UNITED FARM WORKERS
Union De Campesinos
สหภาพแรงงานเกษตรกรรม
NAGKAKAISANG MAGSASAKANG MANGAGAWA
P.O. Box 8337 • Tacoma, WA 98419 • Phone (253) 274-0416 • Fax (253) 274-0718 • www.ufw.org

Chief, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Ave., N.W., Suite 3008
Washington, D.C. 20529

DHS Docket No. USCIS-2007-0055; CIS No. 2428-07; RIN 1615-AB65

Dear Sir or Madam,

The United Farm Workers submits these comments regarding the proposed rule on the H-2A temporary foreign agricultural worker program out of concern for the manner in which our Government and the nation's employers treat migrant and seasonal farmworkers. The proposed rule, published on February 13, 2008, is directly related to the Department of Labor's proposed rule regarding the H-2A program.

This rule fails farmworkers. The Administration should withdraw both proposals and reconsider its approach. The Administration has an opportunity to offer meaningful solutions to the perpetual "plight" of farmworkers that has been the subject of exposés and government commission recommendations for decades. The H-2A program requires extensive reform to ensure that workers are treated fairly and that employers have the opportunity to obtain a productive labor force when labor shortages truly exist. The Departments' proposals do not achieve those goals. Instead, the agencies have rushed forward with proposed changes to the H-2A program that, in combination, will perpetuate abuses associated with guestworker programs. The time for review of the proposed changes has been unduly short. Farmworker organizations and many other organizations and individuals have not had adequate time to consider, discuss and respond to the extensive changes proposed by DOL and DHS. In the short time allotted, we have prepared the following comments.

DHS approaches the H-2A program revisions with an improperly biased perspective. The agency contends that "the requirements that Federal labor and immigration authorities impose on farmers and agribusinesses to obtain H-2A workers are generally felt to be overly burdensome. Therefore, USCIS is proposing changes. . ." 73 Fed. Reg. 8237. It also states that its motivation is to respond to "[m]embers of the public [who] have cited what they consider to be unnecessarily burdensome regulatory restrictions placed on . . . U.S. agricultural employers. . . ." Id. at 8231. We do not believe that the H-2A program is unduly burdensome on employers. In fact, the Government has failed to regulate this program adequately for decades and the results have included harsh, unlawful treatment of both foreign and domestic workers. DHS does not

balance its statement of the perspective of employers with the perspective of others who offer a more objective, fuller view of the H-2A program. Before making its revisions, it should examine the record of the H-2A program more adequately. Any objective analysis demonstrates that vulnerable foreign workers have been exploited and that U.S. farmworkers have suffered displacement and depression in their wages and working conditions. In the short time allotted, the commenters are not able to re-create that record, but DHS does have access to the numerous exposés, court decisions, administrative complaints and other evidence of H-2A program abuses. DHS also has access to the Report of the President's Commission on Migratory Labor (1951), the Report of the Commission on Agricultural Workers (1992) and many other objective analyses that criticize the government's approach and make recommendations that DHS and DOL are ignoring. According to these reports**,** America's agricultural employers must modernize their labor practices and improve wages and working conditions to attract and retain a productive farm labor force rather than relying on constant new waves of foreign workers from poor nations. Although DHS and DOL should address these recommendations in their revisions of the H-2A program regulations, they have failed to do so.

In addition to failing to propose appropriate policies, neither agency has proposed the kind of substantial enforcement efforts that are required to reduce abuses in the H-2A program, deter future illegal conduct and provide remedies to victimized farmworkers. Indeed, DOL is proposing to remove important components of its H-2A enforcement regulations. DHS should not grant H-2A visas to H-2A employers under these circumstances. DHS should insist that DOL withdraw its proposal on enforcement and take steps to strengthen protections against what DOL acknowledges are abuses that rise to the level of "effective indenture." 73 Fed. Reg. 8233.

