COVID-19 symptoms have been fully resolved.
- The availability of paid sick leave, workers' compensation, the three-fourths guarantee, unemployment insurance, and/or other benefits provided, should they be unable to complete the contract due to COVID-19; and
- Their right to a safe workplace and protections against retaliation and evictions.

In light of U.S. Consular offices ceasing in-person interviews, all information, job contracts, and Know-Your-Rights brochures should be posted on the Department of Labor's website to ensure that workers can access this crucial information.

8. Assure three-fourths guarantee for H-2B workers who began work after the COVID-19 crisis began.

Throughout the past year, H-2B employers have been aware of the risks that COVID-19 represents to their industries and the public health at large. Although an exception to the three-fourths guarantee exists for disasters beyond the control of the employer or for similar unforeseeable catastrophic events, H-2B employers who continued to bring workers after the onset of the COVID-19 pandemic are not facing an unforeseeable event, but are acting with full knowledge of the risks associated with COVID-19.¹⁹

Recommendations:

The DOL should affirm that, if any H-2B worker who entered the United States develops COVID-19 or a presumptive case of COVID-19 and, as a result, cannot complete the H-2B contract, they are entitled to the three-fourths guarantee. Likewise, the Department of Labor should affirm that, if any H-2B worker is not offered sufficient hours of work due to COVID-19-related disruptions to business, they are entitled to the three-fourths guarantee. If employers seek to terminate a job order without fulfilling the three-fourths guarantee, certifying officers should deny such requests. As part of the certification process, H-2B employers should be specifically

¹⁹ See 29 C.F.R. § 655.20(g).

informed of their obligation to pay the three-fourths guarantee if COVID-19 impacts contract fulfillment, of their obligation to assist H-2B workers with a transfer to another employer, and of the requirement to pay the workers' return transportation should there be no transfer.²⁰

CONCLUSION

The undersigned organizations and persons request that the Administration take urgent action and implement the recommendations outlined in this letter. The safety and health of H-2B workers, their families, and the community at large depends on the swift action of your agencies. We request a timely meeting to discuss the progress of your agencies in carrying out the recommendations outlined in this letter. You may contact Sulma Guzman (sulma@cdmigrante.org) and Carol Brooke (carol@ncjustice.org). We look forward to your prompt response and leadership in coordinating COVID-19 emergency services.

Sincerely,

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Melanie Stratton Lopez
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Centro de los Derechos del Migrante, Inc.

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Carl Wilmsen
Northwest Forest Worker Center /
Lomakatsi Restoration Project

²⁰ 20 C.F.R. § 655.20(g).

With the support of the following organizations:

Alianza Nacional de Campesinas
AFL-CIO
California Rural Legal Aid Foundation
Chicago's Legal Aid Society
Economic Policy Institute
Freedom Network USA
Human Trafficking Legal Center
Justice in Motion
Legal Action Chicago
Migration that Works
Muslim Advocates
National Employment Law Project (NELP)
National Lawyers Guild Labor and Employment Committee
National Network for Immigrant and Refugee Rights (NNIRR)
National Young Farmers Coalition
Northwest Workers' Justice Project
Public Justice Center, Baltimore, Maryland
RAICES
Seafood Workers' Alliance, New Orleans Workers Center for Racial Justice
South Asian Americans Leading Together (SAALT)
Worker Justice Center of New York

CC: Members, U.S. House Committee on Education and Labor;
Members, U.S. House Judiciary Committee;
Members, U.S. Senate Committee on Health, Education, Labor and Pensions; and,
Members, U.S. Senate Committee on the Judiciary.



