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December 14, 2019

VIA Email
U.S. Citizenship & Immigration Services
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Re: Worker Advocate Comments Regarding USCIS Policy Memorandum "Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production"

To Whom It May Concern:

We write on behalf of the undersigned organizations in response to the U.S. Citizenship and Immigration Services' (USCIS') request for comments regarding its Policy Memorandum of November 14, 2019 ("Memo").

We generally appreciate USCIS' efforts to "ensure consistent application of DHS H-2A regulations addressing temporariness and seasonality to the adjudications of H-2A sheep/goatherder petitions" so that, among other things, "wages and working conditions of similarly situated U.S. workers are not depressed by the employment of H-2A temporary workers." Memo at 3. The H-2A regulations regarding temporariness and seasonality apply to herders, just as they apply to all other H-2A workers. The Memo does nothing more and nothing less than restate that irrefutable proposition.

As the D.C. Circuit recognized, however, the Department of Homeland Security's (DHS's) practices and unwritten policies have fostered an "expectation" among "both herders and their employers" that DHS will effectively "authoriz[e] long-term visas" for "herder jobs that are not temporary or seasonal." *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 386 (D.C. Cir. 2018). And because employers of herders have consistently taken the position that for the entirety of their visas, foreign herders are covered by the special procedures governing labor certifications for workers who perform herding or production of livestock "on the range," these workers are paid wages substantially below the prevailing minimum wage rates governing other H-2A workers. 20 C.F.R. §§ 655.200–655.235. These government policies and industry practices have created an effectively permanent workforce of foreign herders paid a monthly salary that amounts to less than federal minimum wage and substantially less than the prevailing wage rates paid to most H-2A workers.

The longstanding expectations of herder employers will not be easily overcome. We appreciate that the Memo identifies that employers may petition for permanent immigrant visas for herders pursuant to 8 U.S.C. § 1153(b)(3) and associated regulations, and we hope that employers seeking to fill a permanent labor need for herders will either employ domestic herders or petition for permanent visas under those provisions. We fear, however, that many employers will seek to continue to rely on the H-2A program to fill an effectively permanent need for herders. We recommend that USCIS make the following changes to the Memo to guard against that sort of non-compliance.

A. USCIS Should Clarify the Narrowness of the Definition of "Temporary" Work under 8 C.F.R. 214.2(h)(5)(iv)(A)

(1) There Is No "Temporary" Need Where the Employer Petitions for Visas for the Same Work in Consecutive Years, No Matter the Length of the Purported Need or Whether There Was an Intervening Petition

H-2A regulations specify that "[e]mployment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year." 8 C.F.R. § 214.2(h)(5)(iv)(A). The Memo appropriately explains that DHS will not issue H-2A visas to petitioners who have sought "back-to-back petitions" based on a purported "temporary" need—as opposed to a "seasonal" need—unless: (1) the petitions "reflect the employer's need for different job duties to be performed" or (2) there is a showing of "extraordinary circumstances." Memo at 6. In other words, for consecutive petitions to reflect a temporary need, they must identify *distinct* temporary needs. If the employer's need is the same across multiple petitions in different years, it is not temporary because "the employer's need to fill the position" lasts longer than one year.

We are concerned, however, that employers will misconstrue the import of the term "consecutive" in this formulation. Throughout the Memo, USCIC refers to its framework for adjudicating petitions for "consecutive, back-to-back 364-day period (or similar lengthy consecutive periods)." This formulation places too much weight on the length of the work period and on whether petitions are filed back-to-back. USCIS should clarify that all employers

seeking visas to fill a "temporary" need must explain how the proposed job duties differ from the job duties contemplated by petitions from the year prior, regardless of the length of the work period covered by the petition and whether there has been an intervening H-2A petition from the same employer.