Labor Certification Must Be Continued

DHS correctly notes that the employer applying for permission to obtain visas for H-2A workers must first obtain a labor certification from DOL, 8 U.S.C. § 1188. However, DOL is proposing to eliminate the labor certification process, in violation of the statute, and replace it with a labor attestation process. The DHS should oppose DOL's proposal to violate the statute in this manner. DHS should not approve employers' petitions to import temporary foreign workers on H-2A visas in the absence of a true labor certification. In the absence of labor certification, the employer will simply sign a form stating that it will comply with the law, but DOL will do virtually no affirmative review of the job terms offered or efforts to recruit U.S. workers to ensure that foreign workers are actually needed and that U.S. workers' wages and working conditions will not be undermined. Visas for guestworkers should not be issued under such circumstances. If labor attestation is to be adopted in the H-2A program, it needs to be accompanied by substantial protections to overcome risks associated with labor attestation. For example, the "AgJOBS" legislation in Congress would, among other things, provide for labor attestation as a condition for a new statutory provision creating a private cause of action in federal court for temporary foreign workers to enforce their rights. AgJOBS also would encourage collective bargaining, which would help reduce abuses and provide more prompt remedies when violations occur.

Protections Against Recruitment Abuses and Fees Charged to Workers

Foreign workers increasingly pay a high cost to obtain H-2A jobs – they are forced to borrow money at usurious rates to pay to obtain the jobs and travel to them, misled about the earnings opportunities under the H-2A program, threatened with physical harm to themselves or family members, and warned that they will not be granted a visa in a following season if they challenge unfair or illegal conduct. Deeply indebted foreign workers are vulnerable to exploitation and often cannot earn enough money during the contract to pay off their debts. For that reason, some are forced to leave their contracts to seek additional work, for which they could be barred from the H-2A program.

It is encouraging that DHS recognizes that such abuses, including "human trafficking" and "effective indenture," have occurred and that the Government should seek to prevent them. Nonetheless, DHS does not adequately explain the nature of the abuses associated with foreign recruitment under the H-2A program and does not propose effective methods to prevent such abuses. The suggested regulatory changes do not define "fees and other compensation" paid by the "alien beneficiaries" for H-2A employment. Prospective H-2A workers are charged an array of costs and fees by the recruiter just to apply for the possibility of obtaining an H-2A visa.

Employers in the United States must not be permitted to gain the benefit of foreign workers' labor without taking responsibility for the abuses that occur in their recruitment of those workers. DHS currently grants H-2A visas to such employers for distribution to workers these employers recruit. The employers must not be permitted to hire labor contractors and disclaim any responsibility for what happens in the recruitment of people to work on their premises.

DHS proposes to require disclosure of information regarding the relationships between H-2A program employers and recruiters, including the obligation to disclose fees or other charges that may be paid by prospective and actual foreign workers to recruiters. 214.2(h)(5)(i)(C). The requirement of disclosing information regarding fees charged to workers is a small step toward reducing abuses, but it does not go far enough to be as effective as it needs to be.

The obligation to disclose information to the "best of one's knowledge" is too weak. Many employers will affirmatively avoid learning about the specific recruitment methods used by the recruiters who are serving those employers and will claim that they know nothing about the fees "to the best of their knowledge." There must be an affirmative obligation on the part of H-2A employers to know the relationships between the workers and the recruiters who are seeking to fill jobs for those H-2A employers. The H-2A employers also should be required to reach written agreements with labor contractors, recruiters, facilitators and the subcontractors of those entities and individuals that affirmatively prohibit the charging of recruitment fees, usurious interest rates for loans, extraordinary transportation or visa charges and other costs that have been or will be the subject of abuses. DHS should develop model agreements to promote reduction in such visa abuse. The employers also should be required to ensure that workers' passports are not confiscated by recruiters or others for "safe-keeping" or any other purpose.

DHS should require employers and its own agencies to release these disclosures immediately so that workers and their representatives can have access to this information. DHS

should also immediately release to the public any information pertaining to which countries H-2A petitioners are recruiting workers from what countries to ensure transparency and compliance. This information should include the name of the petitioner, his/her agent, if any, and the countries from which they are recruiting H-2A workers.

To ensure that H-2A petitioners do not simply deny knowledge of any fees and costs in order to avoid liability, the petitioners should be held strictly liable for any such charges. This will not result in unjust liability. To the contrary, strict liability for such charges will encourage petitioners to hire reliable recruiters who will not exploit the H-2 workers for their own monetary gain. The goal of the H-2A program is to provide U.S. employers with needed labor, not to have recruiters in the sending countries get rich to the H-2 workers' severe detriment.