LEGAL AID
JUSTICE CENTER



Northwest Forest Worker Center

April 2, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The Honorable Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, SW
Washington, D.C. 20528

The Honorable Michael R. Pompeo
Secretary
U.S. Department of State
2201 C Street NW
Washington, D.C. 20520

The Honorable Alex Azar
Secretary
U.S. Department of Health and Human Services
Mary E. Switzer Building
330 C Street SW Room 5123
Washington, D.C. 20201

RE: H-2B Temporary Work Visa & Impact of COVID-19

Dear Secretaries Scalia, Wolf, Pompeo, and Azar:

We are advocates and legal services providers from across the U.S. who regularly represent and interact with workers employed by H-2B employers in a wide variety of industries and organizations concerned with the well-being of all workers in the United States. Because of the vulnerability of the H-2B workforce, their international travel, their frequent residence in employer-provided or controlled group housing, and the close quarters associated with the work some H-2B workers perform, federal agencies like yours need to take action now to protect these workers and the community from additional spread of COVID-19.

At this time, there are tens of thousands of H-2B workers currently in the United States,¹ with many thousands more who may be crossing the border in the next two months to work in landscaping, seafood processing, hospitality, and other industries.² These workers will travel, live, and work in close quarters.

Many of these workers will be deemed “critical infrastructure” workers and required to work and travel in states that have “shelter in place” orders. They will work in or near communities with confirmed community spread of COVID-19. They will be unfamiliar with the U.S. healthcare system and ineligible for many benefits. For these reasons, they are uniquely vulnerable to acquiring and transmitting COVID-19, and will face many barriers in accessing care and support.

Other workers are employed by or are being recruited for employment with H-2B employers in industries that are not classified as essential critical infrastructure industries.³ The economic disruption caused by the COVID-19 pandemic has resulted, and will result, in H-2B workers being displaced from promised employment because their visas are tied to an employer that is not performing essential work, and potentially being left homeless, unemployed, and unable to return to their homes.

Our concerns and recommendations are outlined below:

1. Protect H-2B workers displaced from employment by layoffs and early termination of work, and provide assistance for H-2B workers who are unable to return to their home countries.

Analysis of the categories of jobs for which employers have historically received H-2B workers indicates that significant numbers of H-2B workers now in the country are likely to be

¹ Unfortunately, the U.S. DOL, ETA, OFLC Performance Data, Disclosure Data, public disclosure information page as of March 27, 2020 has not been updated to include any disclosure information for FY2020Q1 ending on December 31, 2019. As a result, it is impossible to precisely identify data as to the current employers with H-2B workers. A review of FY2019 H-2B DOL labor certification approvals for employment continuing into 2020 suggests that as many as 17,383 positions will continue into the period between April 2020 and the end of the year, with 14,466 of those jobs ending in the period between April and June 30, 2020. It is impossible to know how many of those approved labor certification resulted in the issuance of H-2B visas. The USCIS Cap Count webpage reflects that on Nov. 15, 2019, USCIS reached the cap of 33,000 H-2B visa approvals for the 1st half of FY 2020. Presumably most of the 33,000 H-2B workers entered the U.S. subsequent to October 1, 2019 and most of them likely remain in the U.S. See Cap Count for H-2B Nonimmigrants, <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants>.

² The USCIS Cap Count webpage reflects that on February 18, 2020, USCIS reached the cap of 33,000 H-2B visa approvals for the second half of FY 2020 beginning on April 1, 2020. *See id.* Pursuant to 9 FAM 402.10-11 (U) VALIDITY OF H VISAS, an H-2B visa may be validly issued for entrance to the U.S. ten days prior to the petition date. As a result, under normal circumstances the 33,000 FY2020Q3 H-2B visas for employment beginning on or after April 1, 2020 would have permitted entrance of those workers beginning on March 22, 2020.

³ *See* U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, (March 19, 2020), https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_508C_0.pdf.

employed in industries where state and local health orders limiting employment to “essential workers” during the COVID-19 pandemic will result in their layoff on at least a temporary basis and/or early termination of the promised period of employment.

