



November 14, 2023

Brent Parton  
Acting Assistant Secretary  
Employment and Training Administration  
United States Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210  
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**Re: Comment to NPRM Improving Protections for Workers in Temporary Agricultural Employment in the United States, RIN 1205-AC12 ETA-2023-0003**

**Dear Mr. Assistant Secretary:**

### **Introduction**

The following comments are filed on behalf of the North American Meat Institute (NAMI or the Meat Institute) with respect to the Notice of Proposed Rulemaking (NPRM), *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, DOL Docket No. ETA-2023-0003, RIN 1205-AC 12, published at 88 *Federal Register* 63750 (Sept. 15, 2023).

The North American Meat Institute supports the businesses processing meat and poultry products, and their supplier partners, that sustainably nourish families around the world. NAMI is the largest trade association representing processors of beef, pork, lamb, veal and poultry. NAMI members include more than 350 packer processors of all sizes throughout North America, which operate more than 800 USDA-inspected plants and account for more than 95 percent of United States output of meat and poultry products. The Meat Institute also includes companies that supply goods, equipment, and services to animal protein packers and/or processors and distributors, retail sales, and food service operations.

Although NAMI generally does not support the Department of Labor's (Department or DOL) proposed revisions to 20 C.F.R. § 655.135(h)—which expressly add many provisions that will make it more costly and less efficient for American producers to source America with a safe and high-quality food supply—the Meat Institute wishes to propose technical amendments to the NPRM to better assist meat processors who struggle to find enough willing, able, and qualified domestic workers and wish to turn to the H-2A temporary visa program to fill those shortages.

## **The Department of Labor’s Regulatory Authority to Expand the H-2A Program**

Under both the plain language of the Immigration and Nationality Act, and recent court decisions ratified by the United States Supreme Court, the Department of Labor has significant regulatory authority and flexibility to amend and expand access to the H-2A program for industries, including meat processors.

Pursuant to Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (the Act or INA), Congress stated that “as defined by the Secretary of Labor in regulations,” foreign agricultural workers may enter “temporarily to the United States to perform agricultural labor or services.” This plain language gives the Secretary of Labor broad authority to define the term “temporarily,” as well as “agricultural labor or services.”

In addition, Section 214(a)(1) of the Act provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe.” In *Washington Alliance of Technology Workers v. United States Department of Homeland Security*, 50 F.4th 164, 168 (D.C. Cir. 2022), the D.C. Circuit held that the Executive Branch has “longstanding authority under the INA to set the “time” and “conditions” of nonimmigrants’ stay in the United States.” Furthermore, the Court held that so long as the “time-and-conditions authority” is “exercised in a manner appropriate to the types of people and purposes described in each individual visa class,” the Executive’s regulations regarding a foreign worker program will be valid. *Id.* The Supreme Court recently affirmed the D.C. Circuit’s decision by denying certiorari on October 2, 2023.<sup>1</sup>

Similarly, in *Save Jobs USA v. U.S. Department of Homeland Security*, --- F.Supp.3d --- 2023 WL 2663005 (D. D.C. Mar. 28, 2023), the D.C. District Court held that the Executive Branch could use the same “time-and-conditions and general regulatory authority” to expand the H-4 visa in such a manner to permit spouses of H-1B visa holders to lawfully work in the United States. The Court held that “[t]he D.C. Circuit’s holding and reasoning in *Washtech* apply with equal force in this case.” The Supreme Court recently affirmed this decision by denying certiorari on October 30, 2023.<sup>2</sup>

Therefore, both the statutory language of the H-2A program itself and very recent authoritative case law, demonstrate that the Department possesses the authority to revise and amend the existing H-2A visa regulations to redefine both the term “temporarily” and the term “agricultural labor or services” in order to make the program more accessible to industries that need assistance finding enough willing, able, and qualified agricultural workers.

