November 20, 2023

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

Re: Department of Homeland Security NPRM Modernizing H–2 Program Requirements, Oversight, and Worker Protections, [CIS No. 2740–23; DHS Docket No. USCIS– 2023–0012] RIN 1615–AC76

To Whom it May Concern:

International Fresh Produce Association (IFPA) appreciates the opportunity to comment on the proposed rule entitled "Modernizing H–2 Program Requirements, Oversight, and Worker Protections" (RIN 1615–AC76**;** DHS Docket No. USCIS–2023–0012) that was published in the Federal Register by the U.S. Department of Homeland Security (Department) on September 20, 2023.

Established in 2022 and founded on a deep-seated history of leadership from the Produce Marketing Association and United Fresh Produce Association, our trade association represents over 2500 companies from every segment of the global fresh produce supply chain, including over 500 companies directly involved in the organic fresh fruit, vegetable, and floral supply chain. IFPA is committed to serving all sectors of the produce industry through government advocacy, global engagement, and expertise in food safety, technology, supply chain management, sustainability, marketing, and leadership. Through these efforts, IFPA will enable the produce industry to grow and drive increased fruit and vegetable consumption, including those organically produced, which is a vital cornerstone of public health. Critical to that growth is access to a stable workforce. The majority of H-2A workers are employed in fruits, vegetables, and horticultural specialty crops. Also, labor's share of the cost of production can run as high as 38 percent for fruit and tree nut farms and 29 percent for vegetables and melons.[1] IFPA members also utilize the H-2B program, which also is impacted by this rulemaking. As a result, the impacts of this proposed rule will be far reaching within our membership and allow IFPA to provide valuable input to the Department as it considers final policies.

General Comments:

IFPA members take worker safety and the prevention of worker exploitation with utmost importance. It is imperative that all workers on our farms are treated fairly and with respect. It is also important that employers abide by all

[1] U.S. Fruit and Vegetable Industries Try To Cope With Rising Labor Costs, USDA Economic Research Service, December 28, 2022 accessed at: https://www.ers.usda.gov/amber-waves/2022/december/u-s-fruit-and-vegetable-industries-try-to-cope-with-rising-labor-costs/

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applicable laws and regulations. It is IFPA's experience that most employers not only ensure that they comply with all regulations and employment related laws but go further to treat their employees like family. Unfortunately, the Department's approach in this proposed rulemaking signals that it believes most employers aren't trying to do the right thing. IFPA encourages the Department to recognize that the vast majority of petitioners follow the law. IFPA supports rigorous enforcement on the small percentage of program violators and scrupulous employers. If finalized, this rule could penalize and constructively debar good faith employers rather than focusing enforcement on violations that truly impact worker health and safety.

Prohibited Fees

The Department is proposing various amendments related to the charging of prohibited fees and the associated penalties. IFPA supports the existing prohibition on the charging of fees and reasonable efforts to curb unlawful charging of workers, finding these proposals overreaching beyond what is in a petitioner's control.

First, the Department proposes to align its regulations with DOL's prohibited fee provisions by including fees paid by H-2 workers to an employer, joint employer, petitioner (including to its employee), agent, attorney, facilitator, recruiter, similar employment service, ***related to*** such workers' H-2 employment are prohibited. This is modified from the existing "as a condition of."[2] IFPA supports the conforming of USCIS regulations with those from DOL in using the language "related to" and to clarify the term prohibited fee to include any "fee, penalty, or compensation.[3]"

Second, the Department proposes to clarify that prohibited fees include fees or penalties charged to workers who do not complete their contracts. Generally, IFPA does not have concern with this language; however, IFPA wants to ensure that if a worker abandons employment or is terminated for cause, an employer would not have been considered to charge a prohibited fee where the worker is not entitled to return transportation or the three-quarter guarantee.

Further, the Department clarifies that it will continue to allow reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees. IFPA supports allowing reimbursement for certain costs but has questions as to the scope of what costs are allowed. Is "government-required passport fees" an exhaustive list of reimbursable costs? Could other costs be considered for the benefit of the worker? For example, employers often reimburse workers for meals and travel costs as workers travel to the United States for the job, as allowed by DOL regulation and the Fair Labor Standards Act. IFPA supports the inclusion of these costs as reimbursable and opposes their treatment as prohibited fees. IFPA asks that the Department clarity, what costs would be allowable to be reimbursed under this section, including allowing a per diem reimbursable fee during transport.