The classification of “essential workers” in at least some states (e.g., Pennsylvania) is based on the NAICS code of the industry of the employer rather than on the SOC Code of the workers. Examination of FY19 H-2B DOL labor certifications by NAICS Code shows there is likely to be a significant number of H-2B workers who will be employed in industries which may be classified as non-essential, resulting in a curtailment or cessation of operations by those employers and in turn the temporary layoff or early termination of H-2B workers. The table below reflects the NAICS Sectors of H-2B labor certifications approved by DOL in FY2019.

NAICS Sector	Title Sector	H-2B Workers
	Total All FY 19 Certified	150,465
56	Administrative and Support and Waste Management and Remediation Services	66,842
71	Arts, Entertainment, and Recreation	19,203
72	Accommodation and Food Services	18,461
11	Agriculture, Forestry, Fishing and Hunting	15,015
31-33	Manufacturing	13,170
23	Construction	10,191
42	Wholesale Trade	1,498
54	Professional, Scientific, and Technical Services	1,067
48-49	Transportation and Warehousing	981
21	Mining, Quarrying, and Oil and Gas Extraction	868
61	Educational Services	821
44-45	Retail Trade	739
53	Real Estate and Rental and Leasing	714
55	Management of Companies and Enterprises	342
81	Other Services (except Public Administration)	301
22	Utilities	211
92	Public Administration	16
62	Health Care and Social Assistance	14
51	Information	6
52	Finance and Insurance	5

Workers in industries classified as Arts, Entertainment, and Recreation and as Accommodation and Food Services, which accounted for 37,664 of the FY2019 approved H-2B worker positions, are very likely to be jobs in which H-2B workers will be displaced from employment.

We are aware of H-2B workers currently in the United States whose employers have ceased operations or laid off workers, but who are unable to return to their home country because that country (for example, Jamaica, Peru, and South Africa) has closed its border. As additional businesses shut down or greatly reduce their workforce because of coronavirus concerns or state issued mandates, we anticipate more H-2B workers will find themselves stranded in the United States, facing the expiration of their visas and unable to work or access basic resources, such as food, medical care, housing, or money to pay for their basic subsistence.

Recommendations:

- The Department of Labor and the Department of Homeland Security, in accordance with 20 C.F.R. § 655.20(g), should:
 - *Require* H-2B employers to comply with the requirement to obtain *written approval* of the DOL Certifying Officer before terminating employment of any H-2B worker because of loss of work;
 - *Withhold* such approval until DOL and the employer (and its H-2B processing agent) have made efforts to offer comparable employment to each such worker;
 - *Require* each H-2B employer to provide temporary housing and a daily subsistence allowance until the employer is able to make arrangements at the employer's expense to return the H-2B worker to their home.
 - *Require* the H-2B employer to be responsible for continued housing and subsistence for that worker until the worker can return home or has accepted alternative H-2B employment, where border closings or other barriers prevent that worker from returning to their home.
- The Department of Homeland Security should automatically extend the visas of H-2B workers who are unable to leave the United States and expedite or streamline the processing of requests for workers to transfer to new employers, similar to the process used for change of employers for H-2A workers. *See* 8 C.F.R. § 274a.12(b)(21).⁴

⁴ 8 C.F.R. § 274a.12(b)(21) states:

A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H-2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the "Received Date" on Form I-797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, ~~provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.~~ Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the date of the denial decision.

The above stricken language is in the existing H-2A regulation. However, because of the COVID-19 emergency situation, we would recommend dispensing with the requirement for the new employer to

- The Department of Labor should verify that a worker’s decision to seek other employment is voluntary and should verify job offers so that H-2B workers can avoid fraud and only transfer to employers that have received H-2B labor certifications.
- The Department of Labor should ensure that H-2B workers that have been laid off because of COVID-19 can access unemployment insurance benefits through their state’s UI program or via the Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Pandemic Unemployment Compensation created by the CARES Act, which expands eligibility to provide unemployment compensation to workers who are not normally eligible for benefits so long as their unemployment was connected to the COVID-19 pandemic.