DHS should state that it and other agencies will investigate such relationships to ensure that the promised obligations actually occur. It is important that DHS engage in such investigation in all countries where H-2A workers come from to prevent employers from switching to a different country merely because the agency does not engage in investigations there. The punishments should be serious enough to deter future violations and the remedies must be appropriate to help the foreign workers receive the funds they were entitled to, reimbursement of costs improperly imposed on them, and opportunities to work at employers that comply with the law. DHS's proposed remedy of revoking the certification of an H-2A employer provides no relief for affected workers, who stand to lose their jobs, and by definition, the ability to earn sufficient wages to repay their debts which resulted in the decertification in the first place. Any proposed sanction, including decertification, must not penalize the worker. DHS should require the petitioner to pay the worker's debt, and to issue the effected a visa to allow for their continued legal employment in the US for a period of time.

The regulations should affirmatively state that U.S. employers are required to ensure that they and any of the individuals and entities whose services they utilize or indirectly benefit from comply with the labor and recruitment laws of the foreign workers' homeland. In particular, our Government should require H-2A employers (and their recruiters, agents, contractors, facilitators and their subcontractors) to comply with Article 28 of Mexico's Federal Labor Law, which requires that employers recruiting Mexican citizens in Mexico for employment abroad comply with the following: register with the applicable Board of Conciliation and Arbitration, submit the employment contract to the Board, post a bond to ensure a fund to compensate workers for illegal employment practices, and pay the workers' visa and transportation fees in advance. The U.S. Government, as an active participant in the H-2A program, should not permit U.S. employers to violate the laws of foreign governments that supply workers. Indeed, the North American Agreement on Labor Cooperation, which requires each nation to cooperate to ensure compliance with all labor laws and improve conditions for workers in the three nations, is a treaty that binds the United States.

Additional enforcement measures are required. When H-2A workers suffer on-the-job injuries and file workers' compensation claims, or experience labor abuses, their H-2A visas will expire well before the legal challenge has been resolved. When H-2A workers need to travel back to the U.S. as part of a non-frivolous claim for labor abuses, it is very difficult to obtain a visa to do so. Most H-2A workers have few assets and are not eligible for tourist visas per the

State Department requirements. For this reason, many workers are forced to abandon their rights because they cannot comply with court requirements to return to the U.S. Moreover, some H-2A employers will cause their employees to be deported to avoid liability. The appropriate solution is ready access to temporary work permits that allow H-2A workers to work where they choose while their non-frivolous legal challenges work toward resolution. This will encourage workers to stand up for their rights, ensuring that labor minimum standards are met.

We support the proposed extension of time for H-2A workers to remain in the country between jobs, which benefits employers as well as workers. However, the employers should be obligated to pay for subsistence costs during that time and the first employer should not be relieved of its obligation to pay for the workers' transportation costs home, given that the worker will not be permitted to work during that period of time and may have difficulty paying subsistence costs in the absence of work for up to thirty days.

DHS should recognize the obligation to investigate the conditions under which alleged "absconders" left the job. In some of these cases, the employers engaged in illegal or inappropriate conduct that either resulted in workers being forced to quit or caused the workers to engage in a protest that should be protected activity. Such workers should be protected and should not be barred from future H-2A employment. They should be afforded provisional legal status, much like workers who are found to have paid illegal recruitment fees (above). The standard should not rely on an employer's contention that a worker "absconded" because he or she left work without the consent of the employer.

DHS should recognize that many H-2A workers incur costs to arrive in the U.S. and find themselves without jobs or in extremely terrible working conditions. Many have no choice but to leave their job and therefore be in violation of their visa if, due to their desperate economic circumstances, they remain in the country. In order not to punish workers for the unlawful behavior of the petitioning employer, workers should be provided with options at the beginning of the season should such scenarios arise. The workers should be provided with contact information for the consulate of their homeland and for the U.S. Department of Labor, and should be given an opportunity to be placed with another H-2A employer.

In sum, DHS has not adequately addressed the needs of workers or the nation in this proposal. DHS and DOL should withdraw their proposals and establish a meaningful process to examine the opportunities to modernize American agriculture and treat farmworkers with honesty and fairness.

Sincerely,

Erik Nicholson
International Director
Guestworker Program