Consequences for Charged Prohibited Fees/Reimbursement

The Department proposes to eliminate the current exception that prevents a prohibited fee related denial or revocation, when a petitioner reimburses the worker, makes prepayment cancellation of a prohibited fee agreement, or notifies DHS. IFPA supports strong enforcement against the unlawful collection or threatening to collect prohibited fees.

[2] 88 Fed. Reg. 65052; Proposed §214.2(xi)
[3] 88 Fed. Reg. 65052

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However, the Department's proposal takes a sledgehammer to an issue that requires a scalpel. As proposed, the Department will prevent a petitioner access to a critical program in situations it is impossible to prevent an unlawful collection of fees. Currently, a petitioner is allowed to rectify those situations in the best way possible – reimbursement of fees.

IFPA wants to reiterate that placing complete burden on petitioners to police the payment of related fees is unreasonable and unfair. Currently, there is no tangible way to verify if employees are charged or pay a prohibited fee. Yet, employers simply trust a workers account and do everything they can to make the worker whole. It is not feasible for every petitioner to conduct every step of recruitment themselves. Foreign recruiters will be used. Placing the petitioner as the policing agent is setting them up to fail as it is, unfortunately, simply impossible to completely prevent this behavior. To account for that, rather than denial or revocation (discussed below more completely), IFPA recommends requiring a mutual attestation for an employee's file, where within 5 days upon arrival both parties sign an agreement that that prohibited fees were not charged. If the worker discloses that fees were charged at that time, the petitioner would be required to follow the current regulatory reimbursement requirements.

IFPA encourages the Department to work with petitioners to identify and establish proper safeguards, protocols to prevent the extortion of workers, and methods to swiftly reimburse workers. Often the threatening or charging of prohibited fees is a direct result of a hostile environment in home countries. Realistically, a petitioner only has so much control and can conduct so much due diligence in this situation. Frankly, it is impossible to completely guard against this behavior making denial or revoking a petitioner's access to the program punitive in nature. IFPA wants to work with the Department to increase the integrity in the H-2 programs, to prevent to the extent feasible the threat or charging of prohibited fees and that the worker is reimbursed fully for any unlawful fee. However, as proposed, the Department unfairly places burden upon petitioners to prevent the unlawful collection of fees and issues unjust consequences if they fail.[4] Rather than focusing solely on denial or revoking petitions, IFPA encourages the Department to re-evaluate and provide alternative approaches, for public comment, that develop a comprehensive strategy to protects workers and balances the legitimate need to access this program and limitations of petitioners to prevent this activity.

With that in mind, IFPA provides the following comment on the specific NPRM proposals.

First, the Department proposes that a *petitioner or its employees* found to have collected or entered into an agreement to collect prohibited fees would be subject to denial or revocation on notice and the resulting additional consequence of a 1-to-4-year bar to approval of subsequent petitions. The petition will be denied or revoked unless the petitioner shows through *clear and convincing evidence* that *extraordinary circumstances beyond its control* resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it has fully reimbursed all affected beneficiaries and designees. In the preamble the Department discusses that this standard will require demonstration that the "extraordinary circumstances were rare and unforeseeable" and that the petitioner made "significant efforts" to prevent prohibited fees.[5] The preamble notes that "a mere lack of awareness" would not be sufficient and that a

[4] 88 Fed. Reg. 65053
[5] 88 Fed. Reg. 65054

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petitioner would also have to demonstrate that it took affirmative steps to prevent its employees from collecting or agreeing to collect such fees Second, the Department proposes that if it determines that an H-2 worker has paid or agreed to pay a prohibited fee to the petitioner's *third-party agent, attorney, facilitator, recruiter, or similar employment service* would also result in denial of the petition or revocation on notice, "unless the petitioner demonstrates to USCIS through *clear and convincing evidence* that it did not know and could not, *through due diligence*, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed."[6] The written contract between the petitioner and a third party preventing such fees is not sufficient to meet the standard of proof and that the standard applies irrespective of whether the employer is in contractual privity with the third party or if the third party is operating in the United States.[7]