2. Ensure group housing for H-2B workers complies with CDC recommendations.

Although most H-2B employers do not have to provide housing for their employees, in many locations across the United States, it is common for employers or contractors to either provide or facilitate group housing for H-2B workers. This is particularly true in the seafood, landscaping, horse track, and horse grooming industries. In addition, employers of forestry services workers and carnival workers are required to provide housing. Typically, employer-provided housing for H-2B workers involves crowded motel rooms or apartments (e.g., eight people in a two bedroom apartment or four in a motel room), barracks-style housing, tents, or carnival trailers. These close living conditions do not allow workers to adhere to the Centers for Disease Control and Prevention (CDC)’s social distancing recommendations, as they often sleep, cook, and use the bathroom in close proximity to others.

Recommendations:

The Department of Labor and/or Department of Health and Human Services should provide mandatory guidance to H-2B employers on the provision of group housing. Such guidance should include requirements for:

- Avoiding housing workers in situations where they cannot observe the CDC six foot social distancing recommendation;
- Provision of cleaning products and sanitizer;
- Arranging planned housing for workers with symptoms and for workers with diagnosed COVID-19;
- Providing signs with COVID-19 prevention information and contact information for a clinic or health department; and
- Other recommendations in alignment with CDC guidance.

Many states do not require inspection of H-2B housing. We recommend that all H-2B housing owned, operated, provided, or facilitated by the employer or an agent of the employer be inspected and regulated by the federal Occupational Safety and Health Administration (OSHA) or an OSHA-designated state or local agency. Local, state, and federal agencies tasked with inspecting and certifying such housing should ensure the housing complies with CDC recommendations and require an additional COVID-19 plan, identifying the planned procedure if

participate in the E-Verify program, and instead suggest that DHS simply permit such a “transfer” to any employer with a previously approved H-2B labor certification by DOL.

COVID-19 is identified by a housing occupant.⁵ Such COVID-19 plans should include the following:

- Ensure housing capacity limits are in compliance with CDC recommendations, with a minimum of six feet between bunks or beds and adequate ventilation.⁶
- Provide designated areas with separate sleeping, cooking, and bathing facilities for quarantined workers.
- Provide separate living facilities for workers that are over sixty or have underlying health conditions.
- Post in each housing unit, in a language understood by the workers, educational materials regarding COVID-19 and best health practices, including washing hands frequently for a minimum of twenty seconds and working six feet apart.
- Provide proof of sufficient sanitizing and handwashing supplies at the housing and at worksites.
- Provide proof of sufficient masks for all quarantined workers who develop COVID-19 symptoms or test positive for COVID-19.
- Designate a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements.
- Designate a specific individual(s) responsible for disinfecting worker housing and any vehicles used to transport workers on a daily basis (or more often) at no cost to the workers.
- Designate a specific individual(s) who will receive reports from workers who may have COVID-19 symptoms, and who will coordinate and transport such workers to obtain medical services.
- Designate a specific individual(s) whose sole responsibility is to care for quarantined workers and ensure they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.
- Provide paid sick leave for workers who will be quarantined.
- Provide proof that advance arrangements have been made to ensure sufficient essential supplies and food will be available in the community where the workers will be housed.
- Plan for responding to COVID-19 to limit exposure to other housing occupants and workers and ensure that affected workers/housing occupants receive the needed health care without overwhelming the health care network in rural areas.⁷

⁵ For guidance on steps to sanitize living facilities, see *CDC COVID-19 Preparedness Checklist for Nursing Homes and other Long-Term Care Settings*, https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf.

⁶ The current temporary housing standard requires fifty square feet per person in sleeping areas with beds as close as three feet together. See OSHA Temporary Labor Camp Standard 1910.142(b)(2)-(3); ETA Standard § 654.407.

⁷ Katelyn Newman, *Rural Communities Brace for Coronavirus*, U.S. NEWS (Mar. 23, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-03-23/rural-america-braces-for-coronavirus>;

- Require DOL approval and that written notification be provided to the appropriate foreign consulate prior to any removal of workers from employer-provided housing to ensure no H-2B worker is removed from the housing without treatment.⁸
- Post a notice advising workers of their right to protection from eviction.