This clarification would help to guard against employers filing repeated visas for temporary work for periods of less than, and perhaps even substantially less than, 364 days. We interpret "similar lengthy consecutive periods" to refer to repeated visas of 10 or 11 months. But employers may also attempt to petition for similar visas in consecutive years that seek workers for 5-, 6-, or 7-month stints. To the extent that an employer's need for the same work arises in multiple consecutive years, it is not a temporary need, even if the need arises for 5 or 6 months at a time. Therefore, USCIS should clarify that to determine whether a job need identified in an H-2A petition for herder work is "temporary"—notwithstanding a different petition within the prior year by the same employer identifying a different temporary need—USCIS will assess the "employer's need for different job duties to be performed" across the repeated petitions, no matter how long or short the periods of work sought in such petitions may be.

Additionally, the employer should have to establish its "need for different job duties to be performed" in work covered by visas identifying a temporary need in consecutive years even if the petitions for those visas are not back to back—meaning even if the employer has petitioned for an intervening H-2A visa. An employer's need for similar work of 5, 6, or 7 months in consecutive years is not a temporary need even if the employer has petitioned for H-2A workers, based either on a purported seasonal or temporary need, in an intervening period between those repeated visa petitions.

To be sure, as explained below, it is possible that in some cases an employer may have a "seasonal" need of 5 or 6 months of work in consecutive years. However, to establish a "seasonal" need, an employer must make specific showings regarding, among other things, that such need is tied to an event or pattern and that the employer requires labor levels during that period that are "far above those necessary for ongoing operations." An employer should not be able to circumvent these requirements by petitioning for repeated visas based on a purported "temporary" need without making a showing that the purported need is truly temporary as opposed to the same annually reappearing need.

To guard against non-compliance of the sorts described here, USCIS should clarify its memo in the following ways:

- USCIS should change references to "consecutive petitions," "consecutive back-to-back petitions," and "*see e.g.*, Memo at 6, 7, 8, to "petitions in consecutive years."
- USCIS should clarify through the use of an example in Section 2(b) of the Memo that a need is not "temporary" where it recurs every year, whether ~~or not~~ for 5 months or 364 days. If the employer has a need for labor that recurs every year, but it wants an H-2A visa, it should apply for an H-2A visa identifying a "seasonal" need.

(2) The "Extraordinary Circumstances" Justifying Temporary H-2A Visas for Work of Longer than One Year Should Be Exceptionally Narrow

USCIS should also clarify the narrowness of the "extraordinary circumstances" under which a need to fill a position may be temporary while still lasting longer than one year. As the Memo identifies, the H-2A regulations provide that "[e]mployment is of a temporary nature where the employer's need to fill the position with a temporary worker will*, except in extraordinary circumstances*, last no longer than one year." 8 C.F.R. 214.2(h)(5)(iv)(A) (emphasis added). We have not been able to identify any clarification of what may constitute "extraordinary circumstances" in case law or agency guidance. We think it is important, however, for the agency to clarify that this exception will be narrowly applied in the herder context. Without clear parameters of what constitutes "extraordinary circumstances," there is nothing to stop the industry from reverting to past practices.

This clarification is especially important because many employers of herders may improperly perceive such "extraordinary circumstances" based solely on the purported special skill set of foreign herders. Indeed, as the D.C. Circuit identified, one commenter commenting on the proposed 2015 DOL rule governing herder work argued that "foreign herders should be permitted to stay in the United States longer than typically allowed because of the unique skills of foreign herders." *Hispanic Affairs Project,* 901 F.3d at 390. This justification is clearly inconsistent with H-2A rules and regulations; it would justify a permanent H-2A workforce in any context where foreign workers have a unique skillset. But employers of herders may not understand that the purported "unique skills" of foreign herders cannot constitute "extraordinary circumstances." USCIS should clarify that.

USCIS should additionally clarify that "extraordinary circumstances" will arise to justify an H-2A visa based on a temporary need of longer than one year only where the employer can explain why and when that need will terminate. For example, "extraordinary circumstances" may arise where one of the employer's workers who has permanent status has suffered a serious injury that is likely to prevent him from herding for longer than one year but for a period that is definite and determinable. In that circumstance, it is possible that the employer would be able to establish a distinct temporary need that lasts longer than one year.