IFPA opposes both of these proposals. The consequence for the petitioner is not commensurate with the alleged violation, especially where the worker has been reimbursed in full. First, the Department proposes no required verification of an allegation that prohibited fees were, in fact, charged. A simple allegation or claim that a worker has been charged fees should not be sufficient to issue a Notice of Denial or Revocation. While we want to support efforts to prevent the unlawful charging of fees, the Department should take steps to verify allegations prior to engaging with a petitioner about the matter. Therefore, IFPA recommends the Department outlines for stakeholders what investigation procedures will be followed to determine whether the allegation has merit. Second, the Department's proposal also fails to provide clarity to petitioners about what would constitute "extraordinary circumstances," "rare and unforeseeable," "significant efforts" and "due diligence." Each of these key terms are not defined in the regulation, nor does the Department explain how it plans to evaluate the facts in making its decision. Therefore, petitioners have no context for what they could do to prevent a violation under this section. Last, the Department unfairly extends consequence for petitioners on the actions of third parties. The work of these third parties stretches to recruitment in foreign countries and the individuals participating in the recruitment may change daily. Even through the best vetting of contractors, a petitioner would not have the ability to police this activity as required to prevent all instances of payment of prohibited fees. IFPA encourages the Department to propose alternative approaches, leaving denial or revocation for intentional and egregious violations. These alternatives should establish reasonable protocols recognizing the limitations of petitioners in this process and that clearly delineate regulatory requirements to provide proper notice to petitioners.

The Department proposes an immediate 1-year bar on H-2 petition approvals if it is found that a petitioner violates this section or following petitioners' withdrawal of an H-2A or H-2B petition if withdrawn after USCIS issues an RFE or notice of intent to deny or revoke. For the 3 years following the 1-year bar, the Department proposes to allow petition approval only if each affected beneficiary has been reimbursed in full, no exceptions. If a petitioner cannot demonstrate reimbursement to the beneficiary or the beneficiary designee, the petitioner (and petitioner successor in interest) would be subject to a 4-year bar.

As discussed in detail above, IFPA takes the unlawful charging of workers very seriously and supports strong enforcement against those who exploit workers by charging prohibited fees. However, for the reasons discussed above,

[6] Id.
[7] Id.

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the proposed penalties are not commensurate for the violation. A denial or revocation of petitions – for up to 4 years – is a heightened penalty when the behavior is often unintentional, unknown, and out of the petitioner's control. As proposed, a good faith petitioner that takes all steps it deems reasonable could lose access to the program for at least a year. A year without access to the H-2 program has the potential to put American produce farmers out of business. IFPA encourages the Department to gradient the penalty commensurate with the circumstances of the violation.

Beneficiary Designee

The Department proposes a process to establish a beneficiary designee in the event a beneficiary cannot be located or is deceased for purposes of repayment of prohibited fees. IFPA supports the reimbursement of all unlawfully collected prohibited fees to workers and our members are already required to reimburse workers as soon as they are made aware a worker has been charged a prohibited fee. Also, IFPA also supports ensuring a beneficiary designee receive reimbursement on the worker's behalf if the worker cannot be located or is deceased. With that said, the Department must provide additional guidance on how this would operate in practice. It is most likely that a situation triggering a 'beneficiary designee' would occur after the end of a petition period. The proposal requires that the worker would provide, in writing, contact information of the beneficiary designee. It also proposes to require the petitioner to "maintain and update" that information.[8] It is unclear in the proposal the length of time or efforts a petitioner would need to undergo following a petition period to maintain this record. It cannot be that a petitioner would be required to maintain and update those records in perpetuity. Additionally, the Department does not describe what would qualify as an "exhaustion of efforts" by a petitioner to locate the worker or designated beneficiary.[9] The Department must establish a clear procedure to provide notice to petitions of what reasonable steps must be taken to attempt to reimburse the worker or beneficiary designee.

Denial of H-2 Petitions for Certain Violations of Program Requirements

The Department proposes to allow the denial of H-2 petitions for employers that have been found to violate certain labor law violations or otherwise violated the requirements of the H-2 program within the past three years. The Department proposes violations that would require mandatory denial and certain violations that will result in discretionary denial if the Department determines that the violation "may call into question a petitioner's or successor's intention or ability to comply."[10] IFPA opposes this proposal. This will result in program redundancy, penalty for the same violation twice if not multiple times (equating to double jeopardy), and an increased Request for Evidence (RFE), denials, and appeals. The Department proposes several factors that it would consider in determining whether the previously decided claims may call into question the petitioner's ability to comply with H-2 program requirement.[11] The Department proposes this to be a "discretionary analysis" by USCIS officers and following that analysis the petitioner would receive a denial notice. Quite simply to conduct this analysis the USCIS officer will be making individual judgments about the underlying decision and merits of the claim. The Department fails to provide a method for adequate due

[8] 88 Fed. Reg. 65056
[9] Id.
[10] Proposed §214.2(10)(iii)
[11] 88 Fed. Reg. 65060

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process during the USCIS investigation and does not provide the opportunity for a petitioner to offer evidence about the underlying claim or how it does not call into question their ability to comply with program rules prior to issuing the denial notice. Frankly, USCIS officers are not experts in labor law and regulation. This will undoubtedly result in arbitrary determinations based off of lack of knowledge of the underlying law. As such, any interpretation they provide is arbitrary and capricious.