3. Scrutinize employers seeking additional H-2B workers.

The Immigration and Nationality Act defines an H-2B worker as:

(H) an alien . . . (ii) . . . (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . [non-agricultural] temporary service or labor *if unemployed persons capable of performing such service or labor cannot be found in this country.*

8 U.S.C. § 1101(a)(15)(H)(ii)(b).

In accordance with DOL H-2B regulations, each employer seeking an H-2B labor certification from DOL is required to execute an ETA 9142B, Appendix B Employer Declaration stating:

I HEREBY CERTIFY my knowledge of and compliance with the following conditions of employment applicable to H-2B workers and/or U.S. workers who are hired during the recruitment period for positions covered by this application, including any approved extension thereof:

1. The job opportunity is a *bona fide, full-time* temporary position (of at least 35 hours per workweek). . . .

8. The employer has not laid off *and will not lay off* any similarly employed U.S. worker in the occupation and area of intended employment within the period beginning 120 days before the date of need *through the end of the period of certification*, unless the layoff is for lawful, job-related reasons and all H-2B workers are laid off first.

Recommendations:

Under the unique circumstances of massive nationwide layoffs of U.S. workers and state and local closures of non-essential critical infrastructure businesses, a redetermination that U.S.

see also Dan Keating & Laris Karklis, *Rural Areas May be Most Vulnerable During Coronavirus Outbreak*, WASH. POST (Mar. 19, 2020), <https://www.washingtonpost.com/nation/2020/03/19/rural-areas-may-be-most-vulnerable-during-coronavirus-outbreak/?arc404=true>. The National Rural Health Association has warned that the rural health care safety net, already “fragile before the national emergency, now . . . is being crippled by COVID-19.” Press Release, National Rural Health Association, Urgent Federal Action Needed for Rural Health Care Workers Combating COVID-19 (Mar. 2020), https://www.ruralhealthweb.org/getmedia/dc6252f4-5120-4d0e-91db-32cbb1e8d029/COVID-19-URGENT-REQUESTS-FOR-RURAL-HEALTH-WORKERS_4.aspx.

⁸ Where employers control workers’ housing, they may revoke workers’ access to that housing on short notice. In our current situation, such eviction from housing could cause a public health crisis.

workers would not accept employment and that the offer of employment is a *bona fide* offer of *full time* employment for the period of requested need is appropriate.⁹

4. Require enhanced procedures during consular processing of H-2B workers.

H-2B workers who are applying for visas at U.S. Consulates around the world need up-to-date information on health conditions and restrictions on movement and gathering in the U.S. locations where they are headed.

As of April 2, 2020, officials in at least thirty-eight states have implemented stay-at-home orders restricting the movement of individuals for very narrow purposes and shutting down businesses that are not deemed essential or part of “critical infrastructure.”¹⁰ This is of particular concern for H-2B forestry services workers and carnival workers who travel on approved itineraries from state to state, since conditions and restrictions are likely to vary by location. Employers are required to provide H-2B workers with a contract that includes the terms and conditions of employment. Protections need to be in place prior to the workers’ arrival, and complete information related to COVID-19 should be included in the contract. This can be ensured if USDOL includes new requirements for H-2B job order approval.

Recommendations:

The Department of Homeland Security should provide information to U.S. Consulates to give to workers in their home countries during the visa application process explaining any current restrictions on each location listed in that worker’s H-2B order, as well as general information on how to protect oneself from COVID-19. To the extent that consulates are not having in-person contact with H-2B workers during the visa issuance process, employers should be required to have any in-country recruiter provide this information to each person recruited along with a copy of the H-2B contract. The information should be posted on the Department of State website. H-2B workers should have access to unemployment insurance and expanded pandemic-related disaster benefits. Given the quarantine orders set in place in numerous states to self-isolate after traveling, H-2B workers and out-of-state workers should be paid for this time period.

