



September 3, 2020

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Scalia,

American agriculture is the backbone of our economy, and as we have seen throughout the current pandemic, it is a critical industry that must be preserved. However, the largest threat to the economic viability of food producers and the rural communities in which they live, is the lack of a reliable workforce. Simply put, farm employers cannot feed a nation unless they know they will have workers, today and tomorrow, to work the farm, harvest the crops and care for livestock.

We write as leaders in the Agriculture Workforce Coalition, which unites the agricultural industry to ensure that America's farmers, ranchers and growers have access to a stable and secure workforce now and in the future. During this unprecedented challenge to our nation's economic and public health presented by the novel coronavirus, our members are hard at work sustaining our nation's abundant and diverse production of crops, livestock, and other agricultural commodities so critical to our country.

Agricultural employers go to great lengths to recruit and retain U.S. domestic workers, but there simply are not enough domestic workers willing and able to fill all the available positions in agriculture. Due to the lack of available domestic agricultural workers, H-2A visa holders represent an increasingly important component of the agricultural workforce. The fact that this workforce has been deemed "essential" in the context of the pandemic enforces the critical role it has played and will continue to play in feeding our nation and in supporting the vast economic and export value of agricultural products.

We are writing you today to advise you of recent decisions by the Department's H-2A Certifying Officers (CO), Solicitor's Office and the Office Administrative Law Judges (ALJ) that are of significant concern and will effectively render the H-2A seasonal and temporary agricultural worker program useless to many in agriculture. These decisions and interpretations plainly depart from the Department's longstanding application of the H-2A statute and regulations. We presume that you are unaware of these recent changes in the Department's position and we wanted to ensure that you are aware of the consequences of these new interpretations and decisions, so that they can be corrected.

Recent cases involving growers' applications for H-2A workers have been denied based on these new interpretations of what constitutes seasonal or temporary. In these recent cases, the period for which the workers were requested represented the general cultivation and harvesting period

of the grower. Further, the employers had no farm workers—domestic or foreign—on payroll at the time of, or during the period prior to, the stated Dates of Need. The CO concluded that since no workers were needed in other times of the year, the operation was not “ongoing,” so the need for H-2A workers during the growing season did not present a seasonal need that was “far above those necessary for ongoing operations,” which the CO claimed was the regulatory requirement. On appeal, the ALJ agreed and gratuitously opined that since the labor need occurred with regularity every year (a condition inherent in the production of seasonal fruits and vegetables), that not only was the need not seasonal, the need also was not temporary. These decisions are now being cited as precedent for the CO to deny other H-2A applications.

Mr. Secretary, these interpretations simply defy common sense and the Department’s decades-long interpretation and application of the H-2A program requirements. The fact that a grower does not have a sufficient underlying labor force comprised of US workers is precisely why the H-2A program was created. The statute requires the employer to recruit domestic workers first and the Department then certifies whether the employer was unable to locate sufficient numbers of U.S. workers. The fact that the grower has proven that he or she does not have a sufficient existing domestic workforce should be the very basis for approval of the H-2A application, not the justification for denying the application.

Additionally, because fruits and vegetables obviously must be planted and harvested on a recurring basis every year, the Department’s new position that such a labor need is actually permanent and not temporary for H-2A purposes results in the invalidation of the program entirely.

We ask that you review these new decisions and policy interpretations and immediately correct them so that the H-2A program remains a viable source of critical labor for agriculture.

Sincerely,

American Farm Bureau Federation
AmericanHort
Florida Fruit & Vegetable Association
National Council of Agricultural Employers
National Council of Farmer Cooperatives
National Farmers Union
National Milk Producers Federation
National Potato Council
United Fresh Produce Association
USA Farmers
U.S. Apple Association
Western Growers Association

cc: Secretary Sonny Perdue, U.S. Department of Agriculture
Larry Kudlow, White House National Economic Council
Jared Kushner, White House Office of Innovation