IFPA believes it is simply impossible that the Department will not relitigate the underlying merits of violation and IFPA believes the denial or revocation of a petition based upon an underlying noncompliance is punitive in nature. Moreover, this is redundant enforcement by separate agencies over the same allegations. DOL has the Congressionally mandated authority as the enforcing authority over labor and employment matters and this proposal expands the Department's review beyond its statutory authority. As a result, IFPA opposes this section in its entirety and encourages the Department to withdraw this proposal entirely.

If the Department maintains this section, IFPA offers the following comments. IFPA seeks clarity on the proposed penalty and consequence of denial or revocation under this section. The Department cross references section 214.1(k); however, it is unclear whether this section would result in a one-time denial or revocation or if the Department is applying section 214.1(k) in these situations.[12] Additionally, IFPA has concerns about the impact of delays as a result of this review. H-2 programs are complex regulatory programs and there is the potential for noncompliance determinations even for the most diligent employers. This section will lead to increased RFEs that would take weeks to resolve – time that petitioners do not have in seeking their critical workforce for jobs related to perishable commodities. It the Department insists on this duplicative review, the Department should truncate the scope of violations that trigger this review to prevent unnecessary delays and exclusively to violations of USCIS H-2 regulatory requirements. This is reasonable considering the underlying violation has already been decided and penalties have been issued by the agency of authority.

Extension of Denial for violations of Petitioners Owners, Employee, or Contractor

The Department also proposes to issue a denial or revocation for criminal conviction or final administrative or judicial determination against action by a petitioners' owner, employee, or contractor. IFPA seeks clarity that the criminal conviction or final determination must be related to labor violations or related to job duties related to H-2 and corresponding employees. There are many circumstances where a petitioner may not have knowledge or control of another's behavior. This is especially true for contractors, in which the petitioner has an arm's length relationship and would have not have the ability to control behavior prior to the violation. A petitioner cannot prevent that which it does

[12] Upon debarment by the Department of Labor pursuant to 20 CFR part 655, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) (except for status under sections 101(a)(15)(H)(i)(b1)), (L), (O), and (P)(i) of the Act) for a period of at least 1 year but not more than 5 years. The length of the period shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

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not have knowledge. Therefore, using denial or revocation in this situation is an unfair, unnecessary, and punitive penalty for the actions of third parties. As above, IFPA asks that the Department develop alternative approaches to denial/revocation, including that the Department consider protocols in place to prevent and take corrective action by the petitioner and not on the underlying violation alone. If the Department in some instances, have knowledge about, IFPA supports the reasonable person analysis, an opportunity to provide evidence prior to determination, and an opportunity to provide evidence prior to a denial or revocation determination, and opportunity to appeal to a neutral adjudicating body to fulfill due process requirements and prevent devastating a petitioner's business.

Investigation and Verification Authority

The Department proposes to clarify its authority to conduct inspections and codify consequences of failure or refusal of the petitioner to "fully cooperate" in an inspection. The Department clarifies that inspections may include, but are not limited to, an on-site visit, interviews, record review, and any other records that USCIS considers pertinent.[13] The Department fails to provide notice as to what it is considered to "fully cooperate." The Department provides limited clarity as to what it will consider when deciding if a petitioner fails to cooperate or how a petitioner can ensure that it complies with the regulatory requirement. The Department does not have uncontrolled authority to demand access to property and employers. A petitioner has a right to request that an attorney be present, that a designated person be the sole representative of the petitioner for investigation purposes, and that timing of an investigation not interrupt business activity. IFPA also opposes expanding investigative authority to any records or locations that are already inspected by an H-2 regulatory body. For example, job sites and worker housing are subject to DOL inspection and enforcement. Additional investigative authority by USCIS is redundant as the inspections are conducted to determine compliance with H-2A statutory and regulatory and it places USCIS agents in untenable positions to not only know and understand USCIS regulations, but federal labor laws, DOL regulations, and state health and labor laws. If there are questions or concerns that the Department deems warrant an investigation, it should work with its sister agency or state to obtain the information rather than burden a petitioner and spend government resources on a duplicative review. IFPA encourages the Department to identify opportunities to streamline the program through government collaboration rather than add additional burden to petitioners.