Prior to approval of a job order, the agencies tasked with reviewing job orders should ensure that an employer has a plan for preventing and responding to COVID-19, including requiring the employer to:

- Designate a specific individual(s) responsible for ensuring workers comply with health and sanitation requirements.
- Plan work crew activities to ensure proper distancing to avoid unnecessary transmission of the disease at work.
- Ensure sufficient bathroom and hand washing facilities are available at the worksite.
- Ensure daily sanitization of bathroom and handwashing facilities.

⁹ This is particularly true since DOL is barred by Congressional Appropriation’s restrictions from directly enforcing H-2B regulations for the three-fourths guarantee of the amount of work promised to H-2B workers.

¹⁰ See Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay Home*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

- Provide proof of sufficient personal protective equipment required for any workers handling or working around pesticides, free of charge.
- Provide paid sick leave, workers' compensation coverage and/or the three-fourths guarantee if the worker is unable to complete the contract due to COVID-19, to ensure that all COVID-19-related treatment and medical expenses, including transportation and lost wages, are covered.
- Guarantee that no worker will be sent home with any COVID-19 symptoms.
- Designate a hotline number capable of receiving information or messages twenty-four hours a day should be established to allow workers to report potential symptoms and request medical assistance and COVID-19 testing.

Employers are required to provide workers with the terms and conditions of employment when workers are still in their hometowns. In addition to the normal terms and conditions, all persons who are recruiting workers for H-2B employment in 2020 must provide written information that includes detailed information about COVID-19, including:

- The health risks;
- The risk of exposure during travel;
- The prevalence of COVID-19 in the community where the worker will be working;
- How employers will protect their safety while transporting, housing, and employing them in the United States;
- The promise of free individual cleaning and sanitizing products and the schedule for regular sanitizing of the housing, transportation, and other communal areas.
- The employer's approved COVID-19 Response Plan, including that workers will:
 - Receive free testing and treatment at no cost should they develop COVID-19 symptoms.
 - Be quarantined if they develop symptoms or test positive.
 - Not be sent home until all COVID-19 symptoms have been fully resolved.
- The availability of paid sick leave, workers' compensation, the three-fourths guarantee, unemployment insurance, and/or other benefits provided, should they be unable to complete the contract due to COVID-19.
- Their right to a safe workplace and protections against retaliation and evictions.

In light of U.S. Consular offices ceasing in-person interviews, all information, job contracts, and Know-Your-Rights brochures should be posted on the Department of Labor's website to ensure that workers can access this crucial information.

5. Ensure that H-2B workers travelling to the U.S. can maintain social distancing protocols.

H-2B workers embark on a long journey to get to their worksite in the U.S. The first leg of the trip is from their home community to the U.S. Consulate's office. There they must wait for days, sometimes a week for visa processing. With the current lack of clarity around visa processing for first-time applicants, this waiting time could extend even longer. Once they receive their visas, the second leg of the trip is to their worksite in the U.S. Federal regulations provide that H-2B employers must arrange for or reimburse workers' reasonable transportation

and subsistence expenses.¹¹ The challenge is that workers are typically encouraged to share overcrowded hotel rooms and buses with many other workers for days, or even weeks to curb expenses.

Recommendations:

U.S. Consulates should provide clearer guidance around visa processing for first-time applicants to ensure that job seekers are not congregating unnecessarily near consular offices. Your agencies should encourage H-2B employers to arrange or encourage workers to seek alternate modes of transportation that follow the CDC COVID-19 recommendations.¹² This should include staggering travel, so workers are distributed over multiple, half-full buses, or flying workers commercially to minimize travel time. For private bus travel, H-2B employers should arrange for increased ventilation and supplies to disinfect surfaces at regular intervals. The Occupational Safety and Health Administration and/or Department of Health and Human Services should provide guidance to H-2B employers on the provision of group housing. Employers should arrange for or encourage workers to seek individual hotel accommodations for each worker and reimburse the higher cost of housing. Employers should also arrange for or encourage workers to seek room service or food delivery services to avoid unnecessary contact and reimburse the higher costs of food.