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<sup>1</sup> See <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1071.html>

<sup>2</sup> See <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-22.html>

## **The Current Status of the Meat Processing Labor Market and the Need for Labor**

Meat processing plants are key components of the overall meat production industry, and the industry plays a major role in the country's food supply. The United States is the largest cattle producer in the world, with \$48.2 billion worth produced in 2019. With \$31.8 billion in chicken and \$3.8 billion in turkey produced in 2019, the U.S. is also the largest poultry producer in the world. It is the third largest pork producer in the world, with \$18.8 billion worth in 2019. About 11.7% of the beef (worth \$7.7 billion) produced in the U.S. in 2018 was exported.

Finding capable and willing labor is a serious challenge for all meat processors, regardless of size. Most meat-processing facilities are in rural locations with declining populations and limited job opportunities. Unlike many other manufacturing sectors, meat processing relies heavily on human labor. Animals, particularly cattle, are not uniformly sized, with different muscle and fat characteristics. Today, the human eye is still necessary to make judgements about the precise cuts needed.

According to the DOL, the most recent overall unemployment rate in the food manufacturing sector — which includes meat slaughtering and processing — is 2.9%.<sup>3</sup> This number is significantly below the current nationwide unemployment rate of 3.9 percent.<sup>4</sup> From 2019 to 2022, the median wage for meat and dairy industry workers increased 33.7 percent, from \$14.95 to \$20.00 per hour. This increase far outpaced the U.S. median wage, which increased from \$20.11 to \$21.51 per hour, or 7.4 percent during the same period.<sup>5</sup>

Given the difficulty in finding labor for this industry, the H-2A visa can provide a source of workers for meat processors to use to fill temporary labor needs when U.S. workers cannot be found. As the House Committee on Agriculture found in its recent Agricultural Labor Working Group Interim Report issued on November 7, 2023, “[a]llowing processors to have access to the H-2A program, provided that additional worker safeguards are put in place to address the unique hazards of the industry, could be an impactful reform.”<sup>6</sup> The Committee added that “expanding access to the H-2A program for processors could help solve some short-term workforce problems. In addition, this expansion could likely benefit the rural communities where processors predominantly operate because there will be a need for child care, housing, food services, and other rural economic needs.”<sup>7</sup>

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<sup>3</sup> See <https://www.bls.gov/iag/tgs/iag311.htm>

<sup>4</sup> See <https://www.bls.gov/news.release/pdf/empsit.pdf>

<sup>5</sup> See

[https://www.americanimmigrationcouncil.org/sites/default/files/research/tending\\_to\\_americas\\_food\\_supply\\_meat\\_dairy\\_industries.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/tending_to_americas_food_supply_meat_dairy_industries.pdf)

<sup>6</sup> See [https://agriculture.house.gov/uploadedfiles/house\\_committee\\_on\\_agriculture\\_-\\_alwg\\_interim\\_report\\_-\\_final\\_-\\_11.7.23.pdf](https://agriculture.house.gov/uploadedfiles/house_committee_on_agriculture_-_alwg_interim_report_-_final_-_11.7.23.pdf)

<sup>7</sup> *Id.*

## **Proposed Revisions to the H-2A Regulations Regarding the Definition of “Temporarily”**

NAMI respectfully requests that the Department of Labor amend the definition of the term “temporarily,” as contained in the H-2A visa’s implementing regulations. Under 8 CFR 214.2(h)(1)(ii)(C), “An H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.” The current regulation defines *seasonal* as “where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” *See* 8 CFR 214.2(h)(5)(iv). Moreover, the same regulation defines *temporary* as being “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.”

NAMI respectfully submits that this definition should be expanded to include the additional criteria that exist in the H-2B program—which is also for seasonal and temporary work (albeit non-agricultural work). The H-2B visa regulations define “[t]emporary services or labor” as “any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” *See* 8 CFR 214.2(h)(6)(ii). This includes “a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.”

Given that both INA101(a)(15)(h)(ii)(a) and INA101(a)(15)(h)(ii)(b) plainly state that they are applicable to temporary service or labor, there is no rational basis for maintaining an H-2A regulation that contains a narrower definition of *temporary* than the H-2B regulation.

