Submitted Electronically

November 20, 2023

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: Modernizing H-2 Program Requirements, Oversight, and Worker Protections Docket No. USCIS-2023-0012 (RIN:1615-AC76) (Doc. No:2023-20123)

Dear Mr. Nimick:

On behalf of our members and partners, including mission-driven organizations representing the entire field of aging services, LeadingAge appreciates the opportunity to comment on the Notice of Proposed Rulemaking entitled Modernizing H-2 Program Requirements, Oversight, and Worker Protections, published in the Federal Register on September 20, 2023 (the "Proposed Rule").

In the pages that follow we will offer brief comments relating to specific provisions of the Proposed Rule, then share our broader observations about the need to advance and reform our immigration system to provide greater opportunities for aging services providers to benefit from the talents and services workers who are currently outside the United States, and provide opportunities to these workers in return.

COMMENTS ON THE PROPOSED RULE

LeadingAge offers the following comments on selected aspects of the Proposed Rule:

Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries

To ensure against avoidance of liability for collection of prohibited fees, DHS proposes to change the standards under which a petitioner may be held accountable for the prohibited fee-related violations of its agents, attorneys, facilitators, recruiters, or similar employment services. DHS seeks to clarify and emphasize that it is a petitioner's responsibility 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 Department notes that petitioners will be accountable for improper collection of fees by a third party, unless the petitioner demonstrates through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed; and that a written contract prohibiting such collection would not suffice.[1]

[1] 88 FR 65040, 65054.

We support the Department's goal of protecting workers from abuses relating to fees but believe this specific aspect of the Proposed Rule would benefit from further detail and clarification. For petitioners to understand the potential impact of the proposed regulatory language and to support compliance, we ask the Department to provide additional definition or examples relating to what "due diligence" must entail, what documentation would suffice to demonstrate the petitioner's efforts, and courses of action a petitioner might follow if a third party is not responsive or forthcoming. We further ask the Department to consider allowances for situations in which a petitioner does not have knowledge of an improper action by an agent, despite conducting due diligence and including detailed expectations of an agent within the applicable contract.

Denial of H–2 Petitions for Certain Violations of Program Requirements

We also wish to provide feedback on the Department's proposal to use discretionary authority to deny a petition based on any final administrative or judicial determination that the petitioner violated any applicable Federal, State, or local employment-related laws or regulations, including, but not limited to, health and safety laws or regulations. [2]

We recognize and support the importance of ensuring that employers who hire workers through the H-2B program should comply with federal, state and local requirements, including wage and hour standards and occupational safety and health standards, but we are concerned that application of this discretionary authority may be overbroad. Specifically, H-2B program sanctions potentially will result for petitioners that are in substantial compliance with applicable standards, but where a local, state or federal agency finds that a single or minor violation has occurred, perhaps a result of an administrative error – in other words, as a consequence of violations that do not call into question the ability or intention of the petitioner to comply with H-2 program requirements.

We appreciate the Department's note in the Proposed Rule[3] that it would distinguish between single or minor violations of an OSHA requirement, for example, versus a pattern of serious non-compliance, and that the proposed regulatory language states that USCIS will consider factors such as the recency and number of violations; scope and severity of a violation, and willfulness, among others. We encourage the Department to reinforce this position by providing detailed guidance following issuance of a final rule, both for the benefit of petitioners and for Department staff charged with implementing this section.

Portability Issues

We also noted the Department's proposals to provide flexibility for H–2 workers as well as employers, allowing workers in the U.S. to begin new employment more expeditiously, avoiding gaps in employment and potential hardship to workers, as well as providing employers with access to available and willing workers. Specifically, the proposal would apply to new employment in the same classification with the same or different employer. [4]

We appreciate the Department's attention to issues of portability, and understand the complexities involved with balancing the interests of workers and employers, including the initial petitioner, with respect to these issues. Some of our members organizations and partners have shared examples of

[2] *Id.* at 65059.
[3] *Ibid.*
[4] 88 FR 65067.

scenarios in which workers arrive in a particular U.S. community to work for a given employer on a seasonal basis, with a one-year initial certification period for example, and who, at the end of the season for which the work was intended, have the potential to work for other employers for the duration of the certified period, even if the prospective employer's needs may be less traditionally seasonal or intermittent. While we acknowledge that such scenarios may be outside the scope of the Proposed Rule or the Department's current authority, we encourage consideration of the idea of allowing additional flexibility with respect to matching workers with other employers that are in need of staffing support in such communities, through the initial certified period.

Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa

DHS proposes to increase flexibility by clarifying that an H–2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status. Under proposed 8 CFR 214.2(h)(16)(ii), the fact that DOL has approved a permanent labor certification, or that an immigrant visa petition was filed by or on behalf of a beneficiary, or that the beneficiary has applied to adjust to lawful permanent resident status or for an immigrant visa would not, by itself, be a violation of H–2 status or show an intent to abandon a foreign residence. Such fact, standing alone, would not constitute a basis for denying an H–2A or H–2B petition or the beneficiary's admission in H–2A or H–2B status, or a petition to change status or extend status.

We believe the employer community will welcome this change, and we suggest that the Department consider further clarifying in a final rule its position that employers can sponsor H-2 workers for permanent positions within the employer's business, even if those positions are the same the employer is petitioning for under H-2B.