6. Ensure working conditions for H-2B workers comply with CDC recommendations.

H-2B workers who choose to work during this time are taking on the risk of contracting COVID-19 as an occupational hazard. These workers may not be aware of existing protections that provide for their health and safety in the workplace. They may also not be aware of more recent guidance around precautions they can take to protect themselves in the workplace. Agencies and employers need to ensure that H-2B workers are informed on the CDC and other public health guidelines to minimize the risk of COVID-19 contagion. There are many things federal and state health and safety agencies can do to support employers and H-2B workers through the COVID-19 pandemic.

Recommendations:

- Provide employers of H-2B workers with resources and information. Agencies should make posters, public health guidelines, and educational materials on COVID-19 available to employers in multiple languages. Employers need this information readily available so they can share with their H-2B workers.
- Create an emergency plan. Require employers to have an emergency plan in the event an H-2B worker falls ill with COVID-19. This plan should anticipate quarantine housing needs and proper medical care. H-2B workers often work in rural settings with little to no access to medical care. Agencies need to work with employers to

¹¹ See 29 C.F.R. §§ 655.173, 655.20(j)(1)(i).

¹² *Center for Disease Control and Prevention COVID-19 Workplace, School, and Home Guidance Fact Sheet*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>; *U.S. Department of Transportation and Federal Aviation Administration's COVID-19 Interim Health Guidance for Air Carriers and Crews*, (Mar. 12, 2020), https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2020/S_AFO20003.pdf.

identify medical care and what to do if COVID-19 strikes their workplace. H-2B workers depend on their employers for medical treatment.

- Promote proper hygiene. Provide H-2B workers with breaks and encourage frequent hand washing and social distancing. H-2B employers should provide proof of adequate hand washing stations, disinfecting and sanitizing materials, disposable gloves, masks, and other industry-specific personal protective equipment (PPE). Employers should develop schedules to regularly sanitize and disinfect commonly touched surfaces like doorknobs, handrails, and workstations. Employers should provide for increased ventilation in enclosed workspaces. Employers should stagger shifts and lunch breaks to facilitate social distancing. Employers should hang signs encouraging hand washing and proper sneezing and coughing hygiene.
- Encourage the reporting of COVID-19 symptoms. H-2B workers should be encouraged to report if they are feeling ill. It is important there is no adverse action or retaliatory action taken against a worker that reports their symptoms or those of another worker.
- Ensure access to Families First Coronavirus Response Act. H-2B workers must be eligible to access paid sick days under the Act. Now is not the time to exempt small business operations from coverage under the Act. H-2B workers need to be informed by their employers that they can access paid sick leave if they fall ill with COVID-19.
- Ensure workers recruited from out-of-state are informed of the risk of exposure to COVID-19 by providing information regarding the danger of COVID-19, the prevalence of COVID-19 in the community where the worker will be working compared to the worker's current location and permanent residence, the risk of exposure during transportation, the CDC's recommendations for work and social distancing, and the proposed living and working conditions.
- Ensure workers will be housed and transported in compliance with the CDC social distancing recommendations.
- Provide workers with access to testing for COVID-19 at no cost.
- Provide unemployment insurance or paid sick leave for workers who are unable to complete the job contract due to COVID-19.

7. Assure three-fourths guarantee for H-2B workers who began work after the COVID-19 crisis began.

On March 13, 2020, the White House declared a National Emergency concerning COVID-19. Since at least that date, H-2B employers have been aware of the risks that COVID-19 represents to their industries and the public health at large. Following a brief disruption in consular visa processing, on March 26, 2020, the State Department issued an announcement clarifying that U.S. Consular offices in Mexico will continue to process H-2 visas for first-time and returning workers. Although an exception to the three-fourths guarantee exists for disasters beyond the control of the employer or for similar unforeseeable catastrophic events, H-2B employers who have continued to bring workers after March 13, 2020 are not facing an unforeseeable event, but are acting with full knowledge of the risks associated with COVID-19.¹³

¹³ See 29 C.F.R. § 655.20(g).