Finally, given the history of keeping herders in these positions for "permanent" time periods, the policy memo should clarify that the "extraordinary circumstance" exception will not apply to extend the visa of an H-2A worker currently working in the United States, but only to bring over a worker from abroad to the United States to work for a period longer than one year.

(3) USCIS Should Clarify the Difficulty of Establishing Different Job Duties between Repeated Petitions for Temporary Herder Work

The Memo presumes that it is possible for the same employer to receive repeated H-2A visas for herders based on a purported temporary need in consecutive years if the employer can show that the temporary needs justifying such visas are distinct. After all, if they are not distinct needs, then they are the same need and that need is not temporary because it lasts for longer

than one year. If those needs are distinct, however, then they may indeed be temporary, each of which is shorter than a year.

Considering the long-established practices and expectations of herder employers, we are concerned that some employers will seek to exploit this distinction and manufacture temporary need by contriving different job duties for H-2A visa herders across consecutive years.

USCIS should clarify the extraordinary difficulty of establishing that job duties for H-2A herders are different across different years. In particular, while it may be possible for ranches to experience distinct temporary needs in consecutive years, we cannot imagine circumstances under which there would be distinct temporary needs for herders to perform open-range herding work subject to the special procedures governing open-range herders. 20 C.F.R. §§ 655.200–655.235. A need in consecutive years for open-range herders is inherently not a temporary need. It is the same ongoing, permanent need for open-range herders. If an employer seeks H-2A visas based on temporary need in consecutive years, in at least one of those years, the labor certifications tied to those visa petitions must not be covered by the special procedures governing herders.

B. USCIS Should Clarify the Narrowness of "Seasonal" Need

The Memo recognizes that a herder employer may also petition for H-2A visas to fill a seasonal need. In describing what may constitute a seasonal need, the Memo specifically emphasizes that employment of a seasonal nature occurs where such employment is tied to an "*event or pattern*." Memo at 4 (emphasis in original).

Herder work can indeed be divided into seasons based on distinct "events or patterns." The Worker Advocate comments for the 2015 United States Department of Labor (DOL) rulemaking explained that herder work can be divided between a lambing season which occurs in the spring and involves work on the ranch, and grazing seasons that last from the summer through the winter. *Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States* ("2015 Rulemaking"), 80 FR 62958-01 at 62,999. Our experience instructs that these grazing seasons include both open range grazing seasons, which occur from around June through September and then again during the winter from December through February, and a closed-range grazing season, which typically occurs in October and November.

Similarly, the Siddoway Sheep Company provided comments that the DOL described as "clearly delineat[ing] the seasonal aspects of herder work." At the Siddoway Ranch, the lambing season occurs for 8-10 weeks, beginning in mid-February. Lambing work occurs at the base ranch. After the lambing season, there is a grazing season that can be divided into spring, summer, and fall grazing periods. *Id.* at 62,999-63,000. The fall grazing season is a closed-range grazing season, and all other grazing seasons occur on the open range.

The mere fact that work can be tied to a specific time of year by an "event or pattern" is not, however, sufficient on its own to establish that the work is seasonal. In addition to being tied to a specific time of year, seasonal work must, pursuant to H-2A regulations "require[ ]

labor levels far above those necessary for ongoing operations." 8 C.F.R. 214.2(h)(5)(iv)(A). Particularly considering the nature of herding work, it is essential that the USCIS clarify this separate necessary condition for establishing a seasonal need.

While it may be possible for some ranches that employ herders to identify distinct seasons that could in theory support seasonal visas, it is not at all clear that employers of herders will be able to establish that any of these seasons require labor levels far above those necessary for ongoing production. Indeed, our experience with current herding practice suggests that the same workers and the same number of workers continue to perform principally all a ranch's herding work during both the open range season and the lambing season. Seasonal H-2A visas should not be available for employers that maintain a constant workforce of herders across seasons.

