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November 20, 2023

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528

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 Docket No. USCIS-2023-0012; *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*

Dear Secretary Mayorkas and Mr. Nimick:

Please let this letter serve as New York Farm Bureau's public comment on your agency's rulemaking titled *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*.

New York Farm Bureau (hereinafter "NYFB"), New York State's largest general farm organization, appreciates the opportunity to provide comments to the United States Department of Homeland Security ("U.S. DHS") proposed rule that was published in the Federal Register on September 20th, 2023. The agricultural industry is one that relies on a continually strong labor force to provide fresh and nutritious food to consumers. It is often difficult to obtain labor, and the H-2 programs are a vital program to retain valued and trusted foreign guest workers. Farm employers appreciate all the hard work employees do to continue a strong food supply. However, we have concerns that modifying existing regulations may only make the program more complicated and difficult to follow for both farm employers and employees.

Our initial concern is the lack of clarity surrounding the "due diligence" requirement upon a petitioner. The proposed rule requires a petitioner to conduct due diligence to ensure that any third-party agent, attorney, facilitator, recruiter, or similar employment service with whom it conducts business will comply with H-2 program requirements, including the prohibition on

collection of fees related to H-2 employment. The proposed rule does not explain what satisfies meeting the due diligence requirements, and as such, we have concerns. Additionally, there is a lack of clarity regarding what "extraordinary circumstances" means. NYFB would appreciate greater clarification on these definitions to relay to our members who participate in these programs.

There are provisions of this proposed rule that would streamline the process of applying for H-2 workers and "expand and harmonize the grace periods afforded to H-2 workers." This is appreciated to reduce confusion by allowing sufficient time to ensure workers can transfer to new employment upon the completion of a previous contract. This will be beneficial to farm employers to accommodate logistical challenges while simultaneously allowing enough time for a successive petition to be timely processed by USCIS prior to the beginning of the next contract date. Specifically, this will help the H-2B employees and those who employ H-2B workers, who will be allowed a 30-day grace period under this rule. Currently, it is difficult to determine when to file a petition with the expiration of a previous contract.

NYFB has concerns regarding the proposal of a 60-day grace period following a cessation of employment to allow H-2 workers sufficient time to respond to sudden or unexpected changes related to their employment. Farm employers spend significant expenses in bringing H-2 workers to the farm. There is a concern that this lengthened grace period could result in greater expenses to the farm employer in the situation that H-2 workers start employment, and then thereafter leave employment to find a different H-2 job. This could result in a significant amount of fees and expended resources to the farm employers.

In the proposed rule regarding the H-2B portability provisions, NYFB generally sees this as a positive step. However, there are concerns that employers who have reached their cap in the H-2B program may seek H-2B workers from a different employer who sponsored and paid for the initial transportation costs of the H-2B worker to arrive in the United States. If this situation were to occur, NYFB proposes that the subsequent employer reimburse the first employer who paid the initial costs of the H-2B workers to arrive in the United States.

Another proposed change is that H-2 workers may take steps toward becoming a lawful permanent resident of the United States while maintaining lawful nonimmigrant status. Although NYFB welcomes this change, we encourage the Department to clarify that employers can sponsor H-2 workers for permanent positions within the business, even if those positions are the same for which the employer is petitioning. This would provide greater clarity for both farm employers and H-2 workers.

Lastly, we have significant concerns regarding the Department's proposal to allow USCIS to consider a discretionary denial when the petitioner has been the subject of a final administrative determination by the Secretary of Labor or other federal, state or local administrative agencies with respect to a prior H-2A or H-2B Temporary Labor Certification that does not have a finding which would require debarment. Employers go to great lengths to follow the law. In fact, only

99 employers in the H-2 programs have been debarred, representing only 0.0056% of the participants. Rather, we propose, that if Wage and Hour Division have made a finding, but not one that requires debarment, the Department should not then seek to deny an employer's petition.

In conclusion, NYFB appreciates your time and opportunity to comment on this rule. We hope these comments have provided greater insight into the agricultural industry in New York and the concerns we have with this proposed rule. We are eager to continue our conversations to bolster our H-2 programs and to continue to provide healthy food for our country.

Sincerely,

Ashley Oeser
Associate Director of Public Policy
New York Farm Bureau