GENERAL COMMENTS

LeadingAge has long advocated for domestic solutions to the aging services staffing crisis, including strategies and efforts to boost the participation in the LTSS labor market of both native- and foreign-born workers already in the country, and also strongly supports reform of U.S. immigration policy to help meet current workforce needs and grow our economy. Given the nature of the H-2B program, relatively few employers[5] in the field of aging services rely on this visa category to supplement their workforce.[6] Because the Proposed Rule focuses on a temporary work program, however, we take this opportunity to speak these issues in a general way.

Background

It is well known that the United States is experiencing an aging population surge that will continue for many years to come, fueling a significant increase in the demand for long-term services and supports, as well as other health care services.

[5] A review of the H-2B Employer Data Hub for Fiscal Years 2022 and 2023, filtered by NAICS code, reflects this reality. See https://www.uscis.gov/tools/reports-and-studies/h-2b-employer-data-hub, accessed Nov. 15, 2023.

[6] Aging services providers more commonly rely on other avenues and authorities for legal immigration, TN for nurses, H-1B Specialty Occupations, EB-3 visas, lawful permanent residents for refugees, and R-1 non-immigrant religious workers program, though these programs present important challenges of their own.

Long term care employers will need to fill 7.9 million job openings[7] in direct care from 2020 to 2030, including 1.2 million new jobs to meet rising demand, and another 6.7 million job openings to replace workers who leave the labor force or transfer to new occupations.

Not only do workforce challenges lie ahead, but long term care providers are struggling as we speak to recruit and retain sufficient staff, affecting their ability to serve older individuals and their families in need of care in the here and now. Almost all (92%) of LeadingAge nursing home provider members who completed a February/March 2023 survey reported a significant or severe workforce shortage, and 70% of assisted living providers said the same. In fact, 64% of the respondents on the survey said their workforce situation has not improved in year prior to the survey. For long term care providers across the continuum of care, including home and community-based services, workforce shortages have not eased since the end of the COVID-19 pandemic, as they have for some other sectors, despite our hopes to the contrary.

Given these data, and in light of historically low unemployment rates (3.9% nationally[8]), creative strategies are needed to address our caregiver shortage, which affects both direct care nursing and related positions such as home care workers, residential care aides, and certified nursing assistants, as well as physicians, social workers, allied health providers and others across the continuum – and, critically, the individuals who receive long term services and supports.

A 2019 data analysis from the Pew Research Center suggests that we cannot meet the projected demand for home health aides, personal care aides, and other LTSS workers without considering the potential role of people born in other countries. While immigration alone cannot resolve this labor crisis, addressing immigration policies and ensuring a steady influx of qualified health care workers is imperative to meet the rising demand for care. Most aging services providers would welcome the opportunity to hire more trained and motivated workers – legal immigrants or legal non-immigrant temporary workers – from other countries but face a variety of policy and administrative processing barriers when seeking to do so.

Suggested Solutions

In 2019 LeadingAge released a white paper – IMAGINE: International Migration of Aging and Geriatric Workers in Response to the Needs of Elders – and we continue to advocate for consideration of the recommendations included in this framework.

Specifically relating to temporary, non-immigrant visas, we have recommended the following to Congress and to the Executive Branch:

- Enact an "H2Age" Temporary Guest Worker Program. LeadingAge proposes the creation of a time-limited guest worker program that would allow qualified, English-speaking, foreign-born individuals to enter the U.S. to work in long term services and supports (LTSS) positions that cannot be filled by native-born workers. These positions include home care aides, CNAs, dietary aides, and housekeeping technicians. The U.S. already has authorities in place under the H-2 programs that allow employers to hire temporary workers in the fields of agriculture and hospitality when it can be demonstrated that there are not enough U.S. workers to fill labor gaps. H2Age would address the

[7] See Direct Care Workers in the United States: Key Facts; PHI, 2022.
[8] Bureau of Labor Statistics, U.S. Department of Labor: Employment Situation October 2023. See https://www.bls.gov/news.release/pdf/empsit.pdf.

need for LTSS services directly. Under the program, aging services providers meeting specific criteria would be allowed to hire foreign-born workers to fill a set of positions designated as "H2Age Eldercare Providers."

- Enact "Carer Pairer," a new J-1 authority, to include aging services workers in addition to child care workers. The J-1 Exchange visa category allows temporary workers to enter the U.S. to provide child care in a family or professional setting. These individuals, often serving as au pairs, must be secondary school graduates who are proficient in English, aged 18-26, and capable of providing child care. The new "Carer Pairer" program would be modeled on the au pair program and would be focused on workers who provide aging services. The rationale for updating the J-1 program to include aging services is tied directly to the demographic forces noted above.

We invite review of our IMAGINE paper, which provides additional details concerning these concepts, including that employers would be required to demonstrate they have tried and failed to hire American-born workers, as well as meeting other expectations.

While we acknowledge that the observations above are outside the scope of the current rulemaking, and that Congressional action would be needed to authorize many proposed immigration solutions, we share the information here in hopes that there will be future opportunities to work with the Department on policy recommendations designed to engage foreign-born workers in our efforts to meet the growing care needs of a rapidly aging America through legal pathways.

CONCLUSION

The challenge of staffing aging services today and in the future calls for bold, direct action by policy makers relating to legal pathways of entry to the United States to ensure there are enough qualified, well-trained, mission-focused individuals to meet the needs of older adults who need health care and supports to live as independently as possible. We appreciate this opportunity to submit comments, and please contact me (jlips@leadingage.org) if I can provide additional information.

Sincerely,

Jonathan Lips

Jonathan Lips,
Vice President, Legal Affairs