We recommend that the Memo clarify that along with establishing that the employment must be tied to a specific season, a petitioner seeking a herder visa based on a purported seasonal need must also establish that needs during that season "require[] labor levels far above those necessary for ongoing operations." To ensure that employers do not manipulate their purported needs for foreign workers to the detriment of American workers, USCIS should also clarify that employers petitioning for H-2A visas based on a purported seasonal need will not be able to establish such need if in the past they have maintained substantially similar operations without having to increase "labor levels far above those necessary for ongoing operations" during the season at issue.

C. USCIS Should Clarify that Seasonal Work Contracts for Work That Is Not Principally Performed on the Range Are Not Covered by the Special Procedures Governing Open-Range Herders, 20 C.F.R. §§ 655.200–655.235

A set of special procedures govern applications for visas to hire temporary agricultural foreign workers to perform herding or production of livestock "on the range." 20 C.F.R. §§ 655.200–655.235. Among other things, those procedures allow employers to pay covered H-2A workers a monthly salary of "$7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month," or approximately $1500 per month. 20 C.F.R. § 655.211.

These special procedures and reduced wage rate are only available, however, where "the work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period." 20 C.F.R. § 655.200(b)(2). Under a scheme where herder employers relied on 364-day contracts for H-2A workers based on a purported temporary need, it might have been that many H-2A herders indeed performed work on the range for "more than 50 percent" of the workdays in the contract period.[1] However, as both the Worker Advocate and Siddoway Sheep Company comments to the 2015 DOL rulemaking clarified, to the extent that herding work can be divided into seasons, at least one of those seasons—the

[1] Experience teaches that many workers on herder visas are misclassified and are not actually performing herder work for more than 50 percent of workdays. But much of the work of properly classified herders does indeed occur on the range.

lambing or birthing season in the spring—involves work that is not performed "on the range." And, at many ranches, including at the Siddoway Sheep Company, at least one other grazing season—typically the fall grazing season—occurs on a closed range.

While we understand that it is not USCIS's responsibility to identify a distinct position for H-2A herders performing work that is not on the open range during the lambing or closed-range grazing seasons—that is a task for DOL—because the special procedures and reduced wage rate for herders are so widely exploited by employers of H-2A herders, we think it is important that the Memo clarify that the special procedures will not apply to some seasonal H-2A visas for herder employers. In particular, seasonal H-2A visas for herders will not qualify for the special procedures governing herders in seasons when less than 50 percent of the work performed by workers is not performed on the open range, like in the lambing season. Assuming that employers of herders can qualify for seasonal visas for these seasons, which will only be possible if those seasons require labor levels substantially above what is necessary for ongoing operations, they should be aware that workers covered by seasonal visas for such seasons must be paid at least the prevailing wage rate for similarly situated domestic workers as determined by DOL.

D. USCIS Should Explicitly Provide that the Memo's Guidance Also Applies to Cattle Herders

To provide clarity for agency staff and industry, USCIS should also explicitly provide that the guidance in the Memo applies to cattle herders in addition to goat/sheepherders. This clarification should be uncontroversial. The Memo clarifies that the same rules regarding temporariness and seasonality apply to H-2A goat/sheepherders, just as they apply to other H-2A workers. They apply to cattle herders too.

Additionally, it should make no difference that cattle herders typically work on 10-month visas (as opposed to the 364-day goat/sheepherding recurring visas that were the focus of the litigation giving rise to the Memo). *See* 20 C.F.R. § 655.215(b)(2). The problem with the improperly issued goat/sheepherder H-2A visas is not that they were issued for 364 days but that they were continually reissued for the same purported temporary need. Just as with goat/sheepherding employers, DHS should not be issuing H-2A visas to cattle ranchers petitioning for recurring 10-month visas for herders year after year based on a purported temporary need. That need is not temporary, even if it exists for only 10 months at a time. Foreign cattle herders and their employers should also benefit from the guidance provided in the Memo.

E. USCIS Should Highlight the Availability of Permanent Visas for Foreign Herders under 8 U.S.C. § 1153(b)(3) and Should Incentivize Use of the Permanent Visa

Foreign herders are eligible for permanent visas pursuant to 8 U.S.C. § 1153(b)(3). As noted by the D.C. Circuit, DHS's policy of authorizing long-term H-2A visas resulting in the "creation of permanent herder jobs that are not temporary or seasonal" violates both the Administrative Procedure Act and the Immigration and Nationality Act. This does not mean,

however, that foreign herders cannot fill permanent jobs in the United States—just that they must do so on a permanent visa. Such a visa has long been available for foreign herders working in the Untied States.