H-2 Whistleblower Protection

The Department proposes to provide H-2A and H-2B workers with "whistleblower protection" broader than that it provides to H-1B workers. IFPA disputes the Department's premise that H-2 workers are vulnerable necessitating a lesser burden of proof. H-2 workers are protected by extensive regulatory requirements and currently can, and do, report any alleged violations to the proper authorities. Additionally, the Department does not provide any specific evidence that the lower standard – specifically that an allegation doesn't even need to be true – would alleviate any vulnerability. If anything, it allows any employee the ability to claim whistleblower protection even if the employer is in complete compliance with program rules. Yet, IFPA does not oppose the inclusion of whistleblower protections into the H-2 programs. However, encourages the Department to further define what would constitute retaliatory action so that

[13] 88 Fed. Reg. 65061

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employers have notice as to when this section could be triggered. the statute does not give the Department unending authority to evaluate retaliatory behavior without proper notice to affected stakeholders. Employers cannot ensure that it develops proper policies and employee training to prevent such activity, if the Department does not inform employers what it would consider to be retaliatory action.

Grace Periods

The Department proposes multiple changes to the grace periods provided to workers around their petition dates. Generally, IFPA supports the grace periods proposed. However, we seek clarity as to what obligations exist on the petitioner during the grace periods, specifically whether a petitioner is required to provide housing and meals during those periods of time. IFPA supports ending the terms and conditions of employment on the expiring petition date, revocation date, or terminating date, whichever is earliest, not exempting any existing obligation to meet DOL regulatory requirements.

First, the Department proposes to allow workers to be admitted up to 10 days prior to the petition's validity period and up to 30 days following the expiration of the petition. Second, the Department proposes to provide a new 60-day grace period or end of date of authorized period, whichever is shorter, following a cessation of H-2 employment if the H-2 worker was terminated, has resigned, or otherwise ceased employment prior to the end date of the authorized validity period. This is available only once during the term of admission. Third, the Department proposes to provide a new 60-day grace period or end of date of authorized period, whichever is shorter, following a cessation of H-2 employment if the petition was revoked. Where a petition is revoked, the petitioner would be liable for reasonable costs of return transportation to their last place of foreign residence abroad unless beneficiary obtains an extension of stay based on an approved petition in the same classification by a different employer.

IFPA does not oppose or have specific comment regarding the specific lengths of grace period. However, the Department needs to consider the broader implications of this proposal. The Department has not contemplated the practical considerations for workers and employers during these grace periods. In the H-2A program, workers rely on their employers for their housing and meals. Yet the Department provides no clarity as to what an employer's obligation is during the grace periods. IFPA opposes requiring a petitioner to continue to meet terms and conditions of the program in relation to a worker that is no longer employed, regardless of the circumstances of the end of employment. Also, if it is mid-contract, an employer will need to seek an emergency labor certification to hire new workers and must have housing available for the new worker. This proposal may leave foreign workers in precarious situations without housing and unsure where to go. IFPA encourages the Department to evaluate how it will ensure that a worker that ceases to be employed has resources they need without placing those obligations on an employer following the abandonment, termination, revocation, or expiration of a petition period.

Portability

The Department proposes to permanently provide portability allowing an H-2 worker to begin new employment, within the same classification, upon the proper filing of an extension of stay petition without requiring the subsequent employer to be enrolled in E-verify. IFPA appreciates the flexibility that this provides workers and benefits to subsequent

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employers. However, IFPA also has concerns that this section, coupled with sections related to grace periods, might encourage workers to violate their contract terms. H-2 laws and regulations require employers to invest significantly prior to the hiring of foreign workers, attest to follow all program regulations including a guarantee of hours, and must demonstrate that there is not a domestic workforce available to fill that job need. The Department believes any scenario leading to voluntary abandonment of the job would be related to a hazardous working environment; however, there are many instances where a worker simply quits. In that situation, the employer is without recourse and the worker can stay in the country to find a different job. The abandonment of an employee or multiple employees could cause significant economic harm to the petitioner. There should be an associated consequence for a worker who violates their contract.

Limit of Stay

The Department proposes to eliminate the interrupted stay requirements and uniformly propose to shorten the period of absence that will reset the 3-year limit of stay to uninterrupted 60 days. IFPA supports this change as it will simplify the processing for determining remaining length of stay.

Conclusion

IFPA appreciates the opportunity to provide comment on all aspects of this proposed rule.

Sincerely,

Cathy Burns
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International Fresh Produce Association

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