Amending the H-2A regulation to include the same criteria for determining temporariness as the H-2B regulation will allow industries such as meat processing to be able to access the H-2A program during critical and emergency times when labor shortages are acute. Providing this flexibility is critical to safeguarding America’s food supply and, given the statutory and legal authority provided herein, there is no reasonable justification for the Department of Labor to continue employing such a narrow definition of the term “temporary.”

NAMI also proposes that an additional definition of “temporary” should be added to the regulation, which would provide that “a worker is employed on a temporary basis if the employer intends to employ the worker for no longer than 10 months during any contract period.” This definition would provide a bright-line for both adjudicators and employers to follow and would simplify and expand use of the H-2A program in situations where it is most sorely needed.

**Proposed Revisions to the H-2A Regulations Regarding the Definition of  
“Agricultural labor or Services”**

NAMI further respectfully requests that the Department of Labor consider amending the definition of the term “Agricultural labor or Services” as contained in the H-2A visa’s implementing regulations. Amending the definition will permit industries in sectors that many consider to be “agriculture” – and part of the same mutually dependent food supply chain – to have the access to the labor needed during times when shortages exist.

Department of Labor regulations (20 C.F.R. § 655.103(c)) governing the current definition of agricultural labor or services use the definition of agricultural labor in section 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); and agriculture as defined and applied in section 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f) as their proxy definition for “agricultural labor or services” pursuant to INA Section 101(a)(15)(h)(ii)(a).

But, the current definition is simply one of many permissible definitions that the Department may use to encompass the “agricultural labor or services” that are permitted under the H-2A program. It is not the only required definition under INA 101(a)(15)(H)(ii)(a). As explained by the D.C. Circuit Court in *Washtech* and by the D.C. District Court in *Save Jobs*, any definition of “agricultural labor or services” that is appropriate to the types of people and purposes described in the H-2A visa statute will be deemed legally permissible by the courts.

Sectors such as meat processing that many consider to be agriculture are not included, because these jobs are not considered seasonal, nor do they meet the definition requiring the commodity to be in an “unmanufactured state.” This problem not only harms meat packers and processors, it also harms dairy workers, livestock marketers, and foresters.

Therefore, NAMI respectfully requests that 20 C.F.R. § 655.103(c) be revised to include the following services within the definition of “Agricultural labor or Services:”

- slaughtering of animal species, such as cattle, hogs, sheep, lambs, or calves, for obtaining meat to be sold or to be used on the same premises for different purposes;
- cutting meat;
- inspecting meat to ensure that it is safe for consumption;
- packaging meat; and
- processing meat into other products such as sausage or lunch meats.

If the intent of the H-2A program is to allow employers to be able to obtain the labor necessary to ensure America's food supply and food security in an affordable and efficient manner, there is no appreciable difference between the occupations that are currently permitted under the H-2A program and these proposed amended occupations. As such, the Meat Institute respectfully requests that the definition of "Agricultural labor or Services" be revised to include these critical occupations.

### **Conclusion**

The Congressional purpose behind the creation of the H-2A program in 1952 was to secure America's food supply by allowing employers to address labor needs by employing foreign agricultural workers when there are not sufficient workers who are able, willing, qualified, and available, and when doing so will not adversely affect the wages and working conditions of workers similarly employed in the U.S.<sup>8</sup> This need is more acute now than ever. The current proposed regulation does not address the labor needs that exist within the broader agricultural industry, which undermines the stability of the entire food supply chain. It is critical that the Department finally act to modernize the H-2A program to make it more accessible to the entire food industry. The current proposed regulation provides an opportunity for the Department of Labor to rethink the H-2A program and act to better align the program with the intent of Congress.

The Meat Institute appreciates your consideration of these comments, which are based on decades of expertise working to secure America's food supply in an affordable and efficient manner.

Respectfully submitted,



Mark Dopp  
Chief Operating Officer and General Counsel

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<sup>8</sup> See <https://www.farmers.gov/working-with-us/h2a-visa-program#:~:text=The%20H%2D2A%20temporary%20agricultural%20program%20helps%20employers%20who%20anticipate,%2C%20cultivating%2C%20or%20harvesting%20labor>