Recommendations:

The Department of Labor should affirm that, if any H-2B worker who entered the United States after March 13, 2020 develops symptoms of COVID-19 and, as a result, cannot complete the H-2B contract, they are entitled to the three-fourths guarantee. Likewise, the Department of Labor should affirm that, if any H-2B worker who entered the United States after March 13, 2020 is not offered sufficient hours of work due to COVID-19-related disruptions to business, they are entitled to the three-fourths guarantee. If employers seek to terminate a job order without fulfilling the three-fourths guarantee, certifying officers should deny such requests. As part of the certification process, H-2B employers should be specifically informed of their obligation to pay the three-fourths guarantee if COVID-19 impacts contract fulfillment, of their obligation to assist H-2B workers with a transfer to another employer, and of the requirement to pay the workers’ return transportation should there be no transfer.¹⁴

CONCLUSION

The undersigned organizations and persons request that the Administration take urgent action and implement the recommendations outlined in this letter. The safety and health of H-2B workers, their families, and the community at large depends on the swift action of your agencies. We request that this letter and its recommendations be included in the comments being collected on the implementation of the Families First Coronavirus Response Act and the CARES Act. Additionally, we request a timely meeting to discuss the progress of your agencies in carrying out the recommendations outlined in this letter. You may contact Sulma Guzman (sulma@cdmigrante.org) and Carol Brooke (carol@ncjustice.org). We look forward to your prompt response and leadership in coordinating COVID-19 emergency services.

Sincerely,

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Carl Wilmsen
Northwest Forest Worker Center /
Lomakatsi Restoration Project

¹⁴ 20 C.F.R. § 655.20(g).

With the support of the following organizations:

CRLA Foundation, Sacramento, CA
Oxfam America
Migration that Works (formerly International Labor Recruitment Working Group)
National Lawyers Guild Labor and Employment Committee
Sugar Law Center for Economic & Social Justice
Legal Aid Justice Center, Richmond, VA
Farmworker and Landscaper Advocacy Project -FLAP-, Chicago, IL
Equal Justice Center, Austin, TX
Public Justice Center, Baltimore MD
Northwest Workers' Justice Project, Portland, OR
Migrant Legal Aid, Grand Rapids, MI
Dominican Sisters ~ Grand Rapids, MI
Freedom Network USA, Washington D.C.
Coalition for Humane Immigrant Rights, Los Angeles, CA
Restaurant Opportunities Center of Michigan
Lomakatsi Restoration Project, Ashland, OR
Worker Justice Center of New York - Rochester, Kingston & Hawthornen, NY
Seafood Workers' Alliance, New Orleans Worker Center for Racial Justice, Louisiana
International Institute of Detroit, MI
The Pennsylvania State University, Center for Global Workers' Rights, University Park, PA
Jobs With Justice, Washington D.C.
Idaho Legal Aid Services, Twin Falls, ID
CATA - El Comite de Apoyo a los Trabajadores Agricolas, PA, MD and NJ
Chicago's Legal Aid Society, Chicago, IL
Safe Harbor Law, LLC
Justice in Motion, Brooklyn, NY
Alianza Nacional de Campesinas - National
Advocates for Basic Legal Equality, Inc.; Toledo, OH
Worker's Rights Clinic - MLAW, Ann Arbor, MI
Legal Aid of North Carolina - Farmworker Unit
MESA, West Lafayette, IN
Alianza Nacional de Campesinas Florida
Organizacion en California de Lideres Campesinas, Oxnard, CA

CC:

The Honorable Robert R. Redfield, MD, Director, Center for Disease Control and Prevention;
Members, U.S. House Committee on Education and Labor;
Members, Congressional Progressive Caucus; and,
Members, Congressional Hispanic Caucus.