Particularly because, as USCIS recognizes, the Memo "may have an impact on the long-standing practices of petitioners submitting H-2A sheep/goatherder petitions" who may have relied on obtaining H-2A workers through temporary and seasonal visas that were improperly granted, the Memo should highlight the availability of permanent visas under 8 U.S.C. 1153(b)(3). *See also* 20 C.F.R. § 656.16.

Indeed, pursuant to DHS's and DOL's settlement with the plaintiffs in *Hispanic Affairs Project*, USCIS must clearly explain that a visa for herding work may also be "obtained by petitioning under 8 U.S.C. § 1153(b)(3) and meeting the statutory and regulatory requirements under that classification." *Hispanic Affairs Project v. Scalia*, 15-01562, ECF Doc. 135-1 at 5. In contravention of that agreement, the Memo does not currently address the availability of a permanent visa, aside from its introduction, where it states that one of the purposes of the memo is ensuring that "petitioners filing petitions for permanent sheep/goatherders comply with the requirements applicable to permanent positions." Memo at 1.

In addition to highlighting the availability of the permanent visa for herders, USCIS should make all efforts, consistent with regulation and statute, to incentivize use of that visa for employers who may have relied on the government's long-standing practice of issuing H-2A visas for herder work. In particular, consistent with statute and regulation, USCIS should announce:

(1) that herders who are eligible for permanent visas under 8 U.S.C. §1153(b) and are present in the United States may have their status adjusted pursuant to 8 U.S.C. § 1255(k); and

(2) that employers may apply directly to DHS for fast-tracked labor certification to employ on a permanent basis any herder who has been employed legally as a nonimmigrant sheepherder in the United States for at least 33 of the preceding 36 months.

Finally, USCIS should rely on its discretionary authority to simplify and expedite the change in status of the hundreds of foreign herders who may wish to remain in the United States performing herder work—and whose employers likely also wish for them to remain in the United States performing herder work—but who have been working for extended periods of time on improperly issued H-2A visas. As the policy memo clarifies, frequent renewals of H-2A visas for the three-year time period is inconsistent with the H-2A regulations that require a "temporary" or "seasonal" need. But the policy memo provides no remedy for these workers who have been misclassified and brought over in temporary positions that are anything but.

In 2009, when employers of H-2A herders were subjected to the three-year limitation like other H-2A employers pursuant to 8 C.F.R. § 214.2(h)(5)(viii)(C), employers were granted an exception: the three-year period would begin to run once the rule took effect. See U.S.

Citizenship and Immigration Services, *USCIS Grants One-Time Accommodation for Sheepherders in H-2A Status* (Mar. 8, 2018), https://www.uscis.gov/archive/archive-news/uscis-grants-temporary-extension-accommodation-sheepherders-h-2a-status. Promoted as an accommodation, this exception allowed some herders to remain in the United States for longer than a three-year period and since the exception from this regulation was removed for herders, herders have been routinely brought to the United States as "temporary workers" for the three-year period. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 386 (D.C. Cir. 2018) (noting "herders frequently stay in their positions for much longer than the 364 days authorized by the regulation, and commonly work for up to three years at a time").

We recommend that USCIS grant another one-time exception, similar to the exception granted in 2018, and convert the status of herders who can show that they have been working as a herder for at least 728 days out of the last 1,095 days to EB-3 Status (allowing them to self-petition). These workers are already beneficiaries of a prevailing wage determination and a work order that has been certified by the U.S. Department of Labor, and accordingly as self-petitioners should be eligible to remain in this status until a visa is available to them to apply for permanent residency. A one-time exception like this would serve the interests of sheepherders and their employers and would allow for a smooth transition to a legal immigration scheme for the recruitment and employment of foreign herders.

Sincerely,

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