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October 6, 2021

Administration Options to Exercise H-2B Discretionary Authority

On September 30, 2021, Congress passed an extension of FY21 government funding (continuing resolution) until December 3, 2021. Although the H-2B discretionary authority language remained in past CRs, DHS held the opinion that it did not have the ability to exercise its authority under a CR because the discretionary language was not budgetary and therefore did not carry forward. However, the CR contains specific language that extends the administration's ability to release additional H-2B visas.

As of October 2, DOL has certified 49,526 positions towards the first half cap of 33,000 visas. Although DHS has yet to formally announce that the cap has been met, DHS has stopped issuing approvals which indicates that the cap has been met. In addition, there are currently 15,464 positions pending at DOL. It is our best estimate that there are roughly 20,000 positions with an FY21 first half date of need that will be capped out (and this does not include the employers that would file for a February or March date of need if the cap permitted). This includes over 3,000 workers from the Alaskan seafood industry.

Over the last two years, we have worked diligently with the Northern Triangle Ministries, USAID and the White House to promote H-2B program participation in the Northern Triangle countries as part of the solution to reducing irregular migration.¹ The culmination of this effort was realized in May of this year when DHS allocated 6,000 H-2B visas to the Northern Triangle countries in the FY21 H-2B Supplemental Visa Rule

The allocation was a success. The workers are thrilled with the opportunity to make life-changing money for themselves and their families and the employers are appreciative of having the workers. The reports from employers on their NT workers has been very positive. This policy has been a win win for the workers and the employers. Now it is time to build upon this success!

Our recommendations:

1. Release visas now for capped out employers with a FY21 first half date of need. DHS should release the exact same number of visas as it did in May with a similar allocation breakdown as the May release (we recommend 17,000 new worker/returning worker visas and 5,000 Northern Triangle visas). A release of 22,000

¹ [H-2B is part of the solution to reducing irregular migration](#) | Seasonal Employment Alliance | May 10, 2021

visas would allow all the capped out employers to receive their workers. An allocation of 5,000 visas for the Northern Triangle would be an appropriate ramp up from the past allocation of 6,000 visas as only 3,000 visas of the 6,000 visas released were ultimately issued. We believe that with the processing reforms implemented over the summer and with the NT Ministries building up their database of workers, a 5,000 visa allocation to the NT countries is appropriate and should be fully exhausted. While we continue to have a strong commitment to the NT it remains incumbent on this Administration to allocate supplemental visas for new workers and returning workers from other countries to fulfill the demand for seasonal business as the NT cannot satisfy that demand alone.

a. Timing:

- i. **Announcement:** By mid-October. By the end of October, employers will need to make the decision of whether to withdraw their applications and refile on January 1 for an April 1 date of need. The visa release announcement must be made as soon as possible to permit employers with a winter date of need to have the certainty that they will be able to keep their winter date of need.
 - ii. Promptly issue a temporary final rule (TFR) in a similar manner to the TFR published in May 2021². No formal rule making is required under the discretionary authority provided by Congress. Capped out employers have a time sensitive need for their workers (Alaska seafood) and any further delay will cause irreparable harm to these businesses.
2. Given the expected demand for the second half allotment of visas, if given the authority, we encourage DHS to release the number of visas to match the DOL certified need in a potential second half release. We anticipate the demand on January 1 for the second half allotment of 33,000 visas to exceed the supply by approximately 300%. If the Northern Triangle release in the FY22 first half release is successful, the administration could increase the NT allotment in this rule.

Breaking up the release into two releases would give the NT countries unique access to employers with a winter date of need, such as Alaska seafood. Getting these employers committed to NT workers would create a steady and reliable pool of returning workers from employers with a winter date of need. A first half release would space out demand to prevent the ministries from being overwhelmed with a single surge of worker requests. In addition, two releases solves a political problem for the administration. Two releases, spaced months apart, will attract less attention from the political opposition than would one large release.

The administration has an incredible opportunity to save America's small and seasonal businesses who are in desperate need of labor due to the workforce shortage and to help alleviate the humanitarian crisis at the southern border. The bifurcated releases would also allow for a slow and steady ramp up for the Northern Triangle countries. With each release, we make reform and process improvements that will allow the allocation to be increased in future releases.

Sincerely,

Gray Delany, Executive Director
Seasonal Employment Alliance

² *Exercise of Time Limited Authority to Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers* (DOL Docket No. ETA-2021-0005) May 25, 2021.